



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 125850/2023

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: YES

14 October 2025

In the matter between:

NATIVE CHILD AFRICA (PTY) LTD

APPLICANT

and

MARY OLUWATOBILOBA AKINWALE

FIRST RESPONDENT

LUTENDO SIPHUMA

SECOND RESPONDENT

DEBORAH'S 972

AMICUS CURIAE

Contempt of Court – A civil courts findings of contempt do not constitute criminal convictions for purposes of S271 of the Criminal Procedure Act – common law examined and compared to United Kingdom, Australia, New Zealand common law – Criminal offence of contempt of Court as per the Criminal procedure Act distinguished

SECOND JUDGMENT

K Strydom AJ

“During argument there was debate about whether a civil court’s finding of contempt, with concomitant imposition of punishment, would count as a ‘previous conviction’ for purposes of s 271 of the Criminal Procedure Act 51 of 1977 (which permits the prosecution in a criminal trial to prove previous convictions in aggravation of sentence); or whether, if it were, it would feature in the South African Police Services’ SAP 69 register of previous convictions, and what mechanisms might be necessary to ensure that it was so recorded. Neither counsel ventured firm submissions, and the debate was inconclusive.

And indeed, these questions are not before us now, and it is not necessary to decide them...”

- Cameron JA¹

¹ *Fakie v CCII Systems (Pty) Ltd* [2006] SCA 54 (RSA) at paras 27 and 28

- [1] It is regrettable that these questions were not before the Constitutional Court when it developed the common law in relation to the burden of proof in contempt of court applications in *Fakie*.
- [2] The severe impact of a declaration that a person is in contempt of court vis a vis the practical effect of the implied criminality of the finding, has never been more prevalent than was demonstrated in 2024 in relation to Mr Zuma and the Independent electoral court. What started off as rumblings at the time of the hearing of this contempt of court application crescendoed into a full-blown storm within six months.

Background

- [3] The respondent, a so-called 'influencer', had used her social media platforms to make certain derogatory comments against her erstwhile employer, the applicant. On the 11th of December 2023, the applicant obtained an order on an urgent basis restraining her from posting such further commentary and ordering her to remove those posts that have already been made.
- [4] As the respondent failed to pay heed to the order, the applicant approached this court on the 20th of December 2023 for an urgent declaration that the plaintiff be found guilty of the crime of contempt of court. In the notice of motion, the following pertinent relief was sought, *inter alia*:
- a. A declaration that the respondent "*is guilty of the crime of contempt of court for failure to comply with the order made by this Court.*"
 - b. An order that the Station Commander of the Pretoria Central Police Station "*must within three calendar days of this order, take all steps that are necessary and permissible in law to ensure that the finding that Ms Mary Oluwatobiloba Akinwale is guilty of the crime of contempt is recorded in her criminal record.*"
 - c. The issuing of a rule nisi calling on the Respondent to show, on the 30th of January 2024, why a final order sentencing her to undergo 30 days' imprisonment or such other period as the court may determine, should not be made.
- [5] From the outset I had indicated my discomfort with the formulation of the relief sought. It is evident from the notice of motion that the applicant approached the contempt proceedings as one would a criminal trial, i.e. differentiating between a conviction phase (the declaration of guilt) and a sentencing phase (the rule nisi regarding sanction). The

request that the declaration of a finding of contempt be recorded in her criminal record before sanction had even been determined, was particularly worrisome.

- [6] This pertinently brought to the fore the question of the nature and effect of a finding that a party is in contempt of Court. The exposition hereof in terms of common law forms the basis of this second judgement and will be fully elucidated below.
- [7] The Independent Electoral Commission's assertions in media, on the 17th of January 2024, that Mr Zuma cannot become president after this year's general election, as a result of his criminal conviction for contempt of Court, further evidenced the need for clarity in this regard.
- [8] I accordingly convened a meeting with the legal representatives for both parties to indicate that I foresee a possible need for development of the common law definition of contempt of court and indicated that I intended to provide a problem statement and directions in this regard.

The first judgment: 25 January 2024

- [9] In the first judgment, the Respondent's acts of non-compliance were assessed and for the most part declared to be willful and *mala fide* beyond a reasonable doubt.
- [10] Judgment on the determination of whether first Respondent was in contempt of court by virtue of the aforementioned declarations was reserved pending the determination of the issues raised in the "*Problem statement and directions*" annexed to the first judgment as "A"
- [11] Judgment on the determination of the sanction to be imposed (if any) was reserved pending the determinations contained in the problem statement. In this regard the Respondent was also afforded the opportunity to file supplementary submissions in relation to sanction.
- [12] The Respondent was also ordered to, within 24 hours of handing of the first judgment, comply with the order granted on the 12th of December 2024 by Khinwana AJ.

The problem statement and directives

- [13] The problem statement should be understood within the greater context of the need for certainty of the legal consequences of judicial pronouncements. *In casu*, I agreed, for the most part, with the Applicant's submissions that the Respondent, was 'guilty' of disobedience of the prior court order. There was also significant merit in the submission that relief aimed at coercing compliance would no longer have real effect and that, as established in the Zuma contempt case, it was open to this court to grant purely punitive

sanctions such as committal (as sought by the Applicant) or a fine (as tentatively raised by the Respondent).

[14] I was however greatly perturbed by the fact that my findings could result in a young student having a criminal conviction on record for the next 10 years. On a much wider level, the potential effect could be that the legions of Respondents who, in civil motion proceedings, had been declared to be in contempt of a civil court order, would with the stroke of a pen become convicted criminals. The essence of the argument that this would be the result of such a finding, can be summarised along the following lines:

- a. A “criminal record” is a reference to an extract from a so-called SAPS form 69 used in reference to ‘prior convictions’ for purposes of S271 of the Criminal Procedure Act (“CPA”)
- b. The CPA does not define ‘prior convictions’, but our courts have defined the concept as a conviction by a court of law of a crime or offence.²
- c. Contempt of court is noted to be a ‘criminal offence’
- d. Therefore, if a person is found ‘guilty’ in civil proceedings of civil contempt of court, it would constitute a conviction as envisaged in the CPA

[15] Whilst a copy of the entire problem statement and will be annexed to this judgment, the following extracts thereof elucidate the nub of the issue:

- a. Justice Nkabinde in *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited*, eloquently states the prevailing position regarding contempt of Court as follows:

“[50] It is important to note that it “is a crime unlawfully and intentionally to disobey a court order”. The crime of contempt of court is said to be a “blunt instrument”. Because of this, “[w]ilful disobedience of an order made in civil proceedings is both contemptuous and a criminal offence”. Simply put, all contempt of court, even civil contempt, may be punishable as a crime.” [Underlining my own]

- b. It is against this common law typing of civil contempt of court being a criminal offence, that the following question was posed to the parties:

“In civil contempt of court proceedings, would the finding, that the contemnor is in contempt of court, on its own, render the contemnor guilty of a criminal offence and therefore result in the contemnor having a criminal record?”

² (S v Greveling 1976 (2) SA 103 (O) 104C–D; R v Vos, R v Weller 1961 (2) SA 743 (A) 747; R v Zonele & others 1959 (3) SA 319 (A); S v Rantho 1974 (4) SA 418 (T); see also Du Toit 133).

- c. As a starting point submissions were sought as to whether the pronouncement in *Matjhabeng supra* was in fact a complete exposition of the common law position. If it was not, the parties were requested to indicate what the correct exposition of the common law was regarding for instance, the following issues:
- i. *At what stage of the proceedings is the finding of guilt of a criminal offence made?*
 - ii. *Is the differentiation between when a finding of contempt constitutes a criminal conviction and when it does not, based on a common law principle?*
 - iii. *If so, can such differentiation be applied as a general principle to all matters of that type?*
 - iv. *If the differentiation is based on imposition of a criminal sanction, would the imposition of such a sentence automatically render a finding of guilt of a criminal offence. Given the coercive nature of such orders, would such a finding not impede the effectiveness of the contempt procedure. Simply put, the problem is, as in for instance Hepburn – it is doubtful that a Court would provide a criminal sanction for instances of such contempt if it would have resulted in the Respondent being deemed a criminal. Or does it provide the Court with a discretion to impose a criminal sanction without a finding of guilt of a criminal offence?*

[16] At the time the issues along the following thematic lines were of concern:

- a. The criminality of contempt of court where non-compliance was only established on a balance of probability.
- b. In cases where non-compliance with the order is proven beyond a reasonable doubt, the timing of when a contemnor would be guilty of a criminal offence:
 - i. By way of explanation, a 'normal' criminal trial consists of two stages: conviction and sentencing. Once the presiding officer has found that the accused has, beyond a reasonable doubt, committed the complained of criminal offence, said accused is 'guilty' and is 'convicted'. Only thereafter is a determination on the issue of sentencing made. The sentence imposed does not affect the conviction of the accused and, regardless of the nature of said sentence, a person so convicted will have so-called criminal record.
 - ii. In civil contempt of court proceedings, the sanction (sentence) informs not only the onus but the very criminality of the contempt itself. As such, is a contemnor guilty of a criminal offence if the Applicant proves its case beyond

a reasonable doubt (and the contemnor fails to rebut the presumptions of wilfulness and mala fides) or only after sanction (sentence) is imposed?

c. Retainment of the Court's discretion:

- i. Assuming criminality attaches at the finding of guilt of contempt of court, is a civil court bound to declare a person guilty of contempt of court once non-compliance is proven to be wilful and mala fide beyond a reasonable doubt?

