IN THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS REGARDING EFFORTS OR ATTEMPTS HAVING BEEN MADE TO STOP THE INVESTIGATION OR PROSECUTION OF TRUTH AND RECONCILIATION COMMISSION CASES

In the matters between:

JACOB GEDLEYIHLEKISA ZUMA Applicant

and

JUSTICE SISI KHAMPEPE,
THE CHAIRPERSON OF THE COMMISSION Respondent

and

THABO MVUYELWA MBEKI AND OTHERS Applicants

and

JUSTICE SISI KHAMPEPE,
THE CHAIRPERSON OF THE COMMISSION Respondent

COMMISSION'S HEADS OF ARGUMENT

TABLE OF CONTENTS

INTRODUCTION

1 On 29 May 2025, President Cyril Ramaphosa by Proclamation[1] appointed this Judicial Commission of Inquiry, which must "*in relation to the period since 2003*, inquire into, make findings, report on and make recommendations" on whether efforts or attempts were made to stop the investigation or prosecution of TRC cases. The Proclamation also appointed Justice Sisi Khampepe as the Commission's Chairperson and Justice F D Kgomo and Advocate Andrea Gabriel SC as its members.

2 Some six (6) months later,[2] former President Jacob Zuma brought an application for Justice Khampepe to recuse herself as the Commission's Chairperson. Four (4) days thereafter, former President Mbeki brought a separate application for Justice Khampepe to recuse herself. In their respective applications, both former Presidents refer to Justice Khampepe's having been a deputy NDPP some twenty-five (25) years ago and her having played a role in the TRC and its Amnesty Committee. However, both also rely on matters that arose in the course of an application to have the Commission's Chief Evidence Leader, Ishmael Semenya SC ("**Semenya SC**"), recused (which application was refused). On this issue, former President Zuma alleges that there were improper communications between Justice Khampepe and Semenya SC.

---

1 Proclamation Notice 264 of 2005. See the Terms of Reference, paragraph 1.

2 On 15 December 2025.

3 The Commission opposes the applications for the recusal of Justice Khampepe. Its Answering Affidavit in each case, was made by Semenya SC. In those affidavits, Semenya SC fully considers the grounds on which the former Presidents rely for the Chairperson's recusal and the law and principles relating to recusal applications and contends that no case for recusal has been made out. Semenya SC also deals with the allegations made by former President Zuma of improper interactions between Justice Khampepe and himself. Justice Khampepe did not deliver an affidavit.

4 Astonishingly, in their respective Replying Affidavits the former Presidents challenge Semenya SC's entitlement to deliver an affidavit in opposition to their applications and contend that the reservations they expressed about Justice Khampepe's chairing the Commission stand unchallenged and their applications ought to succeed.

5 In respect of the support for and opposition to the recusal applications, the following needs to be noted:

5.1 First, the Calata Group opposes the applications that Justice Khampepe recuse herself and has filed its Answering Affidavits.

5.2 Second, the Minister of Justice and Constitutional Development and the NDPP, who had applied for Semenya SC's recusal as the Commission's Chief Evidence Leader, do not support the recusal applications.

5.3 Rather intriguingly, on the version of the two former Presidents, it is what transpired during the course of that application that prompted them to bring their respective applications for the Chairperson to be recused.

6 It may be noted that a proper consideration of the affidavits that have been filed suggests that, save for the allegations made by former President Zuma of improper interactions Justice Khampepe and Semenya SC, for the most part the applicable facts are not in essence in dispute. The difference between the Commission and the two former Presidents revolves in the main on whether on the basis of the correct facts the applications for Justice Khampepe fall to be upheld.

7 It is submitted that the principal substantive issues that are raised by the two applications are the following:

7.1 First, the grounds on which former Presidents Zuma and Mbeki base their respective applications.

7.2 Second, given that they each seek the same relief, would it not be convenient to deal with the applications together.

7.3 Third, what should be the impact of the undue delay in the bringing of their applications by the former Presidents.

7.4 Fourth, is there merit in any of the grounds on which they rely, whether these are considered individually or collectively.

8 As has already been pointed out, it is also suggested that the allegations made in respect of the Chairperson stand unopposed and that in effect the applications fall to be determined on the basis of unchallenged evidence of the two former Presidents, as this is set out in their respective affidavits. It is submitted that this is a preliminary issue and ought to be addressed quite early on.

9 However, it is submitted that, given the quite unusual features of the recusal applications and the grounds on which it is alleged or contended that Justice Khampepe is disqualified from chairing this Commission, it will be instructive and helpful to begin by setting out what the tasks of the Commission are and what the relevant principles are in matters such as this.

THE COMMISSION'S TASKS AND FULFILMENT THEREOF

10 The Commission's tasks,[3] are in the main to inquire into, make findings and report on and make recommendations on inter alia the following:

10.1 whether, since 2003, efforts or attempts were made to influence or pressure members of the SAPS or the NDPP to stop investigating or prosecuting TRC cases;

10.2 if so by whom were they made;

10.3 whether such members improperly colluded with such attempts; and

---

3 As set out in the Proclamation establishing it: Government Notice 264 of 2025.

10.4 whether action should be taken against such persons or members.

11 The task of the Commissioners (Justice Khampepe, Judge Kgomo and Advocate Gabriel SC) to assess evidence, whether documentary or oral, that is presented to them and, having regard to their factual findings, to make recommendations.

