

DEMOCRATIC REINFORCEMENT OR OVERREACH? JUDICIAL INTERVENTION TO HOLD SOUTH AFRICA’S PRESIDENT ACCOUNTABLE

*Penelope Andrews**

ABSTRACT

This Article analyzes the effect of the widespread corruption (state capture) in South Africa, especially during the Presidency of Jacob Zuma. The central argument is that South Africa’s judiciary played a pivotal role in holding those accountable for the widespread corruption. Judicial review, however, was a prerequisite but not sufficient to hold perpetrators accountable. It was eventually the role of civil society, utilizing the law, especially the Constitution, that brought a measure of accountability. But even this combination of civil society activism and favorable court decisions was not ultimately able to compensate for the ravages of state capture, which had a devastating political and economic impact on South African society. This loss of revenue has had tremendous consequences for the economy, which may arguably take generations to recover. It has also soiled political culture, resulting in widespread hostility and cynicism towards government.

TABLE OF CONTENTS

I.	Introduction	204
II.	South Africa’s Constitutional Architecture	207
III.	The Role of the Judiciary in Shepherding South Africa From Apartheid to Democracy.....	210
IV.	Jacob Zuma—From Humble Origins to President	213
V.	The Project of State Capture.....	217
VI.	Holding Jacob Zuma Accountable in the Courts	221
VII.	Conclusion.....	234

* John Marshall Harlan II Professor of Law, New York Law School. Thank you to the Drake University Constitutional Law Center for inviting me to the 2025 Symposium where a draft of this Article was presented. Thank you also to NYLS Summer Faculty Grant Research Program for funding part of this research. A special thank you to Avielle Smyslov for research assistance.

I. INTRODUCTION

In this Article, I explore four stories. The first story describes the constitutional architecture underpinning South Africa's democracy, how the constitution came about, and the constitution's substantive provisions.¹ In particular, I focus on how the judiciary shepherded South Africa from an apartheid, authoritarian state steeped in racism,² to a democratic constitutional state promising human rights and dignity to all its citizens.³ The second story is about South Africa's fourth President, Jacob Zuma, and a brief reference to the character of the man—the point being that the character of a President speaks volumes about the values that a society aspires to pursue and emulate, both formally and informally.⁴ The third story is about civil society and civil servants' response in the face of widespread corruption and “state capture.”⁵ The fourth story surveys the role of the judiciary in holding President Zuma accountable during a period of

1. *See infra* Part II.

2. Tom Lodge, *From Apartheid to Democracy in South Africa*, in *DEMOCRATIC TRANSITIONS: PERSPECTIVES AND CASE STUDIES* 34, 34 (Omar Grech ed., 2012).

3. *See infra* Part III; *see also* S. AFR. CONST., 1996, ch. 2 (Chapter 2 includes South Africa's Bill of Rights); Etienne Mureinik, *A Bridge to Where? Introducing the Interim Bill of Rights*, 10 S. AFR. J. ON HUM. RTS. 31, 32 (1994) (discussing, aspirationally, how the new South African Constitution must be based in “a culture of justification — a culture in which every exercise of power is expected to be justified”); Margaret A. Burnham, *Constitution-Making in South Africa*, BOS. REV. (Dec. 1, 1997), <https://www.bostonreview.net/articles/constitution-making-in-south-africa/> [<https://perma.cc/JD9U-7CLZ>] (discussing the role of an active judiciary committed to democratic and human rights values embodied in the South African Constitution).

4. *See infra* Part IV.

5. *See infra* Part V; PUB. PROTECTOR S. AFR., STATE OF CAPTURE: REPORT ON AN INVESTIGATION INTO ALLEGED IMPROPER AND UNETHICAL CONDUCT BY THE PRESIDENT AND OTHER STATE FUNCTIONARIES RELATING TO ALLEGED IMPROPER RELATIONSHIPS AND INVOLVEMENT OF THE GUPTA FAMILY IN THE REMOVAL AND APPOINTMENT OF MINISTERS AND DIRECTORS OF STATE-OWNED ENTERPRISES RESULTING IN IMPROPER AND POSSIBLE CORRUPT AWARD OF STATE CONTRACTS AND BENEFITS TO THE GUPTA FAMILY'S BUSINESSES: REPORT NO. 6 OF 2016/17, at 5 (2016) [hereinafter STATE OF CAPTURE]. The essence of the State of Capture Report describes how a wealthy Indian immigrant family, the Guptas, had control over the country's resources and how state companies were used for personal enrichment, for themselves and a range of public officials and private individuals. *Id.*; *see also* Lynsey Chutel & Lily Kuo, *What the “State Capture” Report Tells us About Zuma, the Guptas, and Corruption in South Africa*, QUARTZ (July 20, 2022), <https://qz.com/africa/825789/state-capture-jacob-zuma-the-guptas-and-corruption-in-south-africa> [<https://perma.cc/K3A4-A938>] (publicizing the release of the report and summarizing its finding).

so-called “state capture.”⁶ There I will highlight a few cases that go to the question of presidential accountability and presidential immunity.⁷

This Article highlights the possibilities and limitations of a constitutional democracy like South Africa, just over three decades in the making yet with strong judicial review, of holding the President accountable in the face of widespread corruption and state capture.⁸ This tension is shown in two reports regarding the corruption, fraud, and state capture in the public sector in South Africa—governmental failures which have not yet been vindicated.⁹ The first report, *State of Capture*, was issued by the Public Protector in 2016,¹⁰ and the second, more detailed report was issued in 2022 and chaired by former Chief Justice Raymond Zondo, titled *Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State* (hereinafter the *Zondo Commission*).¹¹ There have been almost no indictments in the wake of the release of the Zondo Commission Report—and not one individual has been

6. See *infra* Part VI; Neil Arun, *State Capture: Zuma, the Guptas, and the Sale of South Africa*, BBC (July 14, 2019), <https://www.bbc.com/news/world-africa-48980964> [<https://perma.cc/J86A-8KEL>] (defining state capture as “a form of corruption in which businesses and politicians conspire to influence a country’s decision-making process to advance their own interests”).

7. See *infra* Part VI.

8. See *infra* Part VI.

9. See STATE OF CAPTURE, *supra* note 5, at 343–53; R.M.M. ZONDO, JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE REPORT pt. I, vol. I, iv–vi (2022) [hereinafter ZONDO COMMISSION].

10. STATE OF CAPTURE, *supra* note 5, at 2.

11. See ZONDO COMMISSION, *supra* note 9. All the Zondo Commission Reports may be found here: *Commissions*, SO. AFRICAN LEGAL INFORMATION INSTITUTE, <https://www.saflii.org/content/commissions.html> [<https://perma.cc/3YDN-BK43>]. The mandate of the Zondo Commission was broad in scope, with the task of investigating matters of public and national interest concerning allegations of state capture, corruption, and fraud. The terms of reference of the Commission were predominantly concerned with the activities of executive members of the state (namely, senior politicians tasked with having authority over the government, including the President, Cabinet, and their equivalents at the regional level), and the nature of their relationships with private individuals, with special reference to the Gupta family and its consortium of businesses inside South Africa. See Jane Duncan, *Zondo Commission’s Report on South Africa’s Intelligence Agency is Important but Flawed*, THE CONVERSATION (July 12, 2022, at 03:27 EDT), <https://theconversation.com/zondo-commissions-report-on-south-africas-intelligence-agency-is-important-but-flawed-186582> [<https://perma.cc/DSA8-2DZ9>].

imprisoned.¹² This is despite the Zondo Commission referring its findings to the National Prosecuting Authority for further investigation and prosecution.¹³

My argument in this Article is that South Africa's judiciary played a pivotal role in holding those accountable for widespread corruption in South Africa. Judicial review, however, was a prerequisite but not sufficient to hold perpetrators accountable.¹⁴ It was eventually the role of civil society, engaging with legal mechanisms, that brought a measure of accountability.¹⁵ But even this combination of civil society activism and favorable court decisions was not ultimately able to overcome and redress the ravages of state capture, which had a devastating political and economic impact on South African society.¹⁶ For example, state capture has severely restricted the ability of the South African government to pursue its formal commitments to national economic development by draining resources away from economic development goals.¹⁷ The Zondo Commission highlighted in detail the extraordinary amounts of money that flowed from government coffers to the hands of corrupt, rent-seeking politicians and their

12. See *Wanted: The State Capture Conspirators*, OPEN SECRETS (last visited April 5, 2026), <https://www.opensecrets.org.za/wanted-the-state-capture-conspirators/#report> [https://perma.cc/58HR-X25D]; Helen Grange, *Why Has Corruption Increased After the Zondo Report?*, GOOD GOVERNANCE AFR. (Oct. 11, 2024), <https://gga.org/why-has-corruption-increased-after-the-zondo-report/> [https://perma.cc/29GV-GQ6V]

13. OPEN SECRETS, *WANTED: THE STATE CAPTURE CONSPIRATORS* 57 (2022), <https://www.opensecrets.org.za/wanted-the-state-capture-conspirators/#report> [https://perma.cc/7ZA5-XX98]; see also Penelope Andrews, *Its Imperative That South Africa Moves Fast on State Capture Prosecutions. Here's Why*, THE CONVERSATION (Jan. 11, 2022, at 09:03 EST), <https://theconversation.com/its-imperative-that-south-africa-moves-fast-on-state-capture-prosecutions-heres-why-174614> [https://perma.cc/DJH9-CJA2] (noting the significant assistance the Zondo Commission has provided the National Prosecuting Authority while identifying existing obstacles and constraints).

14. See generally HELEN ACTON, *THE LEGAL AND POLITICAL IMPLICATIONS OF A JUDICIAL REVIEW OF THE ZONDO COMMISSION'S FINDINGS* (2022), <https://digitalmallblobstorage.blob.core.windows.net/wp-content/2022/05/Zondo-Policy-Briefing.pdf> [https://perma.cc/UN2G-LEZC] (reviewing the implications of a judicial review of the Zondo Commission and making recommendations for court and African National Congress action).

15. See Annie Kok, *The Role of Investigative Journalism in Uncovering Organised Crime and Corruption in South Africa*, RUSI (Aug. 20, 2021), <https://www.rusi.org/networks/shoc/informer/role-investigative-journalism-uncovering-organised-crime-and-corruption-south-africa> [https://perma.cc/H6CV-DHKP] (describing the work of three media houses, News 24, Daily Maverick, and AmaBhungane in exposing state capture).

