IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No: 2026-026936

In the matter between:

JACOB GEDLEYIHLEKISA ZUMA	1st Applicant
and	
THE CHAIRPERSON OF THE COMMISSION	1st Respondent
SECRETARY OF THE COMMISSION	2nd Respondent
ADVOCATE ISHMAEL SEMENYA SC	3rd Respondent
COMMISSIONER FRANS KGOMO	4th Respondent
COMMISSIONER ANDREA GABRIEL SC	5th Respondent
THE CALATA GROUP	6th Respondent
THABO MVUYELWA MBEKI	7th Respondent
NATIONAL PROSECUTING AUTHORITY	8th Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL AFFAIRS	9th Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	10th Respondent

SEVENTH RESPONDENT'S HEADS OF ARGUMENT

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INTRODUCTION

1 This case[1] is about the refusal, by Madam Justice Sesi Khampepe, of a recusal application for her as the Chairperson of the Judicial Commission of Inquiry into allegations regarding reports or attempts having been made to stop the investigation or prosecution of Truth and Ceconciliation Commission cases ("**the Commission**"),

2 The principal issue is whether – because of Justice Khampepe's prior institutional roles in the Truth and Reconciliation Commission ("**TRC**") and the TRC's Amensty Committee and in the National Prosecuting Authority's Human Rights Investigating Unit ("**HRIU**") between 1995 and 2001, and her handling of serious procedural objections concerning the Chief Evidence Leader, Adv Ishmail Semenya SC between September 2025 and December 2025 – the Commssion's proceedings are tainted by reasonably apprehended bias.

2.1 To be clear, the issue is not whether she is in fact biased, but whether a fair minded observer might reasonably apprehend that she might not bring an impartial or unprejudiced mind to bear on her task as fact finder in the Commission.[2]

3 Justice Khampepe refused to recuse herself and gave a reasoned ruling. The contention is that the refusal is reviewable on a number of grounds. The Court must set aside the ruling, find that she ought to have recused herself and grant

[1] The case for the seventh respondent, Former President Thabo Mbeki.
[2] The Public Protector v Mail & Guardian Ltd and Others 2011 (4) SA 420 (SCA)) [2011] ZASCA 108; 422/10 (1 June 2011) paras 21-22.

consequential relief giving effect to that finding as well as the legal consequences of proceedings conducted by her after refusing to recuse herself.

4 Former President Mbeki supports Former President Zuma's application. He also seeks to be recognized as a co-applicant, i.e., second applicant. He has made out a case for this. He has a direct and substantial interest in the outcome of the application by Former President Zuma, which justifies intervention and joinder to the extent this is required. This is uncontentious as it is the only reason why he has been cited as a respondent. He has also pleaded a proper case for review.

5 All the respondents who have filed answering affidavits to oppose the relief sought have answered Former President Mbeki's affidavit to the extent that it serves as a founding affidavit. There is no prejudice to be suffered in this regard. Only the Calata Group appears inexplicably to oppose the recognition per se as a co-applicant. It is not a serious opposition as it is not based on any principle of law that is applicable. There is substance no opposition. There is opposition only to the substantive relief sought.

6 This Court must grant the recognition as was the case in the *South African Reserve Bank* case.[3] It must also permit the filing of replying affidavits by Former President Mbeki.

[3] *South African Reserve Bank v Public Protector and Others* (43769/17) [2017] ZAGPPHC 443; [2017] 4 All SA 269 (GP); 2017 (6) SA 198 (GP) (15 August 2017) paras 8 and 60.1.

7 The facts relied on by Former President Mbeki are not contentious. What is contentious is whether the facts establish a legal basis for her recusal. The facts relied on by Former President Mbeki in the Rule 53 Record and in these founding papers demonstrate that the question whether there was political influence in the prosecution and investigation of TRC cases arise from Justice Khampepe's role in the TRC's Amnesty Committee and in the NPA, including in relation to the NPA's HRIU. This is all that Former President Mbeki was required to show on prior association.[4]

8 Justice Khampepe instead held that there was no "*evidence to suggest that [her] work at the NPA . . . [and TRC] . . . is somehow of direct relevance to the present work of this Commossion*". She determined that there was no logical connection between her prior institutional roles and the work of the Commission.[5] The essense of these findings is that she ought only to recuse herself if she had already sat or pronounced on the live and central facts in issue before the Commission. This is a material irregularity which vitiates the ruling, especially given her persistent lack of candure about what her role entailed in the NPA's HRIU.

9 On her handling of the procedural complaints, she decided President Mbeki's complaint about her handling of the covert leading of evidence agreement on the

[4] 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 76. 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) para 78.
[5] Ruling paras 53-36.

wrong facts and mischaracterised the complaint. She completely misunderstood the nature of the complaint about the Lead Evidence Leader, Mr Semenya SC's breach of her directive which directed him not to question NPA officials on prosecution policy amendment issues.

10 She then went on to hold that the applicants delayed, without a reasonable explanation and unreasonably, to bring the recusal application and that the interests of justice favour the refusal of the recusal application. She misapplied the test for delay in doing so.

11 These irregularities render her ruling reviewable under PAJA, alternatively undewr the principle of legality.

12 The further submissions are made in the sequence that appears in the "Table of Contents" above.

THE STRUCTURE OF OUR SUBMISSIONS

13 It is convenient to deal with the background under these subheadings:

13.1 The referral of the TRC Cases to the NPA;

13.2 The court proceedings that led to the establishment of the Commission;

13.3 The Commission started its work in September 2025;

13.4 The procedural objections;

13.5 The recusal application.

14 We then deal with Mr Mbeki's factual case and the material irregularities in Justice Khampepe's ruling, and explain why each of the first to sixth respondents' justifications, including their after-the fact-justifications, do not render the decision rational, reasonable and lawful.

15 Lastly, we address the Commission's preliminary points.

THE BACKGROUND FACTS

16 The background facts underlying the recusal application are largely common cause.[6]

The court proceedings that led to the establishment of the Commission

17 The TRC was established at the end of the apartheid regime, and its mandate was to investigate human rights abuses, promote healing, and offer amnesty to those who fully disclosed their participation in these apartheid era human rights abuses.

18 The TRC was chaired by the (now) late Archbishop Desmond Tutu. The TRC implemented its mandate through three committees: (a) the Amnesty Committee,

[6] Mbeki AA/FA CaseLines 009-11 from para 24.

(b) Reparation and Rehabilitation Committee and (c) Human Rights Violations Committee.

19 The primary function of the Amnesty Committee was to receive, consider, and determine applications for amnesty. Applicants were entitled to seek amnesty for any act, omission, or offence associated with a political objective, committed during the period from 1 March 1960 to 11 May 1994. The granting of amnesty rendered the perpetrator immune from criminal prosecution in respect of the particular act concerned. Conversely, where amnesty was refused, the individual remained liable to criminal prosecution by the state.

