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

In the matter between:

JACOB GEDLEYIHLEKISA ZUMA Applicant

and

JUSTICE SISI KHAMPEPE, THE CHAIRPERSON

OF THE COMMISSION Respondent

FORMER PRESIDENT ZUMA'S HEADS OF ARGUMENT

PREAMBLE

"***That justice publicly be seen to be done necessitates, as an elementary requirement to avoid the appearance that justice is being administered in secret, that the presiding judicial officer should have no communication whatever with either party except in the presence of the other.***"[1]

[1] Per Howie JA in *S v Roberts* 1999 (4) SA 915 (SCA) at paragraph [23].

A: INTRODUCTION

1. Naturally the starting point is the Constitution. The purpose of this application is, above all, to vindicate the Constitution.

2. In a constitutional democracy the very idea of a Judicial Commission of Inquiry, which is an organ of state, being afflicted by bias is a direct affront to sections 9, 34, 165 and/or 195 of the Constitution which guarantee, respectively, equality before the law, fairness before tribunals, an independent and impartial judicial and last but not least that organs of state must maintain "*a high standard of professional ethics*" and provide their public services "*impartially, fairly, equitably and without bias*".

3. In the present application it is not disputed that:-

   "*The Commission must be guided, inter alia, by the Constitution and its values and principles, including the rule against bias and the sacrosanct principle that Justice must not only be done but it must be seen to be done*."[2]

4. The conduct impugned in this application violates each and/or all of the above constitutional provisions as well as the rules of natural justice especially *nemo iudex in sua causa* also knows as the rule against bias. It also fails the well-established test for actual and/or reasonably apprehended bias which has been developed through the cases.

5. It is against the above background that this application ought properly to be determined. The legal position was correctly summed up as follows in the leading case of ***Basson v Hugo***[3]:-

   "*The rule against bias is foundational to the fundamental principle of the Constitution that courts, as well as tribunals and forums, must not only be*

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2 Zuma FA paragraph 44, paginated papers page 13 (Bundle A).
3 *Basson v Hugo* 2018 (3) SA 46 (SCA) at paragraph [41].

independent and impartial, but must be seen to be so. The constitutional imperative of a fair public hearing is negated by the presence of bias, or a reasonable apprehension of bias, on the part of a judicial or presiding officer."

6. The second crucial feature of this application is that the purported defences raised on the crucial issues are framed in the form of confession and avoidance. This means that the underlying factual allegations are admitted but must be defeated with a counter factual. However, the answering affidavit seeks to do so without presenting contradictory facts which simply means that the allegations in the founding affidavit are totally admitted. This has far reaching and fatal implications for the case of the respondent. The legal effect of a confession and avoidance defence is to shift the onus to the respondent to prove the justification. This is known as the ***Mabaso***[4] principle. It applies in "*a true case of confession and avoidance, in which the onus to prove the avoidance …rests with the defendant*".[5]

7. To be sure, the threat to present "*further and better evidence*" in reply was specifically made "*in the unlikely event of any denials*"[6] of the facts pleaded in support of the alleged misconduct. In the absence of such denials, there was therefore no need to furnish such further and better evidence in reply. To the extent that it is done it is from an abundance of caution.

8. Furthermore and due to the multiplicity of the pleaded grounds of recusal and the participating parties, this is the kind of case in which it would be easy to gloss over the specific grounds of recusal which have been raised, their true nature, their interrelatedness and the applicable test(s).

9. In this particular matter we are dealing with two recusal applications separately instituted by Former President Jacob Zuma and Former President Thabo Mbeki (representing himself and Former Ministers Mabandla, Nqakula, Didiza

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4 So-called because of the leading judgment in *Mabaso v Felix* 1981 (3) SA 865 (A).

5 Per Vivier JA in *Minister of Law and Order v Monti* 1995 (a) SA 35 (A) at 40 C, in which the *Mabaso* principle was reaffirmed.

6 Zuma FA paragraphs 8 and 40, pages 6 and 12 (Bundle A).

and Kasrils). There are differences as well as significant overlaps between their two mutually supporting applications. These overlaps, particularly regarding institutional bias and procedural irregularities, collectively demonstrate a pattern that undermines the appearance of impartiality.

