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

HELD AT THE SCI-BONO DISCOVERY CENTRE, NEWTOWN JOHANNESBURG

BEFORE:

THE HONOURABLE JUSTICE SISI KHAMPEPE- CHAIRPERSON (JUDGE RETIRED)

THE HONOURABLE JUSTICE FRANS DIALE KGOMO, (JUDGE RETIRED)

ADVOCATE ANDREA A GABRIEL SC

RULING ON RECUSAL APPLICATIONS
04 DECEMBER 2025

A. Introduction

1. This Commission of Inquiry ("Commission") was established by the President of the Republic of South Africa, pursuant to Proclamation Notice 264, published on 29 May 2025. The Commission is appointed to "investigate matters of public and national interest concerning allegations regarding efforts or attempts having been made to stop the investigation or prosecution of Truth and Reconciliation Commission ("TRC") cases."

2. The Commission was scheduled to hold its first session of public hearings from 10 to 28 November 2025, at which it would have received the evidence from

the applicants in proceedings under the North Gauteng Division of the High Court, Pretoria, in the case of *L B M Calata and 22 Others v the Government of the Republic of South Africa and Five Others* (case number 2025-005245) ("the Calata group").

3. On the first day of the hearing, 10 November 2025, the Commission issued directions which set dates for the bringing of applications for the recusal of the chief evidence leader, Mr Ishmael Semenya SC ("Semenya SC"). This arose because of indications in objections filed with the Commission, on an unrelated procedural matter. In those objections, the Department of Justice ("DOJ") intimated that a recusal application would be brought "in due course" while the National Prosecuting Authority ("NPA") suggested that this application ought to be determined on affidavit.

4. Ultimately, two applications for the recusal of Semenya SC served before the Commission, brought by the DOJ and the NPA ("the applicants"). Affidavits were served and written submissions were filed in accordance with the timelines set by the Commission. Oral argument was heard on 26 November 2025.

5. The grounds for the recusal revolved primarily around Semenya SC's representation of both the DOJ and NPA in the matter of *Nkadimeng and Others v NDPP and Others*, case number 32709/07, which culminated in a judgment by Legodi J on 12 December 2008. This prior representation and related conduct on the part of Semenya SC is said to create a conflict of

interest and a reasonable apprehension of bias against the DOJ and the NPA, by Semenya SC's continued participation in this Commission.

6. The Commission also considered the affidavit and submissions filed by Webber Wentzel attorneys on behalf of the Calata group. The Calata group affirmed confidence in Semenya SC's impartiality but ultimately sought that he steps down on grounds of efficiency and practicality.

7. The evidence leaders also filed affidavits by Semenya SC and made submissions, the import of which was to resist the recusal sought by the applicants.

8. For the reasons described below, the Commission finds that the applicants have failed to discharge the requisite burden of proof by applying the incorrect legal test and by failing to establish the necessary factual evidence. The recusal applications must therefore be dismissed, for the reasons set out in this Ruling.

B. The Role of Evidence Leaders in a Commission of Inquiry

9. It is important to understand the role of evidence leaders in a commission of inquiry.

10. The Rules governing the Commission[1] defines "Commission's Evidence Leader" as "the team of lawyers appointed by the Chairperson to assist the

[1] The Rules were published in Proclamation Notice 285 of 2025 on 29 August 2025.

Commission in the investigation and with the presentation of evidence and arguments before the Commission in regard to the matters referred to in the Terms of Reference." Semenya SC is the chief evidence leader in that team of lawyers who have been appointed by me as Chairperson of the Commission.