20 Years after the TRC completed its work, very few of the matters that the TRC referred to the NPA have been taken forward. Survivors and families of loved ones who were murdered or disappeared contend that this failure or refusal to deal with their cases was a grave injustice, violated their constitutional rights and amounted to a breach of the constitutional and statutory duties of the relevant organs of state.[7]

21 On 20 January 2025, the Calata Group launched an application before the High Court of South Africa Gauteng Division, Pretoria, under case number 5245/25 against the Government (the President of the Republic, the Minister of Justice and Constitutional Development, the National Director of Public Prosecutions,

[7] Calata Group AA p5 para 11.

the Minister of Police and the National Commissioner of the South African Police Service).[8]

22 In the founding papers, the Calata Group alleges that over the years, and especially during President Mbeki's tenure as President of the Republic, the Executive ("*at its highest level*"), the NPA, the South Africa Police Service ("**SAPS**") and other state organs colluded or acquiesced in the suppression of the TRC cases (being the cases that were referred by the TRC to the NPA for investigation and prosecution).[9]

23 Despite repeated requests, so it is alleged, the SAPS and the NPA failed to investigate and prosecute the TRC cases. In doing so, they are said at times to have acted on instructions emanating from the highest level of the Executive, namely the President. The Calata Group alleges that this conduct was undertaken in bad faith and for unlawful political purposes. Their central contention is that a deliberate political decision was taken, particularly during President Mbeki's tenure as President of the Republic, not to prosecute individuals responsible for apartheid-era crimes who had been denied amnesty by the TRC. According to the Calata Group, this decision unlawfully deprived them of substantive rights and entitlements guaranteed by the Constitution.

[8] Mbeki AA/FA CaseLines 009-15 from para 39.
[9] Calata High Court Application CaseLines 010-36 from 010-51 para 21.

24 The relief sought by the Calata Group in the High Court includes a declarator that the government respondents' conduct, in unlawfully refraining from, and/or obstructing, the investigation and/or prosecution of apartheid-era cases referred to the NPA by the TRC, or otherwise unlawfully abandoning or undermining such cases, violated the applicants' rights, breached the Constitution, constituted a failure to comply with constitutional and statutory duties and amounted to the commission of criminal offences. Consequent upon such declaratory relief, they seek an order directing the South African government to pay constitutional damages.[10]

25 In addition to the declarator and constitutional damages, the Calata Group also sought a declarator that the failure and/or refusal by the current President to establish a commission of inquiry into the suppression of the investigations/prosecution of the TRC cases was inconsistent with his responsibilities under the Constitution.

26 The government respondents initially filed notices of opposition to the application. However, between 17 and 19 February 2025, all of them, with the exception of the NPA, withdrew their opposition. According to the government respondents, the withdrawal was motivated by the intention of Government and the President to establish a commission of inquiry, which they considered to be the primary objective of the application. Following the withdrawal of opposition,

[10] Calata High Court Application CaseLines 010-44 from para 8-11.

the Calata Group and the government respondents entered into settlement discussions concerning the establishment of a commission of inquiry. In March 2025, President Mbeki and former Minister of Justice, Minister Bridgette Mabandla applied for leave to intervene as respondents in the application by the Calata Group. They were declined leave to intervene in the main application on the basis of a lack of a direct and substantial interest in the outcome of the main application.[11]

27 It appears that around April 2025, agreement was reached on the establishment of a commission of inquiry. However, its terms of reference were not agreed between the parties.

28 On 29 May 2025, the tenth respondent, President Cyril Matamela Ramaphosa, published a proclamation establishing the Commission, pursuant to section 84(2)(f) of the Constitution. In terms of its Terms of Reference,[12] the Commission is mandated 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*."

[11] Mbeki and Another v Calata and Others (005245/2025) [2025] ZAGPPHC 753 (1 August 2025).
[12] Terms of reference ("TOR") CaseLines 009-260.

29 The Terms of Reference say that the primary issue that the Commission must investigate is:

> "*whether, why, and to what extent and by whom, efforts or attempts were made to influence or pressure members of the SAPS or the NPA to stop investigating or prosecuting TRC cases*" and "*whether any members of the NPA or SAPS colluded with attempts to influence or pressure them"*.

30 In terms of the Terms of Reference, the Commission is mandated to investigate political interreference that allegedly started in 2003. However, in their founding affidavit before the High Court, the Calata Group allege that the political influence which frustrated the investigation and prosecution of the TRC cases emanated from discussions between former high ranking defence force and police force generals on one hand and ANC officials on the other hand, and that those discussions commenced in 1998.[13]

31 At paragraph 2, the Terms of Reference describe "interested parties". These are the parties before the Commission. They include the NPA, the SAPS, the Department of Justice and Constitutional Development, the Calata Group and other families and victims in the TRC cases. They do not include Former President Mbeki and former members of his Cabinet that he represented in the recusal application and represents before this Court.

[13] Calata High Court Application CaseLines 010-183 from para 376.

The Rules and Regulations of the Commission

32 The Commission's Regulations were promulgated on 19 August 2025. In terms of the Regulations, the Chairperson may appoint Evidence Leaders to assist the Commission in the performance of its functions. The Chairperson appointed Evidence Leaders. The Chief Evidence Leader is Mr Semenya SC.

33 The Commission also published Rules for the conduct of its proceedings on 29 August 2025.[14] The rules address certain procedural aspects of the Commission, including the manner in which implicated persons are to be notified that they are implicated. The rules also address the presentation of evidence before the Commission, and provide (Rule 3.1) that the Evidence Leaders bear the overall responsibility to present the evidence of witnesses to the Commission.

The Commission begins its work

34 The Commission was established on 29 May 2025. It was envisaged, in the Terms of Refence, that it would finalise its work within 180 days from this date, i.e. by 25 November 2025. However, the Commission did not start its work immediately after the proclamation date. It appears that it started with its background work sometime in late August or early September 2025.

[14] Rules of the Commission published under Government Gazette No. 53251 of 29 August 2025.

35 On 25 September 2025, the Commisison issued Former President Mbeki with a notice in terms of Rule 3.3. Other former members of the executive were served with Rule 3.3 notices on 21 October 2025. The Rule 3.3 notices informed them that they were implicated persons, and that the Commission intended to lead witnesses whose evidence implicated them. They were, in terms of the notices, invited to *inter alia*, submit written statements responding to allegations that implicate them. Those allegations were uplifted, wholesale and including paragraph numbers, from the Calata Group's papers in the High Court. We have referred to these papers above.

36 On 27 October 2025, the Commission convened a pre-hearing meeting for the purpose of assessing its readiness to commence proceedings. Two matters emerged during that meeting: first, a significant procedural issue concerning the presentation of evidence before the Commission; and second, an issue relating to Mr Semenya SC.[15]

Procedural issues in the conduct of the Commission that came to light

37 The first procedural issue that emerged relates to the manner in which the evidence in the Commission would be led.

38 Rule 3.1 of the Commission's Rules stipulates that the evidence leaders bear the overall responsibility of presenting evidence before the Commission.

[15] Pre-hearing meeting Transcript CaseLines 077-1144 from p077-1166 lines 20 onwards.

39 During the pre-hearing meeting, it emerged for the first time that a private arrangement had been concluded on 29 September 2025 between Mr Semenya SC, acting on behalf of the Commission, and Advocate Howard Varney ("Mr Varney") on behalf of the Calata Group on the instruction of Webber Wentzel Attorneys. In terms of that arrangement, Mr Varney would lead the evidence of all the Calata Group's witnesses, in place of the Commission's evidence leaders.

40 This arrangement – which was confirmed in a letter by the Commssion after the hearing[16] – was not disclosed to the other parties when it was concluded. It came to light only on 27 October 2025, during the pre-hearing meeting, and then only after it was raised by other parties. With the exception of the Calata Group, the majority of the interested parties objected to the propriety of this arrangement.

