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**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case No: **A302/2025**

In the matter between:

STEPHAN MARK VAN ROOYEN

1st Appellant

PATRICK MARCO HAUSOTTER

2nd Appellant

and

IRAN KILBRIDE

1st Respondent

LOURENSNICOLAAS JONKER

2nd Respondent

JOHANNES ERNST CICHORIUS

4th Respondent

KARIN BIGGS

5th Respondent

KAREN KLEINGELD

6th Respondent

GAVIN DURELL

7th Respondent

Heard on: 29 May 2026

Delivered on: 04 June 2026

Summary - Contempt of court — Sentencing — Mitigation — Whether court obliged mero motu to invite evidence in mitigation after conviction — Contemnor having filed opposing papers and presented argument at hearing but failing to adduce evidence on mitigating factors — Fair opportunity afforded to place mitigating circumstances before court — Court under no obligation to call for mitigation mero motu where contemnor elected not to present such evidence — Appeal dismissed.

ORDER

In the result the following order is made:

1. The appeal is dismissed.

1.1 The appellants are ordered to pay the costs of the appeal, including:

1.2 the costs of the application for leave to appeal;

1.3 The costs of the petition to the Supreme Court of Appeal; and

1.4 the costs of this appeal, Such costs are to include the costs of counsel on Scale B, jointly and severally, the one paying the other to be absolved.

JUDGMENT

ADAMS AJ

Introduction

[1] This is an appeal, with leave of the Supreme Court of Appeal, against the limited issue set out in paragraph 59.2 of the order granted by Mayosi, AJ (as she then was) on 15 April 2025 (“the judgment a quo”).

[2] By that order, the appellants were sentenced to 60 days’ imprisonment for contempt of the order of Bhoopchand AJ, granted by agreement, on 27 November 2024 (the Bhoopchand AJ order). The sentence was wholly suspended on condition that the appellants comply with the Bhoopchand AJ order.

[3] The appeal is narrowly circumscribed. The sole issue is whether the court a quo erred or misdirected itself by sentencing the appellants without affording them an opportunity to address the court in mitigation, prior to the imposition of sentence. The refusal of the application for a postponement, the contempt finding, the underlying interdict, and the costs order are not before this Court on appeal and remain undisturbed.

Relevant background facts

[4] In terms of the Bhoopchand AJ order, the appellants were interdicted from using the property known as Portion 40 of the farm Angora, Erf 1[...], Swellendam (“the Property”) in question as a venue for entertainment events in contravention of zoning and other regulations.

[5] Between 31 January and 2 February 2025, a large-scale music festival was held at the property in breach of that order. On 14 February 2025, contempt proceedings were instituted, expressly seeking a sentence of 60 days’ direct imprisonment or such lesser period as the court deemed appropriate.

[6] The appellants filed a limited answering affidavit raising urgency, seeking a postponement, and denying that they were in contempt, but placed no facts relevant to mitigation before the court. The application for a postponement was refused and the matter proceeded on 7 March 2025. The appellants were represented by senior counsel, and the merits of the contempt application were fully argued. Judgment was delivered by the court *a quo* on 15 April 2025.

Nature and scope of the appeal

[7] It is necessary at the outset to delineate the scope of this appeal. The appeal is confined strictly to a procedural challenge directed at sentence only and does not reopen the merits of the contempt finding or the lawfulness of the underlying order.

The submissions before this court

The appellants' case

[8] The appellants contend that the court *a quo* erred in imposing a custodial sentence without first inviting submissions or evidence in mitigation after making the finding of contempt. They submit that, once contempt had been established, the court was obliged to afford them a distinct and separate opportunity to place evidence and submissions in mitigation before sentence was imposed. According to the appellants, the failure to provide such an opportunity constituted a material procedural irregularity.

[9] The appellants further contend that sentencing without a discrete invitation to address mitigation infringed their constitutional rights to a fair hearing and fair trial under sections 34 and 35 of the Constitution. They argue that they ought to have been afforded a separate opportunity to address the issue of sentence after the merits of the contempt application had been determined. In this regard, they submit

that the court a quo was required either to postpone the matter for purposes of mitigation or expressly to invite further submissions before imposing sentence.