16. See ELIZABETH DAVID-BARRETT, *STATE CAPTURE AND INEQUALITY* 13–14 (2021), https://cic.nyu.edu/wp-content/uploads/1662/65/cic_pathfinders_state_capture_inequality-2021.pdf [https://perma.cc/ST5Q-STNJ]

17. *Id.*

conspirators in the public and private sectors.¹⁸ This loss of revenue has had tremendous consequences for the economy, which may arguably take generations to recover.¹⁹

II. SOUTH AFRICA'S CONSTITUTIONAL ARCHITECTURE

South Africa moved from a system of apartheid and authoritarianism to one of constitutional democracy in 1994, when Nelson Mandela was elected as the President and the African National Congress garnered the overwhelming majority of votes.²⁰ This shift in legal culture, from one of authoritarianism to a culture of justification has been interpreted as a legal revolution, replacing parliamentary or legislative supremacy with constitutional supremacy.²¹ The Constitution, with its expansive array of rights, has been widely applauded.²²

A few points of departure between South African constitutionalism and that of the United States are worth mentioning.²³ First, South Africa's expansive Bill of Rights incorporates an array of rights, including civil, political, social, economic, and cultural rights—all justiciable in South African courts.²⁴ In a series of cases since its founding, the Constitutional Court has adjudicated rights claims in a range of cases, ensuring that the rights enshrined in the Bill of Rights are implemented and enforced as envisaged by the drafters.²⁵

18. See, e.g., ZONDO COMMISSION, *supra* note 9, at pt. VI, vol. 4, 4, 11, 46, 74–75, 105.

19. See Nkosingiphile Mkhize, Christian Kayembe & Xolani Thusi, *State Capture in South Africa: A Critical Analysis of its Nature, Cost and Subsequent Reforms*, 19 AFRICAN JOURNAL OF BUSINESS ETHICS, no. 2, 2025, at 44, 57.

20. Lodge, *supra* note 2, at 40–41.

21. *Econ. Freedom Fighters v. Speaker of the Nat'l Assembly* 2016 (3) SA 580 (CC) at para. 1 (“One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of State power and resources that was virtually institutionalised during the apartheid era. To achieve this goal, we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy.”).

22. See, e.g., Heinz Klug, *Constitution in the World: The External Dimensions of South Africa's Post-Apartheid Constitution*, 57 VA. J. INT'L L. 657, 677–78 (2018); Adrien Katherine Wing, *The South African Constitution as a Role Model for the United States*, 24 HARV. BLACKLETTER L.J. 73, 74 (2008).

23. See generally MARK S. KENDE, CONSTITUTIONAL RIGHTS IN TWO WORLDS: SOUTH AFRICA AND THE UNITED STATES (2009) (providing a thoughtful discussion comparing the approach of South Africa's Constitutional Court with those of other constitutional democracies, especially the United States Supreme Court).

24. See S. AFR. CONST., 1996, ch. 2.

25. See, e.g., *Fraser v. Child. Ct.*, Pretoria N. 1997 (2) BCLR 153 (CC) at para. 20 (the right to equality); *State v. Makwanyane* 1995 (3) SA 391 (CC) at paras. 39, 80 (the right to life);

A second point of departure is that the Constitution protects rights in the public and private sphere, recognizing that discrimination is often embedded in private relationships.⁴ It therefore mandates that all systems of law in South Africa, including the common law and indigenous law, be subjected and responsive to the constitutional principles of equality and dignity.²⁶ The Constitution is therefore both horizontal and vertical, protecting citizens from intrusion by the state, as well as regulating the relationship between citizens.²⁷ In a number of decisions, the Court has deliberated on these questions, pursuing a jurisprudence that honors this transformative vision of the Constitution.²⁸

A third unique feature of the South African Constitution, is the mandate that in interpreting its provisions, that courts must consider international law in their interpretation and may consider foreign law.²⁹ The Constitution also states that customary international law is law “unless it is inconsistent with the Constitution or an Act of Parliament,”³⁰ and that when interpreting any statutes, courts must give preference to “any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”³¹

A cursory glance at the decisions of the Constitutional Court in its first decade (1995–2005) demonstrates extensive consideration of and engagement

Gov't of the Republic of S. Afr. v. Grootboom 2001 (1) SA 46 (CC) at paras. 44, 99 (right of access to adequate housing); *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC) at para. 4 (right of access to health care); *Carmichele v. Minister of Safety & Sec.* 2001 (4) SA 938 (CC) at para. 29 (right to freedom and security of the person).

26. *See id.* § 8(3); *id.* § 39(2) (“When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”).

27. *See id.* § 8(1)–(2).

28. *See, e.g., Soobramoney v. Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) at para. 8 (“We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. . . . These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order.”); *Du Plessis v. De Klerk* 1996 (3) SA 850 (CC) at para. 157 (“[The constitution] is a document that seeks to transform the *status quo ante* into a new order. . . .”). *See generally* Dikgang Moseneke, *The Fourth Bram Fischer Memorial Lecture - Transformative Adjudication*, 18 S. AFR. J. ON HUM. RTS. 309 (2002) (providing a thoughtful discussion of the transformative vision of the Constitution).

29. S. AFR. CONST., 1996, § 39(1).

30. *Id.* § 232.

31. *Id.* § 233.

with international and foreign law.³² In essence, built into the constitutional text is the vision that the Constitution will be a crucial component for transforming South Africa from an apartheid authoritarian state to one dominated by rights for all.³³ As Margaret Burnham of the *Boston Review* noted:

The creation of a Constitutional Court vested with the power of judicial review represented a symbolic and pragmatic break with the past. The old South African judiciary . . . was deeply committed to the status quo, and could not be trusted to give full meaning to the provisions of the new constitution. New judicial leadership with broad authority was required if constitutional adjudication was to become an effective partner in the social transformation envisioned by the constitution.³⁴

In other words, the Constitution is designed to unsettle the apartheid social and economic order and usher in a system of equality and dignity.³⁵ As Professor

32. See, e.g., Lucky Mathebe, *The Constitutional Court of South Africa: Thoughts on its 25-Year-Long Legacy of Judicial Activism*, 56 J. ASIAN & AFR. STUD. 18, 25 (2021).

33. The Preamble to the Constitution states:

We, the people of South Africa,

Recognise the injustices of our past;

Honour those who suffered for justice and freedom in our land;

Respect those who have worked to build and develop our country; and

Believe that South Africa belongs to all who live in it, united in our diversity.

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to—

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; [and]

Improve the quality of life of all citizens and free the potential of each person[.]

S. AFR. CONST., 1996, pmb.

34. Burnham, *supra* note 3.

35. See *id.*; see also Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. ON HUM. RTS. 146, 154 (1998) (discussing the commitments that the Constitution imparts on the South African government including promoting democracy, human rights, and equality).

Makau wa Mutua observed, South Africa was the first “deliberate and calculated effort in history to craft a human rights state[.]”³⁶

The essence of presidential powers in South Africa is found in sections 83 to 85 of the Constitution.³⁷ Section 83 notes, that the President “must *uphold, defend and respect the Constitution*[.]”³⁸ Other sections of the Constitution provide for the election³⁹ and removal⁴⁰ of the President.

In one of the earliest decisions in which the Court had to address a presidential pardon issued by President Nelson Mandela, the Court noted that the exercise of all public power, including the President’s power to pardon, is subject to judicial review.⁴¹ The power of judicial review is therefore firmly secured in constitutional text and the Court’s jurisprudence.⁴²

III. THE ROLE OF THE JUDICIARY IN SHEPHERDING SOUTH AFRICA FROM APARTHEID TO DEMOCRACY

In my research I have addressed the topic of the racial and gender demographic transformation of the judiciary in South Africa as part of the overall constitutional mandate.⁴³ I have argued that “consideration of racial and gender diversity, and to a lesser extent disability and sexual orientation diversity, has propelled the transformation of the judiciary in South Africa.”⁴⁴ The sentiment that surfaced during the constitutional negotiations, and which was ultimately reflected in the constitutional text, was that the majority of South Africans, who were black and female, could not be adequately served by a majority white and male

36. Makau wa Mutua, *Hope and Despair for a New South Africa: The Limits of Rights Discourse*, 10 HARV. HUM. RTS. J. 63, 65 (1997).

37. See S. AFR. CONST., 1996, §§ 83–85.

38. See *id.* § 83(b) (emphasis added).

39. *Id.* § 86.

40. *Id.* § 89.

41. See *President of the Republic of S. Afr. v. Hugo* 1997 (4) SA 1 (CC) at para. 13.

42. See generally Theunis Roux, *The South African Constitutional Court’s Democratic Rights Jurisprudence*, 5 CONST. CT. REV. 33 (2014) (noting these two sources of authority).

43. See, e.g., Penelope Andrews, *The Judiciary in South Africa: Independence or Illusion?*, in JUDICIAL INDEPENDENCE IN CONTEXT 466 (Adam Dodek & Lorne Sossin eds., 2010); Penelope Andrews, *Without Fear, Favor, or Prejudice: Judicial Independence and the Transformation of the Judiciary in South Africa*, in THE PARADOX OF PROFESSIONALISM: LAWYERS AND THE POSSIBILITY OF JUSTICE 197, 199–200 (Scott L. Cummings ed., 2011).

44. See Penelope Andrews, *Pursuing Gender Equality Through the Courts: The Role of South Africa’s Women Judges*, in GENDER, JUDGING AND THE COURTS IN AFRICA: SELECTED STUDIES 189, 191–92 (J. Jarpa Dawuni ed., 2021).

judiciary.⁴⁵ It was believed that the project of constitutional democracy would be undermined if the judiciary did not reflect the racial and gender diversity of the society.⁴⁶

Beyond the issue of demographics and makeup of the judiciary, the political transition from a system of parliamentary supremacy to one of constitutional democracy demanded greater reconsideration and disruption of the substance and structure of the entire legal system.⁴⁷ This involved disruptions to judicial processes,⁴⁸ judicial interpretation,⁴⁹ judicial training,⁵⁰ judicial appointments,⁵¹ and judicial tenure.⁵² These disruptions were reflected in the constitutional text.⁵³

Part of the overhaul of the judicial system in 1994 was the creation of a Constitutional Court, sitting at the apex of the court structure.⁵⁴ The mandate of the Constitutional Court is to decide disputes between organs of state, review the constitutionality of Amendments to the Constitution, as well as provincial constitutions and legislation passed by all levels of government.⁵⁵

45. Cathi Albertyn & Elsje Bonthuys, *South Africa: A Transformative Constitution and a Representative Judiciary*, in GENDER AND THE JUDICIARY IN AFRICA: FROM OBSCURITY TO PARITY? 49, 52–54 (Gretchen Bauer & Josephine Dawuni eds., 2016).

46. Ruth B. Cowan, *Women's Representation on the Courts in the Republic of South Africa*, 6 U. MD. L.J. RACE RELIGION GENDER & CLASS 291, 299 (2006) (citing S. AFR. CONST., 1996, § 174(2)).

47. See Murray Wesson & Max Du Plessis, *Fifteen Years On: Central Issues Relating to the Transformation of the South African Judiciary*, 24 S. AFR. J. ON HUM. RTS. 187, 213 (2008).

48. S. AFR. CONST., 1996, ch. 8.

49. *Id.* § 39.

50. *Id.* § 180.

51. The Constitution states the need for the transformation of the make-up of the judiciary: “The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.” *Id.* § 174(2).

52. *Id.* § 176.

