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

In the matter for the recusal application of the Commission Chairperson Justice Sisi Khampepe

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APPLICANTS' HEADS OF ARGUMENT

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INTRODUCTION

1 This application is for the recusal of the Chairperson of the Commission[1], Justice Sesi Khampepe ("**Justice Khampepe**") from any further participation in the Commission's work. The key issue for consideration and determination is whether the conduct complained of by the applicants created a reasonable apprehension of bias. The applicants rely on two distinct but mutually reinforcing grounds for Justice Khampepe's recusal, which independently give rise to a reasonable apprehension of bias on her part.

1.1 The first concerns Justice Khampepe's past institutional involvement in matters directly connected to the Truth and Reconciliation Commission ("**TRC**") investigations, as well as the National Prosecuting Authority ("**NPA**"); and

1.2 The second ground, which compounds the first, comprises two aspects:

1.2.1 Justice Khampepe's handling of conflict-of-interest objections pertaining to Advocate Semenya SC, the Commission's Chief Evidence Leader ("**Adv Semenya SC**"); and

1.2.2 her endorsement of a procedurally irregular arrangement between Adv Semenya SC and Adv Varney, the legal representative for the Calata Group. This arrangement – which came about as a result of opaque and bilateral interactions

[1] The Judicial Commission of Inquiry into allegations regarding reports or attempts having been made to stop the investigation or prosecution of truth and reconciliation commission cases ("the Commission").

between the two advocates – permits Adv Varney (and not the Evidence leaders) to lead all eight of the Calata Group's witnesses.

2 The applicants are former members of the executive who have been summoned to appear before the Commission to respond to allegations made by the Calata Group in their founding papers in proceedings before the High Court. As the applicants in these proceedings understand it, those allegations are that that they (the applicants), frustrated the investigation and prosecution of cases that were referred to the NPA for prosecution, by the TRC Amnesty Committee ("**TRC cases**"). According to the Calata Group's court papers, the frustration of investigation and prosecution occurred between the periods 1998 and 2008.

3 In bringing the application, the applicants are seeking to enforce the rule of law, and the principles of judicial impartiality. They also seek to safeguard the procedural integrity of the Commission, and the right to participate before a Commission that upholds fair procedural rights.

4 The application is opposed by the Calata Group, and ostensibly by Justice Khampepe ("**respondents**"). With respect to Justice Khampepe's opposition, we argue that the matter ought to be decided on the applicants' version, on the basis that the opposing affidavit was deposed to by Adv Semenya SC, who has no personal knowledge of the allegations he deposed to, and there is no confirmatory affidavit by Justice Khampepe.[2]

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[2] Replying Affidavit to Semenya SC's affidavit (anticipated Bundle G), p4, para 5; *Von Abo v Government of the Republic of South Africa & others* 2009 (2) SA 526 (T) para 46.

5 That aside for a moment, the respondents' opposition is primarily based on delay. Their argument in that regard is that is that the applicants delayed in bringing the application by some seven to eight months, and there is no cogent explanation for the delay.[3] On this basis alone (so the argument goes), the application should be dismissed.

6 A secondary basis for opposition is an assertion that the two grounds of recusal lack substance.

6.1 Regarding Justice Khampepe's prior roles as TRC Commissioner, TRC Amnesty Committee Member and Deputy Director of Public Prosecutions of the NPA, the respondents argue that the subject matter in this Commission bears no relevance to the issues that Justice Khampepe dealt with in the two positions.

6.2 On Justice Khampepe's handing of the two procedural objections, the contention is that there is no evidence to support a conclusion of perceived bias.

7 These responses do not displace the cogent evidence demonstrating that Justice Khampepe's historical proximity to the TRC and the NPA, when considered cumulatively with her handling of objections in this Commission, gives rise to a reasonable apprehension of bias. In the circumstances, it is submitted that the application ought to be granted.

THE TEST FOR APPARENT BIAS

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[3] Bundle E AA p3 para 8, p23 paras 78-79. Bundle F AA pp5-9 paras 13-44.

8 Section 34 of the Constitution entitles everyone to the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.[4] In *S v Basson*[5] the Constitutional Court remarked that *"[a]ccess to courts that function fairly and in public is a basic right*".[6]

9 Section 165 of the Constitution requires Judicial Officers to apply the Constitution and the law "*impartially and without fear, favour or prejudice*". In addition, Judicial Officers' oath of office requires them to "*administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law*."

10 The impartiality and independence of Judicial Officers are essential in a constitutional democracy, and are core components of the constitutional right of access to courts.[7] These requirements constitute the source of public trust in the Judiciary and in the administration of justice in general.[8]

11 At the lowest level, the presumption of impartiality is implicit in the office of a judicial officer.[9] This stems from a presumption of impartiality in their favour which is linked to the weight of the constitutional obligation imposed on them to act without fear, favour or prejudice.[10] Thus, the law will not lightly suppose the possibility of bias in a judge.

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[4] South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another (CCT 14/19) [2022] ZACC 5; 2022 (4) SA 1 (CC) at para 36.
[5] *S v Basson* 2007 (3) SA 582 (CC).
[6] *S v Basson* para 23
[7] *S v Basson* para 24.
[8] *S v Basson* para 27.
[9] It is otherwise explicit.
[10] See also *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another* (CCT 14/19) [2022] ZACC 5; 2022 (4) SA 1 (CC) at para 59 where the Constitutional Court explained that "The presumption of impartiality has the effect 'that a Judicial Officer will not lightly be presumed to be biased'.