12 As is detailed hereunder, the Commission is not empowered to take any action against anyone. That power resides in the President. The Commission's main task is to ascertain the facts in respect of the matters that it is to inquire into and make recommendations to the President. Accordingly, the Commission's proceedings are inquisitorial in nature: they are not adversarial. This means that the *commission* must make its own inquiries, seek out evidence itself, and interrogate the veracity of evidence where that is required. Counsel appointed by a commission facilitates the performance of these functions, under the *direction of the commission*.[4] [Emphases added.] The goal of the Commissioners and the Evidence Leaders is to establish all the relevant facts to enable them to make recommendations to the President. As a result, unlike in a criminal or civil trial, or even in an ordinary inquiry whose task is to apportion blame, the Commissioners themselves may, and do, play a role in advising the Evidence Leaders on various matters such as whom to call as witnesses. In addition, it is the Chairperson who has the power to decide on

---

[4] See paragraph [29] of the Ruling of Justice Nugent in the Commission of Inquiry into Tax Administration and Governance by the South African Revenue Service.

such matters as the sequence in which evidence is to be led and whether cross-examination of a particular witness should be permitted.[5]

13 As a result, there is a need for frequent interaction between the Commissioners, on the one hand, and Evidence Leaders on the other, many of which take place in the absence of other "parties" or persons who may appear before the Commission: there is nothing untoward about such interactions, especially between the Chairperson and the Chief Evidence Leader.

14 Given the reasons why and the purposes for which Commissions of Inquiry are established, it can hardly be alleged or contended that the independence of the Chairperson or the other Commissioners is compromised by adopting the processes summarised above. Whilst it is they who ultimately determine what the true factual position is, they are also required to ensure that there is a proper and thorough search for all the relevant facts and that these are uncovered. In addition, the fact that the hearings of Commissions are held in public and that interested or implicated persons are permitted legal representation conduces to ensure that their respective rights and interests are protected and that the Commission's proceedings are fair to all categories of persons, both those who make accusations and those against whom accusations are made, that is "implicated" persons.

---

5 Rule 8 of the Commission's Rules. In addition, the Ruling of Justice Nugent in the SARS Inquiry provides a helpful analysis of the workings and operations of Commissions of Inquiry.

APPLICABLE PRINCIPLES

15 It is submitted that for the purposes of these applications, the applicable principles may be summarised as follows.

16 First, an application for recusal is not there simply for the asking. A proper case for such recusal must be made by the applicant.

17 Second, in respect of a Judge, the applicant for recusal bears the onus of alleging and establishing the following on an objective basis:[6] the facts on which he or she relies; and that a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on *the adjudication of the case*, that is a mind open to persuasion by the evidence and the submissions of counsel.

18 Third, the reasonableness of the apprehension must be assessed in the light of the *true facts as they emerge at the hearing of the application*[7] and in light of the oath of office taken by judges to administer justice without fear or favour or prejudice; and their ability to carry that out by reason of their training and experience.[8]

19 Fourth, the presumption of impartiality and the double requirement of reasonableness underscore the formidable nature of the burden resting upon

---

6 *President of the Republic of South Africa and Others v South African Rugby Union and Others* ("*SARFU 1*")1999 (4) SA 147 (CC), at para [48].

7 Ibid, [para 45].

8 Ibid and para [34].

the litigant who alleges bias or its apprehension. The idea is not to permit a disgruntled litigant to successfully complain of bias simply because the judicial officer has ruled against him or her.[9]

20 Fifth, judges have a duty to sit in on any case in which they are not obliged to recuse themselves.[10] Litigants should not be encouraged to believe that, by seeking the disqualification of a judicial officer they will have their case heard by another judicial officer who is likely to decide the case in their favour. As has rightly been observed, judges do not choose their cases and litigants do not choose their judges. An application for recusal should not prevail, unless it is based on substantial grounds for contending a reasonable apprehension of bias.[11]

CONSIDERATIONS TO BE TAKEN INTO ACCOUNT IN THE PRESENT APPLICATIONS

21 In assessing the case for recusal made by the two applicants, it is submitted that it will be instructive to keep in mind the following propositions.

22 First, the person whose recusal is sought is a retired Justice of our highest Court, namely the Constitutional Court.

---

9 *Bernert v Absa Bank Ltd* 2011 (3) 92 (CC), at [35].

10 *SARFU* (above), at [34].

11 *Bernert* (above), at [35].

23 Second, Justice Khampepe has been appointed by the President, in terms of section 84(2)(f) of the Constitution of the Republic of South Africa Act,[12] to chair the Commission, which has been established to inquire into a matter of public importance.

24 Third, the Commission is not a court of law: it is not empowered to determine rights: its task is to ascertain the facts and make recommendations, but it itself takes no decisions.

25 Fourth, it is well established that the functions of such a commission of inquiry are to determine facts and to advise the President through the making of recommendations. The President is not bound neither to accept the commission's factual findings nor is he or she bound to follow its recommendations.[13]

26 Fifth, while it is so that the Commission is not performing judicial functions, this being a judicial commission of inquiry, Justice Khampepe's appointment as Chairperson is tied to her being a retired Justice of the Constitutional Court. Accordingly, the reasonableness of the apprehension of bias must be assessed in the light of the oath of office she took as a judge to administer justice without fear, favour or prejudice and her ability to carry out that oath by reason of her training and experience.

