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 Applicant

and

JUSTICE SISI KHAMPEPE, THE CHAIRPERSON OF THE COMMISSION Respondent

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RULING ON THE APPLICATIONS FOR THE RECUSAL OF THE CHAIRPERSON

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A. INTRODUCTION

1. Two applications serve before the Commission, for my recusal. The first was brought on 15 December 2025 by Jacob Gedleyihlekisa Zuma ("former President Zuma"). The second was brought on 19 December 2025 by Thabo Mvuyelwa Mbeki ("former President Mbeki") and four other former members of the Cabinet.[1] Argument on these applications was heard by the Commission on 16 January 2026.

2. The applications are opposed by the Calata group of families, who represent 25 survivors and families of victims who were forcibly disappeared or murdered during South Africa's struggle against apartheid ("Calata Group"). They are represented by the Foundation for Human Rights.

3. These applications are also opposed by the evidence leaders appointed by me to the Commission. They filed an affidavit by Ishmael Semenya SC in his capacity as Chief Evidence Leader ("Semenya SC").

B. BACKGROUND TO THE COMMISSION

4. This Commission was established by the President by Proclamation in the Government Gazette on 29 May 2025.[2] It is a Commission established in

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1 These are: Ms Brigitte Sylvia Mabandla, former Minister of Justice and Constitutional Development; Mr Ronnie Kasrils, former Minister of Intelligence Services; Ms Thoko Didiza, former Acting Minister of Justice and Constitutional Development; and Mr Charles Nqakula, former Minister of Safety and Security.

2 Proclamation Notice 264 of 2025.

terms of section 84(2)(f) of the Constitution, to enquire into whether efforts or attempts were made to stop the investigation or prosecution of Truth and Reconciliation Commission cases ("TRC cases").

5. The Commission's original mandate was to complete its work within six months and submit its report two months thereafter. Despite substantial preparatory work and owing to various challenges and delays, the Commission was not able to complete its work during the stipulated period. On 28 November 2025 the President extended the term of this Commission to 29 July 2026.[3] Time is therefore of the essence for the Commission to fulfil its mandate.

6. The present recusal applications were not brought during the first 8-month period of the life of the Commission but during the second, extended period granted to the Commission to complete its work.

7. The effect of the recusal applications, if they are successful, will be to bring the work of the Commission to a halt, until a new Chairperson is appointed, which would mean that the Commission would still not be able to complete its work, during an extended period.

C. THE APPLICATIONS FOR RECUSAL

8. Former President Zuma delivered his recusal application first. It must be recorded that the application is riddled with intemperate, rude and disparaging

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3 Proclamation Notice 302 of 2025.

accusations and thinly disguised threats. Needless to say, such vexatious material does not constitute evidence, much less evidence of objective facts.

9. Former President Zuma relies on both a reasonable apprehension of bias and actual bias as the basis upon which my recusal is sought.

10. The former President Mbeki's application is more restrained in its language and it is alleged that he has a reasonable apprehension of bias over my continued role as Chairperson of the Commission.

11. Both former Presidents Zuma and Mbeki raise certain common grounds for seeking my recusal. These relate to my prior roles as a member of the Amnesty Committee of the TRC during the period 1996 to 2001 and as a Deputy National Director of Public Prosecutions (DNDPP) during the period September 1998 to December 1999. The averments and contentions made in both applications overlap substantially. It is consequently convenient that they be heard together, and a composite ruling issued.

12. It is now necessary to deal with the contentions advanced at the outset by both former Presidents Zuma and Mbeki as preliminary issues disguised as points *in limine*.

D. WHETHER THE APPLICATIONS ARE UNOPPOSED

13. Former Presidents Zuma and Mbeki argue that my failure to deliver an answering affidavit in these applications has the effect of their applications

being unopposed. Former President Zuma contests the authority of Semenya SC to deliver an answering affidavit on behalf of the Commission. I disagree with these arguments.

14. As the decided cases on recusal demonstrate, judges do not deliver answering affidavits in applications seeking their recusal. It would indeed be surprising for a judge confronted with a recusal application to deliver an affidavit and then sit in judgment of that very evidence.

15. Rather, the appropriate and routine way for judges to deal with recusal applications is through their reasoned judgments. I propose to do the same. The *SARFU* Constitutional Court Case is precedent setting.

16. In addition, it can hardly be contended that these recusal applications are unopposed because the Calata Group, which the founding Proclamation of this Commission recognises as an 'interested party' in this Commission, is resisting the recusal attempt. [4]

17. That then brings me to the affidavit of Semenya SC. Former President Zuma contends that Semenya SC has not been authorised by the Commission to deliver an answering affidavit. He argues that this affidavit is therefore unauthorised and must be disregarded for the purposes of his recusal application. Former President Mbeki's application is to similar effect.

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[4] Paragraph 2 and specifically 2.1 of the Proclamation of 29 May 2025 makes this clear.

18. I disagree. As pointed out by Semenya SC and the evidence leaders, Semenya SC is alleged to have been the direct recipient of 'secret communication' that I sent to him either on email or on the cellular WhatsApp platform. He is therefore eminently entitled to respond to such matters, given that he is directly implicated in those allegations.