10. Four of the five grounds for recusal pleaded by the applicants are based on reasonably apprehended bias. The one stand alone ground which has been raised by President Zuma alone, namely the alleged misconduct ground, is based on actual bias.

11. The five grounds raised by the applicants have been conveniently grouped into three topics, namely:-

    11.1. The occupational history ground;

    11.2. The Semenya recusal application misconduct and bias; and

    11.3. The detention without trial judgments.

12. Before dealing in detail with these topics it will be appropriate to outline the preliminary issues which arise from the papers and also some of the over-arching general principles applicable to recusal applications.

B: SALIENT FACTS

13. The material facts pleaded by the applicants are largely in the main common cause and/or not seriously disputed. Where bare denials are offered, they are ineffective, especially where the facts lie within the Chairperson's unique knowledge.

14. It needs to be said upfront that no genuine disputes arise. The legal position was correctly articulated as follows in ***Wightman*** [7]:-

"*A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment*."

15. With that in mind, in this application the law must therefore be applied to the admitted facts.

C: PRELIMINARY ISSUES

16. There are two main preliminary issues, reciprocally raised by both sides. The first one is raised in both the Zuma and Mbeki applications regarding the status of the answering affidavit and the other raised by the respondent (Justice Khampepe or "the Chairperson") as well as the Calata Group of victims of apartheid atrocities, regarding unreasonable delay in bringing the recusal applications. We deal with these in turn as well as a third objection which arises from the papers.

C1: Status of the answering affidavit and authority to act on behalf of the respondent

17. The applicant has challenged the competency and/or status of the answering affidavit in so far as it is authorised by Adv Semenya SC purported on behalf

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7 *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* (2008 (3) SA 371 (SCA) at 375 F.

of the Commission as well as his authority to act on behalf of the respondent for various reasons including:-

17.1. The Commission is not a party to the application. No objection of its non-joinder has been raised.

17.2. Even if it was, there is no proper proof for the alleged authority given to the deponent by the respondent – Chairperson and/or Commission.

17.3. There is no indication of opposition or the grounds thereof from the cited respondent.

17.4. To the extent that some of the key averments made in the Chairperson, no confirmatory affidavit has been entered.

17.5. The deponent suffers from a conflict of interests, he claims to have a direct interest in the outcome and in the same breath he states that he has given legal advice in respect of the matter including the decision to oppose.

18. The procedure where an Evidence Leader deposes to an affidavit on behalf of either the Commission and/or its Chairperson, in proceedings which are ancillary to the Terms of Reference, is an unprecedented and legally incompetent invention. That role is typically and appropriately reserved for the Secretary of the Commission.

19. The objection must accordingly be upheld and the answering affidavit be rejected as *pro non scripto* and/or unauthorised. In short that means that this application must be treated as unopposed and therefore it must be granted without further ado.

C2: <u>Disqualifying remarks made or sanctioned by the Chairperson</u>

20. The second preliminary feature is that a logical consequence of the state of the pleadings may well be that the Chairperson is disqualified from sitting in this application because some of the perplexing utterances made on her behalf (or the Commission) betray that she had also prejudged the recusal application, including that:-

20.1. the applicant's former Presidents are not acting in good faith;

20.2. the legal representatives of the Former Presidents are to blame for the views expressed by their clients;

20.3. the former President has "*egregiously insulted the Chairperson*";

20.4. the application(s) are spurious, vexatious, scurrilous and even malevolent;

20.5. President Mbeki is disingenuous and/or he "*does not have confidence in the case made out in the Zuma application*",[8] the very same application in whose support President Mbeki has expressly intervened.

21. This means that the applicants carry the extra burden to disabuse the Chairperson and/or the Commission of these crystalised positions and pre-judgments made even before hearing oral argument, which is supposed to be done with an open. Under the present circumstances it is practically and logically impossible that the recusal application will be approached with the requisite open mind. The deck is already hearing stacked against the applicants.

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[8] Semenya's Answering Affidavit in the Mbeki application, page 6 (Bundle E).