---

12 No. 108 of 1996 ("**the Constitution**").

13 *President of the Republic of South Africa and Others v South African Rugby Union and Others* 2000 (1) SA 1 (CC) *(SARFU III)* (quoted with approval by Jafta J in *Secretary, Judicial Commission of Inquiry into allegations of State Capture v Zuma* 2021 (5) 1 (CC), at para [4].

27 Sixth, while this is not a “case”, the principle that judicial officers have a duty to sit in all cases in which they are not disqualified from sitting (a duty that flows from their duty to exercise their judicial functions), the applications for recusal ought not to prevail, unless based on substantial grounds for contending a reasonable apprehension of bias, or according to former President Zuma, actual bias.

GROUNDS ON WHICH APPLICATIONS FOR RECUSAL ARE FOUNDED

28 Former President Zuma in essence relies on three grounds for the recusal of the Chairperson. Briefly, these grounds are:

28.1 the Chairperson was a member of the TRC and also its Amnesty Committee and she was the Deputy National Director of Public Prosecutions under Advocate Bulelani Ngcuka;

28.2 she allegedly secretly gave advice to the Commission’s Chief Evidence Leader on how to oppose an application for his recusal as the Commission’s Chief Evidence Leader; and

28.3 she was a member of the Constitutional Court that delivered judgments that were adverse to the Applicant and penned two of those judgments.

29 Former President Mbeki relies on two grounds for seeking the Chairperson’s recusal. In essence, they are as set out hereunder.

30 The first relates to Chairperson's past institutional involvement in matters which are claimed to be directly connected to the TRC investigations and the NPA and will create an "objectively grounded concern" that she may not bring the requisite detachment and impartiality to an inquiry scrutinising conduct and decisions of institutions in which she previously played "material roles".

31 The second concerns the manner in which the Chairperson "handled" the alleged conflict of interest objections made against the Commission's Chief Evidence Leader and her "endorsement" of an alleged procedurally irregular arrangement between him and the Calata Group's counsel relating to the leading of evidence of certain witnesses.

32 Based on the foregoing it is submitted that, save in respect of former President Zuma's allegation of improper interactions between the Chairperson and the Commission's Chief Evidence Leader the essence of the grounds relied on by former President Zuma and former President Mbeki are the same.

33 In the circumstances, as was noted in the Commission's Answering Affidavit to former President Mbeki's recusal application, it is intriguing that he brought a separate recusal application instead of simply supporting former President Zuma's application.

34 Be that as it may, it is submitted that as there is a significant overlap between the two applications, it would be convenient to deal with the two applications in the same hearing. As noted in the section of the Heads hereunder, there are further reasons for doing so.

APPLICATIONS SHOULD BE DEALT WITH TOGETHER

35 Whilst considered from a formal perspective, they are separate applications, the applications have the following matters in common.

35.1 First, at all relevant times both former Presidents occupied senior leadership positions in the ANC.

35.2 Second, each is accused by the Calata Group of being involved in "secret deals" that in part at least contributed to the refusal or failure of the Police Service to investigate and the NDPP to prosecute perpetrators of atrocities and grave human rights abuses during the apartheid era.

35.3 Third, while the Commission was established in May 2025, each waited for some six (6) months before bringing his application.

35.4 Fourth, each in his recusal application complains stridently about the Commission being chaired by Justice Khampepe, whose appointment as such was made known at the time the Commission was established.

35.5 Fifth, neither provides any acceptable explanation for why he waited for more than six (6) months before bringing his application.

35.6 Sixth, intriguingly, although an application was made in October 2025 for the recusal of the Chief Evidence Leader, neither of the former Presidents was party to that application or participated therein. Yet,

each relies, in part at least, on what transpired in that application. In addition, each also relies on the fact that more than twenty-five (25) years ago Justice Khampepe had served as the Deputy NDPP and had been appointed as a member of the TRC and a member of its Amnesty Committee. It is so that former President Zuma relies on a further ground: judgments handed down by the Constitutional Court about his refusal to appear before the State Capture Commission and the consequence thereof.

36 It ought to be borne in mind that the former Presidents bring their applications at this late stage while victims of apartheid-era atrocities or their families complain about the delay of some twenty (20) years, for the most part of which the two former presidents occupied the highest executive office in the land. Significantly, it is alleged that former President Mbeki and former President Zuma, who during that period bore the constitutional obligation to bring to book the perpetrators of those atrocities, failed to do so in part on account of “secret agreements” between them and leaders of the perpetrators. The late bringing of their recusal applications further delay that process, while the victims and their families, and indeed the nation, await explanations on why investigations or prosecutions did not take place.

37 As has already been noted, Semenya SC’s entitlement to depose to the Answering Affidavit in response to each of the applications is also challenged. It is convenient to deal with that issue at this stage.

SEMENYA SC'S ENTITLEMENT TO DEPOSE TO AN ANSWERING AFFIDAVIT

38 Semenya SC deposed to an Answering Affidavit responding to the Founding papers in each of the applications. As set out therein, Semenya SC made the affidavits on his own behalf and on behalf of the Commission.

39 However, in his Replying Affidavit former President Zuma contends that that affidavit ought not to be received. He bases his challenge to receipt of the affidavit on two grounds.