11. The evidence leaders are accordingly required to assist and facilitate the work of the Commission. In doing so they must investigate and marshal the presentation of evidence to the Commission. They bear the overall responsibility of leading evidence before the Commission, although this is subject to the direction of the Chairperson.[2]

12. It is instructive to consider the analysis by Judge Nugent in his Ruling of 2 July 2018, in the Commission of Inquiry into Tax Administration and Governance by the South African Revenue Service, which succinctly captures the roles and responsibilities of evidence leaders:

> *"[29] I think it is important also to say something of the role of counsel appointed to assist the Commission, who also came in for insult in the course of the submissions. While often called 'evidence leaders' that is a misnomer. The process of a commission of inquiry is inquisitorial, unlike that of a court. That means it must make its own inquiries, seek out evidence itself, and interrogate the veracity of*

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2 Rule 3.1 provides:

> *"Subject to anything to the contrary contained in these Rules or to the Chairperson's directions in regard to any specific witness, the Commission's Evidence Leader bears the overall responsibility to present the evidence of witnesses to the Commission."*

evidence where that is required. Counsel appointed by a commission facilitates the performance of all those functions under the direction of the commission.

[30] When oral evidence is to be heard it will be presented to the commission by its counsel. Where counsel has no reason to suspect the veracity of the testimony, counsel play their part by guiding the witness through the testimony, so as to ensure that relevant testimony is extracted. Where there is reason to suspect testimony might not be true, they play their part by examining the witness, vigorously, if that is required, to test its veracity. Indeed, it might be that a witness is called solely for vigorous examination, so as to extract information that the commission requires. And if a witness has given testimony when there has been no reason to suspect it might be false, and it turns out later that that might not be the case, then the witness is liable to be recalled, and examined more thoroughly. In short, the approach counsel will take to oral evidence will be dictated by the exigencies of the case. Some cases will require the witness to be guided. Other cases will require the witness to be interrogated. And some cases might require a bit of both.

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[32] What is called for from counsel for a commission, and from the commission itself, is an open but inquiring mind, the meaning of which I had occasion to explain in the Supreme Court of Appeal.

That case concerned the functions of the Public Protector but it applies as much to a commission of inquiry:

> *'That state of mind is one that is open to all possibilities and reflects upon whether the truth has been told. It is not one that is unduly suspicious but it is also not one that is unduly believing. It asks whether the pieces that have been presented fit into place. If at first they do not then it asks questions and seeks out information until they do. It is also not a state of mind that remains static. If the pieces remain out of place after further enquiry then it might progress to being a suspicious mind. And if the pieces still do not fit then it might progress to conviction that there is deceit. How it progresses will vary with the exigencies of the particular case. One question might lead to another, and that question to yet another, and so it might go on.'*

It is in that state of mind that counsel go about their work."[3]

13. From this it is apparent that evidence leaders play a key role in assisting the Commission in executing its mandate and in seeking out and presenting evidence before the Commission. They may make decisions about the type and manner of evidence to be placed before the Commission, yet this is done subject to the direction of the Chairperson of the Commission. Even the leading and questioning of witnesses is subject to the control and direction of

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[3] Available at https://www.politicsweb.co.za/documents/moyane-vs-sars-inquiry-judge-nugents-ruling.

the Chairperson of the Commission. They may also provide legal advice to the Commission from time to time.

14. However, none of this elevates evidence leaders to decision makers, that function being the exclusive domain of the Commission. Indeed, on this fact all parties were *ad idem*.

C. The Applicable Legal Test for Recusal

15. With that background, it becomes necessary to determine the correct legal test to apply for the recusal of evidence leaders. The applicants asserted one test, while the evidence leaders and the Calata group asserted another test.

C1. The *SARFU* test

16. The applicants advocated for the test set out in *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147 (CC) ("*SARFU*"). The import of that test is that recusal will be granted if it is established that a reasonable, objective and informed person would, on the correct facts, apprehend that the judge (or decision maker) will not bring an impartial mind to bear on the case at hand. The test is an objective one and the onus of establishing that the test has been met rests upon the applicant.[4]

17. On this basis the applicants contend that they hold a reasonable apprehension

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[4] *SARFU*, at paragraph 48.

of bias arising from Semenya SC's prior representation of them in *Nkadimeng.*

18. In my view, the *SARFU* test is inapplicable because evidence leaders are assistants to the Commission, but they are not the decision makers. They therefore cannot be equated to judges or those who are vested with decision making powers, as was the position in the *SARFU* case and the line of cases that subsequently followed and applied that test.