22. The attitude of the Chairperson is contrary to the expectations of a reasonable decision maker and especially the following commendable principle: which have been correctly set down in our law:-

"*It should always be borne in mind that a litigant or his representative, who finds it necessary to apply for the recusal of a judicial officer is confronted with an unenviable task and the propriety of his motives should not be lightly questioned*".[9]

23. It was found that the magistrate in that case had "*regrettably showed unnecessary sensitivity in dealing with the application*".

24. In keeping with the above, a conscious decision was taken not to reciprocate the distasteful *ad hominem* attacks on the applicants or their legal representatives.

C3: <u>Alleged unreasonable or undue delay</u>

25. In our law there is no complete defence of unreasonable delay in recusal applications. While it is admittedly desirable to bring such an application as soon as the grounds are appreciated, the real test is the interests of justice. There is no hard and fast rule.

26. In the present case, there is no question of the applicants having waited until an adverse finding on the merits, before raising the issue of recusal. The sequence of events speaks for itself.

27. The triggering ground of the improper and biased giving of advice to one of the partes in the Semenya recusal application only occurred a couple of weeks before the application was duly brought.

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9 *S v Bam* 1972 (4) SA 41 (E) at 43H – 44A.

28. In assessing this objection, the grounds must be viewed cumulatively and in appreciation of the decisive impact of the abovementioned ground based on misconduct and actual bias. The latter ought properly to unravel and/or trump any technical objection.

29. It can clearly never be in the interests of justice to allow a tribunal accused of serious, impeachable and gross misconduct plus unethical behaviour to continue to function purely because of a technicality or procedural defect which is particularly applicable at best. In short, the nature of the grounds for recusal must play a role in the assessment of where the interests of justice must lean.

30. No prejudice can befall the respondent and/or the Calata Group if the issues raised by the applicants are ventilated on their merits. On the contrary and given the tragic history of the matter, the sooner that a legally compliant process is put in place, the sooner will the real issues be resolved. The balance of prejudice therefore favours an early resolution and not the introduction of procedural bogs and inevitable litigation. A robust approach is called for.

31. Even in respect of legality, reviews, in assessing the interests of justice the so-called ***Gijima***[10] principle provides that a court may overlook an unreasonable or undue delay if the impugned conduct is self-evidently illegal and unconstitutional. In short blatantly unconstitutional conduct cannot be condoned on account of procedural niceties. This principle may be extended to the present situation.

32. In short and to the extent that it is pleaded as a bar to the hearing on the merits, undue delay objection must be dismissed out of hand.

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[10] *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* 2018 (2) SA 23 (CC) at paragraphs [49] and [52].

33. At worst and even if the objection were to be upheld in respect of some of the grounds of refusal, which is still disputed, the Commission would be constrained to act consistently with the approach it took in the Semenya application, namely merely to express its deprecation of the delay after dealing with the merits and without unduly non-suiting the delaying party.

D: THE MERITS

34. In the unlikely event that the answering affidavit is recognised as competent and/or the Chairperson is allowed to sit, both of which are disputed, we proceed to deal with the merits of the recusal application.

35. Before dealing with the 3 specific headings referred to in paragraph 11 above, it would be apposite to set out the governing principles and tests applicable to applications of this nature.

36. It is trite that recusation may be based either on actual bias and/or a reasonable apprehension thereof. On either ground the outcome is exactly the same i.e. the recusal of the biased decision maker and the nullification of the proceedings, necessitating starting the process *de novo*.[11]

37. Notably and for obvious reasons, once actual bias has been established there is no need to go into the issues of reasonableness and/or presumptions of impartiality which attach to judicial officers. Those issues apply in respect of the alternative ground of reasonably apprehended bias. This is a crucial distinction which seems to be sadly lost to the respondent.

38. Another crucial distinction is that between a judicial officer acting as such and the Chairperson of a tribunal such as the present Commission, which is an advisory functionary of a member of the Executive no different from a Presidential Advisor or Director-General. To transplant the test for recusal of judges to this situation in a mechanical fashion is therefore another grave

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[11] *Basson v Hugo* (*supra*) at paragraph [42].

mistake evident in the approach adopted in the answering affidavit. This matter is more based on the realm of the administration than the judiciary.