12 Partiality or apprehension of bias in relation to Judicial Officers is not to be lightly inferred.[11] This was confirmed in *SACCAWU*, where the Constitutional Court emphasised that, not only is there a presumption in favour of the impartiality of the Court, but that this is a presumption that is not easily dislodged.[12]

13 In *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another*,[13] the Constitutional Court explained that there are of course instances where a Judicial Officer may not be able to demonstrate impartiality or there may exist some apprehension of bias. Therefore, although the correct point of departure must always be a presumption of impartiality, 'the presumption can be displaced with 'cogent evidence' that demonstrates that something the Judge or Magistrate has done gives rise to a reasonable apprehension of bias.'"[14]

14 In *The President of the Republic of South Africa and others v the South African Rugby Football Union and others*[15] ("***SARFU***"), the Constitutional Court explained that:

> *"[a]t the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the*

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[11] *Stainbank v SA Apartheid Museum at Freedom Park* [2011] ZACC 20; 2011 JDR 0706 (CC); 2011 (10) BCLR 1058 (CC) at paras 35-6.
[12] *South African Commercial Catering and Allied Workers Union v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* [2000] ZACC 10; 2000 (3) SA 705 (CC); 2000 (8) BCLR 886 (CC) (SACCAWU) at para 12.
[13] *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another* (CCT 14/19) [2022] ZACC 5; 2022 (4) SA 1 (CC); 2022 (7) BCLR 850 (CC) (16 February 2022), para 60.
[14] *R v S (RD)* (1997) 118 CCC (3d) 353 cited in *SARFU* at para 40.
[15] *The President of the Republic of South Africa and others v the South African Rugby Football Union and others* 1999 (4) SA 147 CC; 1999 (10) BCLR 1059 (CC) ("SARFU").

part of the litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."[16] [Underlining added].

15 As a matter of legal principle, both actual bias and the appearance of bias disqualifies a judicial officer from presiding (or continuing to preside) over judicial proceedings.

16 *SARFU* posited the test for apparent bias thus:

> *"The question is whether 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."*[17] [Underlining added].

17 The objective, double reasonableness test (in a recusal application) was explained in *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing):*[18]

> *"Not only must the person apprehending bias be a reasonable person, but the apprehension itself must in the circumstances be reasonable. This two-fold aspect finds reflection also in S v Roberts, decided shortly after SARFU, where the Supreme Court of Appeal required both that the apprehension must be that of a reasonable person in the position of the litigant and that it be based on reasonable grounds."*

18 *SARFU* further explained that:[19]

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[16] *SARFU*, supra, at paragraph [12]. See also *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing* 2000 (3) SA 704 CC ("SACCAWU") at paragraph 11.
[17] *SARFU*, para 48.
[18] *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 CC; 2000 (8) BCLR 886, para 15.
[19] *South Africa and others v the South African Rugby Football Union and others* 1999 (4) SA 147 CC; 1999 (10) BCLR 1059 (CC) (the "SARFU" case) at para 48

> *"The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."* [Underlining added].

19 The presumption of impartiality and the double-requirement of reasonableness underscore the formidable nature of the burden resting upon the litigant who alleges bias or its apprehension.[20]

20 In short, a judge who sits in a case in which she or he is disqualified from sitting because, seen objectively, there exists a reasonable apprehension that the judge may be biased, acts in a manner inconsistent with section 34 of the Constitution and in breach of the requirements of section 165(2) and the prescribed oath of office.[21]

21 The disqualification is so complete that continuing to preside after recusal should have occurred renders the further proceedings a nullity.[22] Where the offending

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[20] *Bernert v Absa Bank Ltd (CCT 37/10) [2010] ZACC 28; Bernert v ABSA Bank Ltd* 2011 (4) BCLR 329 (CC) ; 2011 (3) SA 92 (CC) (9 December 2010) at para 35.
[21] *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another* at para 65. *SAP SE v Systems Applications Consultants (Pty) Ltd t/a Securinfo and Another* (376/2022) [2024] ZASCA 26; [2024] 2 All SA 639 (SCA); 2024 (5) SA 514 (SCA) (20 March 2024) at para 12.
[22] *Take and Save Trading CC and Others v Standard Bank of SA Ltd* [2004] ZASCA 1; 2004 (4) SA 1 (SCA) para 5.

conduct sustains the inference that in fact the presiding judge was not open-minded, impartial or fair during the trial, a Court will intervene and grant appropriate relief. In such a case the Court will declare the proceedings invalid without considering the merits.[23]

22 Ultimately, what is required is that a judicial officer confronted with a recusal application must engage in the delicate balancing process of two contending factors.

22.1 On the one hand, the need to discourage unfounded and misdirected challenges to the composition of the court, and

22.2 on the other hand, the pre-eminent value of public confidence in the impartial adjudication of disputes.

23 In striking the balance, a court must bear in mind that it is "'*as wrong to yield to a tenuous or frivolous objection' as it is 'to ignore an objection of substance'*." This balancing process must be guided by the fundamental principle that court cases must be decided by an independent and impartial tribunal, as our Constitution requires.[24]

Official or institutional bias and prior association

24 Institutional bias occurs when a tribunal's structure or decision-making process inherently creates a reasonable apprehension of bias rather than bias stemming from an individual adjudicator's personal predisposition. In such cases, it is

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[23] *Take and Save Trading CC and Others v Standard Bank of SA Ltd*, para 5. *SAP SE v Systems Applications Consultants (Pty) Ltd t/a Securinfo and Another* (376/2022) [2024] ZASCA 26; [2024] 2 All SA 639 (SCA); 2024 (5) SA 514 (SCA) (20 March 2024) at para 12.
[24] *Bernert v Absa Bank Ltd* at para 37.

argued that the decision-maker is inevitably biased as a result of institutional factors, rather than individually biased by virtue of the particular circumstances or personal characteristics.[25]

25 For example, in *Dumbu v Commissioner of Prisons,*[26] the court found institutional bias where the presiding officer had actively suppressed the grievances of the disciplined employees.

25.1 The prison warders in *Dumbu* complained to the authorities about discrimination against black prison officials, but their complaints were persistently ignored or stifled. The warders then engaged in strike action in order to highlight the issue of discrimination. The officer appointed to preside over an inquiry into their conduct was the head of the personnel department, who would almost certainly have participated in the suppression of the warders' complaints. The court found that the warders established a reasonable fear of bias in the circumstances.[27]

26 Similarly, in *Council of Review, South African Defence Force v Mönnig*[28] the court recognised that military officers presiding over a trial concerning loyalty to the military institution created a structural conflict of interest.

26.1 In *Mönnig* the Appellate Division (as it then was) upheld an allegation of institutional bias. *In* casu, military servicemen were prosecuted, in a court martial staffed by senior members of the South African Defence Force

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[25] *Hoexter & Penfold Administrative law in South Africa*, 3rd ed. (2021) at 624.
[26] *Dumbu v Commissioner of Prisons* 1992 (1) SA 58 (E) at 64D.
[27] Ibid 62D–E.
[28] *Council of Review, South African Defence Force v Mönnig* 1992 (3) SA 482 (A).