53. See *id.* ch. 8.

54. See *id.* § 166.

55. *Id.* § 167(4). As I wrote in a previous work:

Below the Constitutional Court sits a range of lower courts, some replicating the court structure under apartheid, albeit with a name change. The apex court under apartheid, the Appellate Division, was renamed the Supreme Court of Appeal. The Supreme Courts were renamed High Courts, and below them were the Magistrates' Courts. New courts were especially created to accommodate this transformative vision of the constitution, including the Land Claims Courts, the Equality Courts, the Electoral Court, and the Sexual Offenses Courts. In addition, a nod to the emerging globally integrated economy at the end of apartheid was the establishment of the Competition Appeals Court and the Tax Court.

Andrews, *supra* note 44, at 193.

As I will illustrate in this Article, the judiciary has, for the most part, been admirable in its commitment to the values of independence and fairness embedded in the Constitution.⁵⁶ South African scholar, Theunis Roux, in a study of the first decade of the Constitutional Court, described the Court in its early years as having developed “an unrivalled reputation” among comparative constitutional law scholars and legal practitioners “for technically accomplished and morally enlightened decision-making.”⁵⁷

The judiciary has consistently been faithful to its role as a coequal branch of government, recognizing its institutional capacity in relation to the legislature and executive.⁵⁸ As the first President of the Constitutional Court and later Chief Justice, Arthur Chaskalson, noted,

We have said previously that our role as Justices of this Court is not to “second guess” the executive or legislative branches of government or interfere with affairs that are properly their concern. We have also made it clear that we will not look at the Constitution narrowly. Our task is to give meaning to the Constitution and, where possible, to do so in ways which are consistent with its underlying purposes and are not detrimental to effective government.⁵⁹

The judges have, therefore, struck a fine balance between defiance and deference, a necessary by-product of a system of strong judicial review.⁶⁰ This was demonstrated most starkly when the Constitutional Court had the task of certifying

56. See Joshua Doherty, *Radical Transformation: The Role of the Judiciary in Post-Apartheid Transitional South Africa* 12 (Apr. 20, 2012) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2230225 [<https://dx.doi.org/10.2139/ssrn.2230225>].

57. THEUNIS ROUX, *THE POLITICS OF PRINCIPLE: THE FIRST SOUTH AFRICAN CONSTITUTIONAL COURT, 1995–2005*, at 2 (2013).

58. See Heinz Klug, *Finding the Constitutional Court's Place in South Africa's Democracy: The Interaction of Principle and Institutional Pragmatism in the Court's Decision Making*, 3 CONST. CT. REV. 1, 1 (2010).

59. *Exec. Council of the W. Cape Legislature v. President of the Republic of S. Afr.* 1995 (4) SA 877 (CC) at para. 99.

60. Professor Heinz Klug observed:

In managing this tension between legal principles and institutional pragmatism within its decisions the Court has thus far avoided the dangers posed by political ‘lawfare’, on the one hand, and the ‘utopian’ or ‘principled’ declaration of rights, on the other, and has instead sought to find its place as a constitutional court in a young and turbulent democracy.

Klug, *supra* note 58, at 2 (footnote omitted).

the 1996 Constitution by considering whether the Constitutional Assembly had remained faithful to the constitutional principles in the 1993 interim Constitution.⁶¹

The Court's stance has not shielded them, however, from continuous and virulent attacks by politicians, especially during the years of the presidency of Jacob Zuma.⁶² Such attacks stand in stark contrast to the example set by President Mandela, who, despite findings against him by the Constitutional Court on some occasions, made it a point to publicly honor the decisions of the Court to highlight and educate the South African public about the new legal culture of accountability and justification.⁶³

IV. JACOB ZUMA—FROM HUMBLE ORIGINS TO PRESIDENT

Jacob Zuma grew up in Nkandla in rural KwaZulu-Natal and had no formal education.⁶⁴ He is a proud polygamist (the practice is legal, but controversial, in South Africa).⁶⁵ He has been married six times and currently has five wives and more than 20 children.⁶⁶ He rose up through the ranks of the African National Congress (ANC) and was imprisoned with Nelson Mandela on Robben Island.⁶⁷ After his release from prison, he went into exile and

61. *Certification of the Const. of the Republic of S. Afr.* 1996 (4) SA 744 (CC); *Certification of the Amended Text of the Const. of the Republic of S. Afr.* 1997 (2) SA 97 (CC).

62. DAN MAFORA, CAPTURE IN THE COURT: IN DEFENSE OF JUDGES AND THE CONSTITUTION 103–05 (Efemia Chela ed., 2023).

63. This was notable when President Mandela lost a court challenge by the Western Cape Legislature to a statute passed by his government. *See Exec. Council of the W. Cape Legislature v. President of the Republic of S. Afr.* 1995 (4) SA 877 (CC); *see also* Stephen Ellmann, *Two South African Men of the Law*, 28 TEMP. INT'L & COMPAR. L.J. 431, 441 (2014) (summarizing the Constitutional Court's decision and noting Mandela's public speech thanking the Court as "a true and fearless custodian of our constitutional commitments.").

64. Martin Legassick, *Jacob Zuma*, BRITANNICA (Feb. 13, 2026), <https://www.britannica.com/biography/Jacob-Zuma>.

65. *See* Penelope E. Andrews, *Who's Afraid of Polygamy? Exploring the Boundaries of Family, Equality and Custom in South Africa*, 2009 UTAH L. REV. 351, 379 (2009).

66. *See* David Smith, *Jacob Zuma Is Father for 20th Time, but Not by One of His Three Wives*, THE GUARDIAN (Jan. 31, 2010, at 14:40 EST), <https://www.theguardian.com/world/2010/jan/31/jacob-zuma-south-africa-child> [<https://perma.cc/P8CY-GML6>]; *Polygamous Jacob Zuma Marries for Sixth Time*, THE TEL. (Apr. 20, 2012, at 21:20 BST), <https://web.archive.org/web/20120423134354/http://www.telegraph.co.uk/news/worldnews/africaandindianocean/southafrica/9217798/Polygamous-Jacob-Zuma-marries-for-sixth-time.html>.

67. Legassick, *supra* note 64; Emily Tian, *Ex South African President Jacob Zuma Begins His Jail Sentence*, OCCRP (July 9, 2021), <https://www.occrp.org/en/news/ex-south-african-president-jacob-zuma-begins-his-jail-sentence> [<https://perma.cc/54SP-VK97>].

became a leading figure in uMkhonto weSizwe, the military wing of the ANC.⁶⁸ Three years after the first democratic elections and the election of President Mandela in 1994,⁶⁹ Jacob Zuma became the Deputy President of the ANC.⁷⁰ In 1999, he became South Africa's second Deputy President after Thabo Mbeki was elected as Mandela's successor.⁷¹ Six years later in 2005, a South African trial court found a businessman guilty of bribing Zuma between 1995 and 2002,⁷² a finding which was reinforced by the Constitutional Court in 2007.⁷³ As a consequence, Zuma was dismissed as Deputy President by President Mbeki.⁷⁴

In 2005, charges were brought against Jacob Zuma for the sexual assault and rape of a woman who was the daughter of one of his ANC comrades and who considered Zuma a father figure.⁷⁵ The alleged rape took place during a time period when the prevalence of HIV and AIDS in South Africa had reached epidemic proportions.⁷⁶ At that time, South Africa appeared to be the epicenter of the HIV and AIDS crisis on the African continent, and countrywide prevention programs encouraged people not to engage in unprotected sex.⁷⁷

Zuma insisted during the trial that the sex with the complainant was consensual.⁷⁸ Throughout the course of the trial, Zuma was regularly supported by a raucous crowd shouting epithets at the complainant like "[b]urn the bitch", which

68. Legassick, *supra* note 64.

69. *The South African General Elections: 1994*, AFR. NAT'L CONG. PARLIAMENTARY CAUCUS, <https://www.ancparliament.org.za/the-south-african-general-elections-1994/> [https://perma.cc/M3F2-2WQ3].

70. Legassick, *supra* note 64.

71. *Id.*

72. See Michael Wines, *South African Guilty of Bribing Deputy President Over Arms Sales*, N.Y. TIMES (June 3, 2005), <https://www.nytimes.com/2005/06/03/world/africa/south-african-guilty-of-bribing-deputy-president-over-arms.html>.

73. *S v. Shaik and Others* 2007 (12) BCLR 1360 (CC) at paras. 86–87.

74. Legassick, *supra* note 64.

75. See MMATSHILO MOTSEI, *THE KANGA AND THE KANGAROO COURT: REFLECTIONS ON THE RAPE TRIAL OF JACOB ZUMA* 12–17 (2007); *Zuma's Rape Accuser Questioned*, BBC News (Mar. 7, 2006, at 13:47 GMT), <http://news.bbc.co.uk/2/hi/africa/4781440.stm> [https://perma.cc/JX7V-PKPD].

76. See Sushil Vachani, *South Africa and the AIDS Epidemic*, VIKALPA: J. FOR DECISION MAKERS, Jan.–Mar. 2004, at 101, 102.

77. See Jodi McNeil, *A History of Official Government HIV/AIDS Policy in South Africa*, S. AFR. HIST. ONLINE (Nov. 16, 2020), <https://sahistory.org.za/article/history-official-government-hiv-aids-policy-south-africa> [https://perma.cc/LKN6-GJUG].

78. REDI TLHABI, KHWEZI: THE REMARKABLE STORY OF FEZEKILE NTSUKELA KUZWAYO 150–51 (2017).

they juxtaposed with admiration for Zuma's tribal origins as a "100% Zulu boy."⁷⁹ When asked why he had unprotected sex with a woman who had acknowledged that she was HIV-positive, Zuma told the court he had a shower after sex to "minimize the risk" of contracting HIV⁸⁰—a comment that for years afterward was replicated in mocking cartoon form.⁸¹ The judge acquitted Zuma of rape, but condemned his behavior as "unacceptable."⁸²

From the start, Zuma portrayed the case as yet another attempt by President Mbeki and his elitist, urban allies to frustrate the ambitions of a humble Zulu individual, who hailed from the rural areas.⁸³ Zuma claimed it was part of a pattern to humiliate him.⁸⁴ The young woman who had accused Zuma of rape, after a campaign of vilification and threats of violence from Zuma supporters, was forced into hiding, fleeing abroad after her house was burned down.⁸⁵

Zuma had already been charged with corruption in June 2005—over alleged bribes from the French arms company Thint tied to a 1999 arms deal—months before his December 2005 rape charge and April 2006 acquittal.⁸⁶ But a few months later the corruption charges were dismissed by the court after prosecutors failed to build the State's case.⁸⁷

79. Waldimar Pelser, *Zuma Accuser 'Raped Again'*, NEWS24 (Mar. 14, 2006), <https://www.news24.com/SouthAfrica/Archives/ZumaFiles/Zuma-accuser-raped-again-20060313> [<https://perma.cc/3YZQ-BYYX>].

80. McNeil, *supra* note 77.

81. Geoffrey York, *Shower of Criticism Has Zuma Fans Sputtering*, THE GLOBE & MAIL (Apr. 28, 2009), <https://www.theglobeandmail.com/news/world/shower-of-criticism-has-zuma-fans-sputtering/article4392698/>; Alan Gardner, *Zapiro Says the Shower Head Will Stay*, THE DAILY CARTOONIST (Apr. 29, 2009), <https://www.dailycartoonist.com/index.php/2009/04/29/zapiro-says-the-shower-head-will-stay/> [<https://perma.cc/P3NF-MAUL>].