19. Semenya SC notes also, under oath, that he delivers the answering affidavit on behalf of the Commission. Although this is contested in reply, the grounds for such contestation do not withstand scrutiny. Semenya SC has been appointed by me as the Chief Evidence Leader. As I have already noted in the Commission's prior ruling on 4 December 2025, evidence leaders work "subject to the control and direction of the Chairperson of the Commission."[5]

20. Further, the evidence leaders have been appointed by me, as part of this Commission and I deem it necessary to take their contentions into account. It is to be noted that in the overlapping grounds in the recusal applications, the historical facts of my prior institutional roles are largely common cause and the resolution of these matters turns primarily on legal argument, rather than on contested evidence.

21. In any event, the grounds of opposition advanced by Semenya SC and the evidence leaders are substantially similar to the grounds of opposition advanced by the Calata Group and there is no suggestion that their affidavits

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5 Ruling on the Recusal Application for Semenya SC dated 4 December 2025, at paragraph 13.

are not properly before this Commission.

22. I accordingly make the signification that these recusal applications are opposed.

23. I propose to deal first with the legal principles established for recusal. These are well established principles in our law.

E. THE LEGAL PRINCIPLE APPLICABLE TO RECUSAL FOR BIAS

24. In recusal applications, two types of bias find application. First is actual bias. The second is a reasonable apprehension of bias.

25. Former President Zuma implicates both types of bias while former President Mbeki only claims a reasonable apprehension of bias.

26. "Bias" '… *is to denote a departure from the standard of even-handed justice which the law requires from those who occupy judicial office or those who are commonly regarded as holding a quasi-judicial office* …'".[6]

27. Allegations of bias "*must be substantiated by a proper factual basis, must not be based on mere speculation and conjecture, and must be proved by the party alleging bias*."[7] Claims of actual bias require evidence of a "*mind which*

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6 *BTR Industries SA (Pty) Ltd v Metal and Allied Workers' Union* 1992 (3) SA 673 (A), at 690C ("*BTR Industries").*

7 *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* (2000) 21 ILJ 1583 (CC) ("*Irvin and Johnson*") at para 12; *S v Basson* 2007 (3) SA 582 (CC) at para 30.

was in fact prejudiced and not open to conviction."[8]

28. The test for a reasonable apprehension of bias set out in the seminal *SARFU* judgment has been the lodestar to follow, enunciated in these terms:

> *"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. 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 predisposition. 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 to a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of the litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."*[9]

29. This test has been referred to as the "*double requirement of reasonableness*" test: "*both the person who apprehends bias and the apprehension itself must be reasonable*."[10]

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8 *BTR Industries*, at 690 B-C.

9 *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC) ("*SARFU*"), at paragraph 48.

10 *Bernert v Absa Bank Ltd* 2011 (3) SA 92 (CC) ("*Bernert*"), at paras 34 and 35.

30. In *Masuku*, these principles were expressed in this manner:

> *"[64] The test for recusal is objective and constitutes an assessment of whether a reasonable litigant in possession of all the relevant facts would have a reasonable apprehension that the judge is biased and unable to bring an impartial mind to bear on the issues in dispute. The application of the test requires both that the apprehension of bias be that of a reasonable person in the position of the litigant and that it be based on reasonable grounds. This test must, thus, be applied to the true facts on which the recusal is based."*

31. In this regard, subjective perceptions are not enough because the test is objective:

> *"The test for recusal is objective and constitutes an assessment of whether a reasonable litigant in possession of all the relevant facts would have a reasonable apprehension that the judge is biased and unable to bring an impartial mind to bear on the issues in dispute. The application of the test requires both that the apprehension of bias be that of a reasonable person in the position of the litigant and that it be based on reasonable grounds. This test must, thus, be applied to the true facts on which the recusal application is based."*[11]

32. Even "strongly and honestly felt anxiety" is not enough.[12] This means that an applicant who brings a recusal application faces a "formidable … burden".[13] Objective evidence in the form of "*an articulation of a logical connection*

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11 *South African Human Rights Commission On Behalf Of South African Jewish Board of Deputies v Masuku and Another* 2022 (4) SA 1 (CC) ("*Masuku*"), at para 64.

12 *Bernert*, at para 34.

13 *Bernert,* at para 35.

between the matter and the feared deviation from the course of deciding the case on its merits" must be presented.[14]

33. There are additional important principles that must be considered in applications for recusal. These form the legal backdrop to any application for recusal of a judicial officer.

34. First, there is a strong presumption of judicial impartiality which is not easily dislodged. This arises from the oath of office taken by judicial officers which presumes that judges are capable of administering justice without fear, favour or prejudice, based on their training and experience.[15]

35. Second, there is a duty on judicial officers to continue to sit in any matter in which they are not obliged to recuse themselves.[16]

36. Third, judges are presumed, by virtue of their training and experience, to innately carry the ability to *"disabuse their minds of any irrelevant personal beliefs or predispositions*".[17]

37. This means that a litigant or an applicant for recusal must present "cogent or

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14 *Ex Parte Goosen* 2020 (1) SA 569 (GJ) ("*Goosen*") at para 29, endorsed in *Masuku*, at paragraph 69.

15 *SARFU*, at para 48. This presumption was emphasised in *Irvine and Johnson Ltd*, at para 12. *See also*, *Bernert* at paras 31-34 and *Masuku*, at paras 59-62.