Events subsequent to the first judgment and problem statement issued.

[17] The Applicant did not file supplementary submissions in relation to the issues raised in the problem statement. In terms of a letter forwarded to my offices on the 6th of February 2024, it chose to abide by the Court's final ruling in this regard.

[18] The Respondent filed her affidavit in relation to sanction on the 6th of February 2024 and the heads of argument in relation to the problem statement on the 6th of March 2024.

[19] In response to my invitation, the Deborah's 972, was joined as amicus curiae. The Deborah's 972 is an accredited Non-Profit Organisation with the Department of Social Development and registered as a law clinic with the Legal Practice Council. Advocates' Reg Willis SC and Kgothatso Masupye acted as their representatives. Their submissions were filed on the 6th of March 2024.

[20] On the 8th March 2024, the Umkhonto Wesizwe Political Party (MK Party), submitted its list of candidates to the Electoral Commission of South Africa (the IEC) for the upcoming election. The list included Mr Zuma and following public inspection on 26 and 27 March 2024, several objections were raised to Mr Zuma's candidature, including the fact that he had been found guilty of the crime of contempt of court and had been sentenced to direct imprisonment. The question of whether Mr Zuma was resultantly disqualified to stand as a candidate by virtue of the provisions of Section 47(1)(e) of the Constitution, culminated in an appeal to the Constitutional Court.

[21] The MK party argued, inter alia, that the conviction of Mr Zuma for contempt of Court was not a conviction as contemplated by section 47(1)(e) of the Constitution as it did not follow normal criminal proceedings. (Notably, a similar argument by the amicus curiae against Mr Zuma's release on parole was previously dismissed by the SCA in the Zuma Parole appeal.)

[22] On the 6th of May 2024, the Constitutional Court directed the parties to file written submissions answering the following questions:

“1. What is the distinction, if any, between a conviction following criminal proceedings and a conviction following civil contempt of court proceedings? Is there any difference in the legal effect of each type of conviction?”

2. In interpreting section 47(1)(e) of the Constitution, should the disqualification to be a member of the National Assembly be applied to both types of convictions?

3. Is there any difference in the legal effect of convictions under civil and criminal proceedings in international and foreign comparative law?”

[23] A perusal of the parties’ supplementary submissions solidified my concern that, if civil contempt is a criminal offence, a finding *in casu* that the Respondent is guilty of contempt of court, would constitute a prior conviction and result in her having a ‘criminal record’. For instance, the IEC’s submissions followed the same line of argument as I have summarised *supra*:

“[8] If it is crime to disobey a court order, a finding that someone has disobeyed a court order is a conviction. A “convict[ion]” is a “judicial determination of a case and this necessitates a finding of guilty or the acceptance of plea of guilty followed by a sentence” S (An Infant) v Recorder of Manchester [1971] A.C. 481 at 484H (cited with approval in S v Zwela 1981 (1) SA 335 (O) at 341A and S v Motsepa 1982 (1) SA 304 (O) at 306G).

[9] Once a court decides, finds, holds, or declares that a person is guilty of a crime, that is a conviction. This Court did just that. As the SCA later described it, “the Warrant of Committal issued by the Constitutional Court could not have made it clearer”: Mr Zuma had been “found guilty ... of the crime of contempt of court”³ In other words, this Court “found” Mr Zuma “guilty”—the same language that is often used in other judgments convicting people of crimes: see, for example, S v Sifiso 2024 JDR 0410 (GJ) at [54]-[59] and S v Nocanda 2024 JDR 0563 (GJ) at [104].”

[24] On the 20th of May 2024, the CC found that:

“[104] There is no difference between a conviction following criminal proceedings and a conviction following civil contempt of court proceedings. Our courts have held that contempt of court, even civil contempt of court, is a criminal offence. Civil contempt is a crime. The only distinction is procedural. Civil contempt is instituted in relation to disobedience of an order made in civil proceedings. Both species of contempt are criminal offences.”

³ *National Commissioner of Correctional Services v Democratic Alliance* 2023 (2) SA 530 (SCA) at [24].

[105] *There is no difference in the type of conviction since a person is convicted of committing a criminal offence in both civil and criminal contempt proceedings. In Fakie N.O., Cameron JA held that “the application for committal for contempt is a peculiar amalgam, for it is a civil proceeding that invokes a criminal sanction”. Therefore, the sanction of a conviction for contempt of court is a criminal sanction, even in civil contempt proceedings.*

“[106] Section 47(1)(e) generally refers to the conviction of an offence. It draws no distinction between convictions for civil contempt and other convictions. The ordinary meaning of an offence should be given to the word: that it is a criminal offence. A differentiation between types of criminal offences is unjustified and unfounded and would undermine the purpose of the disqualification under section 47(1)(e). It is not for a court to limit the scope of the provision when it has been framed in wide and general terms.

[107] Section 47(1)(e) simply says “convicted of an offence and sentenced to more than 12 months’ imprisonment without the option of a fine”. Mr Zuma was “convicted” in that this Court “found” him “guilty. . . of the crime of contempt of court”.⁴

[25] This finding now firmly seemed to imply that a finding in civil contempt proceedings, that a Respondent has, beyond a reasonable doubt, disobeyed an order of court a ‘conviction’ within the context of Section 271 of the Criminal Procedure Act.

Parties’ submissions

[26] When this matter was argued in June 2024, both the Respondent and the Amicus Curiae supplemented or amended their written submissions during oral argument.

[27] Both agreed that a finding in civil proceedings, that a Respondent is in civil contempt of court, could result in the Respondent having a ‘criminal record’.

[28] They however disagreed under which circumstances and at which stage of proceedings it would have such a result,

[29] The amicus curiae’s submissions, in this regard, can be summarised as follows:

- a. Even though civil contempt remains a criminal offence under the Constitution, a finding of contempt, even on the criminal standard, does not necessarily result in the contemnor obtaining a criminal record.

⁴ *Electoral Commission of South Africa v Umkhonto Wesizwe Political Party and Others* (CCT 97/24) [2024] ZACC 6; 2024 (7) BCLR 869 (CC) (20 May 2024) (‘IEC v MK’)

- b. Ultimately it is the sanction and purpose for the sanction that will determine whether the court intends for the contemnor to have a criminal record.
- c. Where a punitive sanction for contempt is imposed, a criminal record will follow. In this regard, I understood the submission to be that a criminal record would result from punitive committal specifically. The amicus defined 'punitive sanction as being: *"...a sentence of imprisonment that cannot be avoided by any action on the part of the respondent to comply with the original order. The sanction can be suspended or unsuspended."* On the other hand, the possibility payment of a fine as a punitive measure was mentioned outside of the context of a criminal record.

[30] The Respondent on the other hand submitted that the import of *Fakie* (as applied in *IEC v MK*) is that the 'conviction' occurs at the stage of the pronouncement that a contemnor is in civil contempt of court. In argument, Mr Luthuli referred to the fact that in *IEC v MK*, the CC treated the consequences of the Zuma contempt order as one would in a criminal trial. I was also referred to the CC's pronouncement in relation to remission and its effect on sentence, where Theron J states that:

"[85]...Whether or not remission is granted is no reflection on the gravity of the relevant person's offence..."

[31] Whilst it had always been the Respondent's stance that the common law treatment of civil contempt in civil proceedings as a criminal offence is inconsistent with the Bill of Rights, the amicus curiae, originally, in the written submissions, was of the view that no development of the common law was necessary. However, post the *IEC v MK* judgment and during oral argument, Mr Willis SC, indicated that upon further reflection and conspectus of the law, the amicus curiae now also contended that development is necessary insofar as a finding of civil contempt could result a Respondent obtaining a criminal record.

