
**CALATA GROUP’S WRITTEN ARGUMENT
LEADING OF WITNESSES**

TABLE OF CONTENTS

INTRODUCTION	2
PROCEDURAL HISTORY	2
THE NATURE OF THE OBJECTIONS	4
RULE 3(1) OF THE COMMISSION’S RULES	6
PAST AND CURRENT PRACTICE	7
RATIONALE.....	9
OBJECTION OF THE FORMER MEMBERS OF THE EXECUTIVE.....	11
OBJECTIONS OF THE GOVERNMENT OBJECTORS.....	13
CONCLUSION.....	16

INTRODUCTION

1. On 29 May 2025, the President appointed this Judicial Commission of Inquiry to investigate allegations of whether efforts or attempts were made to stop the investigation or prosecution of the Truth and Reconciliation Commission cases (“**the Commission**”).
2. The public interest in the work of the Commission cannot be overstated. Moreover, it is imperative that the Commission conclude its work without delay.
3. On 27 October 2025, the Commission convened a pre-hearing meeting. At the meeting, various parties objected to the fact that permission had been granted to the Calata Group’s legal team to lead certain witnesses. The Commission determined that the issue would be determined at a hearing on 10 November 2025.
4. The Commission, in its directive dated 27 October 2025, framed the objection as follows:

“The objection against the leading of witnesses by their legal representatives when so requested and the contention that all evidence before the Commission must be led exclusively by the Evidence Leaders.”

5. It directed that formal objections must be filed by no later than Wednesday, 5 November 2025; that written submissions must be forwarded to the Commission on 7 November 2025; and that oral submissions will be heard on 10 November 2025.

PROCEDURAL HISTORY

6. Following the call by the Commission on 16 September 2025 for evidence, information, statements and submissions to be provided by 10 October 2025, the Calata Group legal team organised the materials, documents and statements in its possession.

7. On 25 September 2025, Webber Wentzel addressed a letter¹ to the Secretary of the Commission attaching various operational documents, including one titled “Availability of Statements for the November Hearing”.² This document sets out the proposed witnesses for the hearing, with links to available statements. In relation to the 8 witnesses who had made statements in the Calata application, the following was stated:

“Since these witnesses are our clients or have given us affidavits in the abovementioned applications, **we are happy to lead them, if the Commission so directs**.” (Emphasis added)

8. Adv Varney collegially shared a copy of this document with Adv Yanela Ntloko, junior counsel for the National Prosecuting Authority (“NPA”), on 24 September 2025, to which she acknowledged receipt on 25 September 2025.
9. On or about 29 September 2025, Varney followed up with the Chief Evidence Leader, Semenya SC (“**Semenya**”), and in a telephone call raised the possibility of leading the witnesses in question. Semenya appeared amenable to the proposal and this discussion was followed up by way of a letter to the Commission on the same date. It is presumed that the offer to lead evidence was placed by the Secretary and Evidence Leaders before the Chairperson for her decision. The Commission communicated its decision in this regard in writing on 2 October 2025, indicating that, “[w]e confirm that witnesses [...] will be led by Adv Varney.”
10. Since that communication was in a letter from the Secretary of the Commission, and only the Chairperson could take such a decision in terms of Rule 3(1) of the Commission’s Rules, the letter could only have reflected a decision of the Commission which had been authorised by the Chairperson.
11. In response to queries, the Commission has since confirmed that it received a request from the legal team of the Calata Group for permission to lead certain

¹ Available at: <https://www.trc-inquiry.org.za/wp-content/uploads/2025/11/2025-09-25-WW-letter-to-COI-Secretary.pdf>

² Available at: <https://www.trc-inquiry.org.za/wp-content/uploads/2025/11/2025-09-25-WW-letter-of-Availability-of-Statements-for-November-Hearing.pdf>

witnesses (“**the request**”); and that the Commission granted such permission in terms of Rule 3(1) (“**the decision**”).³

12. Accordingly, the suggestion that this question was the result of a private arrangement between Semenya and Varney is without foundation. The Calata Group legal team made it clear that they would only lead evidence of their witnesses “*if the Commission so directs*”. Only the Chairperson could make such a direction in terms of Rule 3(1) and there is no reason to suggest that this decision was not taken in terms of that rule.