39. To put it in clearer terms this matter is more amenable to the test articulated, ironically by Justice Khampepe herself in ***Public Protector v South African Reserve Bank***[12] than the more general and equally applicable ***SARFU*** test.[13] This is not a matter strictly concerning judicial bias as articulated, for example in the leading case of ***Bernert.***[14] That is not to say that the judicial office of Justice Khampepe is irrelevant.

40. These distinctions are correctly captured in the following passage found in Hoexter and Penfold[15]

"(I)t is presumed that judicial officers are impartial in adjudicating disputes, and similarly a suspicion of bias is regard as less likely to arise where the decision-maker is judicially trained, but that will not prevent the decision from being set aside on the ground that the decision-maker was in fact biased." (Emphasis added)

41. The third and final set of distinctions to be made relate to the types or categories of bias which are raised in the present matter. The first ground of bias based on occupational history raises both subject matter and institutional bias. The second ground to do with conduct raises subject matter bias. The third ground dealing with the Constitutional Court judgments raises personal bias in the form of enmity or negative disposition towards the applicant. There are nuanced differences in how these types of bias ought properly to be approached or tested.

42. The fourth distinction which is invoked by the respondent is between inquisitorial and adversarial proceedings. While it is true that the main

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12 *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC).
13 *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 1999(4)SA (CC) at paragraph [48].
14 *Bernert v Absa Bank Ltd* 2011 (3) SA 92 (CC).
15 Hoexter and Penfold: Administrative Law in South Africa 3rd Edition, Juta, at page 619.

investigation of the Commission is carried out inquisitorially, the respondent is seriously mistaken in conflating that with a recusal application which is clearly and undisputably adversarial in nature and posture. The defences based on the alleged inquisitorial nature of the proceedings and the fact that Commissions only make recommendations, must therefore fail.

43. It is the most basic rule of any adversarial (and even inquisitorial) proceedings that the basic rule of fairness must be observed. The same requirement applies even when no binding finding are to be made. Lord Denning MR famously stated in ***Re Pergamon Press Ltd***[16] that:-

"*It is true of course that inspectors are not a court of law. Their proceedings are not judicial proceedings … They are not even quasi-judicial, for they decide nothing, they determine nothing. They only investigate and report … But this should not lead us to minimise the significance of their task. They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some, they may condemn others, they may ruin reputations or careers*." (Emphasis added)

44. Finally in respect of general principles it must be said that these proceedings do not purport to deal with the envisaged Judicial Service complaint or any possible judicial review of the President's decision to appoint Justice Khampepe while fully aware of the alleged automatic disqualifiers. These are matters which belong to separate proceedings in different forums. Any reference to those issues is purely tangential and raised only to reinforce the real and present issue of bias.

45. Bearing all of the above in mind, we now turn to dealing with the three headings or topics which make up the three pleaded grounds for recusal. The sequencing of the discussion is purely based on convenience.

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16 *Re Pergamon Press Ltd* [1970] 3 ALL ER 535 (CA), quoted with approval in *Du Preez v Truth and Reconciliation Commission* 1997 (3) SA 204 (A).

E: THE FIRST GROUND: OCCUPATIONAL HISTORY

46. This topic essentially deals with the alleged automatic disqualification of the Chairperson based on her admitted historical positions held in the TRC and the NPA respectively. This objection is solely based on reasonably apprehended bias and not actual bias. The test has been articulated above.

47. On any reading of the papers, the only intelligible defence offered by the respondent in respect of this complaint is that the terms of reference confine the enquiry to issue which took place from 2003 onwards.

48. With respect, this defence does not hold any water. The issue is that a reasonable observer will not be nit-picking about the exactitudes of the terms of references. He or she will be presented with the naked facts that the main and broad thrust of the issues to be investigated pertain to decisions or omissions of the TRC or its Amnesty Committee and the NPA's failure to prosecute.

49. To assign that task to a person who suffers from the double conflict of having been directly associated with both of the abovementioned institutions and expect the reasonable person to apply a fine toothcomb of exceptionalisation, is clearly asking for too much.