[32] The amicus curiae's attack against the continued treatment of contempt of court in civil proceedings as a criminal offence, is best summarised as: if a person convicted of civil contempt is not an *"ordinary criminal in the everyday meaning of the word and he ought not to be treated as such"*,⁵ what type of criminal is he then? The differences in procedure between civil and criminal cases, such as who decides to prosecute, differences in 'sentences', types of pleas etc was highlighted. As the differences in procedure will be fully discussed below I do not intend to set out the amicus curiae's

⁵ *S v Nel* [1990] ZASCA 145; 1991 (1) SA 730 (A) at 733A-E

complete submissions herein, save to state that, per Mr Willis SC's observation: '*There is something amiss in the process*'

[33] The Respondent's attack was in more general terms and aimed at the overall retainment of the criminality within the context of civil proceedings for civil contempt of court.

[34] Having succinctly taken the Court through the eminent cases, such as *Fakie* and *Matjhabeng* etc, to show that the South African Court have thus far 'sidestepped' addressing the 'criminal record' issue head-on, Mr Luthuli's contentions were closely aligned with those of the minority, per Jafta J, in the rescission application brought by Mr Zuma against the order made in the Zuma contempt judgment⁶ ("the Zuma rescission application").

[35] I will return to Jafta J's rationale later in this judgment.

[36] Both Mr Willis SC and Mr Luthuli submitted that the common law in this regard is inconsistent with the spirit, purport and object of the Bill of Rights and in particular Sections 10, 12(1)(a), 12(1)(b), 12(1)(e), 34 and/or 35 of the Constitution.

The niggles, the doubt and the delay

[37] In *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd and Another*⁷, the CC prescribed that a court, in considering whether to develop the common law, should:

"(a) determine exactly what the common law position is;

(b) then consider the underlying reasons for it; and

(c) enquire whether the rule offends the spirit, purport and object of the Bill of Rights and thus requires development."

Furthermore, it should also:

"d) consider precisely how the common law could be amended; and

(e) take into account the wider consequences of the proposed change on that area of law.'

[38] Even though it now seemed that the common law position is that a criminal record could follow a finding of contempt in civil proceedings, the exact nature and circumstances that would have such a result remained uncertain. The order made in the Zuma contempt case was a definitive and final order of unsuspended committal, granted under

⁶ *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* (CCT 52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (17 September 2021)

⁷ *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd and Another* 2016 (1) SA 621 (CC) para [39].

exceptional circumstances .As a result, the subsequent interpretations of the nature of the ‘conviction’, ‘sentence’ and even constitutionality of the proceedings, provided little clarity as to how a court should in normal motion proceedings, approach the vexed question of under which circumstances its finding would result in a Respondent obtaining a criminal record.

- [39] Whilst the amicus curiae’s submission that, in terms of the common law, a conviction for purposes of the CPA (and a resultant criminal record) only arises where the sanction is punitive committal, seems attractive in its simplicity, the finding in the Zuma contempt case point in the opposite direction: The question of ‘guilt’ or conviction of civil contempt stands apart from the nature of the sanction imposed. As, in my view correctly, explained by Fisher (2023):

Before Zuma II, no South African court had ordered direct imprisonment for civil contempt. Instead, courts used suspended imprisonment as a means to coerce convicted contemnors to obey the order that they originally disobeyed. Whether this long-standing practice betrayed an indispensable relationship in South African law between a finding of civil contempt and remedies that sought compliance with the court order originally disobeyed was an important point of division between the majority and minority in Zuma II. Khampepe ADCJ, correctly, recognised that the Court’s own prior statements betray that there is indeed no such indispensable relationship. ⁸

- [40] Furthermore, even assuming that a criminal record only applies to cases where the finding is linked to an order for unsuspended purely punitive committal, the South African common law position would be directly contradictory to the position in terms of the English law, where it has been explicitly held that:

”....Breach of an order made in the course of legal proceedings may result in punishment of the person against to the order was made as a form of contempt.However, a contempt of that kind does not constitute a criminal offence. Although the penalty contains a punitive element, its primary purpose is to make the order of the court effective. A person commits this type of contempt does not acquire a criminal record.” ⁹

- [41] Even though, the answer seems to lie in the fact that in the UK, civil contempt of court “does not constitute a criminal offence”, an understanding of the legislative context in that jurisdiction renders this differentiation irrelevant for present purposes. South Africa

⁸ Fisher C, Naidoo D “Revisiting the Imprisonment of Jacob Gedleyihlekisa Zuma for Contempt of Court by the Constitutional Court” Constitutional Court Review 2023 Volume 13, 363–413

⁹ SEE: *Director of the Serious Fraud Office v O’Brien* 2014 WL 1219281 (2014) at para 38

is one of but a few countries in the world where the criminal offence of contempt of court has not been fully codified and as such still exists as a common law offence. In the UK, the acts that would constitute contempt of court have been codified in terms of their overlap with so-called recordable offences. There, it is commonplace for a civil court to order unsuspended committal as a purely punitive sanction for civil contempt of court,.

[42] The uncertainty as to the impact of a civil contempt finding on a person's record, however, persists even within the UK legal system. The Law Commission in the United Kingdom is presently undertaking a project to investigate and overhaul the approach to contempt of court in the UK *in toto*. In its first consultation paper, published on the 9th of July 2024 it noted as one of the points of clarification needed that:

“10.298 Uncertainty is also problematic because people may be required to “self-disclose” their criminal record. When responding to a question about whether they have a criminal conviction, they may be uncertain about whether a contempt finding is a conviction, especially if the sanction was imprisonment....”

[43] The General Council of the Bar of England and Wales published its comments to the consultation paper in November 2024 and confirmed that a finding of contempt of court (even criminal contempt of court) never constitutes a recordable offence for purposes of criminal record.

[44] Neither the consultation paper, nor any of the submissions of the various law bodies, not any of the available English cases provided any indication why punitive committal warranted in civil proceedings for contempt of court, even though there is no conviction of a criminal offence.

[45] An attempt to understand the underlying reason for the South African common law position, yielded similar concerns and proved even more befuddling; especially when considering that the CC in *Fakie* confirmed the criminality of civil contempt within the context of expanding the protections afforded to a contemnor and to bring the burden of proof in line with, inter alia, that of the UK law on contempt of court...

[46] The problematic nature of the common law of contempt of court has seemingly become endemic to most common law jurisdictions: The Victorian Law Reform Commission has undertaken a significant review of contempt of court law in Victoria, Australia. This project, initiated by a referral from the Attorney-General in 2018, aims to address inconsistencies, uncertainties, and a lack of transparency in the current law. The commission published a consultation paper in July 2024 held a webinar, and is expected

to deliver a final report by the end of 2025 with recommendations for a fair, effective, and coherent legal framework

- [47] Initially, it seemed, that the determination herein would have to wait until the UK Law Commission had hopefully in its final report explained why the prevailing position in the UK is what it is. By way of comparison with that rationale, this Court would then have been able to explain why in South Africa, per the dictum in *IEC V MK*, a finding of guilt of civil contempt of court would or would not be considered to be a conviction for purposes of a criminal record.
- [48] The impact of such a severe delay in determination of the common law position on the right to finality and interest of justice of each party respectively was considered and compared.
- [49] On the one hand, as the Respondent has complied with the orders contained in the first judgment, the Applicant's "...*manifest private interest in securing compliance...*" has been satisfied. The determination of the punitive order and its effect was an issue between the Court and the "...*because of the broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law.*"¹⁰ . It is both in the interest of the rule of law and the broader public interest to obtain certainty before potentially finding that every civil contemnor, at common law, has a criminal record.
- [50] On the other hand, the importance of the decision and impact thereof on the rights of the Respondent cannot be understated. The effect of a criminal record on a person's right to a fair trial in future, freedom of association, movement, trade occupation and profession, etc, is devastating. As was held by the High Court in *Mlungwana and Others v S and Another*¹¹ ("*Mlungwana*"), "...*a previous conviction impacts very negatively on one's future employment, travel, or study prospects,*" and leaves "*an indelible mark ... hampering almost every aspect of their lives.*"
- [51] On the part of the Respondent therefore, the delay caused by obtaining certainty held no prejudice: Whilst the question of whether or not she would have a criminal record remained outstanding, her rights were largely unaffected
- [52] However, final certainty kept getting delayed. The UK Law commission published subsequent addendum consultation papers and indicated that the first portion of final

¹⁰ *S v Beyers* 1968 (3) SA at 80C-H (translation as per *Fakie* at para 11)

¹¹ *Mlungwana and Others v S and Another* (CCT32/18) [2018] ZACC 45; 2019 (1) BCLR 88 (CC); 2019 (1) SACR 429 (CC) (19 November 2018) ("*Mlungwana*")

report is expected to only be published in November 2025 and the second portion in 2026. The Victorian Law Commission's estimated finalisation date of November 2025 was just that: an estimation.

[53] As a result, the development of the South African jurisprudence and the impact of the Constitution was considered and in a well written (and edited) judgment a tentative basis for the differentiation was proposed (with reference to local and international academical writings on the subject.)