("**SADF**"), for conspiring to disclose secret information. The defence of one of the accused was that he had disclosed the information in an effort to protect the End Conscription Campaign (an organisation opposed to military conscription) from an unlawful attempt by the SADF to discredit and vilify it. Corbett CJ found that, because of their loyalty to the SADF, it was reasonable to suspect that the senior SADF officers hearing the matter would not evaluate this defence impartially.[29]

27 Our Courts have firmly established that prior association with an institution cannot form the basis of a reasonable apprehension of bias "*unless the subject-matter of the litigation in question arises from such associations or activities*."[30] This is sensible – most judicial officers would have been engaged in several activities in pursuit of their professional lives before ascending the bench. However, where a judicial officer, in his or her former capacity, either advised or acquired personal knowledge relevant to a case before the court, it would not be proper for that judicial officer to sit in that case.[31]

Delay and the interests of justice

28 To the extent that there was delay in bringing this application, we argue that the interest of justice overrides it.

29 In *S v Herbst*,[32] the court held that a delay in bringing a recusal application ought not to be viewed as a form of acquiescence. The court recognised that "*it is*

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[29] Ibid 494B.
[30] *Bernert v Absa Bank Ltd* at para 78.
[31] *Bernert v Absa Bank Ltd* at para 78.
[32] *S v Herbst* 1980 (3) SA 1026 (E).

obviously desirable that an application for recusal should be brought as soon as possible after the applicant becomes aware of the cause for complaint", but went on to observe that: *"the applicant's delay in bringing his application in the present case precluded him from bringing it at all."*

30 The appropriate consideration where delay is alleged in a recusal application is interests of justice.

31 In *Bernert v ABSA Bank*, the Constitutional Court affirmed the principle that a delay in bringing a recusal application does not amount to acquiescence. Doing so would be contrary to the interests of justice. The Court expressed the principle thus:

> "*It thus seems to me that, in our law, the controlling principle is the interests of justice. It is not in the interests of justice to permit a litigant, where that litigant has knowledge of all the facts upon which recusal is sought, to wait until an adverse judgment before raising the issue of recusal. Litigation must be brought to finality as speedily as possible. It is undesirable to cause parties to litigation to live with the uncertainty that, after the outcome of the case is known, there is a possibility that litigation may be commenced afresh, because of a late application for recusal which could and should have been brought earlier. To do otherwise would undermine the administration of justice*."[33]

32 A determination of 'interest of justice' is a fact-based enquiry – whether it is in the interests of justice to excuse the delay depends on the facts and circumstances of each case. The question to ask is whether it is in the interests of justice to permit a party, having knowledge of all the facts upon which recusal

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[33] *Bernert v ABSA Bank*, para 75.

is sought, to wait (until an adverse judgment on the merits) before raising the issue of recusal. The factors relevant to this enquiry include, but are not limited to, the extent and the cause of delay, the prejudice to other litigants, the reasonableness of the explanation for the delay, the importance of the issues to be decided and the prospects of success. None of these factors is (alone) decisive; the enquiry is one of weighing each against the others and determining what the interests of justice dictate.[34]

33 It is common cause and a matter of public record that the Commission has not commenced with its substantive mandate. There has not been determination of any issues or findings, therefore. It is thus in the interests of justice to bring this application now (before any such determinations have been made).

SALIENT AND COMMON-CAUSE FACTS

34 The basis for this application was provided in the introductory section.

35 In their replying affidavit, the applicants highlighted that Adv Semenya SC might not be the correct deponent to the answering affidavit in these proceedings, more so absent a confirmatory affidavit from Justice Khampepe.[35] Justice Khampepe could appropriately have submitted an affidavit to deal with any factual averments and clarifications,[36] or at the very least, filed a confirmatory affidavit.

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[34] *Grootboom v National Prosecuting Authority and Another* (CCT 08/13) [2013] ZACC 37; 2014 (2) SA 68 (CC) at para 50, in the context of condonation for late filing in general. *Van Wyk v Unitas Hospital and Another* (CCT 12/07) [2007] ZACC 24; 2008 (2) SA 472 (CC) at para 20.
[35] RA Semenya SC AA (anticipated Bundle G), p4 para 5.
[36] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others - Judgment on recusal application* (CCT16/98) [1999] ZACC 9; 1999 (4) SA 147; 1999 (7) BCLR 725 (4 June 1999) para 23.

36 In *Von Abo v Government of the Republic of South Africa & others*,[37] the court observed that:

> "*our courts have long and consistently held that it is impermissible for a deponent to an affidavit to give evidence on behalf of another where the latter does not file a confirmatory affidavit to confirm the evidence. . . one person cannot make an affidavit on behalf of another*."[38]

37 The same considerations apply here. In the absence of an affidavit from Justice Khampepe (at the very least, a confirmatory affidavit), the allegations of perceived bias are effectively not disputed.

38 The facts and circumstances relied on are largely common cause.They are the following:

38.1 Justice Khampepe was appointed as a TRC Commissioner in December 1995. Her tenure expired in 2001.[39]

38.2 She served as a member of the TRC Amnesty Committee from 1996 until 2001. The TRC Amnesty Group decided whether to grant or refuse amnesty to the various persons who applied for it.[40]

38.3 As a TRC Commissioner, Justice Khampepe formed part of the panel that concluded that the African National Congress ("**ANC**") had committed

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[37] *Von Abo v Government of the Republic of South Africa & others* 2009 (2) SA 526 (T) para 46.
[38] See also Competition Commission v Wilmar Continental Edible Oils and Fats (Pty) Ltd and Others(13748/16P) [2018] ZAKZPHC 23; [2018] 3 All SA 517 (KZP); 2020 (4) SA 527 (KZP); [2018] 2 CPLR462 (KZP) (15 June 2018) para 40 where this was affirmed.
[39] Bundle D FA p7 para 16; Bundle E AA p9 para 29.
[40] Bundle D FA p7 para 17; Bundle E AA p9 para 27.

gross human rights violations in the course of its political activities during the armed struggle.[41]

38.4 Some participants before the Commission were involved in the TRC process in which Justice Khampepe participated as a Commissioner. This includes the Calata Group.[42]

38.5 The TRC recommended prosecution of TRC cases. Justice Khampepe was directly involved in making the findings and recommendations regarding the prosecutions of some of those who were declined amnesty.[43]

38.6 Justice Khampepe served as the Deputy National Director of Public Prosecutions under then National Director of Public Prosecutions, Advocate Bulelani Ngcuka from September 1998 to December 1999. During this period, the Human Rights Investigation Unit had been established and was operating within the NPA. The Unit's mandate was to review TRC amnesty records, investigate apartheid-era human rights violations and make recommendations on the prosecution of TRC matters. The precise nature of Justice Khampepe's involvement in the Unit is unclear.[44]

38.7 There was an overlap in the senior roles that Justice Khampepe held with the TRC (1995 – 2001) and the NPA (1998 – 1999).