16 *SARFU*, at para 46. *Electoral Commission v Umkhonto Wesizwe Party and Others* 2025 (5) SA 1 (CC) ("*Electoral Commission")*, at para 24. *Bernert,* at para 35.

17 *Masuku, supra,* at para 61, citing SARFU.

convincing evidence" to dislodge the presumption of judicial impartiality.[18]

38. Mpofu SC, who appeared for former President Zuma, sought to downplay the judicial presumption of impartiality by arguing that I am simply the Chairperson of a tribunal and not sitting as a Judge. I disagree. I have been appointed by the President, through his section 84(2)(f) presidential powers, to chair a Judicial Commission of Inquiry. I have been appointed precisely because of my oath of office and because I am a Judge, albeit presently retired. It is my considered view that Mpofu SC's contention is devoid of substance. The presumption of judicial impartiality remains in my present role as Chairperson of this Commission and, as I have said, it is one that is not easy to dislodge.

39. This is not to say that I fulfil judicial functions in my present position. Commissions of Inquiry are not courts of law. This Commission is an investigatory body tasked with investigating the matters set out in its Terms of Reference. The Commission will ultimately report to the President on the outcome of those investigations. The Commission may make recommendations to the President, but it will be up to the President on whether to implement such recommendations.

40. This Commission does not function as an adversarial body and the proceedings before it must not to be confused with litigious, court based proceedings, with winners and losers.

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18 *Irvine and Johnson Ltd* at para 12.

41. I am, by virtue of the Regulations[19] issued pursuant to the appointment of the Commission, responsible for the processes and conduct of this Commission. I have published Rules[20] that govern its work.

F. PRIOR INSTITUTIONAL ROLES

42. It is common cause that I sat as a member of the Amnesty Committee of the TRC over the period 1996 to 2001. It is also common cause that I was appointed as a Deputy National Director of Public Prosecutions (DNDPP) over the period September 1998 to December 1999. I held these positions over 28 years ago, counting from 1998.

Former President Zuma's Contentions

43. Former President Zuma contends that these positions make me:

> *"(a) distinctively unsuitable and/or automatically disqualified" for my present position;*
>
> *(b) unsuitable because witnesses before this Commission may include my former colleagues and superiors;*
>
> *(c) a potential witness in this Commission; and*
>
> *(d) that the issue of prosecution is directly related to the granting or refusal of amnesty."*

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19 Published on 19 August 2025, in Proclamation Notice R. 278 of 2025.

20 Published on 29 August 2025, in Proclamation Notice 285 of 2025.

44. In effect former President Zuma argues that my prior roles have the concomitance that I have subject-matter bias or disqualifying bias. He referred us to the *Pinochet* case in the United Kingdom. In that matter a member of a panel was found to have disqualifying bias because of his directorship of a company controlled by one of the litigants to the proceedings.[21] That was the basis for the disqualifying bias by association in that case. That case has little relevance to the present facts.

45. Former President Zuma ignores the fact that the issue of efforts or attempts having been made to stop the investigation or prosecution of TRC cases, were not matters that were pertinent before the TRC's Amnesty Committee or indeed at the National Prosecuting Authority (NPA) during my tenure there. Nor has he pointed to any direct aspect of my work there that can be said to constitute an "articulation of a logical connection"[22] between my work in those roles and the present investigations before this Commission.

Former President Mbeki's Contentions

46. Former President Mbeki states that my prior institutional role at the Amnesty Committee meant that I was *"directly involved in making the TRC findings and recommendations (regarding prosecutions of those who were declined amnesty)"* and argues that this yields a reasonable apprehension of bias. The

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21 *Pinochet, In Re* (1999) UKHL 1. In that matter the House of Lords held that a member of the panel, who was a Director in a company controlled by one of the parties, was disqualified because of that association and ought not to have sat in the decision of the first instance.

22 *Goosen* at para 29; *Masuku* at para 69.

far-fetched inference that is sought to be drawn is that I might therefore have a predisposition in favour of justifying or defending conclusions reached during those times.

47. Former President Mbeki argues that I presided over or participated in the amnesty proceedings in the Cradock Four matter, involving "Mr Calata's father." This is not borne out by the facts, as also correctly pointed out by the Calata Group.

48. In addition, former President Mbeki argues that I was party to the conclusions reached by the TRC in its report, which made findings that the African National Congress ("ANC") had committed gross human rights violations. Once again, as correctly pointed out by the Calata group, this is a one-sided assessment of the report of the TRC. That report made key findings that the primary perpetrators of violence and murder during the years of apartheid was the apartheid regime itself. In addition the TRC report also found that several other groups were responsible for committing gross human rights violations.

49. Former President Mbeki also argues that my prior role at the NPA means that I may have an "institutional interest" in defending or validating my decisions made during that time.

50. Former President Mbeki alleges that during my time at the NPA I had *"institutional responsibility for shaping NPA policy on the TRC cases".* I am not aware of any specific policy on TRC cases that I was involved in emerging from the human rights investigation unit during 1998 or 1999. As the Calata

Group further points out, this is mere speculation. This averment is not supported by a factual basis. It therefore veered into the realm of conjecture.

51. Further, former President Mbeki alleges that my prior role in the TRC creates an apprehension of bias because of "the unavoidable overlap" between my "past adjudicative role and her present fact-finding responsibilities." What this alleged overlap is, is not spelt out and I cannot divine what this might be.