[54] This is not that judgment: For all its masterful descriptions of and findings on issues such as the continued relevance of civil and criminal contempts, punitive and non-punitive sanctions, the balancing of constitutional rights and the rule of law etc, the reasoning contained therein was fundamentally and fatally flawed *ab initio*.

The problem with confirmation bias

*"Confirmation bias: (noun): the fact that people are more likely to accept or notice information if it appears to support what they already believe or expect"*¹²

[55] Even though the concept of confirmation bias was defined in the 1960's,¹³ its impact on the facts *in casu*, regrettably, only became apparent at this late stage: it was assumed from the outset by myself and the parties involved that the CC's findings in the various cases interpreting the Zuma contempt order, confirmed that a finding of civil contempt in civil proceedings could result in such a contemnor having a criminal record. The pronouncements in *IEC v MK* referencing "conviction" and "sentence" further cemented that belief.

[56] That commonly held belief that the common law position is settled in this regard, is naturally incorrect. The CC has been very definitive in stating that its interpretation of the nature and effect of the 'conviction' and 'sentence' of Mr Zuma for contempt was done in relation to a specific statute.

[57] As was aptly summarised in the case of *Freedom Front Plus v African National Congress* (02/2009) [2009] ZACC 4 (31 March 2009)

[9] When one seeks to establish the intention of the legislature in a particular piece of legislation one looks not only at the words used but the context in which they occur. This approach is fortified by the judgment of Howie JA in Hoban v ABSA Bank Ltd¹⁴ where

¹² Definition from Cambridge Advanced Learner's Dictionary & Thesaurus © Cambridge University Press

¹³ Wason PC. [On the failure to eliminate hypotheses in a conceptual task](#). *Quarterly Journal of Experimental Psychology*. 1960;12(3):129-140. doi:10.1080/17470216008416717

¹⁴ 1999 (2) SA 1036 (SCA) at 1045B

he quoted with approval E Cameron in Joubert (ed) *The Law of South Africa* vol 27 at 207 para 229 where he said

'...context does no more than reflect legislative meaning which in turn is capable of being expressed only through words in context'. The same or similar language in different statutes may not necessarily mean the same thing.

In this regard in Consolidated Diamond Mines of. SWA Ltd v Administrators of SWA¹⁵ Schreiner JA said: 'Previous decisions on the meaning of the same words in different contexts can hardly be more than suggestive and possibly only faintly suggestive, of the meaning that may be proper in the case under consideration.' [Underlining my own]

[58] In hindsight, the fact that the CC's description of civil contempt as a criminal offence in *IEC v MK* is pertinently based on the pronouncement to that effect in *Fakie* – where Cameron J was emphatic in stating that the issue of criminal records was left undecided – without engaging the issue, should have been the first clue.

[59] Devoid of this error in assumption, it was evident that Cameron J's question remained as unanswered as it was when first formulated 19 years ago.

Contextualising 'Contempt of Court'

*"Contempt of court has been aptly described as the Proteus of the legal world, assuming an almost infinite diversity of forms."*¹⁶

[60] Historically, the various types of conduct that fell under the over-arching term 'contempt of court' were delineated into two sub categories: namely civil contempt and criminal contempt.

[61] 'Criminal contempt', traditionally, refers to:

- a. *"... unlawfully and intentionally violating the dignity repute or authority of a judicial body or interfering in the administration of justice in a matter pending before it."*¹⁷ or
- b. *"...the publishing of information/comment concerning a pending judicial proceeding which may constitute a real risk of improperly influencing the outcome of the proceedings or to the prejudice of the proper functioning of the administration of justice in those proceedings"*¹⁸

[62] In *Matjhabeng*, the CC elaborated that criminal contempt *"..covers a multiplicity of conduct."* which conduct *"...brings the moral authority of the judicial process into*

¹⁵ 1958 (4) SA 572 (A) at 637

¹⁶ Foreword to C J Miller and D Perry, *Miller on Contempt of Court* (4th ed, OUP, 2017)

¹⁷ Milton, *Criminal Law and Procedure* Vol2 p164

¹⁸ *Midi Television (PTY) Ltd v DPP: Western Cape* 2007 (3) SA 318 (SCA) at para 19

*disrepute...by “...interfering in matters of justice pending before the court. It thereby creates serious risk of prejudice to the fair trial of particular proceedings. This was the case in Mamabolo, which involved publication of scandalous remarks against a judicial officer.”*¹⁹

[63] Civil contempt, by contrast refers to only one type of conduct, namely the disobedience of court orders.

[64] The terms “civil” and “criminal” contempt bears no relation to the nature of the proceedings (civil proceedings or criminal proceedings) from which the contempt arose. Historically, applications for committal for criminal contempt of court, could be prosecuted by a private litigant in civil proceedings.²⁰ Likewise, the disobedience of, for instance, a purely procedural order made during a criminal trial, remains ‘civil contempt’.

[65] In the UK, the Court of Appeal explained that:

“[38] There is a distinction long recognised in English law between “civil contempt”, i.e. conduct which in itself is not a crime but which is punishable by the court in order to ensure that its orders are observed, and “criminal contempt”

[39] A criminal contempt is conduct which goes beyond mere non-compliance with the court order or undertaking and involves a serious interference with the administration of justice. Examples include physically interfering with the course of the trial, threatening witnesses or publish material likely to prejudice a fair trial.

*[42]... It is necessary to look at the nature and purpose of the order. It is fallacious to argue that because the order was made by a criminal court, rather than a civil court, disobedience to the order amounts to a crime, whereas it would not have been a crime to disobey a similar order imposed by civil court. The question whether a contempt is a criminal contempt does not depend on the nature of the court to which the content was displayed; it depends on the nature of the conduct. To burst into a courtroom and disrupt a civil trial would be criminal contempt just as much as if the court had been conducting a criminal trial. Conversely, disobedience to a procedural order of a court is not in itself a crime, just because the order was made in the course of criminal proceedings. To hold that a breach of a procedural order made in a criminal court is itself a crime would be to introduce an unjustified and anomalous extension of the criminal law. “Civil contempt” is not confined to contempt of a civil court. It simply denotes contempt which is not itself a crime.”*²¹

¹⁹ *Matjhabeng* at para 52

²⁰ See for instance: *Dunston, N O v Transvaal Chronicle, Ltd* [1913] ZATransvLawRpPD 102; (1913) 4 TPD 557 (2 September 1913) – where an application for committal was brought against the Respondents on the basis that it was an “...interference with the administration of justice and constitutes a contempt of Court for a newspaper to publish the contents of a petition filed but not yet referred to in open Court.”

²¹ *Director of the Serious Fraud Office v O'Brien* 2014 WL 1219281 (2014)

- [66] In many, if not all, instances of civil contempt, the breach of an order or undertaking as between parties will carry with it a threat to the administration of justice by virtue of the court having been defied. In some circumstances such a breach could constitute a serious threat to the administration of justice and be an act that so threatens the administration of justice as to require punishment. In this light, the two categories of contempt are not different or, at least, will not always be different; rather, civil contempt may on occasion be better characterised as a subset of criminal contempt.”²² .
- [67] Even though Cameron J, in *Fakie* (wisely²³) avoided using the term ‘civil contempt’ and opted instead to refer to the act of ‘disobedience of a civil court order’, he confirmed that in committal proceedings (i.e. civil proceedings) a contemnor is not punished on the basis of the disobedience of a court order, but on the criminality that could be associated with the disobedience. The requirements before committal may be ordered in civil proceedings for disobedience of a court order as set out as follows:
- “[9] The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed ‘deliberately and mala fide’....*
- “[40] This approach conforms with the true nature of this form of the crime of contempt of court. As pointed out earlier (para 10), this does not consist in mere disobedience to a court order, but in the contumacious disrespect for judicial authority that is so manifested. It also conforms with the analysis in Beyers (para 11 above), where this court held that even though enforcement is the primary purpose of committal, it is nevertheless not imposed merely because the obligation has not been observed, ‘but on the basis of the criminal contempt of court that is associated with it’”²⁴ [Underlining my own]*
- [68] Thus, Cameron J’s statement in paragraph 6 of *Fakie* that “(i)t is a crime to unlawfully and intentionally to disobey a court order.” should not be read in isolation as equating the declaration of contempt in civil proceedings with a conviction of crime in criminal proceedings. Instead, all the references to the inherent criminality of civil contempt in *Fakie* was to explain the basis upon which a civil court could impose the criminal sanction of committal. The statement stems from the finding in *S v Beyers*, which, as confirmed in *Fakie* “...pointed to the ineluctably criminal dimension of the remedy granted even in proceedings aimed at coercion.”²⁵

²² UK Law Commission Consultation paper at para 2.40

²³ The potential for misunderstanding of the term “civil” is manifest: One could, for instance, seek the committal of a person as a result of civil contempt of a civil order made in a civil court, by way of civil proceeding

²⁴ *Fakie* at para 40

²⁵ *Fakie* at para 29

[69] More recently, in *Pheko II*, the Constitutional Court similarly confirmed that: "...the [civil] courts are able to grant the sanction of committal because there is a public interest being protected."²⁶

[70] It should be borne in mind that the pronouncements in *Fakie* were made with full appreciation that orders of committal to prison, granted in civil proceedings, without criminal findings of conviction of an offence, had already survived constitutional muster.²⁷

[71] In *Fakie* the fact that civil disobedience could also be prosecuted in criminal proceedings, formed part of the Court's rationale for applying the criminal standard where committal was sought in civil proceedings. However, this was not based on similarity of the criminality of the 'offence',²⁸ but rather on the similarity in deprivation of a person's rights occasioned by the order of committal/imprisonment in both proceedings.