41 A second procedural issue that emerged in the wake of the pre-hearing related to a potential conflict of interest concerning Mr Semenya SC, who was previously involved in advising the NPA on issues directly linked to the matters before the Commission. On 18 September 2025, Webber Wentzel addressed a letter to the Commission proposing that Mr Semenya SC not be involved in any deliberations or leading of evidence or cross examinations relating to the amendments to the NPA's prosecution policy.

42 The letter reads as follows, in part:[17]

[16] Rule 53 Record CaseLines p077-1480.
[17] Rule 53 Record CaseLines 077-277.

"*2. It has come to our attention that the chief evidence leader, Ishmael Semenya SC ("**Mr Semenya**"), represented the National Director of Public Prosecutions ("**the NDPP**") and the Minister of Justice ("**the Minister**") in **Nkadimeng and Others v National Director of Public Prosecutions and Other**s [2008] ZAGPHC 422.*

*3. In the foregoing matter, Thembi Nkadimeng (now Simelane) and the wives of the Cradock Four ("**the applicants**") challenged the amendments in Appendix A to the Prosecution Policy titled: "PROSECUTING POLICY AND DIRECTIVES RELATING TO THE PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST AND WHICH WERE COMMITTED ON OR BEFORE 11 MAY 1994" ("**the amendments**").*

4. The applicants contended that the amendments amounted to "a backdoor amnesty" and an unlawful attempt to shield apartheid-era perpetrators from justice. Judge M F Legodi declared the amendments to be unconstitutional and set them aside.

5. Our clients (who include the Simelane and Cradock Four families) 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.

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.

7. Since the Commission must be seen by the community of victims and families and the wider public to be scrupulously independent, we trust that you will give our proposal serious consideration."

43 Justice Khampepe responded to the Calata Group's letter by correspondence dated 19 September 2025, as follows:[18]

"*2. I have sent the letter to Adv Semenya SC for his response.*

3. He advises me that Judge Legodi, in that matter, was not called to decide whether there was any interference with the investigation or prosecution of the TRC cases which is the mandate of this Commission.

[18] Rule 53 Record CaseLines 077-279.

*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*." (own emphasis.)

44 The coming to light of these procedural arrangements led to two formal interlocutory proceedings:

44.1 A formal application for the recusal of Mr Semenya SC, which was filed by the Department of Justice and the NPA. It was opposed by Mr Semenya SC (and/or the evidence leaders). The Calata Group abided the decision.

44.2 Formal objections to the evidence leading arrangement with Mr Varney, opposed by the Calata Group and the evidence leaders.[19]

44.3 The parties filed detailed submissions in respect of both proceedings.[20]

44.4 Written objections and arguments in relation to the leading of evidence arrangement were submitted on behalf of Mr Mbeki and the Former Ministers.[21] The primary contention was that the primary responsibility to lead evidence lay with the evidence leaders, which is an important procedural safeguard to ensure that the Commission properly conducts its fact-finding role.

[19] Rule 53 Record CaseLines p077-1210.
[20] Rule 53 Record CaseLines p077-1580; 1719; 1845; 1915; 1952; 2119 and 077-1243; 1270; 1406; 14361423; 1457.
[21] Rule 53 Record CaseLines p077-252.

45 On 10 November 2025, the Commission directed that the founding papers in the recusal application be filed by 12 November, and that the answering papers be filed by 18 November 2025. The recusal application was set to be argued before the Commission on 26 November 2025.

46 On 13 November 2025, while recusal papers were being filed concerning his suitability to act as evidence leader in light of his prior involvement in the *Nkadimeng* matter, Mr Semenya SC conducted an interview with the former Acting National Director of Public Prosecutions, Dr Silas Ramaite. In the course of that interview, he traversed aspects of the Prosecution Policy and related matters that lay at the heart of the conflict raised in the recusal application. He did so notwithstanding Justice Khampepe's directive of 19 September 2025, which was intended to create a buffer between Mr Semenya SC and issues relating to Prosecution Policy. This conduct was subsequently raised by the NPA in a supplementary affidavit filed in support of its recusal application of Mr Semenya.[22]

47 While the Calata Group initially abided the Chairperson's decision in the recusal application of Mr Semenya SC, they later attested under oath that (a) Mr Semenya SC did question Dr Ramaite, despite his denial under oath; (b) the questioning contravened Justice Khampepe's directive; and (c) Mr Semenya SC ought not to have been involved in the questioning of the witness. In their written

[22] Rule 53 Record CaseLines p077-282 from p077-283 para 5.

submissions, the Calata Group agreed that Mr Semenya SC should stand down as evidence leader because he placed himself in breach of the Chairperson's directive.[23]

48 The recusal application was argued on 26 November 2025.

49 The objection to the leading of witnesses was set down for oral argument on 28 November 2025. On the day of the hearing, however, the parties agreed to an order in terms of which the Chairperson would consider the Calata Group's request to lead their witnesses, together with the parties' written objections and submissions, on the papers, and would thereafter issue a ruling.

The rulings on the recusal of Mr Semenya SC and the leading of witnesses

50 On 2 December 2025, Justice Khampepe issued a ruling in which she granted the Calata Group permission to lead their eight (8) witnesses, without providing any reasons.[24]

51 Former President Mbeki's attorneys wrote to the Commission requesting reasons for the ruling,[25] but the request was summarily refused.[26]

[23] Rule 53 Record CaseLines p077-1922 from para 30.
[24] Rule 53 Record CaseLines p077-281.
[25] Rule 53 Record CaseLines p077-288.
[26] Rule 53 Record CaseLines p077-290.

52 On 4 December 2025, Justice Khampepe issued a ruling refusing the application for Mr Semenya SC's recusal.[27] In her reasons dismissing the recusal application, Justice Khampepe concluded that Mr Semenya SC's prior involvement in the *Nkadimeng* matter did not disqualify him from acting as Chief Evidence Leader, with the result that the directive of 19 September 2025 was said to have fallen away.[28] Nevertheless, the directive remained effective until 13 November 2025, and it was not withdrawn until 4 December 2025.

The recusal application in respect of the Chairperson

53 On 3 December 2025, the Commission circulated correspondence from the legal representatives of Former President Jacob Gedleyihlekisa Zuma ("**Former President Zuma**") in which he sought the recusal of Justice Khampepe on the grounds set out therein.[29] Mr Zuma instituted a formal application for her recusal after Justice Khampepe declined to recuse herself.[30]

54 In due course, and within the timelines communicated by the Commission for participation in a recusal process involving Justice Khampepe, Former President Mbeki caused a supporting application to be prepared and delivered, seeking Justice Khampepe's recusal from the activities of the Commission.[31] The application was based on two distinct but mutually reinforcing grounds for her

[27] Rule 53 Record CaseLines p077-2167.
[28] Rule 53 Record CaseLines p077-2185 para 58.
[29] Rule 53 Record CaseLines p077-2189.
[30] Rule 53 Record CaseLines p077-12.
[31] Rule 53 Record CaseLines p077-141.

recusal: one, her prior institutional involvement with the TRC and the NPA and two, her handling of the procedural objections.[32]

55 The recusal application was opposed by the Evidence Leaders (on their own behalf and on behalf of the Commission), as well as by the Calata Group. Justice Khampepe did not depose to an answering affidavit.