Analysis: The facts

52. The claims, by both former Presidents Zuma and Mbeki, are based simply on generalised suspicions and claims, with no attempt to state what I did or when during those times, that is relevant to the work of this Commission.

53. The question of whether apartheid era crimes should be prosecuted is not before this Commission, and therefore the recommendation of the TRC that offenders who were not given amnesty must be prosecuted, does not have to be defended or justified. Nor should such questions feature at all in the work of this Commission.

54. Furthermore, there is no evidence at all to suggest that my work at the NPA during 1998-1999 is somehow of direct relevance to the present work of this Commission. Again, they allege but fail to produce the proof.

55. As with former President Zuma, former President Mbeki fails to demonstrate any "logical connection" between my prior institutional roles and the work of

this Commission. Without this basic information it requires a leap of logic, to conclude that there might be an apprehension of bias on my part as I continue to probe what this Commission is mandated to determine.

56. But there is a more fundamental problem with the apprehension of bias argument based on my prior institutional roles. It is this. The Terms of Reference of this Commission require that it must investigate whether attempts or efforts were made to stop the investigation or prosecution of TRC cases from 2003. That was well after my prior roles at the Amnesty Committee which ended in 2001 and at the NPA which ended in December 1999.

57. There is thus a 2003 temporal boundary over the work of this Commission which means that what I did in my prior institutional roles will not be the subject of the work of this Commission. Nor have former Presidents Zuma and Mbeki offered any elucidation of what these related matters might be.

58. Consequently, I find that the apprehension of bias based on my prior institutional roles is not reasonable based on the lack of facts established by the applicants in their founding affidavits.

Analysis: The Law

59. It is established law that prior institutional positions will not, without more, be indicative of bias, let alone a reasonable apprehension of bias. Our courts have recognised that judges are the product of their life experiences. They are not expected to "occupy a place of utter isolation from an issue or from

even a party for that matter."[23]

60. In addition, the Constitutional Court has held:

> *"… '[A]bsolute neutrality' is something of a chimera in the judicial context. This is because Judges are human. They are unavoidably the product of their own life experiences and the perspective thus derived inevitably and distinctively informs each Judge's performance of his or her judicial duties…".*[24]

61. In *Masuku*,[25] it was recognised that judicial personal and professional experience play a role in the adjudicative function and "what is more, 'it is appropriate for judges to bring their own life experience to the adjudication process."

Conclusion

62. On this ground therefore, I find that the applicants, have not established any reasonable apprehension of bias, either on the facts or on the law. They fall remarkably short of displacing the presumption of judicial impartiality.

G. MY ROLE IN PRIOR JUDGMENTS

63. Former President Zuma complains that I was the author of judgments against him in the past. His primary concern on this aspect is the judgment of the

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23 *Ex Parte Goosen*, at para 25 (citing *Ebner v Official Trustee* (2001) 205 CLR 337 (HCA)).

24 *Irvin and Johnson*, at para 13.

25 At paragraph 67.

Constitutional Court which resulted in his imprisonment.[26] I wrote the judgment on behalf of the majority of Judges of the Constitutional Court. Even the two minority Judges were of the view that former President Zuma's refusal to appear at the State Capture Commission deserved a sanction of imprisonment. They merely differed in respect of whether the motion procedure followed in convicting and sentencing him to imprisonment was consistent with the Constitution.

64. It is in this area of his application that the language in the founding affidavit is particularly disrespectful, egregious and ad hominem. I choose these adjectives advisedly and buttressed with the following extracts from the founding affidavit:

> *"28. Judged from both the tone of these last two judgments and her general demeanour it was self-evident that Justice Khampepe was motivated by deep-seated personal hatred, animosity and/or anger specifically directed towards me."*
>
> *31. Millions of people in South Africa continue genuinely to believe that the judgment was driven by undue vengeance, bitterness and highly personalised animosity. The decision reportedly sparked unprecedented levels of public rejection and unrest which regrettably resulted in the death of 350 South Africans and untold economic damage. But for the judgment all those would still be alive today."*

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26 *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others* 2021 (5) SA 327 (CC).

> *32. Further confirmation of my reasonable suspicions about the malice behind the judgment came in the form of various public media interviews conducted by Justice Khampepe after retirement."*
>
> *33. I strongly believe that the tone and tenor of the interview confirms that my imprisonment was aimed at 'teaching me a lesson' rather than a detached application of law."*

65. These are, however, the subjective perceptions of former President Zuma. The test for bias is an objective one based on objective facts. It would stretch credulity to believe that these expressed perceptions are bona fide. Former President Zuma has presented no part of the judgment which is said to demonstrate bias, or a reasonable apprehension of bias, on my part. Again, I am left to guess as to what these facts might be. The mention of "millions of people" is a thumb-suck, not even based on a gallup-poll. Further, no reference is made to the Report of the Expert Panel into the July 2021 Civil Unrest or the South African Human Rights Commission (SAHRC) Report on what the source of the insurrection of July 2021 was. Be that as it may, to blame me and the Constitutional Court for what happened is to stoop low. The aim is plainly to denigrate me and delegitimize the Apex Court.