C2. The *Porrit*/*Killian* test

19. The evidence leaders and the Calata group advocated for the use of the test akin to the recusal of prosecutors. They did this upon the basis that prosecutors are not judges, as is the position with evidence leaders who are not decision makers.

20. That test was established in *Porritt and Another v The NDPP and Others*.[5] In that matter the recusal of a prosecutor was sought upon the basis that he had previously played a role in the compelled questioning of an accused in a prior investigation. The concern was that this prior role as interrogator had robbed the prosecutor of impartiality and lack of bias expected of a prosecutor. The court *a quo* had applied the *SARFU* recusal test to disqualify the prosecutor. On appeal, the SCA found that the court *a quo* had incorrectly applied the *SARFU* test, because prosecutors are not decision makers as is the case with

5 2015 (1) SACR 533 (SCA); (978/13) [2014] ZASCA 168 (21 October 2014).

magistrates and judges:

> *"[11] There is a fundamental difference between the role and functions of a prosecutor as opposed to those of a magistrate or a judge. The judiciary is held to the highest standards of independence and impartiality because they are the decision-makers in an adversarial judicial system. Prosecutors neither make the final decision on whether to acquit or convict, nor on whether evidence is admissible or not. Their function is to place before a court what the prosecution considers to be credible evidence relevant to what is alleged to be a crime. Their role excludes any notion of winning or losing. It is to be efficiently performed with an ingrained sense of dignity, the seriousness and the justness of judicial proceedings."*

21. There are obvious differences between a criminal trial and a commission of inquiry. Unlike court cases, commissions of inquiry are inquisitorial and are not adversarial. A commission actively seeks out its own evidence, tests that evidence and bases its recommendations thereon.

22. Allied to this is the fact that evidence leaders assist a commission of inquiry in that task. Theirs is not to attempt to secure a conviction or to represent one party in an adversarial dispute. What is required of evidence leaders is that they bring an open and enquiring mind to bear upon their tasks and to execute their duties subject to the directions of the Commission.

23. I am therefore of the view that the *Porrit* test is more apposite than the *SARFU* test, when the recusal of an evidence leader is sought. This is for the

elementary reason that evidence leaders are not decision makers, and they function subject to the direction of the Commission, as already pointed out.

24. What then is the test to be applied when seeking the recusal of an evidence leader. In *Porrit*, the SCA referred to its earlier decision in *DPP, Western Cape v Killian* [2007] SCA 169 (RSA), where the test for the recusal of a prosecutor was formulated as follows:

> *"The question remains whether the prosecutor's dual role in this case created a substantive unfairness per se. Neither precedent nor principle persuades me that it did. Whether fulfilment of that dual role does involve or bring about substantive unfairness in an ensuing criminal trial will be a matter to be decided on the facts of each case by the trial court. Unfairness does not flow axiomatically from a prosecutor's having a dual role."*[6]

25. Applying the *Killian* test, the issue that falls for determination is whether Semenya SC's role in *Nkadimeng*, and the other alleged conduct, would result in substantive unfairness in the ensuing work of this Commission.

26. I turn to the application of that test next, with respect to the various complaints asserted by the applicants.

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6 At paragraph 18 in *Porritt*, citing paragraph 28 in *Killian*.

D. Applying the Test

Prior Role in Nkadimeng

27. As the Calata group point out they brought a narrowly tailored constitutional and administrative law challenge to the 2005 amendments to the prosecution policy. They maintain that they did not know then, in 2005, that the prosecution policy would be one of several means through which the prosecution of TRC cases would be retarded. That claim was squarely asserted by the Calata group in January 2025 in the pending High Court litigation, which is one of the claims that led to the establishment of this Commission.