[10] The appellants maintain that the omission to do so rendered the sentencing process procedurally unfair and constitutionally defective. They contend that the failure to postpone the matter for the presentation of mitigating evidence amounted to a material irregularity that justifies appellate interference.

[11] In support of these submissions, the appellants relied *inter alia* on *Secretary, Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma*¹ (“Zuma”), *S v Mthimkhulu*² and *S v Gagu*³. They contend that these authorities establish that a contemnor must be afforded a specific opportunity to address sentence separately from the merits, particularly where no mitigating material is already before the court. The appellants argue that, in the present matter, the court a quo was obliged to invite further submissions or evidence directed specifically at sentence before imposing a sanction.

The respondents’ case

[12] The respondents submit that the appellants were afforded a full and adequate opportunity to deal with all aspects of the matter, including sentence, both in their affidavits, and during oral argument. They contend that no further procedural step was required once argument had been concluded.

¹ *Secretary, Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* 2021 (5) SA 327 (CC)

² *S v Mthimkhulu* 2013(2) SACR 89 (SCA) – para 21

³ *S v Gagu* 2006 (1) SACR 547 (SCA).- para 13

[13] The respondents emphasise that there is no authority imposing a duty on a court, in motion proceedings, to solicit mitigating evidence or submissions after argument has been heard. They contend that the appellants were fully aware that direct imprisonment was sought as part of the relief claimed and were legally represented throughout the proceedings. As such, they had every opportunity to place before the court any mitigating material they considered relevant.

[14] The respondents further contend that the appellants were fully apprised of the relief sought, including direct imprisonment for contempt. They were aware, from the inception of the matter, and were alerted in correspondence before the proceedings were instituted, that a custodial sanction would be sought should the contempt application succeed.

[15] The appellants were accordingly afforded an opportunity to place all relevant personal circumstances and mitigating considerations before the court, both on affidavit and in argument.

[16] The respondents therefore submit that the *audi alteram partem* principle was fully satisfied within the procedural framework of the motion proceedings. They contend that the principle does not impose any additional duty on a court to invite mitigation *mero motu* after the conclusion of argument where a party has elected not to place such material before the court.

[17] The respondents further argue that there is no legal duty requiring a court in motion proceedings to invite mitigation *mero motu* after argument has been concluded, particularly where the parties have had a full opportunity to address all issues arising from the relief sought. They submit that the appellants cannot rely on their own failure to place mitigating material before the court as a basis for challenging the sentence on appeal.

[18] Finally, the respondents contend that *Zuma*⁴ is distinguishable on its facts and context. They submit that the decision was concerned with exceptional circumstances involving contemplated unsuspended punitive committal and cannot be interpreted as establishing a general rule requiring courts in all contempt proceedings to postpone matters or invite separate submissions in mitigation before imposing sentence. In the respondents' submission, the procedural safeguards afforded to the appellants in the present matter were sufficient and the court a quo committed no misdirection in imposing sentence without inviting further evidence or submissions on mitigation

Issues for determination

[19] The appeal raises the following issues:

- 19.1 Whether, the audi alteram partem principle imposed a duty on the court a quo, mero motu, to afford the appellants a separate opportunity to place mitigating factors before the court in the context of motion proceedings.
- 19.2 Whether any such misdirection if established is of such a nature, degree or seriousness as to vitiate the sentencing discretion exercised by the court a quo within the meaning of *S v Pillay*⁵; and
- 19.3 The appropriate relief, if any.

Discussion of the relevant legal principles

[20] Civil contempt is sui generis but incorporates procedural fairness requirements akin to those in criminal proceedings, adapted to motion proceedings. However, the procedural content of audi alteram partem is context-dependent and shaped by the form of proceedings. In motion proceedings, the opportunity to be

⁴ *Zuma supra*.

⁵ *S v Pillay* 1977 (4) SA 531 (A) page 535 E - F

heard is ordinarily furnished through the notice of relief sought; the answering affidavits; and oral argument.