39.1 First, he alleges that Semenya SC is not entitled to deliver an affidavit. That assertion is with respect astonishing on account of the following. Mr Zuma makes serious allegations of impropriety against Semenya SC which he further alleges constitutes one of his grounds for the recusal of the Chairperson. It is submitted that on that basis alone Semenya SC is entitled to deliver an answer to the allegations.

39.2 Second, in any case, in his capacity as counsel to the Commission,[14] Semenya SC must be entitled to oppose the Zuma application. Indeed, he is under a duty to do so. His position is much like that of a prosecutor in a criminal trial in which an application for the presiding officer is brought on grounds which are objectively and reasonably unsound, as is the case in respect of these applications.

---

[14] See paragraph [29] of the Ruling of Justice Nugent in the Commission of Inquiry into Tax Administration and Governance by the South African Revenue Service

40 The “prosecutor” analogy referred to above is reinforced by the following further consideration. It is not usual for a Judge to make an affidavit in respect of factual disputes. In a criminal trial, for example, where counsel for the accused relies on what transpired in chambers, it would be strange for a Judge to set out facts relating to that issue. It would be for the prosecutor to place the facts on record. And, if allegations are made that one or more interactions at which the accused or his or her counsel were not present were improper, it would be expected that the prosecutor would be the deponent to any affidavit setting out the correct facts.

41 In the circumstances, the challenge to Semenya SC’s entitlement to deliver an affidavit opposing the applications are with respect misconceived.

42 There is one further issue that needs to be addressed in respect of opposing affidavits. It is this. Former President Zuma suggests that it was necessary for the Chairperson to deal with his allegations of impropriety against her by either filing an affidavit or a statement setting out the relevant facts. It is submitted that there is no merit in that contention on account of the following:

42.1 First, where accusations are made against them, judicial officers do not go on oath because their pronouncements are considered in light of the oath of office that they take upon ascending to the Bench. As noted above, where other persons with direct knowledge of the complaints are able to deal with matters on oath, such as prosecutors or other counsel, their averments on oath would form the factual matrix

on which the judicial officer will base his or her decision on recusal. In all cases, they will advance the reasons for the ruling in their judgments, setting out why the recusal application was refused or granted.

42.2 Second, there is no requirement that a judicial officer sets out in a statement the relevant facts relating to the recusal application. It is so that in *SARFU 1* each of the Justices whose recusal was sought set out the correct factual position in respect of himself or herself. It is submitted that that approach was required in that case on account of the following:

42.2.1 different allegations were made against the Justices concerned;

42.2.2 the correct facts relating to the issues about which concerns were raised were in the personal knowledge of that Justice alone, but were not necessarily known to the other Justices.

42.3 However, as all the Justices sat to decide the recusal application, it was necessary that they should base their decision on all the facts that were on record. In the absence of a statement from each of the Justices whose recusal was sought, they would not have been entitled not to accept the correctness of the allegations made by the applicant. Accordingly, the procedure adopted by the Constitutional Court in that case was necessary and justified. With respect, that is not the position in this case. To require the Chairperson to make a statement would

be an exercise in futility: it would require her to make a statement to herself. However, as has been noted, the judgment on the recusal applications will reflect the facts that she accepts as correct.

43 In the circumstances, the complaint that the failure by the Chairperson to set out the correct factual position is without merit. It should perhaps be emphasised that there is no dispute relating to the Chairperson's role in the TRC, its Amnesty Commission or as deputy NDPP.

44 In the next section of these Heads, the merits of the grounds on which the applicants base their recusal application are considered in the following order:

44.1 former President Zuma's complaints about the Chairperson's role in the judgments that were adverse to him;

44.2 the Chairperson's role in the TRC and NDPP; and

44.3 President Zuma's allegations of improper interactions between the Chairperson and the Commission's Evidence Leader.

FORMER PRESIDENT ZUMA'S COMPLAINTS ABOUT THE ADVERSE CONSTITUTIONAL COURT JUDGMENTS

45 As emerges from the affidavits filed in his application, one of the grounds on which former President Zuma bases his recusal application is the two judgments delivered by the Constitutional Court in an application brought by the Secretary of the State Capture Commission for former President Zuma to

be jailed for not complying with its earlier order that he appear at the Commission and his application for the rescission of the majority judgment. That earlier order was handed down by Jafta J. In terms of that order, former President Zuma was directed to appear before the State Capture Commission and give evidence.

46 Former President Zuma did not appear as directed by the Constitutional Court. As a result, the Secretary of the State Capture Commission approached the Constitutional Court to have Mr Zuma jailed for contempt. As regards Mr Zuma's being in contempt of the Constitutional Court's order handed down by Jafta J, the Court was at one. All the Justices agreed that he was in contempt of the Constitutional Court's order. However, as regards what the consequence of such contempt should be, the Justices disagreed.

47 The majority of the Court held that former President Zuma could, and should, be jailed, even in the absence of a criminal "trial". Two (2) of the Justices disagreed on this issue. As a result, there was a majority judgment and a minority judgment. The majority judgment was penned by Justice Khampepe. Six (6) of the Justices concurred in that judgment. The minority judgment was penned by Theron J. Jafta J concurred in her judgment.