56 The affidavit was deposed to by Adv Semenya SC. Justice Khampepe did not depose to any affidavit, or deliver an explanatory statement.

57 Argument on the recusal application was heard by all three members of the Commission (Justice Khampepe, Mr Justice Kgomo and Ms Gabriel SC) on 16 January 2026.[33]

58 The ruling dismissing the recusal application, penned/signed only by Justice Khampepe and not concurred in by the two other Commissioners, was issued on 30 January 2026.[34]

[32] Rule 53 Record CaseLines p077-144 para 7 and subparas.
[33] Rule 53 Record CaseLines p077-872.
[34] Rule 53 Record CaseLines p077-984.

PRIOR INSTITUTIONAL ASSOCIATION

59 It is not necessary to set out the principles on an apprehension of bias. The principles are well established. It is worth emphasising that the rule against bias applies to statutory inquiries such as commissions of inquiry.[35]

60 Our law on prior association is also firmly established. Prior association with an institution cannot, in and of itself, form the basis of a reasonable apprehension of bias unless the subject-matter of the litigation in question arises from such associations or activities. This will also be the case where a judicial office in his former capacity either adviced or acquired personal knowledge relevant to the case.[36]

61 These are the facts that Former President Mbeki relies on to show that the subject-matter of the Commission, i.e whether there was political influence to try and stop TRC prosecutions and investigations, arises from her previous associations with the TRC and the NPA.

61.1 Justice Khampepe was appointed as a TRC Commissioner in December 1995, and her tenure expired in 2001. She served as a member of the Amnesty Committee from 1996 until 2001, when it was dissolved.

[35] Absa Bank Limited v Hoberman and others [1997] 2 All SA 88 (C) at p 101; Corruption Watch and Another v Arms Procurement Commission and Others (81368/2016) [2019] ZAGPPHC 351; [2019] 4 All SA 53 (GP); 2019 (10) BCLR 1218 (GP); 2020 (2) SA 165 (GP); 2020 (2) SACR 315 (GP) (21 August 2019).
[36] 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) para 78.

61.2 As appears from the records of the TRC, Justice Khampepe, while serving as a member of the TRC Amnesty Committee, participated in the determination of amnesty applications relating to several families and individuals who are interested parties and likely to be witnesses before her in the Commission.[37]

61.3 Justice Khampepe participated in, and was party to, the refusal of amnesty in respect of the killers of Richard and Irene Motasi, as reflected in Schedule 17 of the TRC Amnesty Committee's decision AC 99/0035. Members of the Motasi family are interested parties before the Commission as they were cited as the eighteenth applicant in the related High Court proceedings in case number 2025-005245, Gauteng Division, Pretoria.

61.4 Justice Khampepe also participated in the consideration of an amnesty application relating to the kidnapping of the "Pebco Three" near Cradock AC/2001/064 and AC/2001/107. Members of the Pebco Three families were cited as the sixteenth, twentieth and twenty-first applicants in the High Court proceedings and are interested parties before the Commission.

61.5 Further, in AC/99/0046, Justice Khampepe formed part of the panel that refused amnesty applications brought by several members of the ANC ("**the ANC 37**"). Among those implicated in those proceedings were

[37] Mbeki AA/FA CaseLines 009-57 from para 133.

individuals who are interested persons before the Commission, or who received Rule 3.3 notices from the Commission. Former President Mbeki is one of them, and so are the former members of the executive, on behalf of whom the application was filed. The application was denied because it did not disclose any individual offences.

61.6 According to former TRC Commissioners, Mr Dumisa Ntsebenza SC and Ms Yasmin Sooka, the TRC prepared a letter in October 1998 addressed to the then NDPP, Mr Bulelani Ngcuka. That letter was accompanied by a list of cases in respect of which the TRC requested the NPA to conduct further investigations with a view to possible prosecution.

61.7 Justice Khampepe served as the Deputy National Dierector of Public Prosecutions ("**DNDPP**") under then National Director of Public Prosecutions ("**NDPP**"), Advocate Bulelani Ngcuka ("**Mr Ngcuka**"), for just over a year, from September 1998 to December 1999.[38]

61.8 This period coincides with the establishment and operationalisation of the **HRIU** within the NPA. The HRIU's mandate was to:

61.8.1 review non-amnesty cases and amnesty refusals;

61.8.2 investigate apartheid-era human rights violation;

61.8.3 make recommendations on the prosecution of TRC matters;

[38] Mbeki AA/FA CaseLines 009-14 from para 35.

61.8.4 address the backlog of TRC-related prosecutions; and

61.8.5 oversee the transfer of dockets to Special Operations structures (later the Directorate of Special Operations).

61.9 Mr Justice Vincent Saldanha ("**Justice Saldanha**") (then an advocate of the High Court of South Africa) was seconded to be the part time head of the HRIU for a year in 1999. Justice Saldanha is a witness before the present Commission,[39] and so too Mr Ngcuka.

61.10 Judge Saldanha was requested by the Commission on 14 November 2025, to provide information on whether, during his tenure, and in his capacity as the head of the HRIU, he had access to information concerning decisions, discussions, or policies affecting the investigation and prosecution of TRC Cases.[40]

61.11 According to the Calata Group, Justice Khampepe "*played a role in the HRIU*", including providing advice to the NDPP, Mr Ngcuka – *on the approach to TRC matters*.[41]

61.12 This was conveyed by the Calata Group to the Commissioners and the interested parties in a letter dated 11 November 2025.

61.13 In that letter, the Calata Group set out the roles that members of the Commission have had in the past that in TRC related work or "*matters*

[39] Mbeki Further Affidavit CaseLines 012-7.
[40] Rule 53 Record CaseLines 012-51.
[41] Rule 53 Record CaseLines 007-177 para 12.3.

that might be connected to the Commission's mandate". In regards to Justice Khampepe, they explained that:

> "12.3 Between September 1998 and December 1999, Chairperson Khampepe was a Deputy National Director of Public Prosecutions. *During this period, she apparently played a role on 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*." (own emphasis.)

61.14 The Commission and Justice Khampepe did not respond to this content in the letter to deny it,[42] and neither did the other parties.

61.15 The Commission's Terms of Reference require the Commission to investigate, make findings and report on whether, since 2003, whether, inter alia, why, to what extent and by whom efforts or attempts were made to influence or pressure members of the National Prosecuting Authority (or the South African Police Service) to stop investigating or prosecuting TRC cases. If the Commission finds that there was improper attempts to influence, it must recommend to the President whether any further action, including criminal prosecution, should be taken against persons who had acted unlawfully.

61.16 Although the Terms of Reference say that the Commission must investigate political interferenece from 2003, the evidence before the Commission and pertinently relied on by the Calata Group is that from

[42] Rule 53 Record CaseLines 077-1522.

around 1998, Former President Mbeki and other ANC officials led discussions with former apartheid era police and army generals to discuss what could be done to avoid future prosecution of the TRC cases.

61.17 Former President Mbeki is an implicated person before the Commission. In September 2025, he was issued issued with a Rule 3.3. notice to appear before the Commission to answer to allegations of improper influce. The allegations that he is required to answer commene in 1998, and relate to the alleged interactions with the former apartheid army generals and police. This is made clear in the Rule 3.3 notice issued to Former President Mbeki inter alia under the heading, “Deliberations on a further amnesty” at Caselines page 009-228.