THE NATURE OF THE OBJECTIONS

13. The Commission received 3 formal objections from the National Prosecuting Authority (NPA), the Minister of Justice (MOJ) and the South African Police Service (SAPS) (collectively referred to as “government objectors”). During the afternoon of 6 November 2025, the Commission circulated further objections from the NPA and the Former Members of the Executive (all together referred to as “the objectors”).
14. The objections of the legal team for the NPA are that:
 - 14.1. A decision had already been made permitting Varney to lead the witnesses in question;
 - 14.2. The decision was never communicated to other parties who were not afforded an opportunity to be heard before the decision was taken;
 - 14.3. It is unclear who made the decision and whether the Commission’s Chairperson was consulted; and
 - 14.4. Such decision implicates the procedural fairness, neutrality and integrity of the Commission, given that evidence leadership in a judicial commission is ordinarily a function reserved to the Commission’s own Evidence Leaders.⁴

³ Letter of the Chief Evidence Leader to interested parties dated 27 October 2025.

⁴ Paras 4 and 7 of the letter from N.R. Baloyi, State Attorney (Pretoria) dated 30 October 2025. Further objections from the NPA were circulated in the afternoon of 6 November 2025, which will be addressed below.

15. The objections of the MOJ are that:

- 15.1. The decision to allow the Calata Group legal team to lead certain witnesses was inconsistent with the Commission's decision to exclude Semenya from leading or cross examining witnesses in respect of the 2005 amendments to the Prosecution Policy, given that Semenya had previously represented the then MOJ in litigation challenging that policy.⁵
- 15.2. The MOJ was not consulted before the decision was made and was excluded from the decision-making process and a perception of unequal treatment arises between the parties.⁶
- 15.3. The claimed prejudice to the Minister is that her right to a fair hearing will be compromised if Varney is permitted to lead the witnesses in question, and this prejudice cannot be cured by granting similar requests from other parties.⁷

16. The objections of the SAPS are:

- 16.1. Similar to the objections raised by the MOJ in para 15 above, namely that the decision was inconsistent with the restriction imposed on Semenya in relation to the Prosecution Policy amendments.⁸
- 16.2. All witnesses should be treated the same, consulted with by the evidence leaders, and their evidence presented by the evidence leaders, without exception.⁹
- 16.3. There should be no meetings, interactions or communications between the parties and the Commission on procedural issues without the presence or involvement of all the legal teams of the parties.¹⁰

⁵ Paras 4 and 5 of the MOJ Objections dated 5 November 2025.

⁶ Ibid, paras 9 to 12.

⁷ Ibid, paras 13 to 14.

⁸ Paras 4 – 8 of the undated Objections on behalf of the SAPS submitted by L Gumede (State Attorney).

⁹ Ibid, para 10.

¹⁰ Ibid, para 11.

17. The objections of the Former Members of the Executive are:

17.1. This group did not have a substantive or in-principle objection to the leading of evidence as described above, but the Calata group legal team were “not properly permitted to do so because the process contemplated by the Rules was not followed. There is, as things stand, no request to the Commission and no decision by the Chairperson.”¹¹

17.2. They recommended that the Calata group resubmit their request in the proper manner.¹²

RULE 3(1) OF THE COMMISSION’S RULES

18. Rule 3(1) reads:

“Subject to anything to the contrary contained in these Rules **or to the Chairperson's directions in regard to any specific witness**, the Commission's Evidence Leader bears the overall responsibility to present the evidence of witnesses to the Commission.” (Emphasis added).¹³

19. The application of Rule 3.1 is accordingly subject to the directions of the Chairperson of the Commission.

20. The rule indicates that the Commission’s evidence leader bears the “*overall responsibility*” of presenting the evidence of witnesses, but that in relation to ‘*specific witnesses*’ the Chairperson enjoys a discretion to depart from the general rule.

21. This is accepted and standard practice in commissions of inquiry in South Africa and internationally.

22. In this regard, we note that the Former Members of the Executive do not object in principle to a legal representative leading a witness.¹⁴

¹¹ Para 5.1 of the Objection of the Former Members of the Executive dated 5 November 2025.