66. Former President Zuma also relies on interviews I gave after my retirement which are reported in Newzroom Afrika and News 24. Yet, he does not provide any substantive part of those interviews, apart from a headline in a News24 article, which reads: "*We could not pander to Mr Zuma*." This is said to be demonstrative of bias on my part, or at least capable of instilling a reasonable

apprehension of bias on his part. This is throwing mud against the wall with the hope that some of it might stick.

67. On the law, our courts have definitively established that *"Judges often hear different matters relating to the same applicant without that providing a justifiable basis for recusal."*[27]

68. Consequently, I find that this ground falls woefully short of establishing an objectively established reasonable apprehension of bias.

H. SECRET COMMUNICATIONS

69. Former President Zuma alleges that I have sent secret communication to Semenya SC and that I did so during the application for the recusal of Semenya SC. Former President Zuma did not participate in that application for recusal. That application was dismissed in my ruling dated 4 December 2025.

70. Although former President Zuma claims that I gave "private and secret advice" to Semenya SC, he provides no evidence whatsoever of these communications. In fact, in his founding affidavit, he states that he will produce this evidence if the allegations are denied but will do so before another forum. How one is meant to disprove a negative, or disprove the absence of evidence, is beyond comprehension.

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27 *Electoral Commission*, at para 26.

71. During oral argument Mpofu SC persisted in former President Zuma's averment that I gave private advice to Semenya SC, Chief Evidence Leader, on how to counter certain allegations by the applicants for his recusal. According to Counsel, "*the recusal application is clearly adversarial. So, the fact that the Commission itself might be inquisitorial is neither here nor there. And to the extent that it is adversarial it is improper conduct for the chairperson to give to one of the adversaries."* For this contention he invokes *S v Roberts 1999(4) SA 915 (SCA) at para 23*. As already pronounced at paragraph 40 (above) of this Ruling, Mpofu SC has misconceived the true nature of a Commission of Enquiry. The Roberts case is not on point.

72. The aforesaid approach elicited the following engagement with the Commission:

> *"But you did not bring out the content of the advice. It is just advice in vacuo, the expression 'advice'; the content of the advice, the text of the advice",* is lacking.

73. Mpofu SC then averted to paragraphs 38, 39 and 40 of former President Zuma's statement as an answer to the enquiry. It is apposite therefore to quote verbatim the contents of these paragraphs for objective examination:

> *"38 In the build up to the hearing of the Semenya recusal application Justice Khampepe as a member of the judiciary and as the decision maker who would ultimately make the final ruling, conducted herself improperly and exhibited actual bias in favour of the non-recusal of Adv Semenya SC.*

> *39 A good example of this is that Justice Khampepe, without the knowledge of the applicants, privately and secretly gave advice to Semenya SC on certain key weaknesses in his case and even advised him on what to look out for and what to convey to his legal representative Adv Vas Soni in order to succeed in the recusal application. This is a case of plain and gross misconduct irrespective of the merit or demerit of the Semenya recusal application.*
>
> *40 Purely in order not to jeopardise ongoing investigations into this serious conduct which poses a threat to our democracy, I deliberately and consciously refrain at this [stage], from revealing the complete evidence available to me. If the accusation is denied, then I will be left with no option but to resort to alternative procedural mechanisms in order to secure and/or provide the evidence. I trust that this will not be necessary."*

74. This is not the only threat by former President Zuma. It is neither even veiled nor subtle. Mpofu SC was asked to speak to para 52 of former President Zuma's statement because the "*understanding seems to be that if Justice Khampepe does not recuse herself or perhaps if the finding is that she does not recuse herself, then Mr Zuma is out of here? He is not participating*."

75. Para 52 reads:

> *"52 Last but not least, the previous conduct by the Chairperson in relation to my controversial detention without trial and her subsequent negative public commentary, make it untenable for me to comply with the request to participate in the present Commission as set out in the Rule 3.3 Notice sent to me by*

the Commission and in any process which is tainted by her demonstratable and/or reasonably perceived bias."

76. After a preamble Mpofu SC contends at pp 112-113 (of the transcribed argument):

"Now of course that does not suggest anything about out of here. All it suggests – in fact, let me put it plainly; is that should this commission find that this ground, serious as it is, is not sufficient and the chairperson should nevertheless continue, having given advice to my learned friend, Adv Semenya SC; then former President Zuma will exercise his options which are provided in the Constitution.

One of them he has already mentioned that he is going to approach the Judicial Service Commission. The other one, which is obvious, is that he could approach the courts. So, that is what that paragraph is meant to convey; nothing more, nothing less. And as I say, anyone of us, any human being would find it untenable to appear under such circumstances."

No amount of embellishment by Counsel would alter the plain unequivocal meaning in the said para 52. It is an ultimatum.

77. As in the poem *"The Rubaiyat of Omar Khayyam (1859) Stanza 27*:

"Myself when young did eagerly frequent

Doctor and Saint, ***heard great Argument***

About it and about: but evermore

Came out by the same Door as in I Went."

(own emphasis)

In short, we are none the wiser.

78. Even in his replying affidavit, former President Zuma did not produce a smidgen of evidence with regard to the secret communications. In his replying affidavit, former President Zuma accepts that he has not provided any evidence of these communications and states that the decision to withhold these communications is to protect *"ongoing sensitive investigations"* and that at some future time that will be *"made available to the Judicial Services Commission or even this Commission once specific safeguards have been negotiated."*

79. In his replying affidavit, it is also claimed that I sent an email to Semenya SC on or about 5 November 2025 dealing with advice about the recusal application, but, as the evidence leaders correctly point out, the recusal application was only brought on 12 November 2025, some time later.