[21] Civil contempt proceedings occupy a hybrid position in our law. In *Fakie NO v CCII Systems (Pty) Ltd (Fakie)*⁶, the Supreme Court of Appeal held that although civil contempt proceedings are brought to enforce compliance with court orders, they assume a criminal character where committal is sought.

[22] The right to be heard is a fundamental component of procedural fairness and is rooted in the *audi* principle. As the Constitutional Court emphasised in *De Lange v Smuts NO*⁷, proceedings that may result in a deprivation of liberty must be conducted in a manner that is procedurally fair. Ordinarily, a person may not be convicted of, or sanctioned for, contempt of court without having been afforded a reasonable opportunity to place facts and submissions before the court. The inquiry, however, is not whether the court expressly called for mitigation immediately before imposing sentence, but whether the contemnor was afforded a fair and meaningful opportunity to place all relevant material before the court prior to the determination of sanction.

[23] Where a contemnor has been given notice of the proceedings, has filed affidavits, is legally represented, and has had the opportunity to advance submissions at the hearing, the requirements of procedural fairness may be satisfied notwithstanding the absence of a separate post-conviction invitation to present mitigating evidence. In *S v Jaipal*⁸, the Constitutional Court reaffirmed that not every procedural irregularity results in unfairness; the decisive question is whether the proceedings were fair and whether prejudice resulted. A litigant who elects not to place personal circumstances, explanations, or other mitigating considerations

⁶ *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) – para 24 - 26

⁷ *De Lange v Smuts NO and Others (CCT26/97)* [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) (28 May 1998) at paras 22 – 24.

⁸ *S v Jaipal* 2005 (4) SA 581 (CC) - para 38

before the court despite having had a proper opportunity to do so cannot ordinarily complain on appeal that the court failed to consider material which was never placed before it.

[24] The SCA in *Fakie*⁹ additionally summarised the rationale and requirements for civil contempt as being:

“(a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.

(b) The respondent in such proceedings is not an accused person but is entitled to analogous protections as are appropriate to motion proceedings.”

[25] The nature of the sanction imposed is also relevant. A wholly suspended sentence serves both coercive and punitive purposes. It vindicates the authority of the court while affording the contemnor an opportunity to avoid imprisonment through future compliance. In assessing whether any procedural irregularity warrants appellate interference, a court must consider whether actual prejudice has been demonstrated and whether the alleged irregularity resulted in a failure of justice.¹⁰ The principle that prejudice is central to the enquiry is well established in our law and has repeatedly been applied by appellate courts when considering procedural complaints.

[26] An appellate court will interfere with a sentence only where the sentencing court committed a material misdirection or where the sentence is vitiated by irregularity or is disturbingly inappropriate.¹¹ Absent demonstrable prejudice arising from the procedure followed, the mere fact that the court did not expressly call for

⁹ *Fakie* supra at para 42

¹⁰ *S v Pillay* 1977 (4) SA 531 at page 535 E – G

¹¹ *S v Rabie* 1975 (4) SA 855 (A) and reaffirmed in *S v Malgas* 2001 (1) SACR 469 (SCA).

mitigation immediately before imposing a suspended sentence will not, without more, justify interference on appeal.

Analysis

Audi Alteram Partem in Motion-Based Civil Contempt Proceedings

[27] The appellants' argument rests on the premise that fairness requires a second, post-conviction invitation to address sentence. That submission cannot be sustained in motion proceedings. The procedural architecture of motion proceedings is premised on a single, integrated opportunity to place all relevant facts before the court. Where a litigant is expressly informed that imprisonment is sought and elects not to place mitigating material before the court, the *audi* principle is satisfied. The court is not required to rescue a litigant from forensic omission.

Whether there exists a duty on a court to call for mitigating factors *mero motu*

[28] A central contention advanced on behalf of the appellants is that, following the finding of contempt, the court *a quo* was under a positive procedural duty to invite submissions or evidence in mitigation before imposing sentence. This is said to arise from the *audi* principle, as informed by sections 34 and 35 of the Constitution, and the Constitutional Court's decision in *Zuma*. That submission cannot be sustained. That submission misconceives the nature of *audi* in motion proceedings and impermissibly elevates it into a judicial duty to actively supplement a litigant's case. Properly analysed, this submission conflates two distinct questions: (a) whether a party must be afforded an opportunity to address sentence; and (b) whether a court is obliged to *actively solicit* mitigating material where a litigant has elected not to place it before the court. The authorities do not support the existence of such a proactive judicial duty.