82. *Judge Gives Zuma Tongue-Lashing*, NEWS24 (May 8, 2006), <https://www.news24.com/SouthAfrica/Archives/ZumaFiles/Judge-gives-Zuma-tongue-lashing-20060508> [<https://perma.cc/PHX6-HK6D>].

83. TLHABI, *supra* note 78, at 130–31.

84. *Id.* at 130.

85. *Id.* at 160–61.

86. Martina Schwikowski, *South Africa's President Zuma: A Chronology of Scandal*, DW (Feb. 9, 2018), <https://www.dw.com/en/south-africas-president-zuma-a-chronology-of-scandal/a-42489907> [<https://perma.cc/7WZA-BF78>].

87. Matt Weaver, *Judge Throws Out Zuma Corruption Charges*, THE GUARDIAN (Sep. 20, 2006, at 09:19 EDT), <https://www.theguardian.com/world/2006/sep/20/southafrica.matthewweaver> [<https://perma.cc/PT26-DWUR>].

A year later Zuma managed to rise the ranks of the ANC and was elected its President.⁸⁸ However, in 2007, a few months into his presidency of the party, new corruption charges were brought against Zuma, along with counts of racketeering and money laundering.⁸⁹ But the following year, the corruption charges against Zuma were dismissed by the court a second time on procedural grounds.⁹⁰ In the decision, the judge stayed the prosecution of Zuma, concluding that then-President Mbeki had interfered in the prosecution process.⁹¹

However, in 2009, the appeals court overturned the lower court's decision that dismissed the corruption charges against Zuma, holding that the ruling was riddled with errors.⁹² This new ruling meant that the National Prosecuting Authority was entitled to proceed with new charges against Zuma.⁹³ Despite this, a few months later in April 2009, prosecutors dropped all corruption charges against Zuma.⁹⁴ Later that year, after winning the majority of votes in South Africa's national elections and as President of the ANC, Zuma was inaugurated as the fourth President of South Africa.⁹⁵ His

88. Schwikowski, *supra* note 86. In South Africa, the President of the African National Congress (ANC) is a separate position from the President of the country. The ANC president is the leader of the political party, while the President of South Africa is the head of state and government. See *African National Congress (ANC)*, S. AFR. HIST. ONLINE (Aug. 27, 2019), www.sahistory.org.za/organisations/african-national-congress-anc [https://perma.cc/ZC8N-QWPW]. For a history of the presidency of the African National Congress, see *African National Congress*, BRITANNICA (Mar. 5, 2026), <https://www.britannica.com/topic/African-National-Congress> [https://perma.cc/2SAP-WQV7].

89. Michael Wines, *Zuma Corruption Charges Revived*, N.Y. TIMES (Dec. 29, 2007), <https://www.nytimes.com/2007/12/29/world/africa/29safrica.html>.

90. *Zuma v. Nat'l Dir. of Pub. Prosecutions* 2009 (1) BCLR 62 (N) at para. 247.

91. *Id.* As a consequence of the judgment, President Mbeki was forced to resign as President of South Africa, leading to a split within the ANC and the formation of a new political party. See Katie Cooksey, *Thabo Mbeki to Step Down as South African President After ANC Request*, THE GUARDIAN (Sep. 20, 2008, at 08:28 EDT), <https://www.theguardian.com/world/2008/sep/20/southafrica1> [https://perma.cc/S46R-7PVQ]; Jane Duncan, *Lessons from the Demise of Thabo Mbeki*, SACSIS (Sep. 18, 2013), <https://sacsis.org.za/site/article/1789> [https://perma.cc/Y6AV-PV8V].

92. *Nat'l Dir. of Pub. Prosecutions v. Zuma* 2009 (2) SA 277 (SCA).

93. *See id.*

94. *NPA Drops Corruption Charges Against Zuma*, MAIL & GUARDIAN (Apr. 6, 2009), <https://mg.co.za/article/2009-04-06-mpa-drops-corruption-charges-against-zuma/> [https://perma.cc/SKM2-WJA3].

95. *Zuma Sworn In as President of South Africa*, THE GUARDIAN (May 9, 2009, at 06:13 EDT), <https://www.theguardian.com/world/2009/may/09/zuma-southafrica> [https://perma.cc/6EWF-F6NT].

supporters celebrated and claimed that his humble origins made him “a man of the people,” a charismatic, salt-of-the-earth man rather than his predecessor, the elitist “professor” Thabo Mbeki.⁹⁶

In 2010, Zuma filed a multimillion-rand (the national currency of South Africa) defamation lawsuit against Jonathan Shapiro, a prominent South African cartoonist, and a group of media outlets over a 2008 political cartoon which portrays Zuma raping a female figure symbolizing justice, while his political allies held her down.⁹⁷ The lawsuit was vigorously defended and in 2013 Zuma dropped the lawsuit.⁹⁸ In 2014 Zuma secured a second term as President, with the ANC winning a majority of votes, although its overall majority had diminished significantly.⁹⁹

V. THE PROJECT OF STATE CAPTURE

During the nearly nine years of his presidency from 2009 to 2018, President Zuma and his conspirators embarked on a campaign of corruption and malfeasance, essentially looting every state-owned enterprise,¹⁰⁰ including the supplier of electricity, Eskom;¹⁰¹ the freight transport network, Transnet;¹⁰² and the state airline, South African Airways.¹⁰³ Other state-owned enterprises caught in the web of corruption included the South African Broadcasting Corporation¹⁰⁴

96. See Sean Jacobs, *Zuma's Vision*, THE GUARDIAN (Dec. 20, 2007, at 08:30 EST), <https://www.theguardian.com/commentisfree/2007/dec/20/zumasvision> [https://perma.cc/8UWW-8WND]; Barry Bearak, *Zuma Shows His Charisma, if Not Ideology*, N.Y. TIMES (Sep. 22, 2008), <https://www.nytimes.com/2008/09/22/world/africa/22iht-zuma.4.16377768.html>.

97. *Jacob Zuma Sues South Africa Newspaper Over Cartoon*, THE GUARDIAN (Dec. 14, 2010, at 05:49 EST), <https://www.theguardian.com/world/2010/dec/14/jacob-zuma-sues-newspaper-cartoon> [https://perma.cc/A5TV-AM4H].

98. *South African President Drops Defamation Suits Against Zapiro and Media Outlets*, PEN AM. (June 14, 2013), <https://pen.org/south-african-president-drops-defamation-suits-against-zapiro-and-media-outlets/> [https://perma.cc/XTX3-A9AM].

99. Stephen Hurt, *A Big Election Win for South Africa's ANC, but Results Suggest Future Challenges*, THE CONVERSATION (May 10, 2014, at 04:54 EDT), <https://theconversation.com/a-big-election-win-for-south-africas-anc-but-results-suggest-future-challenges-26418> [https://perma.cc/4499-JXU5].

100. See, e.g., ZONDO COMMISSION, *supra* note 9, at pt. VI, vol. 4, 1–2, 94, 105; *id.* at pt. IV, vol. 1, 255–56; *id.* at pt. V, vol. 2, 837–50.

101. See *id.* at pt. VI, vol. 4, 94.

102. See *Overview*, TRANSNET, <https://www.transnet.net/RenderPage.aspx?id=3101478> [https://perma.cc/S46C-7ZFA]; ZONDO COMMISSION, *supra* note 9, at pt. I, vol. 1, 606.

103. ZONDO COMMISSION, *supra* note 9, at pt. VI, vol. 4, 1–2.

104. See *id.* at pt. VI, vol. 4, 160.

and the Passenger Rail Agency of South Africa.¹⁰⁵ Zuma and his allies in this endeavor seized the South African Revenue Service¹⁰⁶ and nearly seized control of the National Treasury¹⁰⁷ and the Government Communication Information System.¹⁰⁸ The entire project was referred to as “state capture” by the country’s Public Protector.¹⁰⁹ State capture was a project by which a small number of private individuals, in collaboration with those inside and outside of government, engaged in a criminal enterprise and in defiance of the Constitution, to redirect resources from the state coffers for their own personal enrichment.¹¹⁰ This project of corruption was facilitated and enabled through concerted, deliberate methods to “weaken key state institutions and public entities” with the express purpose of exploiting them.¹¹¹ Key to this project was the weakening and capture of “law enforcement institutions and the intelligence services.”¹¹²

This project of state capture was facilitated using strategic appointments, demotions, dismissals at public entities, and the reorganization of procurement processes.¹¹³ The process undermined established oversight and accountability mechanisms and manipulated a public narrative favoring those who sought to capture the state.¹¹⁴ However, more profound was the subversion of South Africa’s

105. *See id.* at pt. VI, vol. 4, 168–69.

106. ZONDO COMMISSION, *supra* note 9, at pt. I, vol. 1, 710–11; *see also* ZENOBIA ISMAIL & ROBIN RICHARDS, STATE CAPTURE AND SERIOUS ORGANISED CRIME IN SOUTH AFRICA: A CASE STUDY OF THE SOUTH AFRICAN REVENUE SERVICE (2001–21), at 36 (2023), <https://www.birmingham.ac.uk/documents/college-social-sciences/government-society/publications/state-capture-and-serious-organised-crime-in-south-africa-report.pdf> [<https://perma.cc/4QNH-9RCC>] (detailing, through academic study, how the South African Revenue Service was captured and the detrimental impacts on its capacity to prevent future tax and financial crimes).

107. ZONDO COMMISSION, *supra* note 9, at pt. IV, vol. 1, 171–72.

108. ZONDO COMMISSION, *supra* note 9, at pt. I, vol. 1, 505.

109. STATE OF CAPTURE, *supra* note 5, at 5.

110. *See, e.g.*, ZONDO COMMISSION, *supra* note 9, pt. I, vol. 1, 43–44, 712, 754; *see also* Michaela Elsbeth Martin & Hussein Solomon, *Understanding the Phenomenon of “State Capture” in South Africa*, S. AFR. PEACE & SEC. STUD., 2016, at 21, 26 (noting that state capture is for the benefit of state coffers while citizens suffer the consequences).

111. *Summary of the Findings and Recommendations of the Zondo Commission*, PROETHICS, <https://www.proethics.co.za/summary-of-the-findings-and-recommendations-of-the-zondo-commission/> [<https://perma.cc/DFP6-GBBA>].

112. *See id.*

113. *See* ADRIAAN BASSON & PIETER DU TOIT, ENEMY OF THE PEOPLE: HOW JACOB ZUMA STOLE SOUTH AFRICA AND HOW THE PEOPLE FOUGHT BACK 229–30 (2017); JACQUES PAUW, THE PRESIDENT’S KEEPERS: THOSE KEEPING ZUMA IN POWER AND OUT OF PRISON 285–86 (Russell Martin ed., 2017).

