

**THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS REGARDING
EFFORTS OR ATTEMPTS TO STOP THE INVESTIGATIONS OR PROSECUTION
OF TRUTH AND RECONCILIATION COMMISSION CASES (TRC CASES
INQUIRY)**

HELD AT:

Sci-Bono Discovery Centre, corner Mirriam Makeba & Helen Joseph Street,
Newtown, Johannesburg

BEFORE:

The Honourable Justice Sisi Khampepe (Judge RTD) – Chairperson
The Honourable Justice Frans Diale Kgomo (Judge President RTD)
Adv Andrea Gabriel (SC)

WRITTEN SUBMISSIONS ON BEHALF OF THE SAPS

TABLE OF CONTENTS

INTRODUCTION	2
BACKGROUND FACTS.....	2
BASIS FOR OBJECTION	4
STATUTORY FRAMEWORK.....	5
THE ROLE OF THE COMMISSION OF INQUIRY	7
PREJUDICE	8
CONCLUSION.....	10

INTRODUCTION

1. These written submissions are filed on behalf the South African Police Service (“**SAPS**”), pursuant to the Commission’s letter dated 27 October 2025. In terms of the said letter, the parties were invited to file their written submissions in respect of *‘the objection raised 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’*.
2. Prior to dealing with the legal grounds underpinning the SAPS’ objection towards the approach adopted by the evidence leaders in relation to the leading of evidence during the public hearings, we set out a brief background of facts giving rise to the current dispute.

BACKGROUND FACTS

3. During the Commission’s pre-inquiry meeting held on 27 October 2025, the parties’ attention was drawn to the fact that the lead counsel for Webber Wentzel, Adv H Varney SC (“**Adv Varney SC**”), acting on behalf of the *Calata Family and Others*, would be permitted to lead his own clients’ evidence as opposed to that being done by the evidence leaders.
4. On clarity being sought by concerned parties as to why Adv Varney SC would be allowed to lead the evidence of his own clients, the parties were referred to the contents of a letter dated 29 September 2025, addressed to the Chairperson of the Commission, Justice Khampepe (“**the Chairperson**”) by Webber Wenzel. The said letter pointed to an ‘*agreement*’ reached between

the Commission's Evidence Leader, Adv I Semanya SC ("**Adv Semanya**") and Adv Varney SC, to the effect that the latter would be permitted to lead evidence of their own clients during the public hearings.¹

5. It then became apparent that the following events took place without the knowledge of the other parties that are before the Commission, including the SAPS:

- 5.1 that on 18 September 2025, Webber Wentzel addressed a letter to the Chairperson of the Commission, Justice Khampepe ("**the Chairperson**"), highlighting the fact that Adv Ishamel Semanya SC represented the National Director of Public Prosecutions ("**the NDPP**") and the Minister of Justice in the matter of **Nkadimeng and Others v National Director of Public Prosecutions and Others**.² It was further proposed in the Webber Wenzel letter that Adv Semanya SC should not be involved in any of the deliberations or leading or cross-examination of witnesses in relation to the amendments of the Prosecution Policy;

- 5.2 on 19 September 2025, the Chairperson responded to Webber Wentzel, advising them of the fact that she would go with their proposed solution and would have another member of the Evidence Leader deal with this aspect (the Prosecution Policy);

¹ Record on page 97 – 98.

² [2008] ZAGPHC 422.

- 5.3 notwithstanding, the Chairperson's decision that evidence would be led by another member from a team of Evidence Leaders, Adv Semenya SC entered into an arrangement with Adv Varney SC that the latter would lead evidence of his own clients.
6. Having noted the objection(s) raised against the agreement he entered with Adv Varney SC, Adv Semenya SC expressed a view that there would be no prejudice if Adv Varney SC was allowed to lead the evidence of his own clients.³ He further enquired as to whether there would be any further objection if each party was to be allowed to lead their own clients' evidence in order to address the concerns raised. It then became very clear that the said approach would still not remedy the cause for the objection raised by concerned parties.⁴ This culminated in Adv Semenya SC inviting the parties to file their written submissions in support of their objection(s) for oral arguments before the Commission on 10 November 2025.

BASIS FOR OBJECTION

7. As clearly evinced by the record of the pre-inquiry hearing held on 27 October 2025, the objection by the SAPS, among others, was directed at the process followed by Adv Semenya SC, in agreeing with Adv Varney SC to lead evidence of his own clients during the public hearings.⁵

³ Record on pp 82 - 86.

⁴ Record on pp 108 – 109.

⁵ Record on p 99.

8. The SAPS' position in relation to its objection towards the process followed by Adv Semanya SC is further reaffirmed in the formal objection filed with the commission on 5 November 2025.⁶ In addition thereto, the SAPS objects against to an arrangement made between Adv Semanya SC and Adv Varney SC regarding the leading of evidence without the involvement of all interested parties.⁷
9. It therefore follows that the Commission's letter dated 27 October 2025 misconstrued the nature of the objection(s) that gave rise to the filing of these written submissions by stating that the objection was raised against the leading of witnesses by their legal representatives when so requested.

STATUTORY FRAMEWORK

10. This Commission is a public body that was established in terms of section 1 of the Commissions Act No. 8 of 1947.⁸
11. The conduct of the Commission's proceedings is governed by the **RULES OF THE JUDICIAL COMMISSION OF INQUIRY TO INQUIRE INTO ALLEGATIONS REGARDING EFFORTS OR ATTEMPTS HAVING BEEN MADE TO STOP THE INVESTIGATION OR PROSECUTION OF TRUTH AND RECONCILIATION COMMISSION CASES**, issued in terms of the Government Gazette No. 53251 dated 29 August 2025 ("**the Rules**").