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[41] Bundle D FA p8 para 18; Bundle F AA p10-12 paras 47-53.
[42] Bundle D FA p8 para 21; Bundle E p26 para 87.
[43] Bundle D FA p8 para 22; Bundle E AA p26 para 87.
[44] Bundle D FA p9 paras 23-24; Bundle E pp10-11 para 35; p26 para 87.

38.8 Justice Khampepe was appointed as Chairperson of the Commission and the presidential proclamation announcing her appointment and establishing the Commission was issued on 29 May 2025.

38.9 This Commission is tasked with investigating, amongst other things, whether, why, and to what extent and by whom, efforts or attempts were made to influence or pressure members of the South African Police Service ("**SAPS**") or the NPA to stop investigating or prosecuting TRC cases. The Commission must also investigate whether any members of the NPA colluded in attempts to influence or pressure them.

38.10 The Commission is mandated to investigate political interreference that allegedly started in 2003,[45] however, when the applicants' legal representatives asked for witness statements from the Calata Group, they were consistently sent back to the founding papers in the high court. The starting point of the Calata Group's case in those papers is 1998.[46]

38.11 While the Commission was established in May 2025,[47] it was only on 25 September 2025 and 21 October 2025 that the applicants were issued with notices in terms of Rule 3.3 of the Commission's Rules.[48]

38.12 The Commission's Rules, especially Rule 3.1, stipulates that 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

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[45] Bundle D FA p10 para 27.
[46] RA Semenya SC AA (anticipated Bundle G), pp20-11 para 25.
[47] Bundle D FA p 6 para 12.
[48] RA to Calata Group's AA (anticipated Bundle H) p5 para 8.9.

Leader bears the overall responsibility to present the evidence of witnesses to the Commission.

38.13 On 29 September 2025, a previously undisclosed arrangement was concluded between Adv Semenya SC and Adv Varney, counsel for the Calata Group, without the knowledge of the other parties. In terms of this arrangement, Adv Varney would lead the evidence of the Calata witnesses instead of the Commission's appointed evidence leaders.[49]

38.14 On 27 October 2025, a prehearing was held which was attended by the majority of the legal representatives of the interested parties. At this meeting, the private arrangement between Adv Semenya SC and Adv Varney was made known to all the parties present at the meeting (not all parties had access to Sharepoint where an earlier letter was apparently shared). This arrangement prompted questions and objections from, inter alia, the NPA and the SAPS' legal teams. The parties also requested disclosure by the Commission of the correspondence containing the Calata Group's request and the approval by the Commission. The parties were then requested to raise their objections and make submissions regarding the leading of witnesses by legal representatives instead of the Evidence Leaders.[50]

38.15 After the pre-hearing of 27 October 2025, the Commission shared a letter dated 18 September 2025 that was addressed to Justice Khampepe by the Calata Group in which the Calata Group drew attention to the

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[49] Bundle D FA p12 para 35.1, Bundle F AA pp18-19 para 81.1 and subparas.
[50] RA to Calata Group's AA (anticipated Bundle H) p6 para 8.12.

potential conflict of interest concerning Adv Semenya SC and suggested that, in the interest of public perception of partiality, he not be involved in any deliberations, leading or cross examination of witnesses in relation to the amendments to the NPA's prosecution policy.[51]

38.16 Justice Khampepe responded on 19 September 2025, saying that "*having considered the concerns of your client and having heard Adv Semenya SC's response, I am minded going with the solution you propose. The concerns . . . are noted. I make no decisions on them. I will have another member of the Evidence Leaders deal with this aspect*".[52]

38.17 Despite Justice Khampepe's directive, on 13 November 2025, Adv Semenya SC interviewed the former Acting National Director of Public Prosecutions and in the questioning, traversed aspects of the Prosecution Policy and related matters that formed the subject of the conflict that the Calata Group had raised.[53]

38.18 A formal application for the recusal of Adv Semenya SC was launched by the Department of Justice and the NPA. Mr Semenya SC's participation in the interview of the former NDPP was raised by the NPA in their recusal application. The recusal application was argued before the Commission.

38.18.1 It is important to highlight that, while the Calata Group initially abided the Chairperson's decision in that recusal application, they attested – under oath – that: (a) Adv Semenya SC did question

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[51] Bundle D FA p14 para 37; RA to Calata Group's AA (anticipated Bundle H) pp6-7 para 8.14.
[52] Bundle D FA p15 para 38; Bundle E AA pp26-27 paras 88-97.
[53] Bundle D FA p16 para 44; Bundle AA pp26-27 paras 88-97.

the witness, despite his denial under oath that he did so; (b) Adv Semenya SC's questioning contravened Justice Khampepe's directive and; (c) Adv Semenya SC ought not to have been involved in the questioning of the witness.[54]

38.18.2 Later, in their written submissions, the Calata Group arrived at the conclusion that it was time "*for Semenya to stand down as an evidence leader*". They relied on two reasons. Firstly, by participating in the interview with Dr Ramaite SC, former Acting NDPP, Adv Semenya SC placed himself in breach of the Chairperson's ruling. Second, they "no longer believe that Semenya is in a position to 'efficiently perform' his function as evidence leader." In their view, the Chairperson's directive had the effect that Adv Semenya SC was excluded from a crucial part of the Commission's work. They were also concerned that Adv Semenya SC would inadvertently breach the directive again and disrupt the Commission's work.[55]

38.19 The parties were also invited to set out objections and written submissions to the leading of witnesses by legal representatives rather than the Evidence Leaders. Several interested parties, including the applicants, objected to the leading of witnesses by legal representatives. The applicants and some of the interested parties filed written submissions, arguing that the default position was that Evidence Leaders

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[54] RA to Calata Group's AA (anticipated Bundle H) p7 para 8.16 and subparas.
[55] RA to Calata Group's AA (anticipated Bundle H) p7 para 8.16 and subparas.