114. *See* PAUW, *supra* note 113, at 268.

democratic process, either at party or state level, not only to extract state resources but also to cement future power for President Zuma and his beneficiaries.¹¹⁵ In other words, Zuma completely controlled the ruling African National Congress through a series of political maneuvers which were purposely opaque.¹¹⁶ It was also patently in violation of South Africa's Constitution.¹¹⁷

Two reports of state capture were crucial in establishing the scope and extent of Zuma's corruption. The first was the Report of the Public Protector issued in 2016¹¹⁸ and the second was the Report of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State, known as the Zondo Commission, which issued its Report, in several parts, from late-2021 to mid-2022.¹¹⁹ President Zuma had made an unsuccessful application to the High Court in Pretoria to have the Public Protector's Report set aside.¹²⁰ In her 2016 Report, the Public Protector had recommended remedial action to be taken, including a directive to President Zuma to appoint a Commission of Inquiry to be headed by a judge selected solely by the Chief Justice.¹²¹ While there was some overlap between the Report of the Public Protector and the Zondo Commission Report, especially regarding the role and influence of the Gupta family in the appointment and dismissal of Cabinet members in key state entities, as well as awarding government contracts, mining licenses, and other business transactions, the latter involved a far more extensive

115. See Rene de Klerk & Hussein Solomon, *The Institutionalisation of Endemic Corruption: State Capture in South Africa*, 82 NEW CONTREE 64, 67 (2019).

116. See Edwin Cameron, *Constitutionalism, Rights, and International Law: The Glenister Decision*, 23 DUKE J. COMPAR. & INT'L L. 389, 393–94 (2013).

117. See *id.* at 406.

118. STATE OF CAPTURE, *supra* note 5, at 2.

119. See ZONDO COMMISSION, *supra* note 9, at pt. I, vol. 1, xii (noting, at the time, the report would be delivered to the President in three parts spanning from December 2021 to February 2022).

120. See *President of the Republic of S. Afr. v. Off. of the Pub. Protector* 2018 (2) SA 100 (GP).

121. STATE OF CAPTURE, *supra* note 5, at 353–54; see also *Statement by President Jacob Zuma on the Establishment of the Commission of Inquiry into State of Capture*, PRESIDENCY REPUBLIC OF S. AFR. (Jan. 9, 2018, at 00:00 CT), <https://www.thepresidency.gov.za/press-statements/statement-president-jacob-zuma-establishment-commission-inquiry-state-capture> [<https://perma.cc/P33N-ZE55>] (“I have decided to appoint a Commission of Inquiry.”).

process.¹²² Both reports concerned themselves with parliamentary oversight as well as the role of the ANC, the ruling party, in enabling state capture.¹²³

Several key findings were made by the Zondo Commission, the most notable being the confirmation that state capture took place in South Africa on a massive scale affecting almost every institution of the state.¹²⁴ The Zondo Commission Report identified a number of key elements underpinning the project of state capture, including the allocation and distribution of state power and resources, directed not for the public good but for private and corrupt advantage.¹²⁵ The Report identified a network of persons both within and outside the government who were found to have acted unethically and illegally to further the project of state capture.¹²⁶ Included in the Report as well was a catalog of the distortion and manipulation of the decision-making rules and procedures in government in order to achieve corrupt ends.¹²⁷ Across all levels of government, at the national, regional and local level, governmental accountability increasingly became a casualty of state capture.¹²⁸ Members of the ANC acted in illegal and unconstitutional ways to shield the President and his allies from accountability.¹²⁹ Deliberate efforts were

122. See STATE OF CAPTURE, *supra* note 5, at 70–85 (detailing interviews, subpoenas, documents, and other sources utilized in its investigation spanning a few months); ZONDO COMMISSION, *supra* note 9, at pt. I, vol. 1, viii–xi (detailing years of work). A brief summary of the Commission’s work provides:

The Commission ran for three and a half years – from January 2018 to June 2022 . . . In that time, it heard the testimony of more than 300 witnesses over 429 days of public hearings. All the hearings were televised and livestreamed for the public to see; transcripts of each hearing were uploaded to the Commission’s website the next day. The Commission’s record includes 1.7 million pages of documentary evidence, including statements, affidavits, investigative reports and other evidence.

DEVI PILLAY, PUB. AFFS. RSCH. INST., THE ZONDO COMMISSION: A BITE-SIZED SUMMARY 2 (2022), <https://pari.org.za/wp-content/uploads/2022/09/PARI-Summary-The-Zondo-Commission-A-bite-sized-summary-v360.pdf> [<https://perma.cc/2U82-DSHH>].

123. See P. Pillay, K. Chitunhu & L. Chivandire, *State Capture in South Africa: Going Back to Basics*, AFR. J. PUB. AFFS., June 2023, at 152, 162.

124. See ZONDO COMMISSION, *supra* note 9, at pt. I, vol. 1, xii; Lauren Kohn, *Integrity & Accountability Commissions of Inquiry: A South African Perspective*, UTRECHT L. REV., 2024, at 98, 117.

125. See Pillay, Chitunhu & Chivandire, *supra* note 123, at 161.

126. See, e.g., ZONDO COMMISSION, *supra* note 9, at pt. VI, vol. 4, 74, 174.

127. See, e.g., *id.* at pt. VI, vol. 4, 73–74, 174–78.

128. See, e.g., *id.* at pt. VI, vol. 4, 1–2, 105–06.

129. Pierre de Vos, *Culture of Corruption Runs Deep Within the ANC, and Shielding Its Members from Accountability Is the Party’s Choice*, DAILY MAVERICK (Feb. 27, 2023),

made to undermine or weaken oversight bodies and to exploit regulatory weaknesses so as to avoid accountability for wrongdoing.¹³⁰

Law enforcement and the intelligence agencies were targeted in a sustained and deliberate effort to weaken their ability to pursue illicit activities as well as to disempower opponents of state capture.¹³¹ Integral to the web of corruption was a network of private actors providing a range of professional services, such as auditors or legal and consulting firms, appointed for the express purpose of masking the corruption with campaigns of misinformation and propaganda.¹³²

As a result of the findings of the Zondo Commission, it is now clear that President Zuma not only failed to perform his constitutional duties, but also cemented a sense of impunity for those officials implicated in the corruption.¹³³ It will take concerted action on the part of the current government to hold those officials accountable, and so far that action has been lacking.¹³⁴

VI. HOLDING JACOB ZUMA ACCOUNTABLE IN THE COURTS

Jacob Zuma was a frequent litigant.¹³⁵ Even before he became the President of South Africa, Zuma either approached the courts as a plaintiff seeking relief, as

<https://www.dailymaverick.co.za/article/2023-02-27-culture-of-corruption-runs-deep-within-the-anc-and-shielding-its-members-from-accountability-is-the-partys-choice> [https://perma.cc/79T6-URN8].

130. See Dirk Kotze, *How Zuma Has Used the Capture of South Africa's State Institutions to Stay in Power*, THE CONVERSATION (Dec. 12, 2016, at 09:36 EST), <https://theconversation.com/how-zuma-has-used-the-capture-of-south-africas-state-institutions-to-stay-in-power-68175> [https://perma.cc/YHF3-6PU6].

131. See Steven Friedman, *Zuma's Abuse of South Africa's Spy Agency Underscores Need for Strong Civilian Oversight*, THE CONVERSATION (Feb. 3, 2021, at 09:46 EST), <https://theconversation.com/zumas-abuse-of-south-africas-spy-agency-underscores-need-for-strong-civilian-oversight-154439> [https://perma.cc/RNE4-THBV].

132. See Chereese Thakur & Devi Pillay, *How Professionals Enabled State Capture*, in STATE CAPTURE IN SOUTH AFRICA: HOW AND WHY IT HAPPENED 109, 109 (Mbongiseni Buthelezi & Peter Vale eds., 2023).

133. *Zondo Final Report – Bosasa: Zuma Failed to Uphold Constitutional Duty*, CORRUPTION WATCH (Mar. 11, 2022), https://www.corruptionwatch.org.za/wp-content/uploads/2022/05/Zondo-final-report-%E2%80%93-Bosasa_-Zuma-failed-to-uphold-constitutional-duty.pdf [https://perma.cc/9LX6-NLVX].

134. See John GI Clarke, *The Nemesis of Jacob Zuma*, MEDIUM (Jan. 16, 2018), <https://johngiclarke.medium.com/the-nemesis-of-jacob-zuma-399a5172e81> [https://perma.cc/LY7E-NGN6].

135. Dianne Hawker, *Zondo – 'Constant litigator' Zuma is Seeking to 'Delegitimise' Judiciary*, DAILY MAVERICK (Sep. 8, 2024), <https://www.dailymaverick.co.za>

a respondent in cases brought by civil society groups, or for matters in which he was indicted by the state for various criminal offenses.¹³⁶ This Part highlights some of the more significant cases that attempted to hold Jacob Zuma accountable during the period of state capture. The number of cases before the courts in South Africa, including the regional courts as well as the Supreme Court of Appeal and the Constitutional Court, are far too numerous for this Article. The cases below therefore attempt to trace the way that the courts on appeal from civil society organizations and from the media, attempted to hold Jacob Zuma accountable—and thereby confirm the culture of accountability incorporated in South Africa's Constitution.¹³⁷

A few months before he was inaugurated as President of South Africa, the Constitutional Court upheld the decision of the Supreme Court of Appeal to a challenge by Zuma regarding evidence obtained by the National Prosecuting Authority.¹³⁸ Zuma had argued that the warrants were overly broad, were vague and lacked specificity, and were improperly executed, thereby violating his constitutional rights to privacy and due process.¹³⁹ This decision came in the wake of years of litigation by Zuma—who had managed to delay prosecution for the corruption charges against him in connection with the French company, Thint's, arm sales to South Africa.¹⁴⁰

Once he was inaugurated as President of the African National Congress and later as the President of South Africa, Zuma began to dismantle parts of the criminal justice apparatus to shield himself and his allies from accountability.¹⁴¹

/article/2024-09-08-zondo-zuma-seeks-to-delegitimise-judiciary-with-constant-litigation/
[https://perma.cc/X8AE-KB4P].

136. For a listing of the many cases of Jacob Zuma, see Schwikowski, *supra* note 86.

137. See Stu Woolman, *A Politics of Accountability: How South Africa's Judicial Recognition of the Binding Legal Effect of the Public Protector's Recommendations Had a Catalysing Effect that Brought Down a President*, 8 CONST. CT. REV. 155, 159 (2016).

138. *Thint (Pty) Ltd v. Nat'l Dir. of Pub. Prosecutions* 2009 (1) SA 1 (CC).

139. Zuma and another defendant had successfully challenged the lawfulness of the warrants and the search and seizures in the trial court, which held that the state had not proved the need for the warrants, that the warrants were too vague, and that the state had provided insufficient protection for Zuma's right to legal professional privilege. *Nat'l Dir. of Pub. Prosecutions v. Zuma* 2009 (2) SA 277 (SCA). The Supreme Court of Appeal held by a 3–2 majority that the state had shown sufficient need for a search and seizure operation, the warrants were neither too vague nor too broad, and that Zuma's right to privilege had been sufficiently protected. *Id.* The court ordered that the state could retain the seized documents. *Id.* The Constitutional Court affirmed the decision of the Appeals Court. *Thint (Pty) Ltd v. Nat'l Dir. of Pub. Prosecutions* 2009 (1) SA 1 (CC).