48 Before considering the judgment further, it is necessary to record the following. Former President Zuma was dissatisfied with the majority judgment. He brought an application for the rescission of that judgment. In respect of the rescission application, the Constitutional Court was again split: seven (7)

Justices dismissed the rescission application, while the same two (2) Justices would have upheld that application. The majority judgment was penned by Justice Khampepe. The minority judgment was penned by Jafta J and concurred in by Theron J.

49 All four (4) judgments speak for themselves. At the heart of the dispute between the majority and the minority in respect of both the contempt application and the rescission application was the following question: in contempt proceedings, may a person be found guilty and be sentenced to jail if no "trial" as such is held? The majority found that the Constitution permits of such an outcome; the minority disagreed.

50 In the present application, one of the grounds on which former President Zuma seeks Justice Khampepe's recusal is what is said in the majority judgment. It is submitted that it will be instructive to set out in some detail the specific allegations that former President Zuma makes about Justice Khampepe and the Justices who concurred in the majority judgment.

51 Among the allegations that former President Zuma makes in support of his recusal application are the following:

51.1 it is "self-evident" from "the tone" of the two (2) judgments that Justice Khampepe penned and "her general demeanour" that Justice Khampepe "was motivated by deep-seated personal hatred, animosity and/or anger specifically directed towards" Mr Zuma;

51.2 *he* gained the distinct impression that this was the case and that she, in particular, and those who *unfortunately* agreed with the judgments she penned, failed to display the requisite levels of *judicial independence and temperament*, and that *she* instead allowed personal feelings and anger at what *they* wrongly perceived as attacks directed at *them* personally or institutionally, get the better of *her*;

51.3 *sufficient evidence* of the foregoing is additionally gained from the minority judgment, the "impugned judgments", Mr Zuma's "undue imprisonment without the benefit of a trial" and "in the negation of clear provisions of the Constitution and international human rights which conduct exceeds even the worst excesses of the apartheid regime", which in his view was "no mere error or oversight", but "*a deliberate abuse*, albeit *technically binding in positive law*"; and

51.4 "Millions of people in South Africa continue genuinely to believe that the judgment was driven by *undue vengeance, bitterness and highly personal animosity*."

52 The allegations that former President Zuma makes in support of this ground of his recusal application have been set out in some detail and reproduced for the most part in his own words. The reason for adopting that approach is to demonstrate that the allegations and/or contentions are without foundation and can hardly be regarded as objective or reasonable. In this connection, the following needs to be borne in mind.

53 First, former President Zuma makes only general observations about the judgements: there is no reference to any words or phrases used or passages that appear in the judgments in support of the various conclusions that Mr Zuma asks be drawn. It is submitted that that omission is deliberate: there are no words or passages in the judgments that can reasonably lead to the conclusions that former President Zuma makes about the judgments.

54 Second, neither former President Zuma nor his representatives appeared at the "contempt hearing". Neither of the *judgments* were delivered in the presence of the parties. Despite the foregoing, Mr Zuma alleges that his allegations of hatred and animosity are based on the "demeanour" of Justice Khampepe!

55 Third, the terms of his criticism of the judgments former President Zuma do not make it clear which part of the attack is directed at Justice Khampepe and which is directed at the Justices who "unfortunately" concurred in her judgment. A reasonable, objective and informed person would have done so, in fairness and out of respect for the different Justices. In addition, a litigant may describe a concurrence as "incorrect": it is highly disrespectful to a Judge to describe his or her concurrence as "unfortunate". In sum, a reasonable, objective and informed person will not, on a proper and objective consideration of the two majority judgments, make the comments that former President Zuma makes about the judgments. The text thereof does not justify the highly unreasonable conclusions that former President Zuma sets out.

56 Fourth, Mr Zuma alleges that the two minority judgments support his allegation of the majority's "animosity" towards and "personal hatred" of him. It is submitted that Mr Zuma's reliance on the minority judgments of being supportive of his position is with respect misplaced. This is because of the following:

56.1 Neither of the minority judgments suggests that the majority judgments display any personal animosity towards former President Zuma.

56.2 Both the two (2) majority judgments and the two (2) minority judgments make it clear that Mr Zuma appeared to be guilty of contempt.

56.3 In respect of this issue, it is instructive to record that in his minority judgment in the rescission judgment Jafta J says the following: "*There can be no doubt that Mr Zuma's disobedience of this Court order* deserves to be dealt with firmly and that it *calls for an appropriate punishment that may include imprisonment*," and he goes on to describe former President Zuma's conduct as "*egregious*".[15]

56.4 Thereafter, the learned Justice noted the following:[16] the problem in this matter is not whether Mr Zuma may be convicted and be punished for contempt of court; it is whether the motion procedure followed in convicting him to imprisonment is inconsistent with the Constitution.

---

15 At para [237] of the [minority] judgment.

16 At para [244] of the [minority] judgment.

57 Fifth, perhaps most decisive of the lack of merit in the allegations or contentions of bias is this. As noted earlier, after the judgment in the contempt application was handed down, former President Zuma brought an application to have the majority judgment rescinded. In his rescission application, Mr Zuma made some strident criticisms of the majority judgment in the contempt proceedings. The more significant of these are set out at paragraph [160] of the minority judgement in the rescission application. There, former President Zuma alleged that it was his view, belief and opinion that the two Constitutional Court judgments [Jafta J's earlier order in the State Capture Commission matter and Khampepe J's order in the contempt application] do not "justify the excessive judicial condemnation" that had been heaped on him, even if he were held to be wrong in holding those views. Importantly, in support of his rescission application, former President Zuma is not recorded as alleging that the majority in the contempt judgment displayed hatred and animosity towards him. Strangely though, that allegation is quite central to his present recusal application. It is submitted that such absence is not without consequences: if they were not made then, it is unlikely that they are objective or reasonable. Those allegations accordingly fall to be rejected.