No general duty to invite mitigation mero motu in motion proceedings

[29] In motion proceedings, the Supreme Court of Appeal in *Fakie NO v CCII Systems (Pty) Ltd*¹² makes clear that contempt proceedings are adjudicated within a structured affidavit-based procedure in which the respondent is required to place all relevant facts before the court.

[30] The “opportunity to be heard” is not an open-ended or iterative process requiring judicial prompting at successive stages. It is a single, composite opportunity, to adduce all relevant evidence by way of affidavit and to advance relevant submissions during argument.

[31] There is no authority in *Fakie*, nor in subsequent Supreme Court of Appeal jurisprudence, imposing a duty on a motion court to invite further mitigation where a litigant has failed to adduce such evidence. To the contrary, the structure of motion proceedings is inconsistent with such a duty. It would undermine finality and distort the adversarial nature of motion litigation if courts were required, after argument, to suspend proceedings and solicit further evidence from a legally represented party who has chosen not to provide it.

[32] Properly analysed, submission overlooks the distinction between affording a party an opportunity to address the issue of sentence and imposing upon the court a duty to elicit mitigating material where the party, despite having that opportunity, elects not to place such material before the court.

[33] There is no further procedural obligation on a court to actively solicit mitigating material after argument has been heard, particularly where the litigant is legally

¹² *Fakie* supra at para 42.

represented and the relief sought, including imprisonment, is expressly set out in the notice of motion.

[34] The respondents submit, correctly in my view, that imposing such a duty would fundamentally distort motion proceedings and convert them into inquisitorial sentencing inquiries conducted on behalf of legally represented litigants. To recognise such a duty would impermissibly transform motion proceedings into inquisitorial sentencing enquiries conducted on behalf of litigants who have elected not to place relevant material before the court. Neither authority nor principle supports such an extension of judicial obligation.

Proper scope of *Zuma*

[35] *Zuma* does not assist the appellants. The appellants' reliance on *Zuma* is misplaced insofar as it is advanced as authority for a general duty on courts to call for mitigation in all contempt sentencing exercises. The relevant passages in *Zuma*¹³ must be understood in context:

- a) The Constitutional Court was dealing with the prospect of unsuspended punitive-committal;
- b) The Court expressly tailored its procedure to the unique situation; and
- c) The direction that Mr Zuma be afforded an opportunity to file submissions on sanction was a case-management remedy, not a general rule of procedural law.

[36] Crucially, nothing in *Zuma* suggests that a court is obliged, in every contempt matter, to *actively invite* mitigation after argument has concluded, particularly in motion proceedings where parties have already been afforded full opportunity to place all relevant material on affidavit.

¹³ In particular paragraphs [64]–[71].

[37] On the contrary, *Zuma* reinforces the proposition that fairness is context-sensitive and that the procedural protections required depend on the nature of the sanction and the procedural form of the proceedings.

[38] The Constitutional Court in *Zuma* contemplated unsuspended punitive committal which means immediate incarceration without suspension in circumstances where Mr Zuma had not participated in the proceedings. The Constitutional Court's corresponding heightened procedural safeguard was tailored to that exceptional situation.

[39] In the present matter, the sentence imposed was wholly suspended and coercive in nature, not punitive in the strict sense. The directions issued in *Zuma* were case-specific and the procedural safeguards in *Zuma* thus cannot be generalised into a requirement for all contempt proceedings.

Distinction between the right to be heard and the duty to prompt

[40] The appellants' argument impermissibly transforms the right to be heard into a judicial obligation to ensure that a party presents its best possible case. That proposition has no foundation in our law.

[41] The *audi* principle requires that a party be given a fair opportunity to present its case. It does not require the court to advise a party on what case it should advance; or to invite further submissions after argument has been completed.