28. The applicants claim that the prosecution policy will play a central role in the commission of inquiry.

29. The Minister of Justice, who deposed to the affidavit on behalf of the DOJ, puts it this way:

> *"32. From these submissions, it is evident that Semenya SC played a crucial and intricate role in formulating and defending the rationale and constitutional validity of the Policy amendments on behalf of the prosecuting authority. His arguments went to the core of upholding the Policy framework that is now, years later, at the centre of this Commission's inquiry."*

30. Advocate Mhaga, a Special Director of Public Prosecutions and head of the legal division of the NPA, deposed to an affidavit for the NPA. The concern

was expressed this way:

> *"28. The Commission's inquiry into the alleged political interference is predicated upon the contention that the Prosecution Policy was crafted and implemented to prevent the prosecution of apartheid-era crimes. In contrast, Adv Semenya's previous professional position was to uphold and vindicate the policy's lawfulness and constitutionality, both in argument before the Court and in written advice to the NPA. It is the NPA's view that having taken such a position, he cannot now be seen to approach the same question with the detachment and neutrality required of an Evidence Leader."*

31. However, as the Calata group and the evidence leaders point out, the amendments to the prosecution policy are simply one of the means through which the Calata group claims that the prosecution of TRC cases was retarded. I agree.

32. Furthermore, as the evidence leaders point out, the *Nkadimeng* judgment is final and the issue of the constitutionality of the amendments to the prosecution policy is *res judicata.* It has been so for the last 17 years.

33. In my view, the terms of reference of this Commission are far wider than a special focus on the amendments to the prosecution policy. We must now inquire into whether efforts were made to stop or interfere with the prosecution of TRC cases. This involves a wide-ranging spectrum of investigation and inquiry.

34. I therefore find that there is no overlap between the subject matter in *Nkadimeng* and the terms of reference of this Commission. Although there may well be reference to the 2005 amendments to the prosecution policy, in the ensuing work of the Commission, this is a documented, historical fact about which there is unlikely to be any controversy.

35. The argument therefore that unfairness will flow from Semenya SC's prior role in *Nkadimeng* is misplaced. It is as well to point out again that the role of evidence leaders, including the questioning of witnesses, is always subject to the direction of the Chairperson of the Commission, which is a key safeguard to ensure that the Commission's proceedings are conducted in a fair manner.

36. I can therefore not envisage that any substantive unfairness would emanate from Semenya SC's prior role in *Nkadimeng*.

Access to Confidential or Privileged Information Resulting in a Conflict of Interest

37. The NPA has presented contemporaneous memoranda from advocate Mpshe SC, the former Acting National Director of Public Prosecutions, and a confirmatory affidavit from him which demonstrates that Semenya SC consulted with its officials before and after the constitutional challenge to the amendments to the prosecution policy.

38. From this the NPA asserts that Semenya SC would have received confidential or privileged information relating to the amendments to the prosecution policy.

In particular they allege that he would have received "confidential legal strategies, institutional deliberations, and internal assessments regarding the policy's rationale and purpose", which it is alleged are the "same matters on which the Commission must now make factual and legal findings."[7] This the NPA asserts gives rise to a "direct and irreconcilable conflict of interest".

39. The DOJ made similar claims. In her affidavit, the Minister of Justice explained that Semenya SC was "intimately involved in defending the same Policy amendments now being relied upon by those alleging interference" which "gives rise to a clear and unavoidable conflict of interest."[8]

40. The problem for the applicants, however, is that they were unable to explain the nature of the confidential or privileged information. Although the NPA referred to an opinion received from Semenya SC, that opinion was not produced. Similarly, the allegations in Mpshe SC's affidavit (for the NPA), about the nature of the consultations with Semenya SC, were couched in broad generalities rather than providing evidence of confidential or privileged information imparted to Semenya SC.[9]

41. It is settled law that evidence is required to succeed in establishing that counsel has a conflict of interest, arising from the imparting of prior confidential or

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7 Paragraph 27 of the affidavit of Advocate Mhaga for the NPA.