had the primary responsibility to lead witnesses – but in exceptional circumstances a party could apply to have their evidence led by their own legal representatives. Blanket approval was impermissible.[56]

38.20 On 11 November 2025, the Calata Group, through their attorneys wrote to the parties and highlighted that, *inter alia*, in her (Justice Khampepe's) role as the Deputy National Director of Public Prosecutions, she apparently "*played a role in the Human Rights Investigation Unit (HRIU) established by then NDPP Bulelani Ngcuka to advise him on how to handle the cases referred by the NPA to the TRC*."[57]

38.21 The objection to the leading of witnesses was set down for oral argument on 28 November 2025. However, on the day of the hearing, the parties agreed to an order. The crux of the order was that the Chairperson would consider the request by the Calata Group and the objections by the parties and then issue a ruling.[58]

38.22 Justice Khampepe was required by the Commission's rules and regulations, and the imperatives of natural justice, to properly investigate the existence, nature and proprietary of the previously undisclosed arrangement of Adv Semenya SC and Adv Varney in respect of the leading of witnesses. She was required to determine whether there was a lawful request for deviation from Rule 3.1, consider whether the arrangement had jeopardised procedural fairness and ensure whether

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[56] Bundle D FA p13 para 36; RA to Calata Group's AA (anticipated Bundle H) p8 para 8.17.
[57] Bundle F AA p7 para 34; Annexure TMM5.1 p37-39 para 12.3.
[58] Bundle F AA pp20-21 paras 84-87.

there was disclosure of the relevant correspondence to all parties pursuant to the arrangement.[59]

38.23 On 2 December 2025, Justice Khampepe issued a ruling in which she granted the Calata Group permission to lead eight (8) of their witnesses, without providing any reasons. The applicants' attorneys request for reasons was summarily refused.[60]

38.24 On 4 December 2025, Justice Khampepe issued a ruling refusing the recusal application.[61]

39 The period of the delay, the reasonableness of the explanation, the importance of the issue, and other elements that concern the interest of justice must be balanced on the basis of the above facts and circumstances.

A BALANCING ACT

40 The respondents argue that the delay in bringing this recusal application is excessive and not properly explained, and that the earliest that this application ought to have been brought is nearly eight months ago, shortly after 25 May 2025.[62]

41 In his answering affidavit, Adv Semenya SC asserts that the applicants' participation in the Commission belies any claim of perceived apprehension of

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[59] Bundle D FA p15 para 40 and subparas.
[60] Bundle D FA p16 para 43, p17 para 47.
[61] Bundle D FA p17 para 44. Bundle E AA p20 para 61.
[62] Bundle E AA p3 para 8; pp6-7 paras 15-20; p9 para 26; p14 para 41.6; p18 para 54. Bundle F AA pP5-9 paras 23-44.

bias. The applicants have, according to Adv Semenya SC, acquiesced or waived their right to seek recusal.[63]

42 The applicants accept that a recusal application must be brought as soon as possible, once all the facts upon which recusal is sought are acquired.

43 In their founding affidavit, the applicants explained the there are two grounds of complaint that they rely on which are mutually reinforcing. The first is Justice Khampepe's prior institutional roles and proximity to the issues before this Commission. The applicants accept that they have known about her prior roles in the TRC and the NPA. They also accept that they knew about her appointment, and the terms of reference of the Commission soon after the Proclamation terms of reference was issued.

44 It does not follow, however, that the application ought to have been brought soon after 29 May 2025. We say so for two reasons: first, the founding affidavit makes clear that the two grounds of complaint are interrelated and mutually reinforcing.[64] These two grounds must be looked at in context and taken as a whole. The apprehension of bias is based on the cumulative effect of the facts and complaints made against Justice Khampepe.[65] The Calata Group contends that the first ground of prior institutional association is undermined by this contention.[66] This is based on the incorrect classification by the Calata group of the second ground as the 'tipping point". A fair and reasonable assessment of the founding papers, and the common cause facts, reveals a progression and

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[63] Bundle E AA pp14-18 paras 41.6-56.
[64] Bundle D FA p4 para 7, p5 para 8, p21 para 63.
[65] *SARFU* at para 49.
[66] Bundle F AA p8 para 39.

crystallisation that the Commission's processes were not being conducted with the requisite institutional neutrality and openness of mind.

45 The second reason is that on the facts, any period before 29 May 2025, immediately after 29 May 2025, and until the Commission issued the applicants with Rule 3.3 notices is irrelevant to the computation of any period of lateness. It is common cause that the Commission only issued the applicants with Rule 3.3 notices on 25 September and 21 October 2025 respectively.

46 The fact that two of the applicants sought to intervene in the Calata Group's damages claim before the high court, and were accordingly aware of the content of those papers, is of no moment. Importantly, the high court dismissed their application on the basis that the issues upon which intervention was sought had already been determined by another court. That ruling rendered the applicants legal strangers to those proceedings.

47 The Commission came about as a settlement in those proceedings, and the applicants remained sheer outsiders to the process that saw the coming to being of the Commission.[67] In those circumstances, the applicants had neither a legal basis nor a procedural entitlement to seek Justice Khampepe's recusal before they were drawn into the 'ring' on 25 September and 21 October 2025 respectively. This is a delay of some twelve weeks at most.

48 We call into aide the legal principle expounded above, that the period of delay, on its own, is not decisive. Other factors, such as the explanation of the delay,

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[67] Including the negotiation of its Terms of Reference.

the prospects of success in the recusal application, and the importance of the issued raised are also important and must be balanced as against the extent of the delay. This is the standard that ought to be applied in these proceedings.

49 The importance of the issues in the Commission's Terms of Reference cannot be overstated. The Commission's investigation and recommendations centre around interference in TRC cases. This is an issue that touches the lives of the many victims of apartheid – including the Calata Group. It is also an aspect that touches on the lives of the applicants for many reasons, among them that a finding of interference on their part (by the Commission) could result in criminal charges being pursued against them.

50 The recusal application itself raises an important issue, namely, whether structural historical and institutional proximity to the subject matter of a Commission of Inquiry taken together with the presiding officer's handling of objections that were formally raised by parties would give rise to a reasonable apprehension of bias. The applicants have good prospects of being successful in the application. They have provided a reasonable explanation for why the application was only brought in December 2025 – the overlapping institutional roles and the manner in which Justice Khampepe handled the objections relating to Adv Semenya SC crystalised the need to bring the recusal application. The application was brought shortly after the rulings on these objections.