[42] This distinction is particularly important in contempt proceedings where the respondent is legally represented and fully apprised of the relief sought, including the possibility of imprisonment.

No support in authority

[43] Neither *Fakie* nor any subsequent authority imposes a duty on a court in civil contempt proceedings to actively solicit mitigation. The appellants' contention is therefore unsupported by precedent and inconsistent with the structure of motion proceedings.

Application to the present case

[44] In the present matter in the notice of motion the respondents explicitly sought a custodial sentence of 60 days. The appellants were legally represented by senior counsel; they filed an answering affidavit but elected not to place any mitigating material before court; and they advanced no request for a separated sentencing hearing or postponement for purposes of mitigation.

[45] Counsel for the appellants conceded that there was an opportunity to present evidence in mitigation by way of the answering affidavit as well as during arguments before the court at the hearing. It was further conceded that the argument sought to be advanced before this court, namely that the appellant lacked sufficient financial means to secure legal representation prior to the hearing and consequently had limited time within which to compile the answering affidavit, and that the appellants had consciously elected to challenge the matter on urgency, is contradicted by the letter dated 24 February 2026. In that letter, a firm indication is given that the answering affidavit will be filed on 6 March 2026, being one day before the hearing of the matter. It is apparent from this letter that legal representation had been secured, and arrangements were made for the answering affidavit to be compiled and filed by the date mentioned in the communication. There is nothing in the papers to alert the court to the issue relating to insufficient funds.

[46] Contempt of court serves a dual purpose: it seeks both to compel compliance with a court order for the benefit of the successful litigant and to vindicate the authority of the courts and the rule of law as recognised in *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others*¹⁴, the public interest in ensuring obedience to court orders is central to contempt proceedings. In determining an appropriate sanction, a court must have regard to the nature and seriousness of the contempt, bearing in mind that a finding of contempt requires proof beyond a reasonable doubt of the existence of the order, service or notice thereof, non-compliance, wilfulness and mala fides, as set out in *Fakie*. These considerations inform both the punitive and coercive dimensions of the sentencing enquiry.

[47] The court a quo acted squarely in line with the principles articulated by the Constitutional Court in *Zuma* and accordingly cannot be faulted for its approach to contempt in both matters, the respondents were fully aware of the court orders in question and nevertheless engaged in deliberate and public conduct in defiance thereof. In the present matter, the order was not only served on the respondents' attorney, who undertook to ensure that it came to their attention, but was moreover an order taken by agreement, thereby placing beyond dispute the respondents' knowledge and acceptance of its terms.

[48] The evidence further established wilful and mala fide non-compliance, satisfying the requirements for contempt as reaffirmed in *Zuma*. Importantly, the court a quo adopted a more restrained approach than the Constitutional Court in *Zuma* by imposing a wholly suspended custodial sentence aimed primarily at securing future compliance with the order, rather than an unsuspended punitive sentence of direct imprisonment.

¹⁴ *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited* (CCT 217/15; CCT 99/16) [2017] ZACC 35; 2017 (11) BCLR 1408 (CC); 2018 (1) SA 1 (CC) (26 September 2017) at para 54.

[49] Far from departing from *Zuma*, the judgment represents a careful application of its principles within a different factual context, balancing the need to vindicate judicial authority with the respondents' constitutional rights to freedom and security of the person. Compliance with the order is entirely within the defendant's control.

[50] In these circumstances, it is difficult to conceive of any real prejudice arising from the imposition of the suspended sentence, as the defendant need only refrain from further non-compliance in order to avoid the sanction altogether. The sentence therefore serves as a coercive mechanism to uphold the authority of the court and ensure obedience to its orders, while affording the defendant a clear opportunity to escape any adverse consequences through future compliance.

[51] Moreover, the court a quo was confronted with a request by the respondents for the imposition of unsuspended imprisonment. Against that backdrop, the appellants had a clear opportunity to place before the court any facts relevant to sanction. An answering affidavit, albeit preliminary or partial in nature, had been filed, the appellants were legally represented, and argument was advanced on their behalf during the hearing. Notwithstanding those opportunities, the appellants elected not to place any mitigating factors before the court. They cannot now complain that the court failed to consider information which they chose not to place before it.