8 Paragraph 34 of the affidavit of the Minister of Justice for the DOJ.

9 For example, in paragraph 8 of the affidavit of Mpshe SC, it is said:

> *"I further confirm that, in the course of these engagements, Adv Semenya SC became privy to confidential discussions, internal assessments, and legal reasoning relating to the Prosecution Policy and its underlying rationale. Those matters are substantially identical to the issues now before the present Commission."*

privileged information. This standard is the outcome of the decision in *Moyane v Ramaphosa and Others* (82287/2018) [2018] ZAGPPHC 835; [2019] 1 All SA 718 (GP), at paragraph 19.[10]

42. In the end, the applicants have failed to establish that any confidential or privileged information was provided to Semenya SC. Accordingly, the applicants have failed to establish any conflict of interest on the part of Semenya SC.

43. Therefore, no substantive unfairness arises from this claim.

The Alleged Irregular Agreement with the Calata Group on the Leading of their Witnesses

44. The applicants alleged that Semenya SC had irregularly permitted Advocate Varney to lead the evidence of certain witnesses for the Calata group. This is a discrete issue and was dealt with by the parties through an agreed formulation on 28 November 2025, which is reflected in Ruling 1 which I handed down on that date. My decision is reflected in my subsequent Ruling handed down on 2 December 2025.

45. Consequently, no substantive unfairness can be said to flow from this procedural issue, which has nevertheless now been resolved.

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[10] Read with the decisions in *Wishart v Blieden NO* 2013 (6) SA 59 (KZP), at paragraph 39 and *Netcare Hospitals (Pty) Ltd v KPMG Services (Pty) Ltd* [2014] 4 All SA 241 (GJ), at paragraph 89.

The Ginwala Commission of Inquiry

46. The DOJ contended that Semenya SC was appointed as an assessor in and legal advisor to the Ginwala Commission following the suspension of the former National Director of Public Prosecutions, Advocate Vusi Pikoli, on 23 September 2007.

47. However, as was pointed out by the evidence leaders, that involved an entirely separate issue, about the fitness of a former National Director of Public Prosecution's to hold office. The sole charge against the former NDPP relating to the handling of the TRC cases. The charge was, in fact, subsequently withdrawn by government at that inquiry.

48. Consequently, no substantive unfairness can conceivably flow from Semenya SC's prior role in the Ginwala Inquiry.

Summation

49. Based on the foregoing, I am of the view that the applicants have not established any meritorious basis upon which to conclude that Semenya SC's continued participation in this Commission will result in substantive unfairness to them.

50. The proceedings of this Commission will be conducted in terms of its published Rules, the evidence leaders work under the direction of the Commission and the proceedings are subject to the control and direction of the Chairperson of

the Commission.

E. Addressing the Calata Group's Pragmatic Concerns

51. Advocate Varney for the Calata group submitted that his clients affirmed their confidence in Semenya SC and in his ability as Chief Evidence Leader. They submitted that they are "of the view that Semenya SC is not biased for or against any party" and that they "have faith in him acting impartially and objectively."

52. Despite this, the Calata group sought that Semenya SC step down because of pragmatic and efficiency concerns. This was said to have arisen from a prior ruling by the Chairperson which provisionally assigned matters dealing with the amendments to the prosecution policy to another evidence leader.

53. That assignment arose because of a letter dated 18 September 2025 from Webber Wentzel, the attorneys for the Calata group. That letter referred to Semenya SC's role in *Nkadimeng* and they proposed that Semenya SC be excluded from dealing with matters relating to the amendments to the prosecution policy in order to address the families' concerns and to avoid any public perceptions of conflict or bias:

> *"6. In order to avoid any public perception of partiality or conflict we respectfully request that Mr Semenya not be involved in any of the deliberations or leading or cross examination of witnesses in relation to the amendments of the Prosecution Policy. As there is in any*

event likely to be a division of labour amongst the evidence leaders, we believe this to be a practical and sensible suggestion."