¹² Para 60 of the Objection of the Former Members of the Executive dated 5 November 2025.

¹³ Proclamation Notice 285 of 2025, Government Gazette No 53251 of 29 August 2025.

¹⁴ Paras 4.1 – 4.2 of the Objection of the Former Members of the Executive dated 5 November 2025.

23. However, the government objectors appear to argue that:

- 23.1. the Chairperson of the Commission may not exercise the discretion afforded to her under rule 3.1 without first consulting with the other parties or affording them a hearing, and
- 23.2. Should she exercise her discretion in favour of a person leading evidence who is not an evidence leader, such decision would automatically be prejudicial to them.

PAST AND CURRENT PRACTICE

24. LAWSA makes reference to the Salmon Principles when dealing with a fair procedure in relation to witnesses:¹⁵

The Salmon principles When considering the elements of a fair procedure in so far as witnesses are concerned, a commission might find the so-called cardinal principles laid down by the Salmon Commission helpful.

These are as follows:

- (a) before any person becomes involved in an inquiry, the tribunal must be satisfied that there are circumstances which affect him or her and which the tribunal proposes to investigate;
- (b) before any such person is called as a witness, he or she should be informed of any allegations which are made against him or her and the substance of the evidence in support of them;
- (c) such person should be given an adequate opportunity of preparing his or her case and of being assisted by legal advisers;
- (d) such person should have the opportunity of being examined in chief by his or her own legal adviser and of stating his or her case in public at the inquiry;**
- (e) any material witnesses he or she wishes to be called at the inquiry should, if reasonably practicable, be heard; and
- (f) such person should be given the opportunity of testing by cross-examination by his or her adviser any evidence which may affect him or her.¹⁶
(Emphasis added).

¹⁵ At par 188.

¹⁶ *Salmon Report of the Royal Commission on Tribunals of Inquiry* (1966) par 32.

25. These principles have provided guidance on the general operations of commissions in several commonwealth countries.
26. The Marikana Commission of Inquiry permitted counsel representing various clients and witnesses to lead their evidence. This was so even though the inquiry had 7 senior and experienced evidence leaders.¹⁷
27. By way of example, a key witness, former SAPS Commissioner General MV Phiyega, was led by the SAPS lead counsel, Adv Semenya SC, who dealt with her evidence in chief on 14 March 2013 (day 64), while chief evidence leader Adv M Madlanga SC (as he then was) cross examined her on 19 March 2013 (day 65).¹⁸
28. This was also the case with several other witnesses. For example, on 10 June 2014, evidence leader, Adv Chaskalson SC, cross-examined Lieutenant Colonel Kaizer Modiba rather than leading him; and on 5 June 2014 M G Da Costa, Vice President of Lonmin's Karee Mining, was cross examined by evidence leader Adv Budlender SC.¹⁹
29. In the Report of the Enquiry into the Fitness of Adv VP Pikoli to hold the Office of National Director of Public Prosecutions, the Ginwala Enquiry permitted the parties to prepare and present the evidence of their witnesses:

“As a result there were aspects of this Enquiry that may have taken an adversarial complexion – for instance, **I allowed the parties to prepare and present evidence of their witnesses**, cross-examine “opposing” witnesses and received “closing” argument. However the intention was always to have a process that was inquisitorial and investigative in nature rather than accusatorial and adversarial.”²⁰ (Emphasis added).
30. A similar approach was adopted in the Mokgoro Enquiry into the fitness of Advocate Jiba and Advocate Mrwebi to hold office.²¹ That enquiry also had a team of evidence leaders.²²

¹⁷ Adv Mathew Chaskalson, SC, Adv Geoff Budlender, SC, Adv Charles Wesley, Adv Kameshni Pillay, Adv Matthews Mojapelo, Adv Thantaswa Lupuwana and Adv Ashley Mjikeliso (Co-ordinator). In 2012 Adv M Madlanga, SC was appointed Chief Evidence Leader, a position he resigned early in 2013 to prepare for judicial office.

¹⁸ See: <https://www.justice.gov.za/comm-mrk/transcripts.html>

¹⁹ See: <https://www.justice.gov.za/comm-mrk/news.html>

²⁰ Para 22. Available at: https://www.justice.gov.za/commissions/2008_ginwala.pdf

²¹ Para 34, Mokgoro Enquiry Report.