[72] In fact, Cameron J's reasoning clearly illustrates that there is a distinct difference in the nature and effect of these two types of proceedings. For instance:

a. When referencing criminal proceedings, he states that:

In such a prosecution the contemnor is plainly an 'accused person' in terms of s 35(3) of the Bill of Rights...²⁹ (T)o avoid conviction (the accused) need only lead evidence that establishes a reasonable doubt."³⁰

b. Whereas, in respect of civil proceedings,:

*"It permits a private litigant.... to approach the court again, in the event of non-compliance, for a further order declaring the non-compliant party in contempt of court and imposing a sanction."*³¹

"There can be no reason why these protections should not apply also where a civil applicant seeks an alleged contemnor's committal to prison as punishment for non-compliance. This is not because the respondent in such an application must inevitably

²⁶ *Pheko II* para 34

²⁷ See for instance: *Nel v Le Roux NO and Others* (CCT30/95) [1996] ZACC 6; 1996 (4) BCLR 592; 1996 (3) SA 562 (4 April 1996)

²⁸ The footnote para 25 of *Fakie* to the aforementioned passage reads as follows:

'In re Dormer (1891) 4 SAR 64 at 85 per Kotzé CJ "Contempts of court are certainly in some respects analogous to criminal offences, but they are a distinct species of offence, to which a special mode of summary procedure is applicable, and do not admit of the ordinary and usual forms and modes of criminal procedure"', applied in Afrikaanse Pers-Publikasies (Edms) Bpk v Mbeki [1964 \(4\) SA 618 \(A\)](#) 626."

²⁹ *Fakie* para 22

³⁰ *Fakie* para 23

³¹ *Fakie* para 7

be regarded as an ‘accused person’ for the purposes of s 35 of the Bill of Rights. ... Section 12 of the Bill of Rights... affords both substantive and procedural protection.³²

And in interpreting the ambit of the right’s procedural aspect, it seems to me entirely appropriate to regard the position of a respondent in punitive committal proceedings as closely analogous to that of an accused person; and therefore, in determining whether the relief can be granted without violating s 12, to afford the respondent such substantially similar protections as are appropriate to motion proceedings”. [Underlining my own]

Comparative common law jurisdictions

[73] In South Africa, ‘contempt of court’ is a criminal offence for which an accused may be charged, tried, convicted and sentenced in criminal proceedings. Undoubtedly, upon conviction, it would constitute a previous conviction in terms of S271 of the CPA.

[74] It should however be noted that the criminal prosecution for disobedience of court orders (civil contempt) as a criminal offence, is unique when considered against other common law jurisdictions. In South Africa, criminal prosecution is possible as a result of the constitutional recognition of common law as a source of South African law, read with the definition of ‘offence’ in the CPA as any act or omission ‘*punishable by law*’.

[75] In other common law jurisdictions, such as New Zealand, Australia and the UK, where the common law criminal offence ‘contempt of court’s not incorporated into the relevant criminal statutes, contempt of court is not a criminal offence capable of prosecution in criminal proceedings.

[76] In all three jurisdictions, however, the civil motion application for committal for contempt of court has been retained in similar form and character as traditionally understood. In all three jurisdictions there is consensus that a declaration of contempt of court (be it civil contempt or criminal contempt) in civil proceedings, does not translate into a conviction of crime or result in a criminal record:

New Zealand

[77] The New Zealand Law Commission, noted, in their 2017 consultation paper on the reform of contempt of court, that:

“Contempt is currently not a true offence and there is no resulting conviction or criminal record, although contempt may result in a court imposing a criminal penalty..., contempt

³² *Fakie* para 24

*proceedings begin with an originating application, so are procedurally more akin to civil proceedings.*³³

[78] The Law Commission (in 2017) suggested that new offences be published to replace certain of the common law contempt of court offences, noting that:

*If the new offences are prosecuted in the same way as other criminal offences, the Police would file a charging document in the District Court. The procedural protections specified in the Criminal Procedure Act would apply in the usual way and so would the criminal rules of evidence. Under this option, a conviction would result in a person having a criminal record*³⁴

Australia

[79] In Australia contempt of court is a common law offence and there is no maximum penalty, subject to the Bill of Rights³⁵ All proceedings for contempt must 'realistically be seen as criminal in nature'.³⁶ However, a proceeding to punish a contempt is not a criminal proceeding.³⁷ Although a person found guilty of contempt may be convicted and imprisoned or fined, contempt is not tried under the usual criminal procedure in the Criminal Procedure Act. A contempt proceeding does not commence with police or another public official filing a charge in the Magistrates' Court or with the DPP filing a direct indictment with the County or Supreme Court. There is no committal proceeding to determine if the person should stand trial. There is no criminal trial with a jury to consider the evidence and deliver a verdict.

[80] In *Fakie*, Cameron J aligned himself with the Australian High Court's exposition of the nature of civil contempt proceedings:

*"In Witham v Holloway (1995) 131 ALR 401 (HC of A. the High Court of Australia has observed, in the context of the English-derived process for contempt, that 'to say that [civilly-initiated] proceedings for contempt are essentially criminal in nature is not to equate them with the trial of a criminal charge'."*¹ [Underlining my own]

³³ New Zealand Law Commission "Reforming the law of contempt of court: A modern statute" May 2017, Report 140 para 7.24

³⁴ New Zealand Law Commission "Reforming the law of contempt of court: A modern statute" May 2017, Report 140 para 7.28

³⁵ *R v Smith* (1991) 25 NSWLR 1 at 13 et seq; SCR Pt 55 r 13.

³⁶ *Witham v Holloway* (1995) 183 CLR 525, 534; quoting *Hinch v A-G (Vic)* (1987) 164 CLR 15, 49 (Deane J)

³⁷ *Hinch v A-G (Vic)* (1987) 164 CLR 15, 89.

[81] In *Re Colina; Ex parte Torney*³⁸, the High Court considered the question of whether s 80 of the Australian Constitution³⁹ (which provides for the right of a trial by jury on indictment of any Commonwealth offense) required contempt charges to be heard by a jury. In finding that it did not, the High Court held that (at 428):

“Although I accept that it is right to speak of an “offence” of contempt, the use of that term should not be permitted to obscure the significant differences between the powers that are invoked against an alleged contemnor and those that are set in train under the criminal law.

As was said in *Hinch v Attorney-General (Vict)*:

“Notwithstanding that a contempt may be described as a criminal offence, the proceedings do not attract the criminal jurisdiction of the court to which the application is made. On the contrary, they proceed in the civil jurisdiction and attract the rule that ordinarily applies in that jurisdiction, namely, that costs follow the event.”