[52] The appellants' criticism also overlooks the distinctive nature of civil contempt proceedings. These are not criminal proceedings in the ordinary sense, and a contemnor is not an accused person standing trial in a conventional criminal process. As recognised in the contempt jurisprudence, including the decision in *Zuma*, contempt proceedings differ from ordinary criminal proceedings in that issues of guilt and sanction are often determined within a single process.

[53] What is required is that the alleged contemnor be afforded a fair opportunity to place relevant information before the court. In the present matter, that opportunity was afforded. The appellants were aware of the relief sought, were represented throughout the proceedings, and were able to place whatever evidence or submissions they considered relevant before the court. Their election not to advance mitigating circumstances cannot constitute a procedural irregularity on the part of the court a quo.

[54] The court a quo furnished cogent reasons for imposing a suspended term of imprisonment rather than immediate incarceration and explained why such a sanction constituted an appropriate and measured response to the appellants' conduct. In these circumstances, the reasoning of the court a quo cannot be faulted. Far from acting unfairly, the court adopted a sanction that afforded the appellants every opportunity to avoid imprisonment while simultaneously safeguarding the rule of law and the authority of judicial orders.

[55] Significantly, in *Zuma*, despite Mr Zuma having elected not to participate in the proceedings at all, the Constitutional Court issued an invitation for the filing of an affidavit dealing with an appropriate sanction before making a final finding on guilt. The invitation was therefore extended in advance of the ultimate determination of contempt, precisely because contempt proceedings do not ordinarily contemplate separate and sequential hearings on conviction and sentence.

[56] Against that background, the submission advanced by counsel for the appellants, that the court a quo was required first to make a finding of contempt and only thereafter to embark upon a distinct and separate process concerning sanction, finds no support in *Zuma*. If anything, *Zuma* illustrates the contrary. The essential requirement is not a separate sentencing hearing, but rather that the contemnor be afforded a fair opportunity to place before the court information relevant to the

exercise of its discretion regarding sanction. In the present matter, that opportunity was plainly afforded.

[57] Having declined to utilise the opportunity afforded to them, they cannot now contend that procedural fairness required the court a quo to initiate a second, separate process after the finding of contempt had been made.

[58] In these circumstances, there was no procedural trigger giving rise to a duty on the court a quo to solicit mitigation mero motu. The omission now relied upon is therefore a consequence of litigation strategy, not procedural unfairness. To hold otherwise would impose an obligation on courts to conduct a sentencing inquiry on behalf of a recalcitrant litigant, which is inconsistent with both the adversarial system and the structured procedure governing motion proceedings.

[59] The court a quo was accordingly entitled to determine both liability for contempt and the appropriate sanction within the same proceedings. In doing so, it remained mindful of the appellants' constitutional rights, including those protected by section 12 of the Constitution, while also giving due weight to the need to vindicate the authority of the courts and secure compliance with judicial orders. Its decision to impose a wholly suspended sentence, rather than the unsuspended imprisonment sought by the respondents, demonstrates a measured and proportionate exercise of judicial discretion. The judgment demonstrates a careful consideration of the competing interests at stake, the seriousness of the contempt, the need to vindicate the authority of the courts, and the imperative that any sanction be proportionate. The reasoning of the court a quo is therefore consistent with the approach endorsed in *Zuma* and cannot be faulted on appeal.

Distinction between *S v Mthimkhulu*, *S v Gagu* and civil contempt sentencing

[60] The appellants' reliance on *S v Mthimkhulu* and *S v Gagu* is misplaced. Both authorities were decided in the context of ordinary criminal sentencing proceedings, conducted after conviction in trials where sentencing is informed by viva voce evidence and a developed evidential record. In those matters, the appellate courts were concerned with failures in the criminal sentencing enquiry, including the absence of adequate factual foundations upon which to assess personal circumstances and the triad of sentencing considerations.

[61] Civil contempt proceedings stand on a materially different procedural footing. They are motion proceedings of a sui generis nature, in which both liability and sanction are determined on affidavit and argument rather than through oral evidential proceedings. It follows that the principles in *Mthimkhulu* and *Gagu* cannot be transplanted uncritically into contempt proceedings conducted on motion.