140. See Legassick, *supra* note 64.

141. See *id.*

One of the first activities that the ANC embarked upon was to pursue legislation that would dissolve a state agency centrally involved in the fight against corruption.¹⁴² The Directorate of Special Operations, known as the Scorpions, was set up in 1999 as a specialized unit of the National Prosecuting Authority and mandated to investigate and prosecute high-level and priority crimes including organized crime and corruption.¹⁴³ The Scorpions came to be seen as an elite unit due to their competence and independence, and they received praise for their investigative and forensic skills accompanied by increasingly successful prosecutions.¹⁴⁴

In January 2009, South Africa passed two pieces of legislation that disbanded the Scorpions and replaced them with the Directorate for Priority Crime Investigation, known as the Hawks, which was situated within the South African Police Service, rather than the National Prosecuting Authority.¹⁴⁵ Many in the country saw this as a political move on the part of Zuma and the ANC to weaken the power of the Scorpions, since they had been so successful at prosecuting leading figures within the ANC.¹⁴⁶

The legislation was challenged, and the Constitutional Court struck down the legislation as unconstitutional.¹⁴⁷ The Court found that the legislation failed to secure an adequate degree of independence for the new body.¹⁴⁸ Specifically, the majority of the Court held that both the Constitution as well as South Africa's

142. See Mmanaledi Mataboge & Lionel Faull, *Scorpions Disbanding Unconstitutional*, MAIL & GUARDIAN (Mar. 18, 2011), <https://mg.co.za/article/2011-03-18-scorpions-disbanding-unconstitutional/> [<https://perma.cc/5BE5-VXG7>].

143. Jeremy Vine, *World: Africa Scorpions Target South African crime*, BBC NEWS (Sep. 1, 1999, at 14:47 GMT), <http://news.bbc.co.uk/2/hi/africa/435550.stm> [<https://perma.cc/S8ZC-REN9>].

144. Mataboge & Faull, *supra* note 142.

145. See National Prosecuting Authority Amendment Act 56 of 2008; South African Police Service Amendment Act 57 of 2008.

146. See Kwazi Dlamini, *Scorpions' Downfall Due to Political Interference*, CORRUPTION WATCH (Oct. 10, 2018, at 15:56 CT), <https://www.corruptionwatch.org.za/political-interference-in-south-africas-elite-anti-corruption-unit-leads-to-impunity/> [<https://perma.cc/2D2Y-BU92>]; Paul Hoffman, *The Fight for the Scorpions Was Not in Vain*, POLITICSWEB (July 20, 2017), <https://www.politicsweb.co.za/opinion/the-fight-for-the-scorpions-was-not-in-vain> [<https://perma.cc/7TPM-HQX3>].

147. *Glenister v. President of the Republic of S. Afr.* 2011 (3) SA 347 (CC).

148. *Id.*

obligations under international law obligate the state to establish and maintain an independent body to combat corruption and organized crime.¹⁴⁹

Another legal challenge ensued in 2011 when Zuma wanted to extend the tenure of the Chief Justice's term of office beyond the mandatory retirement age.¹⁵⁰ Zuma relied on a section of the Judges' Remuneration and Conditions of Employment Act to extend the Chief Justice's term.¹⁵¹ A group of civil society advocates launched a legal challenge to the President's action, arguing that the President lacked the authority to unilaterally extend the term of a Constitutional Court judge and that such a power would undermine judicial independence.¹⁵² The applicants argued that the relevant section of the statute was in conflict with the Constitution and should therefore be rendered invalid.¹⁵³ They contended that the section of the statute that permitted the President to extend the term of office of the Chief Justice amounted to an unlawful delegation of a legislative power.¹⁵⁴ The Court agreed and held that the President, through his unilateral action, had usurped the power of Parliament.¹⁵⁵ Parliament alone had the power to extend a Constitutional Court judge's term of office.¹⁵⁶

149. *Id.* at paras. 177, 190, 192, 194 (inferring from sections 7(2), 8(1), 39(1)(b), and 231 of the South African Constitution that the state has a duty to establish a sufficiently independent corruption fighting unit).

150. *Just. All. of S. Afr. v. President of the Republic of S. Afr.* 2011 (5) SA 388 (CC).

151. *Id.* at para. 7 (citing Judges' Remuneration and Conditions of Employment Act 47 of 2001 § 8(a)). Section 8(a) allows for the extension of the Chief Justice of the South African Constitutional Court's term in office at the request of the President. *See* Judges' Remuneration and Conditions of Employment Act 47 of 2001 § 8(a).

152. *Just. All. of S. Afr. v. President of the Republic of S. Afr.* 2011 (5) SA 388 (CC) at para. 42; *see also* *Extension of CJ's Term to Be Challenged*, LEGAL BRIEF TODAY, <https://legalbrief.co.za/diary/legalbrief-today/story/extension-of-cjs-term-to-be-challenged-2/print/> [<https://perma.cc/4HJX-YMS6>] (publicizing the legal challenge).

153. Hanibal Goitom, *South Africa: Constitutionality of Extension of Chief Justice's Tenure to Be Challenged*, LIBR. OF CONG. (June 17, 2011), <https://www.loc.gov/item/global-legal-monitor/2011-06-17/south-africa-constitutionality-of-extension-of-chief-justices-tenure-to-be-challenged/> [<https://perma.cc/CEA4-GS9F>].

154. *Just. All. of S. Afr. v. President of the Republic of S. Afr.* 2011 (5) SA 388 (CC) at paras. 43–44.

155. *Id.* at paras. 62, 116 (finding § 8(a) an unlawful delegation of power from the Parliament to the President and ordering the resulting extension of the term of office of the Chief Justice had no force and effect).

156. In another part of the decision, the Court held that the term “a Constitutional Court judge”, properly interpreted, meant that section 176(1) does not permit the singling out of any one of the Constitutional Court judges for the extension of their term. *Id.* at para. 67. The Court was unanimous that the extension of the term of office of the Chief Justice was unconstitutional.

Pivotal to Zuma's project of state capture was the appointment of loyal allies to key state institutions, especially within those institutions fighting crime and corruption.¹⁵⁷ In 2011, Zuma appointed a National Director of Public Prosecutions (NDPP),¹⁵⁸ even though a Commission of Inquiry had found the character and integrity of the President's nominee to be lacking in many respects.¹⁵⁹ The National Prosecuting Authority Act provides that the NDPP, in addition to being a South African citizen and possessing the requisite legal qualifications, must "be a fit and proper person" having regard to his or her "experience, conscientiousness and integrity".¹⁶⁰ Opposition parties challenged Zuma's appointment in court.¹⁶¹ They argued that since a commission of inquiry had raised many questions about the appointee's integrity and experience, the President could not have applied his mind

in this case. *Id.* at para. 97; see also Katharine Child, *Zuma Acted Unconstitutionally, Says ConCourt*, MAIL & GUARDIAN (July 29, 2011), <https://mg.co.za/article/2011-07-29-zuma-acted-unconstitutionally-says-concourt/> [<https://perma.cc/QV2T-R3UJ>] (publicizing the decision).

157. See Dan Mafora, *The Strongman's Vision of Democracy*, AFR. IS A COUNTRY (May 5, 2021), <https://africasacountry.com/2021/05/the-strongmans-vision-of-democracy> [<https://perma.cc/G27D-ZKQ8>]; William Gumede, *The President Who Would Be Chief*, GOOD GOVERNANCE AFR. (July 12, 2017), <https://gga.org/south-africa-jacob-zuma/> [<https://perma.cc/M4MS-2PR3>].

158. This appointment was made amidst political turmoil. President Mbeki, Zuma's predecessor, set up a Commission of Inquiry in October 2007 after he suspended the NDPP, Vusi Pikoli. See Karthy Govender, *The Risk of Taking Risky Decisions: Democratic Alliance v President of the Republic of South Africa*, 5 CONST. CT. REV. 451, 454 (2013). Menzi Simelane built the government's case against Pikoli before the Commission and became Zuma's choice for NDPP. See *id.* at 454–55. Pikoli had, against the instructions of the Minister of Justice which Pikoli believed did not have the authority to interfere, proceeded with the prosecution of the former Commissioner of South African Police Service, who was later found guilty of taking bribes from drug dealers. See *id.* at 453 n. 13. The function of the Commission was to inquire into Pikoli's fitness to hold office. See *id.* at 454. Instead, the Commission's findings questioned the honesty and integrity of Simelane. See *id.* Specifically, the Commission found that Simelane's accusations against Pikoli were baseless and malicious. See *id.* at 454 n. 15; Paul Hoffman, *NPA's Ability to Act Independently Deeply Compromised by Political Interference and Corruption*, ACCOUNTABILITY NOW (Apr. 9, 2025), <https://accountabilitynow.org.za/npas-ability-to-act-independently-deeply-compromised-by-political-interference-and-corruption/> [<https://perma.cc/982Q-HUGY>].

159. John Eligon, *South African Court Invalidates a Presidential Pick*, N.Y. TIMES (Dec. 1, 2011), <https://www.nytimes.com/2011/12/02/world/africa/south-african-court-rejects-menzi-simelane-top-prosecutor.html>.

160. National Prosecuting Authority Act 32 of 1998 § 9.

161. *Democratic All. v. President of the Republic of S. Afr.* 2013 (1) SA 248 (CC) at para. 4.

and therefore failed to undertake a proper inquiry as to whether the appointee had met the legal requirements for the position.¹⁶²

The Court pointed out that the Constitution and governing statute confers the power on the President to appoint an NDPP, but to ensure that the person appointed has the conscientiousness and integrity to be entrusted with the responsibilities of the office.¹⁶³ Such an individual is tasked with ensuring that the prosecuting authority's functions, including decisions about prosecution policy, decisions regarding the pursuit of criminal prosecutions, and challenges to its authority, are carried out honestly and fairly "without fear, favour or prejudice".¹⁶⁴ In the words of the Court: "It is obvious that dishonesty is inconsistent with the hallmarks of conscientiousness and integrity that are essential prerequisites to the proper execution of the responsibilities of a National Director."¹⁶⁵

The Court noted that the evidence of Zuma's nominee at the Commission of Inquiry was contradictory and, on its face, indicative of his dishonesty, which raised serious questions about his conscientiousness, integrity, and credibility as required under the governing statute.¹⁶⁶ The failure to take this into account would, absent acceptable reasons for not doing so, not be rationally related to the achievement of the purpose of appointing a person of conscientiousness and integrity as NDPP.¹⁶⁷ The Constitutional Court held that the failure of the President to take into account this evidence without more was irrational in the sense of not being rationally related to and inconsistent with the purpose of appointing as NDPP a fit and proper person with due regard to his conscientiousness and integrity.¹⁶⁸ As a consequence of the Court's decision, the appointment was set aside.¹⁶⁹

162. *Id.* at para. 11.