²² The evidence team included N Bawa SC, N Sikhakhane, N Rajab-Budlender and Z Gumede.

RATIONALE

31. There is a strong rationale for legal representatives to lead their own witnesses or clients where they request or offer to do so. These reasons relate to expediency, conservation of costs and resources and the expediting of the Commission's fact finding mandate.

Time, resources and costs

32. This Commission has limited time and resources at its disposal. It has to cover an extensive period of time, canvass thousands of pages of documents, and deal with a large number of witnesses.
33. By way of example in the potential witness lists supplied by the Calata Group alone, there are 23 complainants, 18 direct and contextual witnesses, and 30 implicated or potentially implicated persons, coming to a total of 71 witnesses.²³ This does not include witnesses (not already on the lists) that other parties may wish to call or witnesses that may be discovered as the Commission's investigations proceed. The total number could well exceed 100.
34. In terms of the logic of the government objectors the evidence leaders must consult with all the witnesses, take their statements, prepare and precognise them and then lead their evidence.²⁴ This is apparently for 'appearance sake', 'equal treatment' and to ensure a level playing field.
35. While the Commission is empowered to take evidence on statement only, and determine which witnesses will testify, it is evident that slavishly reserving these roles exclusively to the evidence team would place an overwhelming burden on them. This would be highly imprudent if the Commission is aiming to complete its work within a reasonable time and not incur excessive costs.

²³ Attached in a letter to the Commission dated 12 September 2025.

²⁴ The government objectors will no doubt argue that the evidence leaders do not have to take statements from witnesses, they only need to lead them. However, for purposes of effective fact finding, it makes little sense for one legal team to consult with a witness and take his or her statement and then a totally different legal team must come in and prepare, precognise and lead the witness.

Expediting the fact finding mandate

36. It makes eminent sense for a legal representative who has:

36.1. consulted with a witness,

36.2. carried out research in connection with the relevant evidence, and

36.3. taken his or her statement,

to also lead his or her evidence, where the Commission decides that in addition to the statement, it wishes to hear the evidence orally.

37. That legal representative will be best placed to assist the Commission in meeting its mandate as set out in the terms of reference. Since the lawyer is steeped in the facts and detail, he or she will be in the best position to present the evidence coherently and logically, focusing on what is most relevant and avoiding tangential matters.²⁵

38. Leaving it to an already overburdened evidence leader, who will not enjoy the same familiarity with the facts and detail, will likely add to the time involved with such a witness, since the legal representative is likely to seek time to conduct follow-up questions on details or angles not covered, or inadequately covered – through cross-examination.

39. This approach is moreover advantageous to the Commission since the evidence leaders can then engage in cross-examination of the witness and tackle any matter they feel needs to be particularly probed or exposed. Legal representatives for parties potentially implicated in the evidence will have a clearer picture of what they need to explore by way of cross-examination.

40. Accordingly, the approach serves the inquisitorial method of commissions, which is to ultimately employ the best means of getting to the truth. It is well within the power of this Commission to decide on the best approach of getting to the truth.

²⁵ Note LAWSA at 187, *Witnesses and evidence* where it is stated that persons leading evidence before a Commission are not prosecutors who are required to prove a case. Their role is to facilitate the leading of evidence of witnesses who may be able to assist the Commission in its fact finding mission. Witnesses are similarly not required to present a case; they are storytellers who narrate factual experiences relevant to the issues that the commission must inquire into.

41. Accordingly, it may decide on a case by case basis, given the particular circumstances of each witness, what is the most appropriate approach to leading. A slavish, one size fits all approach, as advocated by the government objectors would not serve the fact finding objects of the Commission.
42. In doing so, the Chairperson may consider the issues and issue a decision in terms of rule 3.1. If she so chooses, she may consult with the parties, but she is not obliged to do so. Indeed, if she were so obliged, it would erode her powers to pursue a robust and efficient inquiry.