54. In response thereto, I recorded on 19 September 2025 that I made no decision on those concerns but stated that I was minded adopt the route proposed by the Calata group. I recorded as follows:

> *"4. Having considered the concerns of your client and having heard Adv Semenya SC's response, I am minded going with a solution you propose. The concerns expressed by your client are noted. I make no decision on them. I will have another member of the Evidence Leader deal with this aspect."*

55. The Calata group then contended that based on that prior Ruling, Semenya SC ought not to have interviewed Dr Ramaite SC, the former Acting National Director of Public Prosecutions, on 13 November 2025, during which interview the amendments to the prosecution policy surfaced.

56. The Calata group submitted that that interview was in breach of the 19 September 2025 Ruling because it effectively excluded Semenya SC from being involved in that interview. They submitted that the Ruling meant that Semenya SC would have to be excluded from a large part of the work of the Commission, given that he would not be able to deal with various National Directors of Public Prosecutions and their evidence on the amendments to the prosecution policy.

57. When the communication of 19 September 2025 is analysed, it is clear that I

made no decision on the concerns raised by the Calata group but merely, as a preliminary measure, adopted the proposal submitted by the Calata group at the time. This exercise preceded the hearing of these recusal applications, where the issues have been fully ventilated and all the parties have made their submissions.

58. Given that I conclude that there is no basis upon which Semenya SC's role in *Nkadimeng* serves to disqualify him as chief evidence leader, the logical basis for that preliminary direction falls away and must be read *pro non scripto*.

59. If the restrictions placed on Semenya SC are lifted, the pragmatic concerns regarding his inability to perform his tasks efficiently are rendered moot. That will then dispel the efficiency concerns raised by the Calata group.

60. In any event, the breach of the 19 September 2025 preliminary direction was not an issue that was raised on application by the Calata group. Semenya SC has therefore not had an opportunity to respond to this issue and the Commission is unable to make a ruling in respect thereof.

F. Delay in the Recusal Applications

61. I deem it necessary to say something about the applicants' delay in instituting the applications for the recusal. These applications were only brought as a result of direct questioning by the Commission on the first day of the public hearings in this matter. In the result, on 10 November 2025 I issued timeline directions on the filing of papers for the recusal applications. This became

necessary because the applicants had, prior thereto, merely intimated that the applications would be brought, a most undesirable state of affairs, in light thereof that the Commission was to have commenced its first sitting from 10 to 28 November 2025.

62. The DOJ states that the conflict only crystallised when their representatives learnt on 27 October 2025 that Semenya SC had reached an agreement with Advocate Varney that Varney would lead the evidence of certain of the Calata group witnesses. This was approximately two weeks before the first public hearings of the Commission and prior to the recusal application being brought.

63. It is common cause that the NPA's junior counsel was sent Webber Wentzel's letter of 18 September 2025 and that she was also sent the Chairperson's response of 19 September 2025. That was some seven weeks prior to the NPA's recusal application being launched.

64. It is trite law that applications for recusal must be brought as soon as the cause for concern becomes known.[11] In this case, and particularly on the part of the NPA, an inordinate amount of time passed before the recusal applications were brought.

65. This delay and the applications for recusal resulted in the adjournment of the first sitting of the Commission, during which it was to hear the evidence of eight

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11 *Bernert v Absa Bank Ltd* 2011 (3) SA 92 (CC) (CCT 37/10, [2010] ZACC 28), at paragraph 71: "It is highly desirable, if extra costs, delay and inconvenience are to be avoided, that complaints of this nature be raised at the earliest possible stage."

witnesses over the course of three weeks. The prejudice to all concerned is obvious and substantial and it is to be deprecated.

G. Conclusion and Ruling

66. Based on the foregoing, I am of the view the Commission has decided that the applications for recusal must be dismissed.

67. I accordingly make the following Ruling:

(a) The applications for the recusal of Semenya SC as Chief Evidence Leader, brought by the Department of Justice and the National Prosecuting Authority are dismissed.

(b) The preliminary directions previously issued by the Chairperson on 19 September 2025, concerning the restriction of Semenya SC's participation in deliberations, questioning or cross-examination relating to the amendments to the prosecution policy are hereby uplifted.

JUSTICE SISI KHAMPEPE
CHAIRPERSON

04 DECEMBER 2025