163. *Id.* at para. 49.

164. *Id.*

165. *Id.*

166. *Id.* at paras. 81, 89.

167. *Id.* at paras. 85–86.

168. *Id.* at para. 86. "The President too should have been alerted by the adverse findings of the . . . Commission . . . and ought to have initiated a further investigation for the purpose of determining whether real and important questions had been raised about [the nominee's] honesty and conscientiousness." *Id.* at para. 88.

169. *Id.* at para. 89. The Court pointed out it was not saying that the appointee cannot in the future be appointed as NDPP. In its words: "He may have an explanation and may well be able to persuade the President that he is a fit and proper person and should be appointed." *Id.* at para. 90. For an interesting discussion of the case, see Karthy Govender, *The Risk of Taking Risky Decisions: Democratic Alliance v President of the Republic of South Africa*, 5 CONST. CT. REV. 451 (2013).

In a case involving another inappropriate appointment to a state institution, the Supreme Court of Appeal of South Africa dismissed an appeal against an adverse finding by Zuma's nominee to the South African Broadcasting Corporation (SABC).¹⁷⁰ The case arose in the wake of a 2014 report by the Public Protector detailing "pathological corporate governance deficiencies at the SABC."¹⁷¹ It singled out Hlaudi Motsoeneng, Zuma's appointee and acting chief operating officer (COO) at the time, for particularly scathing criticism.¹⁷² Among a slew of allegations, the Public Protector had found that: his appointment as acting COO was irregular; his salary progression, doubling in one fiscal year, was irregular; and that he had fraudulently misrepresented his educational qualifications.¹⁷³ As a consequence, the Public Protector directed the SABC and the Minister of the Department of Communications to implement various remedial steps, including the disciplinary action against Motsoeneng¹⁷⁴ as well as requiring them to submit implementation plans.¹⁷⁵

Instead of implementing the Public Protector's remedial action, the Board of the SABC, loyalists to Zuma, appointed Motsoeneng as the permanent COO.¹⁷⁶ A legal challenge was launched to request that the court suspend Motsoeneng, institute disciplinary proceedings against him, and set aside his appointment.¹⁷⁷ The order was granted by the lower court and confirmed by the appeals court.¹⁷⁸ In addition, the appeals court decided to rectify the record with respect to the finding by the lower court that the directions of the Public Protector were not binding and enforceable in the same way as a court order, stating that the "independence, impartiality and effectiveness of the Public Protector are vital to ensuring accountable and responsible government."¹⁷⁹ The appeals court noted:

170. *S. Afr. Broad. Corp. Soc Ltd. v. Democratic All.* 2016 (2) SA 522 (SCA) at para. 70.

171. *Id.* at para. 6 (citation omitted).

172. *See id.*

173. *Id.*

174. *Id.* at paras. 4, 7–8.

175. *Id.* at para. 8.

176. *Id.* at para. 9, 14–16 (explaining the justification given to the court for ignoring the Public Protector's remedial action was that a firm of attorneys had been appointed to investigate the veracity of the findings contained in the Report, and a report prepared by them had apparently exonerated Motsoeneng).

177. *Id.* at para. 10.

178. *Id.* at paras. 20–21, 70. The lower court reached this conclusion even though they held in dicta "that the findings of the Public Protector were not binding and enforceable." *Id.* at para. 20.

179. *Id.* at para. 29. The court further noted:

Our Constitution sets high standards for the exercise of public power by State institutions and officials. However, those standards are not always lived up to, and it would be naïve to assume that organs of State and public officials, found by the Public Protector to have been guilty of corruption and malfeasance in public office, will meekly accept her findings and implement her remedial measures. That is not how guilty bureaucrats in society generally respond. The objective of policing State officials to guard against corruption and malfeasance in public office forms part of the constitutional imperative to combat corruption.¹⁸⁰

The court of appeal therefore dismissed the appeal from the decision of the lower court, confirming the latter's order—namely that the recommendations of the Public Protector had to be enforced.¹⁸¹ In the process of the judgment, the Supreme Court of Appeal clarified the powers of the Public Protector,¹⁸² which is important for the series of cases described below. Ultimately, the Constitutional Court denied Motsoeneng the opportunity to appeal the Supreme Court of Appeal's decision.¹⁸³

In another example of civil society activism against corruption and transparency in the Zuma government, two small nongovernmental organizations (Earth Life Africa and the Southern African Faith Communities Environment Institute) brought a successful environmental challenge against the government for its plan to build nuclear power stations at a cost of 1 trillion rand (about \$58 billion).¹⁸⁴ The legal challenge in the Western Cape High Court (a regional court

The office inherently entails investigation of sensitive and potentially embarrassing affairs of government. . . . The office of the Public Protector provides ' . . . what will often be a last defence against bureaucratic oppression, and against corruption and malfeasance in public office that are capable of insidiously destroying the nation.' It follows that in fulfilling its constitutional mandate that office will have to act with courage and vigilance.

Id. (footnotes omitted).

180. *Id.* at para. 44 (footnote omitted).

181. *Id.* at para. 70.

182. *See id.* at para. 23.

183. *Constitutional Court Dismisses Appeal by Hlaudi Motsoeneng, Making Him Liable to Pay Back the Success Fee of R11.5 Million*, SPECIAL INVESTIGATING UNIT (Sep. 19, 2024), <https://www.siu.org.za/constitutional-court-dismisses-appeal-by-hlaudi-motsoeneng-making-him-liable-to-pay-back-the-success-fee-of-r11-5-million/> [<https://perma.cc/CC2L-YEYA>].

184. *Earthlife Afr. Johannesburg v. Minister of Energy* 2017 (5) SA 227 (WCC) at para. 146. Currency conversions throughout this Article are based on the exchange rate published by the U.S. Department of the Treasury on March 31, 2026, available at <https://fiscaldata.treasury.gov/currency-exchange-rates-converter/>.

in South Africa) was based on the unlawful process during the phase requiring requests for proposals.¹⁸⁵

In December 2013, South Africa's Energy Minister determined that the nation required 9.6 gigawatts of nuclear power and that this should be procured by the Department of Energy.¹⁸⁶ The determination was, however, only gazetted in December 2015 and only because it was sought by the applicants as part of their lawsuit.¹⁸⁷ South Africa's Electricity Regulation Act¹⁸⁸ requires that "prior to the commencement of any procurement process for nuclear new generation capacity, the Minister [of Energy] and NERSA were both required in accordance with '*procedurally fair public participation processes*' to have determined that new generation capacity was required and must be generated from nuclear power[.]"¹⁸⁹

The applicants' case evolved in three stages through the courts. "The relief initially sought was a review and setting aside of the Minister's decision to sign the Russian [intergovernmental agreement] IGA, the President's decision authorising the Minister's signature, and the Minister's decision to table the Russian IGA before Parliament[.]"¹⁹⁰ The applicants also sought a declaration from the Court with respect to how the nuclear procurement process should unfold

185. Wendell Roelf, *South African Court Declares Nuclear Plan with Russia Unlawful*, REUTERS (Apr. 26, 2017), <https://www.reuters.com/article/markets/currencies/south-african-court-declares-nuclear-plan-with-russia-unlawful-idUSKBN17S25Q/> [<https://perma.cc/RJD2-55GQk>].

186. *Earthlife Afr. Johannesburg v. Minister of Energy* 2017 (5) SA 227 (WCC) at para. 4.

187. *Id.*

188. See Electricity Regulation Act 4 of 2006.

189. *Earthlife Afr. Johannesburg v. Minister of Energy* 2017 (5) SA 227 (WCC) at para. 4 (citation omitted). The Electricity Regulation Act provides in part: "The Minister may, in consultation with the Regulator— (a) determine that new generation capacity is needed to ensure the continued uninterrupted supply of electricity; (b) determine the types of energy sources from which electricity must be generated, and the percentages of electricity that must be generated from such sources[.]" Electricity Regulation Act 4 of 2006 § 46(1)(a)–(b).

190. *Earthlife Afr. Johannesburg v. Minister of Energy* 2017 (5) SA 227 (WCC) at para. 7. Section 231(3) of the South African Constitution provides: "An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, . . . must be tabled in the Assembly and the Council within a reasonable time." S. AFR. CONST., 1996, § 231(3).

in relation to the issuing of determinations as required by the Electricity Regulation Act¹⁹¹ and the Constitution.¹⁹²

The court found that the Minister of Energy had not undertaken the necessary procedural steps when they handed over the nuclear procurement process to South Africa's national power utility, Eskom.¹⁹³ The court found that the government had violated statutory law and the Constitution by not in making the decision to pursue a nuclear power option, as well as in other critical areas.¹⁹⁴ The court also ruled that Eskom's request for information from nuclear vendors, a step taken to prepare the procurement, was invalid.¹⁹⁵

Although this did not mean the end of the road for the pursuit of nuclear energy in South Africa, it was a significant setback for the Zuma administration, which had rushed to push the deal through before the end of its parliamentary term.¹⁹⁶ Many in South Africa believe that such an enormous investment in nuclear

191. Electricity Regulation Act 4 of 2006 § 34(1). Section 34(1) of the Electricity Regulation Act deals with the capabilities of the Minister to, in consultation with the Regulator, make determinations of new generation capacity, types of energy sources, the persons and manner electricity may be sold to, and require a "fair, equitable, transparent, competitive and cost-effective" tendering procedure for new generation capacity. Electricity Regulation Act 4 of 2006 § 34(1). *Id.*

192. *Earthlife Afr. Johannesburg v. Minister of Energy* 2017 (5) SA 227 (WCC) at para. 7; S. AFR. CONST., 1996, § 217(1). Section 217 of the Constitution deals with the requirements for a fair procurement system for state institutions. It provides: "When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective." *Id.*

193. *Earthlife Afr. Johannesburg v. Minister of Energy* 2017 (5) SA 227 (WCC) at paras. 78–79, 146. Eskom had been mired in corruption according to the Report of the Zondo Commission. See ZONDO COMMISSION, *supra* note 9, at pt. VI, vol. 4, 94. It was one of the institutions that was a textbook example of state capture, and which implicated Zuma and his conspirators by clear and convincing evidence. See *id.* at pt. VI, vol. 4, 576–79. The government sidestepping NERSA and dealing directly with Eskom indicated that certain individuals connected to Eskom had a vested financial interest in seeing the deal go through. See David Fig, *Court Ruling on Zuma's Nuclear Deal Is a Marker of South Africa's Political Health*, THE CONVERSATION (Apr. 28, 2017, at 09:46 EDT), <https://theconversation.com/court-ruling-on-zumas-nuclear-deal-is-a-marker-of-south-africas-political-health-76870> [<https://perma.cc/ZVT9-JH54>].

194. *Earthlife Afr. Johannesburg v. Minister of Energy* 2017 (5) SA 227 (WCC) at para. 146.

195. *Id.* at paras. 140, 146.