58 In the paragraphs immediately above the issue that was addressed was former President Zuma's allegations that the adverse judgments about which he complains were actuated by hatred, animosity or the like. It is necessary, however, to deal with a related matter, namely, whether an adverse judgment that is critical of a party or has serious consequences for him or her may constitute a ground for recusal.

59 To the extent that former President Zuma may seek to rely on the two (2) judgments that Khampepe J penned and other judgments that are adverse to him in which she concurred as constituting bias or giving rise to a reasonable apprehension of bias, it is submitted that he misconceives the correct legal position, which is as set out hereunder.

60 First, it would be perfectly impossible to conduct the administration of justice in the proper way if judicial officers were to be recused because at some prior time they had expressed unfavourable opinions as regards persons who subsequently come before them. That is not a ground of recusal.[17]

61 Second, when in any case a judge finds upon the law or evidence, he is discharging a duty and there can never be a suggestion that merely because such a finding is adverse to one of the parties the Court is biased or hostile to that party. The fact that the findings were made in judicial proceedings, which were published *ex cathedra*, in the discharge of a duty, rebuts any presumption of malice or ill-feeling.[18]

62 Third, even where a Judge erred in revoking an accused person's bail, which was then restored by a higher Court, the allegation of bias or apprehension bias was rejected.[19] In this respect, the SCA noted that a mistake in the application of the law or the facts does not in itself mean that the Judge was

---

17 *R v Heilbron* 1922 TPD, 99 at 100

18 *Law Society v Steyn* 1923 SWA 59 at 60-61

19 *Maritz v The State* [2024] ZASCA 72 (8 May 2024), at para [16].

biased. [In order for that mistake to provide a proper ground for recusal] there must be a connection that calls into question her ability to apply her mind in an impartial manner to the case before her.[20] In *Maritz*, it was also alleged that the Judge had mentioned in chambers that she would be revoking bail. This allegation was however found not to have been proven.

63 As regards the *Maritz* matter, the following is worth noting. The learned Judge's decision to revoke bail was found to have constituted a mistake of law. Yet, the SCA found that it did not constitute a proper ground on which to base a recusal application. By way of contrast, the two (2) judgments that Khampepe J penned were the majority judgments. The majority in the rescission application did not accept that the majority judgment in the contempt application falls to be rescinded. That contempt judgment stands as the law on the issues canvassed therein. In the circumstances, it is baffling that former President Zuma could reasonably even consider that his recusal application can be founded on the text of the judgments. Certainly, a reasonable, objective and informed person would not come to that conclusion.

64 Based on the analysis of former President Zuma's complaints about the Chairperson's penning or concurring in judgments that were adverse to him and the authorities cited in the paragraphs immediately above, it is submitted that former President Zuma's complaints about bias or the apprehension of

---

20 Ibid. See also *Bernert v Absa Bank* 2011 (3) SA 92 (CC), at [102]-[103].

bias on the part of Justice Khampepe is without merit and his application for her recusal on this ground falls to be dismissed.

ASSOCIATIONS WITH TRC AND THE NDPP

65 It is submitted that former President Zuma has not alleged or proven facts that suggest that a recusal is warranted in respect of such associations. In this regard, for the purposes of his application, it is submitted that the following two (2) principles are relevant:

65.1 First, the fact that the member of a panel whose recusal is sought has years previously had a previous professional relationship with a person who may appear at the proceedings does not in itself constitute a ground of recusal.[21]

65.2 Second, as has already been noted, the fact that a member of a panel has given a decision that was adverse to a person who may appear at the proceedings is also not a basis for seeking her recusal.

66 It is further submitted that in respect of the foregoing two (2) principles, it is necessary to bear the following in mind. As is clear from the reason why the Commission was established, it is required to inquire into what transpired over a period of more than twenty (20) years; and the persons whose conduct is in issue are from various State Departments. Accordingly, former Presidents

---

21 *Head and Fortuin v Woolaston NO and De Villiers* 1926 TPD 549.

Zuma and Mbeki are but two (2) of many State actors whose conduct needs to be inquired into. In addition, as emerges from the Rule 3.3 Notice served on them, the matters in respect of which adverse comments about them are made are quite limited. The foregoing, it is submitted, are factors that need to be taken into account to determine whether the complaints that the former Presidents make against the Chairperson justify that she be recused.

67 In addition, former President Zuma alleges that the fact that the Chairperson was the Deputy NDPP as well as a member of the TRC Amnesty Committee renders her "distinctively unsuitable and/or automatically disqualified" from being the Chairperson of the present Commission. In support of that allegation, he goes to allege that witnesses who may appear before the Commission may include former colleagues or superiors from the TRC or NDPP.