51 If Justice Khampepe is obliged to recuse herself but declines to do so, any subsequent step taken in the Commission's proceedings would be tainted and

liable to be set aside as a nullity.[68] In practical terms, this means that if the Commission dismisses the present application and nonetheless proceeds in the interim, and the Commission's ruling is later overturned on review or appeal, all intervening steps would be rendered legally ineffective. Such an outcome would occasion unnecessary prejudice, procedural inefficiency, and institutional embarrassment. In these circumstances, the interests of justice and the public interest militate against permitting the continuation of proceedings that may ultimately prove to be a nullity, particularly where the objection raised is confined to a technical contention relating to timing rather than the substantive merits of the recusal application.

52 Courts assess the period of lateness in tandem with other factors.

52.1 In *Bernert*,[69] a 39-day period of lateness was assessed alongside the appellants' grounds of complaint and the fact that the appeal court had expended resources to determine the merits of the appeal without the appellant raising any issue of recusal.

52.2 In *Bennett and Another v S; In Re: S v Porritt and Another*[70] the applicants had failed, since August 2017, to bring a recusal application and only lodged it in October 2019.[71] The Court assessed this period alongside the time lapse in the trial itself. The trial was in its fourth-year post plea,

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[68] *Take and Save Trading CC and Others v Standard Bank of SA Ltd* [2004] ZASCA 1; 2004 (4) SA 1 (SCA) para 5. *SAP SE v Systems Applications Consultants (Pty) Ltd t/a Securinfo and Another* at para 12. See also *Basson v Hugo and Others* (968/16) [2018] ZASCA 1; [2018] 1 All SA 621 (SCA); 2018 (3) SA 46 (SCA) (17 January 2018).
[69] *Bernert v Absa Bank* Ltd.
[70] Bennett and Another v S; In Re: S v Porritt and Another (SS40/2006) [2020] ZAGPJHC 275; [2021] 1 All SA 165 (GJ); 2021 (1) SACR 195 (GJ); 2021 (2) SA 439 (GJ) (12 October 2020.
[71] Ibid para 55.

> two material witnesses had completed their testimony, the events that some of the witnesses were testifying to had happened some 20 years ago, and some witness had commenced giving evidence in 2016 and was finally concluded in 2019. There had also been attempts to delay the cross examination.[72] These are all factors that swung the interest of justice against determining the question of recusal: "a lot of water ha[d] passed under the bridge."[73]

53 The above considerations do not arise here. The Commission has not started to lead any evidence. This is in part due to the manner in which it has handled the objections in relation to Adv Semenya SC. The applicants have not attempted to delay the work of the Commission. On the Commission's own version, the applicants have participated in the Commissions' work. Adv Semenya SC has set out comprehensively the various ways in which the applicants worked with and participated in the Commission, so as not to be the cause of a delay in its work.[74]

54 In these premises, it would be in the interests of justice to excuse a ten and twelve-week delay.

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[72] *Bennett and Another v S* ibid paras 58-59.
[73] *Bennett and Another v S* ibid para 62.
[74] Bundle E AA pp 15-18 paras 42-56.

THE CUMULATIVE EFFECT OF JUSTICE KHAMPEPE'S PRIOR INSTITUTIONAL ROLES AND HANDLING OF OBJECTIONS

The prior institutional roles

55 The central thrust of the respondents' opposition is that the applicants have adduced no evidence to show that Justice Khampepe's prior roles as a Commissioner of the TRC, a member of the TRC Amnesty Committee, and Deputy Director of the National Prosecuting Authority between 1998 and 2001 give rise to a reasonable apprehension of bias. This argument is advanced on two principal bases:

55.1 The first is that the Commission's mandate is confined to inquiring into political interference in the investigation and prosecution of the TRC cases. This is a distinct subject-matter from the functions performed by the TRC, the TRC Amnesty Committee, and the NPA. It is also a subject-matter in respect of which Justice Khampepe (according to the respondents) never had any involvement during her tenure at those institutions.

55.2 The second is that the temporal scope of Commission's inquiry is limited to instances of political interference arising from 2003 onwards. As Justice Khampepe vacated her positions at both the TRC and the NPA by 2001, there can, on this basis alone, be no suggestion of a perceived or institutional bias.

56 This argument misses the point. The applicants do not contend that prior institutional association, without more, mechanically or automatically

necessitates a recusal. To argue that way would be contrary to established legal principles. Rather, the applicants' case is that Justice Khampepe's institutional proximity, when assessed cumulatively together with the nature of the Commission's mandate and the subsequent procedural developments in these proceedings, gives rise to a reasonable apprehension of bias.

Justice Khampepe's role in the TRC

57 Justice Khampepe's roles in the TRC are common cause: (i) she was appointed as TRC Commissioner in 1995, and some of the families before the Commission, including the Calata Group, participated in the TRC;[75] (ii) she was involved in the writing of the TRC's findings and recommendations;[76] (iii) as a TRC Commissioner, she formed part of the panel that concluded that the ANC committed gross human rights violations in the armed struggle;[77] (vi) she was a TRC Amnesty Commissioner from 1996 until 2001, and in that capacity, assessed and determined TRC Amnesty applications that were brought by perpetrators of apartheid era offences; [78] and (v) the TRC recommended and directed the National Prosecuting Authority to prosecute crimes committed during apartheid where the perpetrators were denied amnesty.[79]

58 Viewed cumulatively, these roles place Justice Khampepe in close institutional and decisional proximity to the very historical record, evaluative judgments, and prosecutorial consequences that form an essential backdrop to the

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[75] Bundle D FA p5 para 12.
[76] Bundle D FA p8 para 20.
[77] Bundle D FA p8 para 18.
[78] Bundle D FA p7 para 16.
[79] Bundle F AA p17 para 76.2; RA to Calata Group's AA (anticipated Bundle H) p17 para 24.

Commission's present mandate, thereby reinforcing the applicants' case of a reasonable apprehension of bias.