[82] In *CFMEU v Boral*,⁴⁰ Nettle J held (at [67]) that:

*“A proceeding for punishment for contempt constituted by disobedience of an injunction granted in a civil proceeding is not part of the criminal justice system in the sense essayed in *Caltex, X7* or *Do Young Lee v The Queen*. Although “all proceedings for contempt ‘must [now] realistically be seen as criminal in nature’”, not all contempts are criminal. Failure to obey an injunction is not a criminal offence unless the failure to comply is defiant or contumacious. A proceeding for contempt is not a proceeding for criminal contempt if the proceeding appears clearly to be remedial or coercive in nature as opposed to punitive. A criminal contempt is a common law offence, albeit not part of the ordinary common law. But even a proceeding for criminal contempt is not a criminal proceeding.” [Underlining my own]*

[83] More recently, in *Dowling v Prothonotary of the Supreme Court of New South Wales* [2018] NSWCA 340, the Supreme Court of Appeal criticised the court a quo (there called “the primary judge”) for applying criminal concepts such as conviction and sentencing to civil applications for contempt committal. In confirming that criminal sentencing statutes did not apply to committal for contempt of Court proceedings, the Court, inter alia, held that the application thereof is incorrect to do so: “assumes the exercise

³⁸ (1999) 200 CLR 386; [1999] HCA 57

³⁹ Commonwealth of Australia Constitution Act 1900 (Imp) 63 & 64 Vict, c 12

⁴⁰ (2015) 256 CLR 375; [2015] HCA 21.

being undertaken is one of “sentencing” and that contempt is a criminal offence of the same kind as other offences relating to past conduct.”⁴¹

[84] The Supreme Court in Dowling also made the following observations

“[56] It is not in doubt that the contempt proceedings, commenced by summons with a statement of charge, complied with Pt 55, rr 6 and 7 of the Supreme Court Rules. Count 3 of the charge alleged a contravention of the order made by Beech-Jones J pursuant to the Court Non-publication Orders Act. Contravention of an order under that Act is an offence, pursuant to s 16(1). It carries a maximum penalty of imprisonment for 12 months or a fine, or both. It expressly states that “conduct that constitutes an offence under this section may be punished as a contempt of court even though it could be punished as an offence”: s 16(2). (The reverse is also provided for: s 16(3).) The distinction between proceedings for an offence and proceedings for contempt is clearly identified, although each may result in punishment. ... [Underlining my own]

[57] The primary judge purported to impose a non-parole period and a balance of term. The structure of the sentence thus assumed the application of s 44 of the Sentencing Procedure Act. It also assumed that the Parole Authority had power to consider whether the applicant should be released on parole and, if so satisfied, release him on parole, pursuant to the Crimes (Administration of Sentences) Act 1999 (NSW). Neither of those statutes applied in their terms; they each involve sentences imposed in the criminal jurisdiction, as does the Crimes (Appeal and Review) Act 2001 (NSW). In committing a person to prison for contempt of court, the court is operating in its civil jurisdiction. That is not to say that many incidents of the general law protections of the person charged with a criminal offence will not operate; rather it is to identify the jurisdiction of the Court as being civil rather than criminal.

[58] The reasoning in Whiley is not, in my opinion, persuasive as to the operation of the Sentencing Procedure Act with respect to a finding of contempt in the civil jurisdiction of the Supreme Court. For these reasons, the primary judge was wrong to “convict” the respondent and was wrong to sentence in accordance with the Sentencing Procedure Act. Having made declarations in accordance with the orders sought in the summons, to the effect that the respondent was guilty of contempt of court in relation to each of the three counts, and being satisfied that a custodial penalty was appropriate, it was sufficient to order that the respondent be committed to prison.”

⁴¹ Dowling v Prothonotary of the Supreme Court of New South Wales [2018] NSWCA 340 para 53

United Kingdom

[85] The difference in the meaning of 'contempt of court' when brought in civil applications versus criminal prosecutions, is perhaps best understood when regard is had to the current position in the UK. There, the acts or omissions which traditionally constituted the criminal offence of contempt of court, have been codified as distinct criminal offences, e.g.:

- a. Under the Juries Act 1974, it is a criminal offence for a juror to fail to attend jury duty, conduct research about a case and tell someone who is not on the jury details of the jury's thoughts and decisions on the case they are considering.
- b. Threatening, abuse or insulting words or behaviour in the courtroom or the vicinity of the courthouse may amount to offences under the Public Order Act 1986 or other appropriate offences

[86] The criminal offence of "contempt of court" therefore no longer exists as an overarching term for the various contemptuous acts that, in common law, used to constitute criminal offences.

[87] However, in civilly initiated proceedings, 'contempt of court' remains largely as traditionally understood in common law, despite being (mostly) governed in terms of Part 81 of the Civil Procedure Rules. Part 81 sets out the procedures applicable for committal applications for civil (disobedience of a court order) and criminal (contempt in face of court, interference with the administration of justice etc). The jurisdiction of the civil court hearing the application to grant criminal sanctions, such as fines or committal has likewise remained intact.

[88] Contempt of court and criminal offences can overlap because the same actions can potentially be both. For example, threatening a witness could be a criminal offence and also a contempt of court. While contempt proceedings are handled by civil courts, not the police or the Crown Prosecution Service (CPS), the behaviour involved may also amount to a statutory criminal offence, such as witness intimidation, and be prosecuted as such.

Is contempt of court a criminal offence in South Africa?

[89] In South Africa, the nature of contempt of court as a criminal offence versus contempt of court applications in civil proceedings, by way of analogy to the aforementioned UK position, can be explained as follows:

- a. The CPA is amended to explicitly set out the various acts and omissions that have to date been prosecuted in terms of the overarching offence of 'Contempt of Court'. In terms of Section XYZ, the offence 'disobedience of court orders' may be prosecuted as a Schedule 1 offence. The offence is defined as 'the wilful and mala fide disobedience of any order of court.'
- b. The common law civil application for committal for civil contempt (being the disobedience of court orders) remains unchanged.
- c. Jane Doe blatantly announces on social media she will not obey an order, granted that morning in an urgent civil application brought by her ex guru, John Doe, to remove any and all photos she has of him from her Facebook page. Instead, she posts more photos of him along with a video of her burning the served court order on the steps of the Palace of Justice.
- d. The NPA can charge her with the commission of the Section XYZ of the CPA *criminal offence* of disobedience of court orders. John Doe may simultaneously (based on the same conduct) bring an application for punitive committal for civil contempt of court. The conduct is a criminal offence in relation to the criminal proceedings, and she would be charged, convicted and sentenced in terms of the criminal offence. Such a conviction would constitute a prior conviction in terms of S271 of the CPA.
- e. On the other hand, because of the hybrid nature of the civil application for contempt of court, the civil court may also declare her to be in contempt of court and impose the criminal sanction of direct punitive committal. In the civil context however, the conduct is not a criminal offence, and the proceedings do not follow the criminal two step proses of conviction and sentencing. She is not convicted of a criminal offence per the CPA and, resultantly would not obtain a criminal record.

[90] This exposition of disobedience of a court order being both a criminal offence within the context of criminal proceedings, whilst also constituting conduct punishable as crime in civil proceedings, is supported by, inter alia, the following pronouncement in *Pheko II*:

"... if all of the elements of criminal contempt are satisfied⁴², civil contempt can be prosecuted in criminal proceedings, which characteristically lead to

⁴² It must be committed intentionally and in relation to the administration of justice in the courts. See *S v Van Niekerk* 1970 (3) SA 655 (T) at 657F-G; *S v Gibson NO and Others* 1979 (4) SA 115 (D) at 120A-121B; *S v Benatar* 1984 (1) ZLR 296 (SC) at 304D-E, 1984 (3) SA 588 (ZS) at 593I; *S v Harber and Another* 1988 (3) SA 396 (A) at 413G414E.

committal. Committal for civil contempt can, however, also be ordered in civil proceedings for punitive or coercive reasons."⁴³ [Underlining my own]

- [91] Similarly, the nature of contempt in the context of civil proceedings explains why, in *Matjhabeng* para 50 it is stated that: "...*(s)imply put, all contempt of court, even civil contempt, may be punishable as a crime.*".

The Zuma contempt judgment

- [92] To my mind, the Zuma contempt judgment, not only confirms, but also strengthens, the aforementioned exposition of the nature of contempt findings in civil application being decidedly different from contempt prosecutions in criminal proceedings.
- [93] The 'tension' between the majority and minority is related to the whether or not a civil court may impose a punitive sanction of unsuspended committal for civil contempt of court. The minority formed the view that if committal does not contain a coercive element (such as by suspending the order) and constitutes only punishment, the matter should be referred to the National Prosecuting Authority for prosecution in criminal proceedings.
- [94] The majority definitively found that at common law the purpose of the sanction did not dictate the nature of the proceedings in which committal for contempt of court could be pursued. In this regard, the majority's reasoning only served to further align the South African common law with that of other common law jurisdictions. For instance, as explained in *Miller on Contempt of Court*,⁴⁴ in the UK:

"Historically, civil contempt through non-compliance with a court order could be dealt with by committal for a fixed or for an indefinite term. The form of the committal order and the duration of the term of imprisonment depended upon the purpose for which committal was being employed. Committal for a fixed term was appropriate where the objective was punishment for past disobedience. However, where committal was being employed for a remedial or coercive purpose an indefinite term might be preferable as carrying the maximum incentive to comply with the original order."

- [95] The tension between the majority and the minority in fact confirmed that in South Africa, criminal and civil proceedings for contempt of court exist. The majority not only upheld the distinct nature and effect of the different proceedings, but also emphatically held that the order made against Mr Zuma should not be construed as conflating the distinct nature and effect of these proceedings:

⁴⁴ C J Miller and D Perry, *Miller on Contempt of Court* (4th ed, OUP, 2017) at [2.17].