OBJECTION OF THE FORMER MEMBERS OF THE EXECUTIVE

43. As mentioned above, this group asserts that the proper process was not followed and that accordingly, there was no request before the Commission and no decision taken. They do not object on any substantive grounds but only on the form or format employed.
44. They state more specifically:

We submit, therefore, that Rule 3.1 must be interpreted to mean that: (a) the Chairperson of the Commission may (naturally, on request) permit the leading of evidence by a legal representative; (b) the legal representative must set out cogent reasons for the request. The application may be by way of a letter addressed to the Chairperson of the Commission (and Commissioners) and the affected parties; (c) the Chairperson may invite comments from an affected party, but ultimately it is the Chairperson who decides whether to grant the request; (d) a record of the request, objection (if any) and the directive must be sent to all parties to the Commission.²⁶

45. The legal team of the former executive members offer this ‘interpretation’. They do so because none of this is to be found in rule 3.1 or anywhere else in the rules.
46. Rule 3.1, and the rules more generally, do not prescribe an application or any particular process to activate a direction in terms of this rule. If a formal application had been intended, it would have been a simple matter to have included the words “*on application*” in rule 3.1.

²⁶ Para 4.3 of the Objection of the Former Members of the Executive dated 5 November 2025.

47. Indeed, the Chairperson may even make such a direction *mero motu* or adopt any process she deems expedient. Her hands may not be tied in this regard.
48. In this instance the Calata Group suggested to the Evidence Leader that it would be expedient for Varney to lead their witnesses, which was in turn placed before the Chairperson for her decision. The decision was subsequently communicated by the Secretary of the Commission.
49. Since there was manifestly no prejudice that could arise from a legal representative leading his or her own witnesses, there was no need for the Chairperson to consult with other parties or hold a hearing before making a decision; and indeed, the legal team for the former executive members, correctly, alleges no prejudice.

Claim of no relevant documents

50. We note in passing that the former members of the executive group (“**the FME Group**”) claim that “*so far, the Commission has not produced any relevant documents that seek to demonstrate the political interference.*” They also suggest that the Calata Group has failed to put up documents it intends to rely on. This is an extraordinary claim to make and suggests that the team for the FME Group has much reading to do.
51. This Commission exists because of the application that the Calata Group brought earlier this year. That application consists of a comprehensive founding affidavit and a large number of statements and documents as annexes. The Calata Group made it clear that they rely in large part on those papers. These papers have been publicly available since January and have been on the Commission’s website since at least mid-August.
52. The Calata Group legal team organised the different statements into separate bundles and provided both hard certified (6 lever arch files) and electronic copies to the Commission on 10 October 2025, as requested by the Secretary.²⁷ We were one of the only parties to comply with the Commission’s request to supply statements and documents by that date.

²⁷ Available at: https://www.trc-inquiry.org.za/wp-content/uploads/2025/11/2025-10-10-Calata-and-Others-Witness-Bundle_COI-2.pdf and https://www.trc-inquiry.org.za/wp-content/uploads/2025/11/2025-10-10-Calata-and-Others-Witness-Bundle_COI-1.pdf

53. We indicated that the witnesses in question would confirm their earlier statements when on the stand under oath. Between 27 October and 5 November 2025, we also supplied confirmatory affidavits to the Commission from the 8 witnesses confirming their earlier statements.²⁸
54. To further assist the Commission, and the legal teams representing the 30 identified persons of interest, we prepared bundles of extracts where each person was mentioned or implicated in the Calata founding affidavit. These 'extracts' included hyperlinks to many of the documents and/ or identified the annexes where they were located in the Calata papers.
55. These were provided to the Commission on 12 September 2025. We understand that these bundles were used by the Commission to prepare the Rule 3.3 notices before it was sent to the implicated persons in question between mid-September and early October.

OBJECTIONS OF THE GOVERNMENT OBJECTORS

NPA

56. Most of the NPA objections have already been dealt with above. These include the claim of an "*improper private arrangement*" and the claimed "*uncertainty as to who took the decision*". These were dealt with under 'procedural history' above.
57. The claim that the Calata Group failed to provide witness statements is meritless as described in detail in the preceding section, which will not be repeated here.
- 57.1. Indeed, on 24 September 2025, Varney collegially shared with the junior counsel for the NPA a proposed draft schedule for the November hearing, which identified available statements per witness together with links to their statements.²⁹
- 57.2. We even identified the paragraphs we intended to rely on in those statements.