[62] Properly understood, those authorities do not establish a general rule that a court is obliged to solicit mitigating factors or postpone sentencing mero motu in all cases where such material has not been placed before it. At most, they affirm the uncontroversial principle that a sentencing discretion must be exercised on a proper factual foundation. In motion proceedings, that foundation is constituted by the affidavits and argument presented by the parties.

[63] In the present matter, the appellants were fully apprised that imprisonment was sought, were legally represented, and elected not to place any mitigating material before the court. In those circumstances, the absence of mitigation does not constitute a procedural irregularity attributable to the court.

Alleged misdirection and materiality

[64] Even if it were accepted that the court a quo ought to have expressly invited mitigation (a proposition this Court rejects), such omission does not automatically vitiate the sentence. The enquiry remains whether the alleged irregularity resulted in a failure of justice as set out in Pillay.

[65] The appellants placed no mitigating material before this Court and identify none that could plausibly have altered the outcome. The sentence imposed is already the most lenient coercive mechanism available: a wholly suspended custodial order contingent on future compliance. There is accordingly no demonstrated prejudice.

Sentencing discretion

[66] An appellate court may interfere with sentence only where the discretion was not judicially exercised or was vitiated by material misdirection. That threshold is not met. The court a quo imposed a standard coercive contempt sanction in circumstances of deliberate and continuing non-compliance with a court order. The sentence is proportionate, measured, and consistent with established contempt jurisprudence.

Appropriate remedy

[67] Given the absence of any evidential basis relating to mitigation, this Court is in no position to substitute its own sentence. However, that difficulty does not arise

from procedural unfairness but from the appellants' own failure to place material before court.

[68] The suggestion that the matter should be remitted is misconceived. Remittal would serve no practical purpose and would merely prolong finality in circumstances where the sentence is already the least restrictive form of coercive relief.

Conclusion

[69] The appellants were aware that imprisonment was sought. They were represented, heard, and afforded full procedural opportunity to place all relevant material before the court. Their failure to do so cannot be converted into a procedural irregularity on appeal. The absence of a further invitation to address mitigation does not constitute a procedural irregularity, still less a constitutional infringement. As stated above, the *audi* principle does not impose a duty on a court in motion contempt proceedings to invite mitigating factors *mero motu* after argument.

[70] No material misdirection has been established, nor has any failure of justice been shown. No basis exists for interference with the sentencing discretion exercised by the court *a quo*. The appellants' contention that the court *a quo* was under a duty to call for mitigating factors is therefore legally untenable. Neither *Fakie*, nor *Zuma*, nor any authority binding on this Court supports the existence of such an obligation in motion-based contempt proceedings.

[71] The critical question is not whether the court expressly invited mitigation immediately before sentence, but whether the contemnor had a fair opportunity to place relevant material before the court prior to the imposition of the sanction. If the contemnor was aware of the proceedings, knew that imprisonment (including suspended imprisonment) was sought or was a competent remedy, filed answering

affidavits, was legally represented; and had the opportunity during the hearing to advance submissions relevant to sanction, the requirements of procedural fairness may be satisfied notwithstanding the absence of a specific opportunity to present mitigation.

[72] For all these reasons the appeal cannot succeed.

Order

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

73.1 The appeal is dismissed.

73.2 The appellants are ordered to pay the costs of the appeal, including:

73.2.1 the costs of the application for leave to appeal;

73.2.2 the costs of the petition to the Supreme Court of Appeal; and

73.2.3 the costs of this appeal, such costs are to include the costs of counsel on Scale B, jointly and severally, the one paying the other to be absolved.

ACTING JUDGE OF THE HIGH COURT

M F ADAMS

I agree and it is so ordered.

JUDGE OF THE HIGH COURT

M HOLDERNESS

Appearances

For the Plaintiff:

Adv. A Engelbrecht

Instructed by Hermie Wentzel & Jaenre Botha attorneys

For the Defendant:

Adv. M De Wet

Instructed by Dingley Marshall Lewin Inc.