50. In any event the 2003 cut off date is in itself artificial and unsustainable on the objective facts. The Commission's own Rule 3.3 notices, served on the applicants, explicitly reference meetings and discussions from as early as 1998, which fall squarely within the Chairperson's tenure at the TRC and/or the NPA.

51. On this point even the Calata Group confirms that::-

"*We do …. agree with Mbeki that the Commission must interrogate these interactions. It would be irrational to do so*."[17]

52. In a nutshell, these previous occupational or institutional associations place the Chairperson in the position of a potential witness in the Commission. This is an obvious disqualifier and a breach of the *nemo iudex* fundamental rule of natural justice.

53. Nothing has been said to rebut the admitted presumption of impartiality which arises from the mere occupation of the two previous positions by the Chairperson.

54. The respondent has also sadly failed to appreciate that this objection covers both subject matter bias as well as institutional bias. Regarding institutional bias, the Constitutional Court explained the test as "*bias at a structural level*", as follows:-

"*In as much as the applicant raises the issue of a relationship of influence and dependency between the Chairperson of the CCC and other individual members, the argument was that the decision-maker … is inevitably biased as a result of institutional factors rather than an individual member being biased by virtue of personal traits.*"[18] (Emphasis added)

55. Similarly and regarding subject matter bias, the court in the famous ***Pinochet*** case was at pains to point out that it was not making a finding of actual bias against Lord Hoffman, but he was "*disqualified as a matter of law automatically by reason of his Directorship of AICL, a company controlled by a party*".[19]

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17 Calata Group AA in the Mbeki Application, paragraph 75, page 16 (Bundle F).
18 *Islamic Unity Convention v Minister of Telecommunications and Others* 2008 (3) SA 383 (CC) at paragraph 41.
19 *Pinochet, In Re* (1999) UKHL1; [2001] 1 AC 119; (1999) 1 ALL ER 577 (15th January 1999).

F: THE ALLEGED MISCONDUCT AND/OR BIAS

56. Under this topic two pointed accusations have been levelled against the Chairperson, namely collusion in the form of:-

56.1. collusion by giving legal advice to and/or sharing helpful research with one party to the dispute before her;

56.2. coaching in the form of pointing out potential pitfalls to the implicated party and even going as far as propose what instructions are to be given to the legal representative of that party, Adv Vas Soni SC;

56.3. doing all of the above without the knowledge of the applicants, privately and/or secretly (in short the conduct was undisclosed);

56.4. doing so with the intention to assist Adv Semenya to succeed in the recusal application which was yet to be argued before the very same Chairperson; and

56.5. to indicate knowledge of unlawfulness, conveying the impugned messages from her private email address and not the one officially assigned by the Commission.

57. In order to properly understand the true extent and ambit of the serious accusations not lightly made against the Chairperson, one must read thoroughly and with an open mind, the contents of paragraphs 38, 39 and 40 of the Zuma Founding Affidavit.[20]

58. These paragraphs must also be read together with the contents of the letter of demand dated 03 December 2025 in which it was specifically alleged at paragraph 3.1 thereof that, *inter alia*, the Chairperson had aided and abetted Adv Semenya SC in dealing with his (alleged) conflict of interest.

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[20] At page 11 and 12 of Bundle A.

59. The most abiding feature of the present proceedings is that these accusations are not denied in any legally meaningful or sustainable manner. At best for the applicants the accusations are admitted and at worst they are responded to with a confession and avoidance. The latter is articulated in the form of a justification i.e. the advice was indeed given but there is nothing wrong in so doing because, by definition, there is frequent interaction between Evidence Leaders and Commissions.

60. Bearing in mind the discussion above in respect of the incidence of the onus, the "*defence*" is with respect a classical non-sequitur and can therefore not amount to any avoidance. It is indeed indisputable that such frequent interactions routinely and properly take place. However, that is deliberate diversion and obfuscation because, to the knowledge of the respondent, that is not the issue. Here the issue is the pleaded nature and not the mere occurrence of the alleged interactions.