61.18 The Commission issued a request for information to Justice Saldahna in November 2025. Justice Saldahna was the head of the NPA’s HRIU in 1998. He has been requested by the Commission to give evidence on whether, during his tenure, he became aware of any attempts to influence or suppress the prosecution of the TRC cases. Justice Saldahna and Justice Khampepe appear to have been at the HRIU at the same time, or at the very least Justice Khampepe played a role in respect of the HRIU and preparations for the prosecution of the TRC cases as reported in the undisputed Calata Group letter. The content of this letter was not disputed by the Commission in its proceedings, nor is it disputed in this Court.

61.19 Mr Ngcuka, the former NDPP between 1998 and 2004, has also been requested to appear before the Commission to testify about and to furnish to the Commission any material in his possession to which he had access to, and his version of any discussions, decisions, or considerations relevant to the Commission's Terms of Reference.

62 From these facts, it is clear that Justice Khampepe in the TRC Amnesty Committee and the NPA, worked in the machinery and was engaged in making decisions that were aimed at the prosecution of TRC cases. A reasonable oserver may conclude that she has an interest to see to it that those she denied amnesty had to be prosecuted, and was in the NPA to prosecute them. Such a person can also apprehend that she may not bring an impartial mind to bear in determining whether there was interference as opposed to that the NPA (which she was part of and involved in TRC cases) simply failed to do its work.

Justice Khampepe's oscilation on her involvement in the HRIU

63 Before the Commission, Former President Mbeki squarely raised a question concerning Justice Khampepe's role in the NPA's HRIU and expressly sought clarity as to the nature and scope of that role.[43]

64 Adv Semenya SC (on behalf of Justice Khampepe) acknowledged that Justice Khampepe had served as Deputy National Director of Public Prosecutions and

[43] Rule 53 Record CaseLines 077-150 paras 25-26.

further acknowledged that it had been put to the Commission that she was involved with the HRIU. However, Mr Semenya SC did not engage with the substance of that allegation. Instead, he successively deflected: first, he acknowledged it merely as an allegation; second, he said it was irrelevant in light of the temporal limits of the Commission's terms of reference; and third, he treated it (in the answering affidavit) as a matter to be addressed only in legal argument.[44]

65 In paragraph 50 of the recusal ruling, Justice Khampepe said that she was not aware of any specific policy on TRC cases in which she was involved that may have emerged from the NPA's HRIU during 1998 or 1999. However, she did not deny that she was involved in the HRIU,[45] or with TRC cases and the work undertaken to ensure their prosecution.

66 For the first time in these proceedings, Justice Khampepe denies that she had any role in the HRIU.[46] She offers a bare denial, which we submit does not raise a genuine dispute of fact. The bare denial does not even meet the principal ways in which a dispute may arise as recognised in *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*; namely where the respondent denies the material allegations by the applicant and produces positive evidence to the contrary, or admits the applicant's facts and pleads additional disputing facts.[47] The bare

[44] Rule 53 Record Bundle E p077-462 para 35.
[45] Rule 53 Record Recusal Ruling p007-998 para 50.
[46] Commission AA p015-58 para 342.
[47] *Room Hire (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163

denial fails to address whether she was involved at all whilst at the NPA in any steps by the HRIU or the NPA, having been the second in command to Adv Ngcuka, to prepare for the prosecution of TRC cases.

67 This denial is simply an after the fact rationalisation when the shoe pinches. It is impermissible for Justice Khampepe to *provide ex post facto* rationalisations for her ruling. It prevents this Court from scrutinising the actual reason behind the decision when it was made.[48] These rationalisations formulated after the fact cannot be relied upon to render a decision rational, reasonable and lawful.[49] They do not appear from the record of the decision and cannot be retrofitted after the decision has been taken. The new justification provided in the Commission's answering papers, not apparent from the record, are of no value in law.

68 Significantly, no attempt is made to take the Court into Justice Khampepe's confidence and say what precise role she played in the NPA regarding TRC cases. She keeps completely silent on this aspect which is at the centre of the recusal application and this review. Any doubt as to her precise role in this regard is left to linger, only exacerbating the apprehension of bias. We submit that when there is such doubt, recusal is appropriate.[50]

[48] *Forum De Monitoria Do Orcamento v Chang and Others* [2022] 2 All SA 157 (GJ) at para 82.
[49] *National Energy Regulator of South Africa and Another v PG Group (Pty) Ltd and Others* 2020 (1) SA 450 (CC) at para 39. See also *National Lotteries Board and Others v South African Education and Environment Project* 2012 (4) SA 504 (SCA) at para 27; *JICAMA 17 (Pty) Ltd v West Coast District Municipality* 2006 (1) SA 116 (CPD) referring with approval to *R v Westminster City Council, Ex parte Ermakov* [1996] 2 All ER 302 (CA) at 315H–316D.
[50] Dube and others v S [2009] 3 All SA 223 (SCA) para 13.

Direct knowledge not the sole test

69 Before this Court, the Commission maintains its stance that prior institutional roles are irrelevant unless they involve direct knowledge of the particular cases before the Commission. In other words, Justice Khampepe must have knowledge or involvement in the matters to be investigated by the Commission,[51] i.e., that she played not role and has no knowledge of facts regarding political interference in the prosecution of TRC cases. The Calata Group makes the same submission.[52]

70 This is not the sole test.

71 In *SARFU*, the Constitutional Court set out that a reasonable apprehension of bias cannot be based upon prior association unless the subject matter of the litigation in question arises from such associations or activities.[53] The Court went on to say that where judges, in their former capacity as advocates either advised or acquired personal knowledge relevant to a case before the court, it would not be proper for them to sit in such matter.[54]

72 A few years later, in *ABSA Bank*, that same Court again clarified that bias can be apprehended where the subject-matter of the litigation arises from the

[51] Commission's Answering Affidavit p015-22 from para 85.
[52] Calata Answering Affidavit p33 para 133.
[53] SARFU para 76.
[54] SARFU para 79.

association which the judicial officer had with the institution prior to their appointment to the bench, or where in the course of their association with the institution, the judge acquired personal information that was relevant to the proceedings before them.[55]

73 In another judgment, *Absa Bank v Arif*,[56] the Supreme Court of Appeal again distinguished between the two instances, namely (a) where the subject-matter of the litigation arises from any association the judicial officer may have with the institution and (b) that in the course of that association they acquired personal information that is relevant to the proceedings.

74 Five principles emerge from this.

74.1 *SARFU* says that prior institutional involvement is not enough. The subject matter of the litigation in question must arise from such associations or activities.

74.2 *SARFU* also says that where judges, in their former capacity [as advocates] either advised or acquired personal knowledge relevant to a case before the court, it would not be proper for them to sit in such matter.

74.3 *ABSA* reiterates this and says that where a judicial officer, in his or her former capacity, either advised or acquired personal knowledge relevant

[55] 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) para 78.
[56] Absa Bank Ltd v Arif and another 2014 (2) SA 466 (SCA) para 25.

to a case before the court, it would not be proper for that judicial officer to sit in that case. *ABSA, like SARFU,* thus distinguishes an apprehension that may arise (a) in the instance where the litigation arises from the association and (b) where because of the association the judge obtained personal knowledge and (c) she advised the institution.

74.4 There is a distinction between these instances. This is why, in para 25 of *ABSA/Arif*, the court there says that in that case (a) the subject-matter of this appeal does not arise from any association the judge might have had with Absa; (b) nor is there even a hint that in the course of that association they acquired personal information that is relevant to this appeal.