Justice Khampepe's role in the NPA

59 Justice Khampepe was appointed as the second highest prosecuting official in the NPA – the Deputy National Director of Public Prosecutions, in September 1998, when Adv Bulelani Ncguka was the NDPP.[80] She held that position until December 1999. The Human Rights Investigation Unit ("**HRIU**") was operational during that period.[81] Its mandate was to review the TRC amnesty record, investigate apartheid era human rights violations and make recommendations on the prosecution of the TRC cases. [82]

60 According to the Calata Group, Justice Khampepe played a role in the HRIU including advising the NDPP on the approach in TRC cases.[83] However, the *precise* nature of Justice Khampepe's involvement in the HRIU is unclear, and the applicants raised this squarely in their founding affidavit.[84] Despite the applicants' candour, Adv Semenya SC[85] and the Calata Group[86] failed to provide the expected clarity in their answering papers.

61 Against this backdrop, the applicants' concern is neither speculative nor abstract. Justice Khampepe occupied the office of Deputy National Director of Public

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[80] Bundle D FA p9 para 23.
[81] Bundle D FA p9 para 23; Bundle E pp 10-11 para 35; p26 para 87; Bundle F AA p14 para 66; pp15-16 para 71.
[82] Bundle D FA p9 para 23.
[83] RA to Calata Group's AA (anticipated Bundle H) p para 23 para 37. Bundle D Annexure TMM 5.1 Letter from Webber Wentzel dated 11 November 2025 pp37-39.
[84] Bundle D FA p10 para 25.
[85] Bundle E pp 10-11 para 35; p26 para 87.
[86] Bundle F AA p14 para 66; pp15-16 para 71.

Prosecutions at a time when the HRIU was operational and centrally involved in reviewing TRC amnesty records and shaping prosecutorial approaches to TRC-related cases. While the Calata Group asserts that Justice Khampepe played an advisory role within the HRIU, the precise nature, scope, and extent of her involvement remain opaque. That uncertainty is material. It bears directly on whether a reasonable, objective observer might apprehend bias, particularly given the Commission's mandate to scrutinise prosecutorial decision-making in relation to the very category of cases with which the HRIU was concerned. The applicants raised this issue candidly and squarely in their founding affidavit; the failure by Adv Semenya SC and the Calata Group to provide clarification in their answering papers serves only to accentuate, rather than allay, the apprehension complained of on the basis of Justice Khampepe's role in the NPA.

This Commission's mandate

62 The Commission's mandate is to investigate, in relation to the period since 2003, whether, why, to what extent, and by whom efforts were made to influence or pressure members of the SAPS or the NPA to halt the investigation or prosecution of TRC-related cases. It must also inquire whether any members of the SAPS or the NPA improperly colluded in such efforts. On the basis of its findings, the Commission is required, *inter alia*, to make recommendations, including recommendations for criminal prosecution.

63 The Calata Group agrees with the applicants that the temporal curtailment of the period under investigation to 2003 is artificial and irrational.[87] This is consistent

[87] Bundle F AA pp 16-17 para 75 and subparas.

with their case in the high court; in their founding affidavit before the high court, they allege that the political influence which frustrated the investigation and prosecution of the TRC cases emanated from discussions between former defence force and police force generals on one hand and ANC officials on the other hand, and that those discussions commenced in 1998. These allegations are also repeated in the Rule 3.3 notice that the Commission issued to former President Mbeki.[88] It is clear, therefore, that the Commission will investigate the motive for the alleged interference which started before 2003, and specifically, from 1998 when Justice Khampepe was at the NPA and the TRC.

64 In their answering affidavit, the Calata Group advances a number of conclusions which, viewed objectively, fall squarely within the matters the Commission is required to investigate in terms of its mandate. They allege that:

64.1 during 1998-1999, the NPA appeared to simply be focusing on gearing up for the investigation and prosecution of the TRC cases;[89]

64.2 until 2003, the NPA was working towards the prosecuting serious apartheid-era crimes unhindered;[90]

64.3 active interventions to frustrate investigations and prosecutions of TRC cases only commenced in 2003, more than three years after Justice Khampepe had left the NPA;[91] and

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[88] Bundle E Annexure SC2 pp40-157.
[89] Bundle F AA pp14-15 paras 66 - 67.
[90] Bundle F AA p17 para 76.2.
[91] Bundle F AA p15 para 68.

64.4 the only policy or strategy to address TRC cases (that they are aware of) emerged in the secret reports of the Amnesty Task Team during 2004.[92]

65 Adv Semenya SC's temporal defence is thus unsustainable. If these factual conclusions are accepted by the Commission, it would mean that the Commission has already pre-determined aspects that are central to its work.

66 The applicants accept that the questions before the Commission about political influence did not arise in the TRC. However, we submit that prior work of both the TRC and the NPA's prosecutorial mandate are central to the question of alleged political influence. It is inevitable that the Commission will have to look at the internal infrastructure of the NPA at the relevant periods, and the efforts to pursue TRC cases.

67 The evidence by the Calata Group that Justice Khampepe advised the NDPP on the prosecution of the TRC cases in 1998, and their stance that the 1998 deliberations must be "closely probed"[93] fortify the applicants' apprehension of bias.

68 We submit that the reasonable observer would apprehend that a person who had institutional responsibility to shape NPA policy on TRC cases and who was responsible for TRC amnesty decisions may find it difficult to approach with neutrality a Commission now tasked to determine whether the NPA failed or neglected to pursue those cases. A reasonable observer would apprehend that

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[92] Bundle F AA p15 para 69.
[93] Bundle F AA p17 para 75.3.

Justice Khampepe may have an institutional interest, conscious or unconscious, in validating the propriety of decisions made during her tenure in either role.[94]

The handling of objections pertaining to Adv Semenya SC

69 The applicants' case on the handling of objection pertaining to Adv Semenya SC is that:

69.1 Justice Khampepe (as Commission Chairperson) endorsed an irregular arrangement between Adv Semenya SC and Adv Varney in regard to the leading of witnesses in a ruling dated 2 December 2025. She then summarily refused to give reasons for the decision despite comprehensive objections from the applicants and other interested parties.

69.2 Justice Khampepe endorsed the breach by Adv Semenya SC of her directive to him not to involve himself in any questioning of NPA officials about the Prosecution Policy given Adv Semenya's prior advisory role to the NPA in litigation on the issue.

70 The respondents do not engage with the constitutional substance of these complaints. Instead, they dispute the factual characterisation of the witness-leading arrangement; and seek to meet the point by asserting that the applicants did not pursue Adv Semenya SC's recusal.