61. Regarding the legal implications of the failure of a party to deal with serious accusations made against her impartiality, the Court in ***Public Protector v SARB*** had this to say, per Khampepe J:-

> *"[190] The Public Protector's failure to deal pertinently and responsibly with the serious accusations made against her impartiality in light of these meetings meant that the High Court was left with only the handwritten notes as evidence of what was discussed at the meetings and no countervailing account from the Public Protector. This led the High Court to conclude that "the question remains unanswered as to why [the Public Protector] acted in such a secretive manner and she does not give an explanation for doing so".* (Emphasis added)

62. It is by now settled law that a party is not permitted to "*envelope (its) case in a fog which hides or distorts the reality*"[21] in the manner attempted by the respondent in the answering affidavit.

63. Incidentally the issues of non-disclosure and/or secret interactions featured prominently in making the finding of bias against the Public Protector.

64. By any legal standards, a supposedly neutral, independent and unbiased decision maker who not only enters the fray but also given advice to one of the adversaries on how to obtain a favourable outcome, without the knowledge of the other side, is disqualified from any further occupation of the seat of an impartial arbiter. In this regard reference will be made to the extract from ***S v Roberts*** (*supra*) which is quoted in the preamble at the beginning of these submissions as well as the earlier case of ***Maharaj***, in which it was similarly stated that::-

"*It is elementary that a judicial office should have no communication whatsoever with either party in a case before him except in the presence of both parties*."[22]

65. Even if one were to take the longer route of confession and avoidance or justification, no valid ground of justification has been pleaded. We are therefore only left with the confession or admission and back to square one. It is trite that the onus for a justification shifts to the justification party. That onus has not been discharged or even attempted in the present application, by any stretch of the imagination and upon a proper reading of the pleadings.

66. At the risk of repetition, it ought to be self-evident that, if true, the impugned conduct is evidence of actual bias and not merely reasonably apprehended

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21 *Van der Linde v Calitz* 1967 (2) SA 239 (A) at 263D.
22 *R v Maharaj* 1960 (4) SA 256 (NPD) at 258 B – C.

bias. In ***Hamata***[23] the legal position was succinctly and correctly stated as follows:-

"*Bias or partiality occurs when the tribunal approaches a case not with its mind open to persuasion nor conceding that exceptions could be made to its attitude or opinions, but when its shuts its mind to any submissions made or evidence tendered in support of the case it has to decide. No one can fairly decide a case before him if he has already prejudged it*."

67. According to Khampepe J in ***Public Protector v SARB*** (*supra*) at paragraph 170:-

"*The context in which a public official conducts themselves in a procedurally unfair manner may …. indicate bias on the part of that official*."

68. That being so and judged by the high standards set by none other than herself in respect of the Public Protector, the Chairperson will have no option but to recuse herself from any further participation in the present Commission.

69. The mere fact that she was fully aware of the higher standard expected from her as a public official, as can be clearly read from her own judgment in the ***SARB*** case, only serves as aggravation and an indication of intention to break the law and the Constitution.

70. Another case of exemplary conduct on the part of a decision maker, which will be commenced in the alternative, is that adopted by Judge Koein in ***S v Zuma 2023 (1) SACR 621 (KZP)***.

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23 *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee* 2000 (4) SA 621 (C) at paragraph [67], per Hlophe JP and Brand J. This view was not questioned in the SCA.

G: THE DETENTION WITHOUT TRIAL JUDGMENTS

71. This heading relates to the one ground which uniquely and exclusively refers to the Zuma application.

72. The main thrust of the complaint is based on the following considerations:-

72.1. First, the tone, demeanour and content of the judgments penned by the Chairperson is indisputably hostile, vengeful and hateful towards the applicant.

72.2. Second, the applicant having been on the receiving and holds a genuine apprehension of bias.

72.3. Third, the apprehension of bias is shared by millions of South Africans.

72.4. Fourth and lastly, by her subsequent conduct in holding public interviews which are vitriolic towards the applicant, the reasonableness of the pleaded pre-existing apprehension of bias is further enhanced or aggravated.

73. As already explained, the implication of the non-denial and hence admission of these and other factual premises for the desired conclusion, spells a fatal blow to the case of the respondent.