²⁸ Posted at <https://www.trc-inquiry.org.za/> under Submissions in the Calata folder.

²⁹ Adv Ntloko acknowledged receipt on 25 September 2025.

- 57.3. This document was also shared with the Commission Secretary on the same date, but since it has not been posted on the website, we annex it hereto marked “A”.
- 57.4. In addition, as mentioned above, extracts relating to each person of interest were supplied to the Commission on 12 September 2025 and were subsequently sent by the Commission to such persons (including former NPA personnel) in the form of Rule 3.3 notices.
58. In the circumstances, the claim by the NPA that itself and the other parties “*are forced to operate in the dark*” and do not know what case they must meet is, with respect, an absurd claim.
59. In the objection, the NPA seeks the recusal of the Chief Evidence Leader, Semanya SC, because he represented government parties in the litigation challenging the Prosecution Policy amendments in 2008.
- 59.1. We have indicated that the Calata Group is satisfied with the ruling of the Chairperson in her letter to Webber Wentzel dated 19 September 2025, in which she indicated that Semanya would not be involved in deliberations on that question, since other evidence leaders would deal with it.
- 59.2. This issue is, in any event, unconnected to the question of the Calata Group leading its witnesses.
60. On the question of whether the NPA will suffer prejudice if the Calata Group legal team leads its witnesses, the NPA is conspicuously silent. The asserted prejudice is confined to the complaint that they were not consulted in the Commission’s decision to permit Varney to lead certain witnesses.
61. In respect of substantive prejudice arising from a non-evidence leader leading a witness, the only claimed prejudice we could find was the claim made by Ms Ntloko at last Monday’s pre-hearing meeting, “*that the Evidence Leaders were appointed to lead evidence which they were seeking to outsource to the representative parties.*”

62. The mere fact that someone other than an evidence leader leads evidence before the Commission is not *ipso facto* prejudicial. The NPA offered no explanation as to why this would be prejudicial on the face of it.
63. In the circumstances, the NPA's objection is substantively devoid of content and can only be described as frivolous. It appears aimed solely at preventing the Calata Group from leading evidence by counsel well acquainted with the facts and details.

The MOJ

64. The MOJ claims that the process followed by the Commission in granting permission for Varney to lead certain evidence was "*inconsistent with the directive previously issued by the Chairperson*" in respect of the ruling of the Chairperson in respect of the role of Semenya in relation to the Prosecution Policy amendments.³⁰
65. As mentioned above, the two issues are unconnected and the MOJ makes no attempt to explain why the decision runs foul of the aforesaid ruling.
66. In relation to prejudice, the MOJ makes similar process claims of procedural unfairness, which have been dealt with above.
67. In relation to substantive prejudice the MOJ states:

"The Minister has a right to a fair hearing. This will no doubt be compromised if Adv Varney SC and his clients' representative lead the Commission's witnesses.

The prejudice cannot be cured merely by extending the same irregular procedure to all parties. The integrity of the inquiry demands adherence to a consistent, impartial process as envisaged by the Commission's rules."³¹

68. The claim that the Minister's right to a fair hearing will be compromised by the mere fact of Varney leading witnesses is a bald claim and unexplained. As mentioned above, it does not follow that prejudice arises on the mere *ipso facto* of a non-evidence leader leading evidence.

³⁰ Para 7 of the MOJ objection.

³¹ Paras 13 - 14 of the MOJ objection.

SAPS

69. The SAPS objections are not materially different from the other government objections and do not warrant a separate response.

CONCLUSION

70. In the circumstances, the objectors have made out no case to disturb the decision of the Commission to grant the Calata Group permission to lead certain witnesses.
71. No substantive prejudice has been demonstrated, and it appears that the objectors, the government objectors in particular, are intent on stopping the Calata Group from the benefit of having the evidence they have marshalled over several years from being led by counsel familiar with that evidence.
72. This is not a legitimate objection.
73. Accordingly, it is respectfully submitted that the Calata Families be permitted to lead the witnesses as requested.

HOWARD VARNEY
Instructed by Webber Wentzel
7 November 2025