68 In response to those allegations or contentions, the following is submitted. Apart from the fact that the TRC had a mandate entirely different from that of the Commission, the TRC did not enquire into whether *since 2003* there were any attempts to stop the investigation or prosecution of persons who were refused amnesty or those who did not apply for amnesty. There is no confluence of whatever nature between the Terms of Reference of this Commission and the issues that that the TRC confronted.

69 In respect of this issue, it is submitted that the correct legal position is as follows. Where a judicial officer had previously appeared for a party in a

different matter, that is not a basis for his or her recusal. In this regard, it is pointed out that it is not without significance that the Chairperson was a member of the TRC and the NDPP some twenty-seven (27) years ago. That reinforces the contention that such association does not constitute a proper basis for her recusal. This is especially so because the matters that this Commission is required to inquire into happened after 2003, which is some five (5) years after the Chairperson left the NDPP.

70 As has been observed above, former President Mbeki's first ground for the recusal of the Chairperson are similar to those made by former President Zuma. What is said above applies equally to the allegations and contentions he makes in respect of this ground.

71 It is convenient now to consider the allegations made in respect of the Chairperson in respect of the application that was brought for the recusal of the Commission's Chief Evidence Leader.

THE PROCEEDINGS FOR THE RECUSAL OF THE CHIEF EVIDENCE LEADER

72 Aside from an alleged apprehension of bias, former President Zuma raises the following further issue as a ground for the Chairperson's recusal, namely interactions between the Chairperson and the Commission's Chief Evidence Leader. In his Founding Affidavit he described this as a "private and secret" communication from the Chairperson to Semenya SC in respect of the earlier application that the Minister of Justice and the NDPP had brought for his recusal. In his Answering Affidavit, Semenya SC notes that as the

Commission's proceedings are inquisitorial in nature and frequent interactions between him and the Chairperson are necessary, the allegation is based on a misconception of how the various role players in the Commission may interact with another.

73 The interactions are not secret. In the circumstances, the fact that persons not directly involved with the work of the Commission are not present does not render such interactions untoward. Indeed, the fact that the Evidence Leaders and the Commissioners occupy offices on the same floor of the building in which the Commission is housed facilitates such interactions.

74 But former President Zuma also make the following grave allegation: the Chairperson "privately and secretly" gave Semenya SC advice on how to deal with the application for his recusal and that in doing so the Chairperson "conducted herself improperly and exhibited actual bias in favour of [Semenya SC's] non-recusal".

75 In his Answering Affidavit, Semenya SC notes the following: this is a grave allegation to make against a former Justice of the Constitutional Court; and one would expect that proper proof thereof would be furnished – especially from a person who occupied the highest executive position in our country; instead, however, no details of the time when or the place where the advice was given are set out; nor are details of the advice set out; rather, the approach is that former President Zuma "deliberately and consciously refrains at this stage, from revealing the complete evidence available to him". He goes on to

point out that he is unable to respond to the vague and unsubstantiated allegations.

76 Seemingly taken aback by Semenya SC's response that he regularly communicated with the Chairperson and that such communications are not secret, at paragraph 23.2 of his Replying Affidavit former President Zuma describes the issue, which *he* had raised, as a "red herring". In addition, aware that the onus is on him to allege and prove impropriety, at paragraph 23.6 he belatedly alleges that it was on 5 November 2025 that the Chairperson sent an email containing advice to Semenya SC's recusal. But he does not produce the email. Be that as it may, it is submitted that it is highly unlikely that, even if there is an email of 5 November 2025, it contained advice to Semenya SC on the application for his recusal. This is because the founding papers in the application for Semenya SC's recusal were filed only on 12 November 2025. It is tenuous to suggest that the advice to Semenya SC would have been given before the founding papers for Semenya SC's recusal were filed.

77 It is submitted that the approach adopted by the SCA in *Maritz*, in which an accused made allegations against a Judge which allegations appeared contrived ought to be followed and that it be found, as was found in *Maritz*, that the allegations made by former President Zuma in support of this ground of recusal are without merit.

78 It is perhaps worth recording that, as regards the application that Semenya SC be recused, former President Mbeki makes a different complaint. He alleges

that the manner in which the Chairperson "handled" that application constitutes a ground of recusal. In whatever terms that complaint is framed, it is submitted that in essence former President Mbeki's complaint is that the Chairperson erred in accepting the arrangement reached between Semenya SC and the Calata Group's counsel that the latter would lead the Calata Group witnesses. It is submitted that there are two (2) short answers to that complaint:

78.1 First, even if the Chairperson erred, and this has been disputed, as noted in *Maritz*[22] (above), in a case such as this former President Mbeki's remedy is to seek a review of the decision, not to seek the recusal of the Chairperson.

78.2 Second, in any case, Rule 3.1 does not, on a proper interpretation, require that all witnesses who testify at the Commission must be led by an Evidence Leader. In other Commissions, witnesses have been led by "their own" legal representatives. In the premises, the complaint is misconceived.

79 In the circumstances, in respect of this ground for the Chairperson's recusal, there is no evidence of anything untoward having taken place.

80 Given that, as emphasised, the test that applies is the evidence presented at the recusal proceedings, there is no evidence in support of this ground. The Applicant cannot succeed on this ground.

---

22 At para [16].

CONSIDERING THE COMPLAINTS COLLECTIVELY

81 It has been contended that, even if the complaints or grounds considered individually, do not make out a case for recusal, the ground considered collectively make out a case for recusal.