[65] However, this is not a conventional criminal trial. And I emphasise that I am alive and deferential to the jurisprudence of this Court that affirms that “a respondent in contempt proceedings . . . is not an ‘accused person’ as envisioned by section 35 of the Constitution”

[76] It can be inferred that my Sister is of the view that the sanction sought by the applicant in these proceedings has the consequence of transforming Mr Zuma into an accused person. But I cannot agree. Ordinary criminal proceedings differ vastly from civil contempt proceedings, and it cannot be that something as simple as a party’s, in this case, the applicant’s, pleadings can have the effect of marrying these two markedly distinct concepts....

[77] I shall not belabour this point any further, other than to emphasise that it is perspicuous that contempt of court may be brought through civil proceedings, and that many of the specific rights listed in section 35(3) cannot fit comfortably, or at all, within these motion proceedings. I agree with Cameron JA that “not all of the rights under that provision will be appropriate to or could easily be grafted onto the hybrid process”. This is because the section 35 rights were crafted with the specific criminal process in mind. Moreover, if one is prepared to accept that contempt of court may be litigated through civil proceedings, as our jurisprudence unequivocally does, it is simply unavoidable that a contemnor in civil proceedings will not be categorised as an accused person and enjoy each of the rights enshrined in section 35...

[120] The summary process under scrutiny in *Mamabolo* cannot be characterised as being akin to ordinary civil contempt proceedings, like those in *casu* (in this case), for defiance of a court order. In that matter, this Court even described the alleged scandaliser as “an accused person as contemplated by section 35(3) of the Constitution”, because of the summary process involved on those specific facts. Thus, to imply that these proceedings are akin to the summary process held to be unconstitutional in *Mamabolo* constitutes a mischaracterisation of these proceedings. That the applicant seeks a sanction, which this Court has said may be apposite under certain circumstances for defiance of court orders, that happens to be committal, does not have the effect of transforming Mr Zuma into an accused person in terms of section 35 of the Constitution. As I have already stated, to say that it does would contradict the clear findings in *Fakie* that have been affirmed by this Court in *Pheko II*.

[121] This Court is at large to impose a sanction that is appropriate upon a consideration of all of the relevant facts and law. I am by no means beholden to the applicant’s desires and, as I have demonstrated, the sanction that this Court has chosen

to impose on Mr Zuma has been informed and supported by numerous important legal, and indeed constitutional, considerations. Moreover, without in any way implying that accused persons may be tried for criminal charges summarily. I am confident that unsuspended committal may be ordered by a court in contempt proceedings in these extraordinary circumstances." [Underlining my own]

[96] The astute reader would note that I have thus far refrained from entering into the argument that has dominated the Zuma contempt judgment and the three subsequent judgments concerning the interpretation thereof, as well as academic discussions on the effect of all four: Was Mr Zuma entitled to the constitutional protections of Section 35(3) or those per Section 12?

[97] The reason for not engaging with the highly intellectual discussions such as whether motion procedure can accommodate Section 35(3) protections, is simply this: The extent of the protections afforded to a Respondent in civil contempt proceedings, do not change the fact that the Court is exercising its civil jurisdiction.

[98] In this regard, I align myself with the common sense and logic of the reasoning in *Dowling* (supra):

"[53].....In committing a person to prison for contempt of court, the court is operating in its civil jurisdiction. That is not to say that many incidents of the general law protections of the person charged with a criminal offence will not operate; rather it is to identify the jurisdiction of the Court as being civil rather than criminal."

[99] The constitutional rights of a party and the jurisdictional powers of the court before which such rights are enforced have no relation to each other. To hold otherwise would lead to the absurd situation where, by raising the burden of proof to afford the Respondent the greater protections of the Constitution, the finding in *Fakie* simultaneously also increased in the risk of infringement of such rights.

[100] In civilly initiated committal for contempt proceedings, criminal concepts such as conviction and sentence (as understood within the context of the criminal law statutes) simply do not apply. In civil proceedings a court grants an "*order declaring the non-compliant party in contempt of court*," and grants a sanction, which may under appropriate circumstances include the "*...alleged contemnor's committal to prison as punishment for non-compliance*." ⁴⁵

⁴⁵ *Fakie* para 7

[101] For instance, in *Dowling*, the Supreme Court of Appeal of New South Wales, having confirmed the civil jurisdiction of the court, corrected the criminal references in the court a quo's order to the correct civil terminology, noting that

"...the primary judge was wrong to "convict" the respondent and was wrong to sentence in accordance with the Sentencing Procedure Act. Having made declarations in accordance with the orders sought in the summons, to the effect that the respondent was guilty of contempt of court in relation to each of the three counts, and being satisfied that a custodial penalty was appropriate, it was sufficient to order that the respondent be committed to prison."

[102] That being said, the fact a court, in civilly initiated committal for contempt proceedings, uses language more appropriate to criminal proceedings (such as conviction sentence guilt etc) does not magically vest such a civil court with criminal jurisdiction.

[103] The indiscriminate and imprecise use of criminal terminology in civil proceedings does however result in a conflation of the civil nature of the order with the legal effect normally ascribed to such criminal terminology.

[104] For instance, in the UK, where criminal proceedings for contempt of court have not existed for decades, the Law commission as late as June 2025 noted that:

*"10.229 We can only surmise that the explanation for the confusion over when contempt may be entered on to the PNC and appear on a record may lie in a lack of understanding about contempt, which may substantially be brought about by the use of terminology. Phrases such as "criminal contempt", "prosecution" for contempt, "guilty" of contempt, or "sentenced" for contempt are in common parlance."*⁴⁶

[105] And, as noted by the IEC in their response to the CC's request for written submissions, even the UK Court of Appeal is on occasion guilty of such legal imprecision:

"There is, however, at least one (more recent) example of the Court of Appeal referring to a "conviction and sentence" for civil contempt: Sage v Hewlett Packard Enterprise Company [2017] 1 W.L.R. 4599 at [1]"

[106] The order made in the Zuma contempt case, does not espouse overtly criminal terminology. It definitely does not imply that the CC assumed criminal jurisdiction and

⁴⁶ The Law Commission of England and Wales: *Consultation Paper No 262: Summary of Consultation paper* (9 July 2024)

was making the order in terms of the CPA and related criminal statutes. The relevant portions thereof simply read that:

“3. It is declared that Mr Jacob Gedleyihlekisa Zuma is guilty of the crime of contempt of court for failure to comply with the order made by this Court ...

4. Mr Jacob Gedleyihlekisa Zuma is sentenced to undergo 15 months’ imprisonment.”

[107] In fact, the first references to ‘conviction’ and ‘sentence’ are contained in Jafta J’s minority judgment in the Zuma rescission matter. However, his use of these terms did not result from an interpretation of the wording of the Zuma contempt order. It will be recalled that Jafta J argued that the order of unsuspended committal could never have been made by a civil court and should be set aside.

[108] The SCA, in the Zuma parole matter and, more recently, the CC in the *IEC v MK* both interpreted the order as constituting one of conviction and sentencing. However, as I have already noted, the failure to appreciate the statutory context within which the respective interpretative exercises were done led to the erroneous assumption that the meanings so ascribed ex post facto should be retrospectively read into the actual Zuma contempt order. Hindsight being 20/20, it is obvious that to, given the majority’s emphatic insistence that it was exercising civil jurisdiction, the assumption that their order, nonetheless, was intended to be an exercise of criminal jurisdiction and powers, is nonsensical.

[109] As indicated at the very inception of this judgment, in both instances, the Court was interpreting the Zuma contempt order within the context of the specified statutes. In both, the words ‘convicted’ and ‘sentenced’ were used and the Court (SCA and CC) had to determine whether the Zuma contempt order could be understood as one of conviction and sentence within the context of the particular statute.

[110] My finding, that the CC in the Zuma contempt matter did not change to common law to now afford a court in civil contempt proceedings criminal jurisdiction, effectively disposes of any notion that this court’s (in fact any civil court’s) declaration that the Respondent is in contempt of court could be noted against her criminal record.

[111] However, lest it be said my conclusion (above) runs contrary to the dismissal of the argument (raised in both the Zuma parole and the *IEC v MK* matters) that Mr Zuma was not convicted as the contempt proceedings did not constitute a ‘normal criminal trial’, I will briefly address the question of criminal records and civil contempt proceedings from a purely interpretive perspective. (For present purposes it is assumed that civil contempt constitutes a criminal offence within civil proceedings)

[112] As indicated at the start of this judgment, one of the primary factors that contributed to the erroneous assumption that the present issue was for all intents and purposes decided in *IEC v MK*, was the fact that the CC, in interpreting the Zuma contempt order as constituting a conviction, seemingly reflected the same meaning ascribed thereto by our courts where they considered the term in the context of previous convictions.