⁶ Formal Objection at para 8.

⁷ Formal Objection at para 5.

⁸ Proclamation Notice R. 278 of 2025.

12. Rule 3 deals with the witnesses presented by the Commission's Evidence Leader and implicated persons and their evidence and reads thus:
 - "3.1 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 bars the overall responsibility to present the evidence of witnesses to the Commission."**
 - 3.2 A member of the Commission's Evidence Leader may put questions to a witness whose evidence is presented to the commission by the Commission's Evidence Leader including questions aimed at assisting the Commission in assessing the truthfulness of the evidence of a witness. Subject to the directions of the Chairperson, the Commission's Evidence Leader may ask leading questions."** (emphasis added)
13. It is therefore very clear from the reading of the Rules that absent anything to the contrary, the responsibility to present evidence in the Commission is reserved for evidence leaders.
14. Even more fundamentally, the Terms of Reference of the Commission of Inquiry do not sanction a process where the evidence leader may on his own discretion (without any directions and/or ruling from the Chair of the Commission), to conclude an agreement with one party and afford it an entitlement and/or a right to lead its own witnesses.
15. In fact, all witnesses who are called upon to testify in a Commission of Inquiry should all be treated as witnesses for the Commission even in instances where they may choose to have their own private legal team to be present in the Commission of Inquiry in order to advise them accordingly.

THE ROLE OF THE COMMISSION OF INQUIRY

16. In a Commission of Inquiry:
 - 16.1. all witnesses who are called upon to testify are regarded and considered as the witnesses for the Commission;
 - 16.2. the nature of the Commission of Inquiry is not adversarial in nature, but fact finding and that is the reason why all witnesses must be treated equal without any witnesses being afforded a privilege of being led by their own lawyers;
 - 16.3. all witnesses ought to be led by the evidence leaders duly appointed to execute that function on behalf of the Commission.
17. In order to maintain transparency, objectivity and fairness, all witnesses of the Commission ought to be treated the same, consulted upon with the evidence leaders and their evidence being presented with the assistance of the evidence leaders.
18. Even more fundamentally, there should not be any meetings that are held without the involvement of all the legal teams of the parties where procedural issues impacting on the process and procedures of this Commission are discussed and/or agreed upon.

19. Mlambo JP (as he then was) explained in **Corruption Watch and Another v The Arms Procurement and Others**⁹ that the purpose of a commission of inquiry is to restore public confidence in the situation which is investigated and thus should operate within the framework of the principles of legality. This can only be achieved if Evidence Leaders execute their functions in manner that is fair, transparent, reasonable and within the Commission's terms and mandate.
20. The court further clarified in *Corruption Watch* that:

“[16] Although a judicial commission of inquiry is entirely a different legal body from that of the Public Protector, the following dictum of Nugent JA in *Public Protector v Mail and Guardian* 2011 (4) SA (420) SCA at para 21 would appear to be equally applicable in that it reveals the legal confines within which a commission is enjoined to investigate a defined set of issues:

'But I think there is nonetheless at least one feature of an investigation that must always exist - because it is one that is universal and indispensable to an investigation of any kind - which is that the investigation must have been conducted with an open and enquiring mind. An investigation that is not conducted with an open and enquiring mind is no investigation at all.'

PREJUDICE

21. It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the

⁹ 2019 (10) BCLR 1218 (GP) at para 15.

Executive and other functionaries must, at least, comply with the requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.¹⁰

22. The Rules of the Commission make it clear that the role of leading of evidence is vested upon the evidence leaders. No such provision is made in the Rules to allow any of the parties other than evidence leaders to lead evidence of their own clients. Consequently, the agreement entered between Adv Semanya SC and Adv Varney SC falls outside the parameters of the Rules of the Commission.
23. Furthermore, it is common cause that the agreement reached between Adv Semanya SC and Adv Varney SC regarding the leading of evidence was taken without interested parties being afforded any opportunity to partake in the discussion leading up to the said agreement.
24. The *audi* principle is a rule of natural justice which comes into play whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting individual in his liberty or property or existing rights, or whenever such individual has a legitimate expectation entitling him to a hearing, unless the statute expressly or by implication indicates to the contrary.¹¹

¹⁰ *Pharmaceuticals Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) at para 85.

¹¹ *South African Roads Board v City of Council Johannesburg* 1991 (4) SA 1 (AD).

25. The *audi* principle is also but one facet, albeit an important one of the general requirements of natural justice that in the circumstances postulated the public official or body concerned must act fairly. The duty to act fairly, however, is concerned only with the manner in which decisions are taken: it does not relate to whether the decision itself is fair or not.¹²

CONCLUSION

26. Having considered the legal principles set out above, it is submitted that the process followed by Adv Semenya SC to enter into an agreement with Adv Varney SC so that the latter shall be permitted to lead evidence of his own clients is inherently prejudicial for lack of consistency with the principle of legality.
27. In the premises, the SAPS submits that the Commission should find that the leading of evidence be done by evidence leaders as contemplated in the Rules. In addition thereto, is submitted that the evidence related to the amendment of the Prosecution Policy be assigned to another evidence leader other than Adv Semenya SC to ameliorate a potential conflict of interest.

Phillip Mokoena SC

Motlalepule Rantho

Chambers, Sandton

6 November 2025

¹² *Du Preez and Another v Truth and Reconciliation Commission* [1997] ZASCA 2; *Van Huyssteen and Others NNO v Minister of Environmental Affairs and Tourism and Others* 1996 (I) SA 283 (C) at 304 A - 305 D; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC).