80. Further, as the evidence leaders pointed out there is nothing untoward about me communicating with the Chief Evidence Leader and the evidence leaders' team because this is how this Commission is supposed to work and others in reputable jurisdictions operate. Frequent communication between us is therefore to be expected.

81. What is most sinister about these allegations is that former President Zuma

does not explain the lawful bases upon which he has acquired such communications, on the assumption that these exist and are in his possession. It is an offence in terms of the Cybercrimes Act 19 of 2020 to gain access to another person's computer system or data storage without permission. I have given no such permission to former President Zuma, or to anyone else for that matter, relating to the work of this Commission.

82. What is more, former President Zuma contends that I emailed Semenya SC from my private email address rather than my official email address. The system that obtains is that all Commissioners use their private email addresses and have not been allocated official email addresses.

83. In so far as the work of the Commission is concerned, matters of direct relevance to the public are posted, in real time, onto the Commission's website and the public has ready access thereto. This includes all correspondence and communication with the parties involved in this Commission and matters about which the public must be kept informed. It is a historical record of the work of the Commission.

84. It follows therefore, that if former President Zuma has access to my communication with Semenya SC, that can only be through unlawful surveillance. This is a serious matter which warrants thorough investigation.

85. For present purposes, however, it is perspicuous that the lack of cogent evidence by former President Zuma as to the alleged secret communications, falls flat. There is no factual basis upon which an objective conclusion could

be drawn about bias, let alone an objectively justifiable, reasonable apprehension of bias.

86. I consequently find that there is no substance in this allegation.

I. PRIOR PROCEDURAL DIRECTIONS

87. Former President Mbeki complains about my handling of objections pertaining to Semenya SC. The complaints are two-fold.

88. First, that I endorsed an irregular arrangement between Semenya SC and Advocate Varney in regard to the leading of witnesses in a ruling dated 2 December 2025. It is argued further that I failed to give reasons for this decision.

89. Second, it is alleged that I endorsed a breach by Semenya SC of my prior directive to him not to participate in any questioning of NPA officials about the prosecution policy at a stage when Semenya SC's prior advisory role to the NPA was at issue.

90. In so far as the first ground is concerned, it is significant that former President Mbeki's legal team delivered heads of argument pertaining to the objection to Advocate Varney leading the witnesses of the Calata Group. In those heads of argument, former President Mbeki's legal team analysed the provisions of Rule 3.1 of this Commission and argued that this decision was one that I could make. Those procedural objections were initially set down to be argued on

28 November 2025.

91. On the scheduled date, the parties, including former President Mbeki's legal team, approached the Commissioners in chambers, with an agreed process for the resolution of the objection over the arrangement for Advocate Varney to lead the witnesses of the Calata Group. That agreed process is contained in my Ruling on that day, which is published on the website of the Commission.

92. Pursuant thereto, I made a decision, in accordance with the process agreed by the parties, considered the objections and the arguments against those objections, and exercised my discretion to permit Advocate Varney to lead the witnesses of the Calata Group.

93. In light of paragraphs 5 and 6 of the Draft Ruling submitted by the legal representatives of all parties present, it is evident that Advocate Varney and the Calata Group have not been accorded any preferential treatment. These paragraphs provide as follows:

> *"5. In respect of future requests by the parties to lead witnesses, such requests will be made by way of letter addressed to the Chairperson, copied to all parties, identifying the witnesses in question and providing the reasons why the parties wish to lead those witnesses.*
>
> *6. Any party wishing to object to another party leading their witnesses, may do so by way of letter addressed to the Chairperson, copied to all parties"*

94. These paragraphs and the Ruling I made on 2 December 2025, therefore, eliminated the dispute or *lis* on this aspect. It would accordingly have been a futile exercise and superfluous to furnish reasons in these circumstances.

95. In addition, that was a procedural direction and my decision is not uncommon. Several other Commissions in this country have permitted parties to be led by their legal representatives, for example at the Marikana Commission of Inquiry.

96. Given that this was a procedural direction, I exercised my discretion not to write a reasoned ruling. It is seldom in our Courts that procedural directions are accompanied by written judgments, or followed by reasons for that direction. Indeed, these are matters that are not regarded as final or appealable because they are simply procedural directions and may be subject to variation.

97. If former President Mbeki was dissatisfied with the outcome of my discretion and my eventual ruling on this issue, then the appropriate course would have been to approach the Commission to vary the ruling, or to take the matter on judicial review to the High Court. Former President Mbeki has not done so.

98. Notably, nothing in the Rules require me to give reasons in respect of the Directive I issued in terms of Rule.3.1.1.

99. The point I make is this. Dissatisfaction with my procedural ruling is not objective evidence in support of a reasonable apprehension of bias.