[113] This assumption lost sight of the fact that “(p)revious decisions on the meaning of the same words in different contexts can hardly be more than suggestive and possibly only faintly suggestive, of the meaning that may be proper in the case under consideration.”

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[114] It may be self-evident that the meaning the CC ascribed to the term ‘conviction’ was within the context of S47(1)(e), however, it must also be appreciated that the meaning the CC ascribed to the definition of the concept in other judgments, was similarly informed.

[115] The issue for determination *in casu* is squarely based on the provisions of the CPA and, as such, the interpretive exercise must duly be done within the context thereof.

[116] A conviction will not be a previous conviction for purposes of s 271 of the CPA unless the accused has been brought before court and convicted and sentenced by that court.⁴⁸

[117] As the CPA does not provide a definition of what constitutes a “previous conviction”, it is informed by the definition as contained in case law. For instance, our courts have defined the concept as a ‘conviction by a court of law of a crime or offence’⁴⁹ or as a “judicial determination of a case and this necessitates a finding of guilty or the acceptance of plea of guilty followed by a sentence”⁵⁰

[118] The various definitions have one central commonality – they all were made in the context of criminal proceedings and more specifically the provisions of the CPA. Within that context a ‘finding of guilt’, inherently presupposes a charge, plea, trial etc per the CPA. Indeed, it has also been held that: “the legal position is clear that a conviction ‘can only occur in respect of a charge on which an accused is indicted, or a competent verdict in respect thereof’⁵¹

⁴⁷ *Consolidated Diamond Mines of SWA Ltd v Administrators of SWA* 1958 (4) SA 572 (A) at 637

⁴⁸ *S v Smullion (Sullivan)* 1977 (3) SA 1001 (RA) 1004E).

⁴⁹ *S v Greveling* 1976 (2) SA 103 (O) 104C–D; *R v Vos*, *R v Weller* 1961 (2) SA 743 (A) 747; *R v Zonele & others* 1959 (3) SA 319 (A); *S v Rantho* 1974 (4) SA 418 (T); see also *Du Toit* 133).

⁵⁰ *S (An Infant) v Recorder of Manchester* [1971] A.C. 481 at 484H (cited with approval in *S v Zwela* 1981 (1) SA 335 (O) at 341A and *S v Motsepa* 1982 (1) SA 304 (O) at 306G).

⁵¹ *Jacobs v S (Review)* (02/24) [2025] ZAWCHC 20; - (29 January 2025)

[119] The examples listed in *Mamabolo* to show how far the summary procedure employed in summoning an accused on a charge of scandalising the court, by converse, exemplify of the proceedings envisioned when conviction is understood within the context of the CPA:

“There is no adversary process with a formal charge-sheet formulated and issued by the prosecutorial authority in the exercise of its judgment as to the justice of the prosecution; there is no right to particulars of the charge and no formal plea procedure with the right to remain silent, thereby putting the prosecution to the proof of its case. Witnesses are not called to lay the factual basis for a conviction, nor is there a right to challenge or controvert their evidence. Here the presiding judge takes the initiative to commence proceedings by means of a summons which he or she formulates and issues; at the hearing there need be no prosecutor, the issue being between the judge and the accused. There is no formal plea procedure, no right to remain silent and no opportunity to challenge evidence.”

[120] Even if the conviction point were put to one side, the ‘criminal sanctions’ which may be imposed in civil contempt proceedings and ‘sentences’ per the CPA are vastly different concepts.

[121] Committal for contempt is not a sentence of imprisonment:

- a. In *Fakie* the ‘crime’ was described as ‘committal for contempt of court’. Even in the Zuma contempt case, the majority vacillated between terming the sanction to be “committal” or “sentence of imprisonment”: For instance:

[122] I now turn to grapple with the vexed question of determining the length of committal in these contempt proceedings. Before I settle on the length of the sentence...

- b. Within the context of the CPA, the terms committal and sentence are distinct concepts. For instance, Section 114 thereof relates to the “(c)ommittal by magistrate’s court of accused for sentence by regional court after plea of guilty.”

[122] Suspended sentences.

- a. In terms of the CPA, courts have the power to suspend or condition the sentence imposed. As a result, custodial sentences can be imposed without condition, imposed subsidiarily if the accused fails to pay a specified fine, or suspended or deferred for up to five years (section 297(1)(b) CPA). Deferred sentences can be conditioned on whether, for example, the accused compensates the victim, performs community service, or is placed under correctional supervision (section 297(1)(a) CPA). The court can even “discharge” the person with a “caution” which

has the effect of an acquittal for sentencing purposes but is recorded as a prior conviction (section 297(6) CPA).

- b. However, in terms of the CPA the lack of any interrelation between conviction and sentence insofar as a criminal record is concerned has been confirmed by the Constitutional Court:

“The fact that on conviction, the sentencing court may take the attempt to give adequate notice as a strong mitigating factor warranting the most lenient sentence available does not detract from the fact that the convener will have to live with a criminal record and its attendant dire consequences.”⁵²

- c. In civil contempt proceedings, it is usually held that the committal of the contemnor is suspended provided he/she complies with the prior order. In essence, in these proceedings’ compliance would always purge the ‘conviction’.

[123] A final point to ponder is the proposed future treatment of the actual criminal offence of contempt of court (i.e. as prosecuted per the CPA). In February 2025 the South African Law Reform Commission (SALRC) as part of its review of the Criminal Justice System has proposed the “Adult Diversion in Criminal Matters Bill”⁵³ which specifically lists contempt of court a “Schedule 8 minor offence.” for which adult diversion is possible. The following proposed sections are of interest:

67.(1) *The authority to divert a matter from the court for purposes of alternative resolution lies with the Director of Public Prosecutions, which authority may be delegated to a prosecutor.*

75. *Legal consequences of alternative resolution*

(1) *If a divertee has successfully complied with the terms of a diversion order, a prosecution on the same facts may not be instituted.*

(2) *A diversion order made in terms of this Chapter does not constitute a previous conviction.*

(3) *A private prosecution may not be instituted against a divertee in respect of whom a diversion order has been made.*

[124] It would be truly bizarre if, in future, a contemnor in criminal proceedings (an accused) could avoid a criminal record by complying a diversion order, whilst a contemnor in civil contempt proceedings could not.

⁵² Mlungwana at para 91

⁵³ SALRC: Discussion Paper 164 - Review of the Criminal Justice System: Alternative Dispute Resolution in Criminal Matters – Part B

Finding on common law query

[125] In view of all the aforementioned and in answer to Cameron JA's question: *A civil court's finding of contempt, with concomitant imposition of punishment, would **NOT** count as a 'previous conviction' for purposes of s 271 of the Criminal Procedure Act 51 of 1977*

[126] This conclusion is based on the existing common law which has remained unaltered by for instance, the imposition of a purely punitive unsuspended order in the Zuma contempt matter.

[127] There is accordingly no need to develop the common law, however, given the persistence of the uncertainty in this regard, I will also confirm the common law position by way of a declaratory order.

Finding on Respondent's contempt and sanction

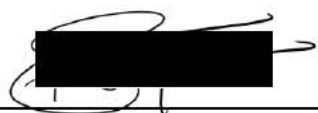
[128] I have already in the first judgment examined the Respondent's conduct and made findings in relation thereto. Given that I have now found that a criminal record would not result from a declaration of contempt, I am satisfied that she should be found to be in contempt of court.

[129] I have also considered whether she should be committed to goal (as requested by the Applicant) however, as the orders contained in the first judgment were akin to so-called 'suspended' orders and as she did comply, I am satisfied that committal is no longer warranted and that, in the intervening period the Respondent has reached a level of maturity to appreciate that her words and deeds have lasting consequences.

[130] *In casu*, as a consequence of her open defiance of a court order within days of it being handed down, the Applicant was necessitated to urgently approach this court. The lasting effect hereof is that she will be held liable for their costs until date of handing down of the first judgment.

[131] I accordingly order as follows

1. It is declared that a civil court's finding of contempt of court, with concomitant imposition of punishment, does not count as a 'previous conviction' for purposes of s 271 of the Criminal Procedure Act 51 of 1977
2. The first Respondent is declared to be in contempt of the court order made by, Khwinana AJ on 11th of December 2023
3. The first Respondent is ordered to pay the Applicant's costs up to the 10th of January 2024 on a High Court party and party scale, with counsel's fees determined at Scale B.

A handwritten signature in black ink, appearing to be 'K. Strydom', is written over a solid black rectangular redaction box. The signature is fluid and cursive.

**K. STRYDOM
ACTING JUDGE OF
THE HIGH COURT
PREORIA**

For the Applicant:

A instructed by B

For the Respondent:

X instructed by Y