82 Such an approach was considered recently in *Maritz* (above).[23] In that matter the SCA pointed out that the number of complaints made against the Judge in question may raise an eyebrow. However, the Court stressed that before any cumulative effect of the grounds relied on is considered, individual scrutiny of each ground must be undertaken. It went on to find that no reasonable apprehension of bias has been shown in respect of any of the grounds relied on. It accordingly dismissed the appeal against the Judge's decision declining to recuse herself. The cumulative approach, it might be observed, had also been mooted in *SARFU 1,*[24] where it was contended that, in determining the apprehension of bias, regard should be had to the cumulative effect of the facts and complaints, which should be placed in a "basket" and weighed together. The CC's response was: "We have no difficulty with that approach subject to the 'basket' only receiving those facts which are correct and which may contribute to a reasonable apprehension of bias. That is the approach that is in effect followed in *Maritz.* In effect, it is submitted that, based on the foregoing, a recusal application ought not to succeed where each of the grounds fails to pass the test for recusal.

---

23 See para [33] of the judgment.

24 See para [48].

83 It is submitted that as each of the grounds relied on by the Applicants does not meet the test for recusal, the applications for recusal fall to be dismissed.

THE LATENESS OF THE APPLICATIONS

84 It has been pointed out earlier that the applications have been brought at a late stage. In the circumstances, given the lack of merit in the grounds relied on, it is submitted that the lateness itself ought to disqualify the merits of the applications from being considered.

85 In this connection, the following matters are highlighted.

85.1 Each applicant knew or ought to have known, as early as 29 May 2025, that the Proclamation establishing this Commission announced that Justice Khampepe would be its Chairperson.

85.2 Each knew or ought to have known that the Terms of Reference would point, in part, to a period when they served as the President of the country.

85.3 In the case of former President Mbeki, he would also already have been aware of the allegations that would be made against him in this Commission, as he had sought to intervene in the Calata application in the High Court.

85.4 If *bona fide*, the applicants would have brought their recusal applications at that time.

85.5 On receipt of the Rule 3.3 Notice, they ought to have realised that they are “implicated” in a matter in which the Chairperson was to preside. At that stage each elected not to apply for the Chairperson’s recusal, (clearly indicating his acquiescence in her appointment and in effect perempting the challenge that they now bring.)

85.6 Instead, the applicants requested an extension to file their responses.

85.7 Such conduct is seriously at odds with the allegations that they now make about their reservations about appearing at a Commission presided over by the Chairperson.

86 In all the circumstances, the applications fall to be dismissed on this basis alone.

CONCLUSION

87 In this application, two former Presidents of the country seek the recusal of the Chairperson of a judicial Commission of Inquiry. The Chairperson, who was appointed by the [present] President is a retired Justice of the Constitutional Court. It is reiterated that she remains a Judge and the oath of office she took upon ascending to the Bench is still binding on her. As a result, it is important to emphasise the following matters.

88 First, there is an assumption that Judges are individuals of careful conscience and intellectual discipline, capable of applying their minds to a multiplicity of

cases which will seize them during their term of office, without importing their own views or attempting to achieve ends justified in feebleness by their own personal opinions.[25]

89 Second, the presumption of impartiality has the effect that a judicial officer will not lightly be presumed to be biased. There is not only a presumption in favour of the impartiality of judges, but this is a presumption that is not easily dislodged.[26]

90 Third, the presumption in favour of impartiality must always be taken into account when conducting an enquiry into whether a reasonable apprehension of bias exists.[27] It is submitted that the same applies *a fortiori* where actual bias is alleged.

91 Applying those considerations to the case made by the two former Presidents, it is submitted that the presumption of impartiality has not been dislodged and the alleged apprehensions of bias are not those of a reasonable, objective and informed person; nor are the apprehensions reasonable.

92 In the circumstances, it is respectfully submitted that both applications fall to be dismissed.

---

25 South African *Human Rights Commission obo South African Jewish Board of Deputies v Masuku* [2022] ZACC 5 (CC), at para [58].

26 Ibid, at para [59].

27 Ibid, at para [62].

DATED AT JOHANNESBURG ON THIS THE 14TH DAY OF JANUARY 2026.

EVIDENCE LEADERS

LIST OF AUTHORITIES

Legislation

The Constitution.

Rulings

The Ruling of Justice Nugent in the Commission of Inquiry into Tax Administration and Governance by the South African Revenue Service.

Authorities

1. President of the Republic of South Africa and Others v South African Rugby Union and Others (“SARFU 1”)1999 (4) SA 147 (CC), at para [48].

2. Bernert v Absa Bank Ltd 2011 (3) 92 (CC), at [35].

3. President of the Republic of South Africa and Others v South African Rugby Union and Others 2000 (1) SA 1 (CC) (SARFU III)

4. Secretary, Judicial Commission of Inquiry into allegations of State Capture v Zuma 2021 (5) 1 (CC), at para [4].

5. R v Heilbron 1922 TPD, 99 at 100

6. Law Society v Steyn 1923 SWA 59 at 60-61

7. Maritz v The State [2024] ZASCA 72 (8 May 2024), at para [16].

8. Head and Fortuin v Woolaston NO and De Villiers 1926 TPD 549

9. South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku [2022] ZACC 5 (CC), at para [58].