100. In *Martiz v The State*[28] the Court had to deal with a failure of a Judge to recuse herself prior to sentencing. It was claimed that the Judge had revoked a person's bail which had then been restored by a higher court. This was one of the grounds asserted as a basis for a claim of reasonable apprehension of bias. The SCA noted that a mistake in the application of the law or the facts does not in itself mean that the Judge was biased:

> *"If a litigant is for some sound reason, not satisfied with a judicial officer's judgment or decision, the aggrieved litigant has a right to approach a higher court for the appeal or review of the judgment (as the case may be) to adjudicate on its correctness. The reason why we have the appeal court system is inter alia, a recognition of the fact that judges may sometimes err in the exercise of their discretion or misapply the law in the process of adjudicating. Naidoo J may have wrongly revoked the appellant's bail. Her mistake in the application of the law, or on the facts did not by itself mean she was biased. The relevant connection must call into question her ability to apply her mind in an impartial manner to the case before her."*

101. Even a mistake on the facts is not sufficient, on its own, to establish a reasonable apprehension of bias:

> *"[102] As we held in Basson II, 'a mistake on the facts, even if correct, is not ordinarily sufficient on its own to give rise to a reasonable apprehension of bias'. Judicial officers are not superhuman beings who do not make mistakes. That is why there is an appellate process to correct mistaken findings on law or facts. A mistake on the facts will only give rise to a*

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28 [2024] SASCA 72 (8 May 2024)

> *reasonable apprehension of bias if it is so unreasonable on the record that it is inexplicable except on the basis of bias. A litigant who relies on bias based on incorrect factual findings bears the onus of establishing this fact. This is a formidable onus to discharge."*[29]

102. From these cases, it is apparent that dissatisfaction with the outcome of a judgment or decision is therefore something ordinarily to be taken up on appeal or review, as the case may be. But such dissatisfaction does not, without more, suffice to establish a reasonable apprehension of bias.

103. In so far as former President Mbeki's second complaint is concerned, namely, that I endorsed a breach by Semenya SC of my prior directive to him not to participate in any questioning of NPA officials, I should point out that this was dealt with in my Ruling on the Semenya SC recusal application. This Ruling was delivered on 4 December 2025. That ruling deals with the fact that the very basis for that earlier preliminary ruling was to be regarded as *pro non scripto*.[30]

104. It is significant that former President Mbeki did not play any part in the recusal applications for Semenya SC, despite him having had every opportunity to do so.

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29 *Bernert*, at paragraph 102.

30 Ruling on Semenya SC's recusal application, which deals with this issue at paras 53-58 and which finds at para 58 as follows:

> "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*."

105. Again, if former President Mbeki had any concerns with my ruling on this issue, then the appropriate course for him was to have taken the matter on review before the High Court. But dissatisfaction with that Ruling, does not by itself equate to a reasonable apprehension of bias.

106. In my view, former President Mbeki has failed to establish any "relevant connection" between these complaints and my ability to apply my mind impartially to the work of this Commission. Nor is it suggested that my ruling was so unreasonable that it can only be explained upon the basis that I am biased.

107. I consequently find that former President Mbeki has not established any reasonable apprehension of bias on this set of complaints.

J. CONCLUSION ON THE GROUNDS ADVANCED

108. As is evident from the foregoing, none of the grounds advanced by former President Zuma for actual or a reasonable apprehension of bias can be said to be sufficient to meet the required legal tests. I therefore find that former President Zuma has made out no case of actual bias on my part, or indeed that he holds a reasonable apprehension of bias on my part as I perform my duties to chair the Commission.

109. The same is true of the argument advanced by former President Mbeki. None of the grounds advanced by him equate to objective evidence of a reasonably held apprehension of bias.

110. Both applications for my recusal must therefore fail.

111. But that is not the end of the matter. Even if I am wrong in these conclusions, there is the pressing issue of delay. In my view, and apart from the grounds advanced by the applicants, both applicants delayed unreasonably in bringing these recusal applications. The applications for my recusal must be dismissed on this basis alone. I deal with this next.

K. DELAY

112. As noted at the outset, both applications were launched in the extended second term of this Commission. Yet, the common cause facts of my prior institutional involvement have been publicly known for decades.

113. At the very least both former Presidents Zuma and Mbeki would have, or ought to have had such publicly available knowledge on 29 May 2025, which is when the Proclamation establishing this Commission was gazetted.

114. At that time, both applicants as former Presidents of this country, would have or ought to have been aware that the Terms of Reference of this Commission overlapped with their terms as Presidents of this country.

115. Further, former President Mbeki would have known of these matters because he had earlier applied to intervene in the pending Calata application before the High Court.

116. There can therefore be no suggestion that these applicants were unaware of

my position in this Commission and of the Terms of Reference of this Commission. Yet both applicants failed to act.

The legal principles applicable to delay in recusal applications

117. It is established law that recusal applications go to the heart of the administration of justice. This means that they must be brought with expedition because such applications have the possibility of disturbing the proper administration of justice.

118. In *Bernert*, the Constitutional Court held:

> *"It is highly desirable, if extra costs, delay and convenience are to be avoided, that complaints of this nature be raised at the earliest possible stage."*[31]

119. There must be an explanation for any delay in instituting recusal applications. The Constitutional Court in *De Lacy and Another v South African Post Office*[32] held the following:

> *"It must be added that a litigant who raises a complaint of bias or its apprehension must do so at the earliest possible opportunity, setting out the details of the time and circumstances under which the apprehension of bias would have arisen. These details would be singularly important in assessing whether the apprehension advanced is reasonable."*

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31 At para 71.