74.5 This implies that knowledge of personal information is not the only yardstick. There are, in essence, three that have been delineated by our courts: (a) knowledge of the issue; (b) subject matter arises from the association and (c) advice was given.

75 We submit that the facts in this matter fall into category (b).

76 The Commission and its subject matter arise from refusals to grant amnesty, that those denied amnesty should be prosecuted, and that the NPA failed to prosecute them. Justice Khampepe was involved in refusing amnesty and deciding that those denied amnesty should be prosecuted, and taking early steps (in the NPA) to prosecute TRC cases or to prepare for their prosecution. Now she must investigate whether there has been interference in prosecuting those

she denied amnesty and those in respect of whom early steps were taken to prosecute because they were denied amnesty. The earlier NPA steps are relevant and that is why Judge Saldannah and Adv Ngcuka must explain before the Commission what the NPA did or failed to do, and why.

77 Having denied Former President Mbeki and other ANC leaders amnesty, and having served in the NPA taking steps to prepare for the prosecution of TRC cases, Justice Khampepe must make findings whether Mr Mbeki interfered with those prosecutions for self-preservation since he did not have amnesty. This calls for a determination on a balance of probabilities taking all the facts – starting from the alleged discussions and agreement with apartheid generals and attempts to institute a general amnesty. It is a continuous story with a start and end.

78 In sum, Justice Khampepe misdirected herself on the test applicable when prior institutional association is alleged. In *Lewis Stores*,[57] the Constitutional Court recently restated that the adoption of an incorrect legal standard to decide an application to amend is to make an error of law. It is not a misapplication of law because the decision does not proceed from a correct legal premise to an incorrect conclusion as a result of a failure properly to apply the law to the relevant facts. Such an error is material and infringes upon the rights of litigants

[57] Lewis Stores Proprietary Ltd v Pepkor Holdings Ltd and Others (CCT316/25) [2026] ZACC 4; 2026 (3) BCLR 207 (CC) (30 January 2026) paras 26-27.

to enjoy access to the courts, contrary to section 34 of the Constitution.[58] It effectively denied Mr Mbeki a fair hearing or a hearing at all and gives rise to a reviewable irregularity.

79 An error of law also results in an irrational decision. The SCA confirmed in *Scalabirini* that in order to be rational, a decision must be based on accurate findings of fact and a correct application of the law.[59]

80 The ruling fails these tests in this regard.

Direct knowledge in any event established where Justice Khampepe is a competent and compellable witness

81 Even if direct knowldge of the subject matter is required, the evidence presently before the Commission demonstrates that Justice Khampepe may well have material personal knowledge relevant to the very issues the Commission has been established to investigate.

82 We say this for two reasons.

83 First, the Commission's mandate includes determining whether decisions, discussions, policies or institutional practices within the NPA affected the investigation or prosecution of TRC-related cases. The evidence already placed

[58] Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others (1107/2016) [2017] ZASCA 126; [2017] 4 All SA 686 (SCA); 2018 (4) SA 125 (SCA) (29 September 2017)
[59] At para 59.

before the Commission indicates that the NPA's HRIU played a central role in assessing those cases. Justice Saldanha, who headed that unit, has been called upon to give evidence regarding the functioning of the unit and the institutional processes surrounding TRC-related prosecutions. It is common cause that Justice Khampepe served within the same institutional environment during the relevant period or had a role to paly with the HRIU as the Calata Group stated in its undisputed letter. In those circumstances, the possibility that she may have relevant institutional knowledge cannot be dismissed as the Commission seeks to do by way of a bare denial. Justice Khampepe fails to say what her precise role was regarding the prosecution of TRC cases in the NPA. Such conduct exacerbates the apprehension of bias and must result in recusal.

84 Second, the evidence already before the Commission further illustrates why the posibiliy that she may have material personal knowledge cannot be discounted.

84.1 In the sworn statement of Judge Saldahna, in response to the question whether in his capacity as the head of the HRIU, he had access to information concerning decisions, discussions or policies affecting the investigation and prosecution of TRC cases, he provides an indirect answer to this question and says that he does not possess any documents or audio records relating to the TRC cases referred to the NPA for investigation and prosecution.[60]

[60] Mbeki Further Affidavit CaseLines pp012-14-012-15; 012-53.

84.2 The sworn statement of Adv Anton Ackermann dated 25 October 2025 demonstrates[61] that he raised concerns within the NPA regarding the obstruction of TRC prosecutions and refused to participate in amendments to the prosecution policy which he regarded as unconstitutional. Adv Ackermann SC further states that when he and the then NDPP, Adv Vusi Pikoli, appeared before the Justice Portfolio Committee on 3 May 2007, Adv Pikoli indicated that attempts to prosecute former police officials were met with political intervention. By contrast, the statement of the former National Director of Public Prosecutions, Mr Bulelani Ngcuka ("**Mr Ngcuka**"), signed in February 2026, asserts categorically that during his tenure, there was never any attempt by members of the executive or any other person to influence or pressure the NPA to stop the investigation or prosecution of TRC cases.

84.3 These accounts raise materially different explanations for the handling of TRC-related prosecutions within the NPA. Resolving such differences will inevitably require the Commission to examine the institutional processes, discussions and decision-making structures that existed within the NPA during the relevant period. The HRIU, which was established to review TRC matters, forms part of that institutional context. Justice Saldanha's evidence confirms that the functioning of that unit lies squarely within the Commission's inquiry. In these circumstances, it cannot be said that Justice Khampepe's evidence is irrelevant or inconceivable. To the

[61] RA to the Commission's AA, paras 66 and 68, CaseLines 010 – 318 to 010 – 318.

contrary, the possibility that she may possess material institutional knowledge arises precisely from her prior roles within the structures now under examination. This is not speculative.

85 The Commission tries to get out of the difficulty presented by the evidence by saing that there are other persons well-placed to speak to the issues that are alleged to fall within Justice Khampepe's personal knowledge and "the mere fact of her personal knowledge takes the matter no further."[62] They contend that even if Justice Khampepe could be called to testify on her institutional knowledge, the evidence will already be before the Commission, her testimony is not necessary and therefore there is no legal prescripts requiring her recusal.[63]

86 To entertain this submission would be to allow the Commission to blow hot and cold.[64] This is impermissible. The fact of her personal knowledge is relevant to the question of perceived bias. This is the Commission's case on the prior institutional roles, and it is the basis upon which Justice Khampepe dismissed the ground of complaint.

87 The law is clear that where a presiding officer may potentially be a material witness in proceedings over which he or she presides, the integrity of the process is compromised and recusal becomes necessary.[65] This is to suggest that she

[62] Commission AA CaseLines p015-45 para 174.
[63] Commission AA CaseLines p015-46 para 176.
[64] Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others (CCT 52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (17 September 2021) para 103.
[65] Bernert v Absa Bank para 78.

will be called to testify. It is to magnify that in substance she occupies the role of witness and fact finder.

88 For Justice Khampepe, this was always a possibility but it became manifest as soon as the Commission issued the Request for Information to Judge Saldahna in November 2025. At the very least, a reasonable and informed observer apprised of the evidence presently before the Commission would reasonably apprehend that the Chairperson may be required to engage with issues in respect of which she may herself be a source of relevant evidence. She was the second in command in the NPA when it was setting policies, processes and procedures to prosecute TRC cases.