74. Starting with a brief analysis of the impugned judgments the angry language and demeanour which is manifest in the judgments as confirmed in the subsequent public interviews leaves no doubt that President Zuma was unfairly targeted to be taught a lesson or to be used as an example that "*no one is above the law*" while forgetting that targeting itself is the exact opposite of equality before the law.

75. A very simple example of the extent to which the impugned judgments went out of their way to bend if not break the law was the application of the direct

access provisions of the Constitution to what were essentially criminal proceedings. It is unheard of that a criminal conviction and sentence can be unopposed by way of urgent proceedings and the direct access procedure. Nor is it likely that it will ever happen again. It was procedure tailor-made for one specific individual. This view is confirmed in the exclusive public interviews.

76. The juxtaposition of the minority judgment, whose conclusions were unreasonably rejected by Khampepe J, also serves to illustrate the perception of the applicant. In this regard it matters not whether Khampepe J was indeed biased, hateful and hostile or not. That is not the test.

77. The issues under this topic, especially the admitted publicity campaign conducted by the Chairperson must be viewed against the background of the multiple breaches of the applicable Judicial Code of Conduct,[24] which provides, *inter alia*, that a judge must:-

77.1. "*Save in the discharge of judicial office, not comment publicly on the merits of any case pending before or determined by that judge or any other court*.

77.2. *Not enter into a public debate about a case irrespective of criticism, levelled against the Judge, the judgment or any other aspect of the case*."

78. Article 13 of the said Judicial Code also states that:-

"*a judge must recuse himself or herself if there is a real or reasonably perceived conflict of interest or if there is a reasonable suspicion of bias based on objective facts*."

[24] Article 11 of the Code.

79. In this regard we will hand up a copy of the News24 article, which has since been obtained, as reference material. It speaks for itself as to whether the above standards have been egregiously flouted or not. In any event the publicity campaign is not denied.

80. In the totality of the circumstances the last and alternative ground for recusal ought properly to be upheld.

H: SUMMARY AND CONCLUSION

81. The first and principal ground of total recusal in the Zuma application is actual bias premised on the alleged misconduct. The second ground, based on a reasonable apprehension of bias is the occupational history ground. Regarding the Mbeki application, the two principal grounds, both based on reasonably apprehended bias are the occupational history grounds and the Chairperson's handling of the Semenya SC recusal application.

82. It therefore stands to reason that the alternative prayer for a "*partial recusal*" based only on the Constitutional Court judgments, which applies exclusively to President Zuma will not be reached if any one or more of the other grounds is upheld.

83. In structuring the legal arguments these realities will be taken into account.

84. To the extent that the Chairperson must also be assessed against her constitutional obligations as a Judge, then the broader context underlying the appointment of a judicial Commission are relevant.

85. In the present case the Chairperson has, with due respect, failed the test based on the judicial standard. A fortiori she cannot overcome the easier test for administrative bias. If necessary this application of simple logic will be explained during oral argument.

86. In the totality it is respectfully submitted that the legal effect of all the grounds pleaded in both the Zuma and supporting Mbeki applications, whether viewed individually or cumulatively, point to the irresistible conclusion that the Chairperson ought properly to recuse herself from the Commission, failing which any further proceedings are bound to be declared a nullity and invalid *ab initio*. This will not be in the interests of justice, the public and/or the long suffering victims of the abhorrent apartheid atrocities under investigation.

87. Granting this application is not an obstruction to justice. It is the essential safeguard for a Commission whose findings must command public confidence and endure historical scrutiny.

88. The application must be granted.

D.C. MPOFU SC
B.N. BUTHELEZI
K. SIHUNU
Counsel for President Zuma
Sandton
14 January 2026

LIST OF AUTHORITIES

1. Basson v Hugo 2018 (3) SA 46 (SCA)

2. Bernert v Absa Bank Ltd 2011 (3) SA 92 (CC)

3. Du Preez v Truth and Reconciliation Commission 1997 (3) SA 204 (A)

4. Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee 2000 (4) SA 621 (C)

5. Islamic Unity Convention v Minister of Telecommunications and Others 2008 (3) SA 383 (CC)

6. Mabaso v Felix 1981 (3) SA 865 (A)

7. Minister of Law and Order v Monti 1995 (a) SA 35 (A)

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