196. See KARYN MAUGHAN & KIRSTEN PEARSON, NUCLEAR: INSIDE SOUTH AFRICA'S SECRET DEAL 11–12 (Russell Martin ed., 2022).

energy would have effectively bankrupted South Africa.¹⁹⁷ With the election of President Cyril Ramaphosa as South Africa's fifth President, the Russian nuclear deal was abandoned.¹⁹⁸

Shortly after his second inauguration in 2014, Zuma used public funds to the tune of 246 million rand (about \$14 million) to upgrade his private estate in a village called Nkandla in the province of KwaZulu-Natal.¹⁹⁹ Zuma tried to argue that these upgrades were necessary as a matter of security—and therefore subject to state funding.²⁰⁰ Exercising their constitutional powers, the Public Protector issued a report stating that the use of public funds for personal enrichment was a violation of the President's constitutional duties and ordered that the President, duly assisted by certain state officials, should pay the proportion of the funds used for his personal benefit.²⁰¹ Instead of complying with the Public Protector's order, and in order to avoid accountability, the National Assembly (dominated by the ANC) instead set up its own committee, while Zuma ordered his Minister of Police to conduct a separate inquiry.²⁰² Unsurprisingly, both concurred with the President that the upgrades to his private estate were indeed security measures and not for his personal and familial use and therefore no violations had occurred.²⁰³

The opposition parties challenged the President's noncompliance at the Constitutional Court, which found that the remedial action taken by the Public Protector against President Zuma was binding and his failure to comply with such

197. *5 Years After the Corrupt Nuclear Deal Was Stopped, SA Still Waits for Improved Energy Decision-Making*, EARTHLIFE AFR. (May 19, 2022), <https://earthlife.org.za/5-years-after-the-corrupt-nuclear-deal-was-stopped-sa-still-waits-for-improved-energy-decision-making/> [<https://perma.cc/XX9X-4KYV>].

198. Jean-Jacques Cornish, *South Africa Scraps Russian Nuclear Plant Plans*, RFI (Aug. 24, 2019, at 11:58 CT), <https://www.rfi.fr/en/africa/20190824-south-africa-cancel-russia-nuclear-plant-order-economy-ramaphosa> [<https://perma.cc/XX9X-4KYV>].

199. PUB. PROTECTOR S. AFR., *SECURE IN COMFORT: REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPRIETY AND UNETHICAL CONDUCT RELATING TO THE INSTALLATION AND IMPLEMENTATION OF SECURITY MEASURES BY THE DEPARTMENT OF PUBLIC WORKS AT AND IN RESPECT OF THE PRIVATE RESIDENCE OF PRESIDENT JACOB ZUMA AT NKANDLA IN THE KWAZULU-NATAL PROVINCE: REPORT NO. 25 OF 2013/14*, at 189 (2014).

200. *See id.* at 19.

201. *Id.* at 442.

202. Paul Nantulya, *South Africa's Democracy Is Put to the Test*, AFR. CTR. FOR STRATEGIC STUD. (May 23, 2017), <https://africacenter.org/spotlight/south-africas-democracy-put-test/> [<https://perma.cc/GK4N-DCUM>].

203. *Id.*

remedial action was unconstitutional.²⁰⁴ In a unanimous decision, the Court ordered that the National Treasury was to determine the reasonable costs of the work that improved the President's private estate that do not relate to security and that the President must personally pay those costs.²⁰⁵ The Court ordered that the National Treasury must report back to it on the outcome of its determination within 60 days from the date of the order.²⁰⁶ The Court also ordered that the President must reprimand those Ministers identified in the Public Protector's report "for the appalling manner in which the Nkandla Project was handled and state funds were abused."²⁰⁷ The Court held that the President, the Minister of Police, and the National Assembly must pay the costs of the applications, including the costs of two legal counsel.²⁰⁸ The Court found that the resolution passed by the National Assembly absolving the President from compliance with the remedial action taken by the Public Protector was invalid,²⁰⁹ and that they had failed in their constitutional duties to hold the President accountable.²¹⁰

After the Court's decision, Parliament failed to take the steps mandated in the Court order, and the opposition once again approached the Court for relief.²¹¹ The applicants argued that Parliament should have initiated impeachment proceedings or another appropriate accountability mechanism required by the Constitution.²¹² The Court agreed with the applicants and ruled that Parliament had a constitutional duty to put mechanisms in place to hold the President accountable, including an independent process to determine if the President committed a serious

204. *Econ. Freedom Fighters v. Speaker of the Nat'l Assembly* 2016 (3) SA 580 (CC) at para. 105.

205. *Id.* at para. 105.

206. *Id.*

207. *Id.* at para. 10.

208. *Id.* at para. 105.

209. *Id.*

210. *Id.* at para. 104. The Court also referred particularly to section 55 of the Constitution, which provides that the National Assembly "must provide for mechanisms — to ensure that all executive organs of state in the national sphere of government are accountable to it; and to maintain oversight of the exercise of national executive authority[.]" *Id.* at para. 41 (quoting S. AFR. CONST., 1996, § 55(2)).

211. *Econ. Freedom Fighters v. Speaker of the Nat'l Assembly* 2018 (2) SA 571 (CC) at para. 154.

212. *Id.* at para. 157. Section 89 of the Constitution provides as follows: "The National Assembly, by a resolution adopted with a supporting vote of at least two thirds of its members, may remove the President from office only on the grounds of — (a) a serious violation of the Constitution or the law; (b) serious misconduct; or (c) inability to perform the functions of office." S. AFR. CONST., 1996, § 89(1).

violation of the Constitution or the law.²¹³ According to the Court, Parliament had failed in their constitutional duty to hold President Zuma accountable.²¹⁴ Moreover, the Speaker of Parliament and Parliament acted unconstitutionally by not initiating a proper process as required by the Constitution.²¹⁵ The Court ordered Parliament to make rules for implementing the constitutional requirements under section 89, including the possibility of impeachment.²¹⁶

In June 2017, the Constitutional Court set aside the Speaker's ruling that they had no power to call for a secret ballot on a motion of no confidence in the President.²¹⁷ In response to the Speaker's view that neither the Constitution nor the rules of the National Assembly provide for secret ballot, the Court held that as the constitution is silent on the voting procedures, a secret ballot is permissible.²¹⁸ The Constitutional Court stated:

Our interpretation of the relevant provisions of the Constitution and the rules makes it clear that the Speaker does have the power to authorise a vote by a secret ballot in motion of no confidence proceedings against the President, in appropriate circumstances. The exercise of that power must be duly guided by the need to enable effective accountability, what is in the best interests of the people and obedience to the Constitution.²¹⁹

The Court added that the Speaker's decision must be supported by a proper and rational basis and made to facilitate the effectiveness of parliamentary accountability mechanisms.²²⁰

As the cases unfolded through the courts over the years, Zuma insisted there was a conspiracy against him to weaponize the law and that he was the true victim.²²¹ He survived three votes of no confidence in Parliament, but ultimately the ANC "recalled" Zuma in 2018 and demanded that he resign—which he did

213. *Econ. Freedom Fighters v. Speaker of the Nat'l Assembly* 2018 (2) SA 571 (CC) at para. 208.

214. *Id.*

215. *Id.* at para. 196.

216. *Id.*

217. *United Democratic Movement v. Speaker of the Nat'l Assembly* 2017 (5) SA 300 (CC) at para. 91.

218. *Id.* at paras. 57–59.

219. *Id.* at para. 90.

220. *Id.* at paras. 86, 94.

221. *Our Viewpoint | Court Judgments and Zuma's Victim Card*, WITNESS (Apr. 12, 2024), <https://witness.co.za/opinion/columnists/ourviewpoint/2024/04/12/our-viewpoint-court-judgments-and-zumas-victim-card/> [https://perma.cc/9SPD-39E5].

after nine years in office.²²² His resignation was not the end of the litigation against him in the attempts to hold him accountable for state capture.²²³ Because of the sheer volume and extent of the corruption and malfeasance of the Zuma administration, the Zondo Commission was established, which issued its detailed report.²²⁴ The expectation is that the Zondo Commission Report will be the basis for future attempts to hold those responsible for state capture accountable and to seize the ill-gained assets.²²⁵

VII. CONCLUSION

As these decisions indicate, the judiciary has been steadfast in ensuring that the rule of law in South Africa is reinforced and that the values embedded in South Africa's Constitution are not abandoned.²²⁶ Despite the rule of law prevailing, the economic and social damage has been devastating for South Africa. Not only did the Zuma administration cease to honor their constitutional duties, but because of the ubiquitous nature of the corruption, the impunity of officials implicated in state capture has increased.²²⁷ This remains a huge problem in South Africa.

Zuma's successor, President Cyril Ramaphosa, has taken some measures to minimize some of the ravages of state capture, but whether these measures are sufficient or adequate, and whether alternative steps may be required, remains uncertain. State

222. *In Full ANC Statement on the Recall of President Zuma*, TIMES LIVE (Feb. 13, 2018, at 14:37 CT), https://www.timeslive.co.za/politics/2018-02-13-in-full-anc-statement-on-the-recall-of-president-zuma/#google_vignette [<https://perma.cc/P5AG-DHRZ>]; Norimitsu Onishi, *Jacob Zuma Resigns as South Africa's President*, N.Y. TIMES (Feb. 14, 2018), <https://www.nytimes.com/2018/02/14/world/africa/jacob-zuma-resigns-south-africa.html>.

223. See ROBIN RENWICK, *HOW TO STEAL A COUNTRY: STATE CAPTURE AND HOPES FOR THE FUTURE IN SOUTH AFRICA* 278 (2018).

224. Pillay, Chitunhu & Chivandire, *supra* note 123, at 160–62.

225. See ZONDO COMMISSION, *supra* note 9, at pt. I, vol. 1, x–xi (noting the Commission's major distinctive outputs includes a legacy of data and evidence to support future research and policy development, specifically by law enforcement). Indeed, in July 2025, President Ramaphosa established the Madlanga Commission of Inquiry (named after retired Constitutional Court Justice Mbuyiseli Madlanga) to investigate widespread corruption and political interference and criminality within the criminal justice system. Emma Solomon, *What is the Madlanga Commission? Inside South Africa's Explosive Justice Inquiry*, EXPLAIN (Sep. 29, 2025), <https://explain.co.za/2025/09/29/what-is-the-madlanga-commission-inside-south-africas-explosive-justice-inquiry/> [<https://perma.cc/34YM-2ZE5>]. The Commission is expected to conclude its findings and issue a report at the end of 2026. *President Ramaphosa Grants Extension of Madlanga Commission Report Deadline*, The Presidency Republic of South Africa (July 9, 2026), <https://www.thepresidency.gov.za/president-ramaphosa-grants-extension-madlanga-commission-report-deadline> [<https://perma.cc/A7SS-69CB>].

226. See *supra* Part VI.

227. See *supra* Part V.

capture in South Africa resulted in almost all the state-owned enterprises compromising their functions and duties, which consequently undermined accountability and institutional checks and balances. It is of the utmost importance that those who committed criminal acts and violated fiduciary responsibilities be brought to justice. It is clear that the Report of the Zondo Commission and its recommendations need to be followed assiduously to ensure that any future occurrence of state capture is thwarted.