89 We submit that these circumstance gives rise to precisely the type of institutional difficulty which the doctrine of reasonable apprehension of bias seeks to avoid.

90 It must also be clear that because of the inquisitorial nature of commissions of inquiry, she is expected to play an active role in searching for the truth[66] - within the confines of the Terms of Reference.[67] It starts with her knowledge of the truth, and the full truth. And she does not volunteer what she knows.

[66] Corruption Watch and Another v Arms Procurement Commission and Others (81368/2016) [2019] ZAGPPHC 351; [2019] 4 All SA 53 (GP); 2019 (10) BCLR 1218 (GP); 2020 (2) SA 165 (GP); 2020 (2) SACR 315 (GP) (21 August 2019) paras 66-69. Bell v Rensburg 1971 (3) SA 693 (C).
[67] Minister of Finance v Afribusiness 2022 (4) SA 362 (CC) at para 39. Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1999 (1) SA 374 (CC) at para 58.

Temporal scope is unhelpful

91 Yes, the Terms of Reference require the Commission to investigate whether attempts were made, since 2003, to influence the investigation or prosecution of TRC-related cases.

92 However, the Commission's reliance on what it describes as a "temporal boundary" beginning in 2003 is unsustainable[68] and is irrational.

93 As a general point to depart from, the context within which the enquiry happens is relevant to the enquiry itself. It is common cause that the TRC referred the TRC cases to the NPA in 1998. It is also common cause that after the NPA took ownership of these cases, it established a specialised unit (the HRIU) to investigate and prosecute these cases – this also occurred in 1998. For the Commission to understand how the alleged influence happened, the Commission would need to understand the institutional history and prosecutorial treatment of those cases prior to 2003. The Commission would also reasonably anticipate that if the alleged influence started in 2003, this did not arise in a vacuum. Such decisions would be the product of institutional practices and prosecutorial approaches developed in the preceding years. This is precisely why the Calata Group took the view (before the Commission) that the 2003 temporal boundary is irrational.[69] It is also why the Commion has itself lined up

[68] Commission AA CaseLines p015-25 from para 96.
[69] Rule 53 Record CaseLines p077-731 para 75 and subparas.

TRC and NPA officials who were at the institutions before 2003, and especially those who were at the NPA at the same time as Justice Khampepe (Judge Saldahna, Adv Pikoli).

94 This means that the Commission cannot meaningfully perform its mandate without considering the historical context in which TRC-related prosecutions were addressed in the late 1990s and early 2000s. That period directly overlaps with Justice Khampepe's prior institutional roles within both the TRC and the NPA. The suggestion that those roles are automatically irrelevant because the Commission's mandate refers to conduct "since 2003" is therefore incorrect and is irrational. It is not rationally related to the purpose for which the Commission was set up, i.e., to investigate fully and in their proper context.

95 More specifically, the Rule 3.3 notice issued to President Mbeki (at Caslines page 009-228) implicates him in deliberations that apparently took place between 1998 and 2004.[70] In terms of the allegations in that notice, and according to the Calata Group, meetings took place between former police and army generals and ANC government officials to disucss what could be done to address or avoid future prosecution of TRC cases. to have taken various steps to accommodate a possible general amnesty.[71] This was all allegedly done for self-preservation and the preservation of the other ANC leaders.

[70] Calata High Court Application CaseLines p010-159 from para 376.
[71] Rule 53 Record CaseLines p077-731 para 75 and subparas.

96 To this extent the ruling is irrational because it is based on an incorrect understanding of the facts and ignoring relevant considerations.[72] The considerations ignored are rationally related to the purpose for which the power of investigation was conferred on the Commission; and ignoring the relevant fact colours the entire recusal process with irrationality and thus renders the final decision irrational.

97 This context is absolutely relevant to assess the allegation that President Mbeki (and former Ministers) interfered with the prosecution of TRC cases and had a reason for doing so. The Commission must take this context into account and evaluate the veracity of the allegations made in order to determine whether indeed, on a balance of probabilities, there was interference with the prosecution of TRC cases in 2003 onwards.

98 It beggars belief that it is even suggested by the Chief Evidence Leader and the Commission Chairperson that all of this is irrelevant to the Commission's investigations. It magnifies the irrationality of the ruling.

99 For their part, the Calata Group contends that:

> "*unless the Chairperson can be connected to the discussions [between former police and army generals and representatives of the ANC government in the late 1990s and early 2000s] which she cannot, the fact*

[72] Democratic Alliance v President of South Africa and Others (CCT 122/11) [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) (5 October 2012) para 39.

that they were taking place while she was with the TRC and the NPA is entirely irrelevant."[73]

100 This is a new justification, and no doubt provided because they are trying to shy away from their earlier evidence before the Commission that these deliberations are relevant and crtical. It is an irellevant *ex post facto* justification by a non-deicison maker. It must be ignored. Justice Khampepe has to decide the probabilities of Former President Mbeki interfering in the prosecution of TRC cases from 2003 given the refusal of amnesty and the risk of prosecution. She must do this whilst having been part of refusing him and other ANC leaders amnesty in the TRC, and having been part of the NPA when it laid groundwork for the prosecution of TRC cases in respect of those that were denied amnesty. The Rule 3.3 Notice also confirms that the ANC 37 were denied amnesty. It is impermissible for her to sit as a decision maker to make findings and recommendations, including as to possible criminal prosecution of Mr Mbeki.

PROCEDURAL COMPLAINTS

101 There are two complaints:

101.1 Justice Khampepe's handling of conflict-of-interest objections pertaining to the Commission's Chief Evidence Leader, Advocate Semenya SC; and

[73] Calata AA, Caselines - 077-127 - 077-140 para 74.

101.2 her endorsement of a procedurally irregular arrangement between Adv Semenya SC and Adv Howard Varney who is counsel for the Calata Group. This arrangement – which came about as a result of opaque and bilateral interactions between the two advocates – permits Adv Varney (and not the Evidence leaders) to lead all eight of the Calata Group's witnesses.

102 The essence of the Commission's answer to the complaints is that the Chairperson cannot be biased, or be apprehended of bias, towards an Evidence Leader who is only tasked with the presentation of evidence in inquisitorial proceedings. The nature of the exercise by an Evidence Leader precludes that he can have any real interest with which the Chairperson is capable of aligning her own functions.[74] The Commission also submits that on the facts, there is nothing to suggest that Justice Khampepe's own conduct is blameworthy or indicative of bias that she may have towards Mr Semenya SC or against the applicants.[75]

103 The first submission is legally wrong.

104 It is firmly established that a commission of inquiry has to comply with a standard of procedural law of fairness in the manner in which its proceedings are

[74] Commission AA CaseLines p015-38 paras 151-152.
[75] Commission AA CaseLines 015-41 para 161.

conducted.[76] If a commission, or its member, is perceived to be biased against certain witnesses, its (or her) conduct are open to challenge – regardless of its inquisitorial nature.[77]

105 The facts that President Mbeki relies on to ground the procedural compaints demonstrate why such a high premium is placed on even handedness by the Chairperson in the conduct of the proceedings. They are set out in in paras 34 to 49 above.