32 2011 (9) BCLR 905 (CC)

120. In *Bernert* that Court held:

> *"In Locabail, the Court of Appeal held that if, after disclosure of interest in one of the parties to proceedings, a party does not raise any objection to the judge hearing the case or continuing to hear the case, that party cannot thereafter complain of the matter disclosed as giving rise to a real danger of bias. To allow a party to complain of bias in these circumstances would be unjust to the other party and undermine both the reality and the appearance of justice."*[33]

121. What is clear from these extracts is that in assessing delay, not only is the administration of justice and its disruption to be considered, but it is also the interest of other parties, such as the Calata Group, who were responsible for the establishment of this Commission by consent with the President. They are waiting for their matters to be heard and investigated and they have been waiting for a long time.

Former President Zuma's Delay

122. Former President Zuma received his Rule 3.3 notice on 19 September 2025. This notice advised him of allegations made by the Calata Group, which implicated him and called upon him to furnish the Commission with his response. In response, former President Zuma's lawyers sought further time in which to respond. An extension of time was given to former President Zuma to file his response by 17 November 2025.

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[33] At para 72.

123. Yet on 14 November 2025, former President Zuma's lawyers sought a further extension of time so that he could cooperate with the Commission:

> "*In the circumstances, we beg the indulgence of the Commission to grant our client a further extension so as to allow him to make a meaningful contribution to its work."*

124. There was no suggestion then by former President Zuma or his lawyers that they took umbrage to my chairing of this Commission.

125. It is only in his replying affidavit that former President Zuma attempts to explain his delay. The allegation is that *"the most recent improper conduct in respect of the Semenya recusal application constituted the last straw and trigger for the recusal application."* Former President Zuma did not participate in that application for the recusal of Semenya SC. Yet it is asserted that my ruling on the Semenya SC recusal application was the "trigger" which prompted him to bring this application.

126. This means that former President Zuma's arguments about the adverse judgments and my previous roles in the TRC and the NPA were not deemed sufficiently serious to him so as to "trigger" the recusal application. In fact, former President Zuma was well aware that the Commission was set to hear the first set of witnesses beginning on 10 November 2025, yet he did not act then. What is odd is that former President Zuma did not participate at all in the application for Semenya's recusal. It is only after my ruling that he formed the view that this was a "trigger" for my recusal.

127. In my view this constitutes an unexplained and unreasonable delay.

Former President Mbeki's delay

128. Former President Mbeki too delayed unreasonably, for which there is no adequate explanation in the founding affidavit. The one ground advanced is that he had to wait for his lawyers to consider former President Zuma's recusal application, before he could act.

129. It would therefore seem that but for the former President Zuma's application, former President Mbeki would not have sought my recusal. The trigger for former President Mbeki was the former President Zuma's application. Yet, former President Mbeki could have acted much earlier on his grounds relating to my prior institutional involvement and my ruling on the leading of witnesses. Former President Mbeki and his lawyers failed to do so.

130. But former President Mbeki also argues that the handling of the two complaints against Semenya SC was more recent and crystalized the need to bring the recusal application. Given what I have already found in respect of these complaints, elsewhere in this ruling, and in particular in paragraphs 87 to 98; 103 to 106, I am of the view that these complaints were a feeble attempt made with hindsight on his part to justify why the recusal application was not filed timeously.

131. Significantly, former President Mbeki too had prior to his recusal application, willingly co-operated with the work of the Commission. His lawyers committed

to assisting the Commission at various stages prior to the recusal application being brought, as is detailed in the answering affidavit of Semenya SC. And, all of this was reiterated shortly before the sudden arrival of his recusal application.

Applying the Legal Principles on Delay

132. As I recorded at the outset to this Ruling, this Commission is currently in its second term, and these recusal applications have already had the effect of delaying justice and closure to the complainants with the result that this Commission will in all likelihood not complete its work in the remaining limited time.

133. As it is, this recusal application and the preparation of this Ruling has meant that the Commission has had to adjourn its first sitting of 2026, which was scheduled for 27 January 2026. These are factors that I must consider in assessing the reasonableness of the delay in the institution of these recusal applications, including the astronomical costs implications.

134. Therefore, on the facts, I find that both applicants have delayed, without proper explanation, unreasonably so, in bringing these recusal applications. They ought to be non-suited on this ground alone.

135. Further, the time bound nature of the work of this Commission and the various interests involved, dictate that the work of this Commission must continue in an uninterrupted fashion.

136. In my view, this outcome is the only outcome that gives effect to the proper administration of justice in the work of the Commission and redounds to the benefit of the aggrieved parties and to the public interest.

137. I have a duty, as Chair of this Commission, to ensure that the work of this Commission is completed as expeditiously as the exigency permits and in accordance the Commission's mandate.

138. I therefore rule that both applicants:

(a) delayed unreasonably;

(b) failed to provide proper explanations for their delays; and

(c) that such delays demonstrate that their apprehension of bias is not reasonable.

139. The applications for my recusal must therefore be dismissed on this basis alone.

L. CONCLUSION

140. The work of this Commission has been beset by undue delays. The Rule of Law, the principle of legality and the proper administration of Justice dictate that I must ensure that this Commission continues and complete its mandate. The public is entitled to and deserves no less.

141. I therefore rule that both applications for my recusal, brought by former Presidents Zuma and Mbeki, must be and are hereby dismissed.

Justice Sisi Khampepe
Chairperson of the Commission
30 January 2026