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[94] *Council of Review, South African Defence Force v Mönnig* 1992 (3) SA 482 (A). *Dumbu v Commissioner of Prisons* 1992 (1) SA 58 (E) at 64D.

71 It was necessary for the respondents to address the substance of the complaint. The facts set out in the applicants' affidavit, taken together with the respondents' answers reflect the position as set-out in paragraphs 38.12 to 38.24 of these heads of argument. The applicants submit that these undisputed facts serve to reinforce the reasonable apprehension that Justice Khampepe is unwilling to confront or adequately address irregular conduct arising in the course of the Commission's proceedings.

72 We submit that a reasonable observer, apprised of these facts, would be alarmed that Justice Khampepe:

72.1 In her ruling dated 2 December 2025, endorsed without interrogation, an irregular and undisclosed private arrangement only disclosed to the rest of the parties on 27 October 2025.

72.2 declined to interrogate a clear breach of her own directive; and

72.3 treated serious objections by multiple parties as though they are insignificant and not worthy of examination.

73 The perception that is created is that Justice Khampepe is predisposed to preserve Adv Semenya SC's involvement in the Commission, regardless of procedural irregularities or fairness concerns.

74 Notwithstanding their earlier acceptance that Adv Semenya SC ought to have recused himself,[95] the Calata Group now seeks to resist the applicants'

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[95] In their letter to the Chairperson of 18 September 2025, the Calata Group in raising the conflict-of-interest concern informed the Chairperson that they *"intend to put up the amendments to the Prosecution Policy as a key example of how the South African government sought to intervene and block the bulk of the TRC cases from proceeding*." [Bundle D Annexure TMM7 Letter from Webber

complaint. They contend that, in her reasons dismissing the recusal application, Justice Khampepe concluded that Adv Semenya SC's prior involvement in *Nkadimeng* did not disqualify him from acting as Chief Evidence Leader, with the result that the directive of 19 September 2025 is said to fall away.[96]

75 This submission is misconceived. The subsequent finding that Adv Semenya SC was not disqualified from office does not retrospectively cure or negate the factual breach of a binding directive that was operative at the time. The directive existed, it was known to Adv Semenya SC, and it governed his conduct pending the determination of the recusal application. Compliance with such directives is not contingent upon the eventual outcome of the recusal enquiry. To hold otherwise would render interim directives nugatory, incentivise non-compliance, and undermine procedural discipline within the Commission's processes. The failure to adhere to the directive therefore remains a material irregularity, independent of, and unaffected by, the later refusal of the recusal application.

76 In these circumstances, a reasonable objective and informed person would apprehend that Justice Khampepe may not bring an impartial, open and enquiring mind to matters involving the Adv Semenya SC issue.

The cumulative effect

77 In sum, we submit that Justice Khampepe's prior institutional proximity, when combined with the nature of the Commission's mandate and her own supervisory

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Wentzel dated 18 September 2025 p138 para 5]. It is within that context that they raised the conflict-of-interest concern.

[96] Bundle F AA p23 para 95.

handling of the objections, her endorsement of a departure from the Commission's processes, and her approach to enforcing her own directive, viewed cumulatively, could reasonably give rise to an apprehension that the process is not being managed with the requisite procedural neutrality. These grounds are significant. No countervailing has or can be been offered. The application ought to be granted.

THE REMAINING ISSUE

The criticism about this being a self-standing application

78 The Calata Group has criticised the applicants for bringing this application, on the basis that the application supports the recusal application that was filed by former President Zuma, and thus, the applicants (in this application) ought to have filed answering papers in support of the President Zuma application.[97]

79 There is no provision in this Commission's rules, nor in the ordinary rules of court for a respondent in motion proceedings to deliver a supporting affidavit of the kind described by the Calata Group. Courts have struck out such affidavits, holding that once a respondent seeks the relief sought by the applicants, it was no longer placing evidence before the court but making itself an applicant while not seeking to be a co-applicant.[98]

80 The general rule is that a co-respondent cannot claim relief unless it enters the litigation as a co-applicant and seeks that relief on notice of motion.[99] It would

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[97] Bundle F AA p2 para 8.
[98] *Goldstar Finance (Pty) Ltd and Others v Capitec Bank (Pty) Ltd and Another* (16589/23) [2023]ZAWCHC 336; [2024] 1 All SA 727 (WCC) (31 December 2023) para 51.
[99] *Minerals Council of South Africa v Minister of Minerals Resources and Energy* [2021] 4 All SA 836 (GP) para 63.

wreak havoc with the established basis on which factual disputes in motions are determined as set out in *Plascon Evans*.[100] The applicants followed the correct process, in light of these principles.

CONCLUSION

81 The applicants have demonstrated, on the correct legal standard, that a reasonable, objective and informed observer would apprehend that Justice Khampepe may not bring an impartial and open mind to bear on the proceedings of this Commission. This apprehension does not rest on any single fact viewed in isolation, but on the cumulative effect of her prior institutional proximity to the TRC and the NPA, the nature and scope of the Commission's mandate, and her handling of material procedural objections arising in the course of the Commission's work.

82 The respondents' reliance on delay as a dispositive answer is misplaced. The applicants have provided a cogent and reasonable explanation for the timing of the application, and the relevant authorities make clear that delay does not amount to acquiescence where the interests of justice require the issue of recusal to be determined. In circumstances where the Commission has not yet embarked upon its substantive mandate, and where the consequences of an invalidly constituted process would be profound, the interests of justice plainly favour entertaining and determining this application on its merits.

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[100] *Goldstar Finance (Pty) Ltd and Others v Capitec Bank (Pty) Ltd and Another* at para 52.

83 The applicants have further shown that the handling of objections relating to Adv Semenya SC, (including the endorsement of a procedurally irregular arrangement, the failure to interrogate a breach of a binding directive, and the refusal to provide reasons), reinforces the apprehension of impartiality. These features, taken together with Justice Khampepe's historical roles, materially undermine public confidence in the procedural neutrality of the Commission.

84 In these circumstances, the constitutional imperative of impartiality, the need to safeguard the integrity of the Commission's proceedings, and the overarching public interest in a process that is both fair and seen to be fair, compel the conclusion that Justice Khampepe ought to recuse herself from any further participation in the Commission. The applicants accordingly pray that the relief set out in the notice of motion be granted.

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Sandton, 14 January 2026

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