106 In short, a secret agreement was made between Adv Semenya SC and Adv Varney that goes against the rules of the Commission about how evidence should be led before the Commission. Rather than interrogate and correct this, Justice Khampepe okayed it – and insists (today still) – that the complaint had been settled by agreement (when it had not) and she was entitled not to explain herself for this. Then, Mr Semenya SC breached a directive that she had issued to maintain the appearance of propriety in the Commission's processes. Instead of interrogating the breach, Justice Khampepe – *ex post facto* – corrected the breach without any reprimand.

107 The effect of her handling of these complaints is that the Commission adopted a process for the leading of evidence that some interested parties including Mr

[76] Corruption Watch and Another v Arms Procurement Commission and Others (81368/2016) [2019] ZAGPPHC 351; [2019] 4 All SA 53 (GP); 2019 (10) BCLR 1218 (GP); 2020 (2) SA 165 (GP); 2020 (2) SACR 315 (GP) (21 August 2019) paras 9-10.
[77] Can. (A.G.) v. Blood System Inquiry (1997), 216 N.R. 321 (SCC) para 55.

Mbeki, for clearly articulated reasons, was opposed to. Her handling of both complaints demonstrates an unwillingness to assess significant procedural irregularities in the conduct of the Commission's proceedings which compromises entrenched procedural rights and safeguards.

108 Her handling of the comaplaints found a conclusion of apprehended bias.

DELAY

109 In her ruling, and before this Court, Justice Khampepe places substantial reliance on delay.[78] The Calata Group does as well.[79]

110 The Commission says that President Mbeki unduly delayed in seeking Justice Khampepe's recusal. It asserts further that Mr Mbeki (a) had been aware of the broader subject matter underlying the Commission since March 2025 (b) knew of its establishment from at least May 2025, and (c) nevertheless only sought recusal in December 2025 only after President Zuma had done so. The high water-mark of this contention is that President Mbeki should be precluded from seeking Justice Khampepe's recusal on that basis alone.

111 That contention is incorrect.

[78] Commission AA CaseLines p015-11 paras 39 onwards.
[79] Calata AA p28 from para 105.

111.1 The Commission's argument proceeds from an incorrect premise, namely that the mere passage of time between the establishment of the Commission and the bringing of the recusal application is sufficient, *without more*, to render the application impermissibly delayed. That is not the correct legal position. In applications concerning recusal, delay is not a self-standing bar. It is one factor to be considered within the broader enquiry into what the interests of justice permit.[80]

111.2 The question is not simply whether some period of time has elapsed, but whether, in all the circumstances, the delay is such that it would be contrary to the interests of justice to entertain the recusal complaint. That enquiry necessarily involves a consideration of multiple factors, including the length of the delay, the explanation for the delay, the stage of the proceedings, the nature and importance of the issue raised, the prospects of success on the merits, and the prejudice that may arise if the proceedings continue before a decision-maker who ought to have recused herself. The mere absence of an adequate explanation is not dispositive, depriving the Court of the ability to overlook the delay. In

[80] 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. *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. *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)

appropriate circumstances, a court may overlook delay even if the explanation is weak or there is none.[81]

111.3 Significantly a delay in bringing a recusal application ought not to be viewed as a form of acquiescence.[82] Doing so would be contrary to the interests of justice. [83]

112 Yes, time has lapsed, but how much? The Commission conflates knowledge of the broader dispute concerning the alleged suppression of TRC prosecutions, and knowledge of the existence of the Commission, on the one hand, and the earliest opportunity President Mbeki could competently have brought the recusal application. It also treats the issue of delay as dispositive in a recusal application. With this conflation in mind, the Commission is wrong in its determination of when the clock started ticking for purposes of any period of delay.

113 We submit that the clock only started ticking when the Commission issued the Rule 3.3. notice requiring Mr Mbeki to participate in the Commission to assist in its investigations on pain of sanction. The Rule 3.3 notice was only issued in September 2025. The period of delay is to be reckoned from this period until December 2025 when the application for the recusal of Justice Khampepe was brought. Prior to this, President Mbeki had not been identified as an implicated

[81] *Department of Transport and Others v Tasima (Pty) Limited* (CCT5/16) [2016] ZACC 39; 2017 (1) BCLR 1 (CC); 2017 (2) SA 622 (CC) (9 November 2016) paras 165-166 (per Khampepe J); *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* (CCT91/17) [2019] ZACC 15; 2019 (6) BCLR 661 (CC); 2019 (4) SA 331 (CC) (16 April 2019) paras 54-58 (citing Tasima).
[82] *S v Herbst* 1980 (3) SA 1026 (E).
[83] *Bernert v ABSA Bank*, para 75.

party before the Commission. That period of delay is short and ought to be overlooked in all the circumstances of the case.

114 Moreover, the grounds for recusal include the two procedural issues that came to a head in December, when Justice Khampepe issued her two rulings.

115 Mr Mbeki's case has never been that delay is irrelevant. It is that delay cannot be considered in isolation from the seriousness of the issue raised and for which there are good prospects of success. If the Chairperson ought to have recused herself, the continued conduct of proceedings before her risks tainting the fairness of the process that follows and rendering them a nullity.[84] That is a factor of obvious significance in determining whether it is in the interests of justice to entertain the recusal complaint notwithstanding the respondents' allegations of delay.

116 In the circumstances, the Commission's reliance on delay does not provide a basis for rejecting the recusal complaint or for upholding the ruling under review. Neither does the Commission's reliance on the limited time for which the Commission should run.

[84] *Take and Save Trading CC and Others v Standard Bank of SA Ltd* [2004] ZASCA 1; 2004 (4) SA 1 (SCA) para 5; Basson v Hugo and Others (968/16) [2018] ZASCA 1; [2018] 1 All SA 621 (SCA); 2018 (3) SA 46 (SCA) (17 January 2018) paras 17-20.

117 The proper enquiry remains whether, having regard to all the relevant factors, the interests of justice dictate one way or another. We have deomsntrated that the interests of justice lean strongly in favour of overlooking the delay.

RULING IS NOT THAT OF THE COMMISSION AND NO OPPOSITION

118 In the event that the Court finds that the ruling is unasailable, we submit that there are two further reasons why it out to be reviwed and set aside.

Commissioners Kgomo and Gabriel SC did not rule on the recusal

119 On the face of the ruling, it is not clear whether Commissioners Kgomo and Gabriel SC concurred in the ruling or that the ruling is a ruling of "the Commission" written for it by the Chairperson. It was also signed by Justice Khampepe alone.[85] Mr Semeny SC a has also admitted that the other Commissioners did not concur in the ruling.[86]

120 This is plainly irregular.

121 In an application of this nature, where the Commission is constituted by three members and the allegation is directed at one of them, Justice Khampepe was required to consider her own position individually and then collectively together

[85] Ruling CaseLines 077-1023.
[86] Commission AA CaseLines 015-47 para 181; 015-50 para 198.

with the two Commissioners.[87] It is not only her consideration and findings but the findings of the entire Commission that are required. They should also assess whether Justice Khampepe should sit. Her continued sitting, if incorrect, taints the entire proceedings.

122 The ruling ought to be set aside for this reason alone. The Commission concedes to this by admitting to the irregularity.

No opposition

123 Justice Khampepe did not file any affidavit, confirmatory affidavit or statement before the Commission.

124 The Commission's counter to this is that presiding officers do not ordinarily depose to affidavits in matters on which they must depose, including recusals.[88]

125 We submit that where the allegations lay within her personal knowledge only, it is required of her to respond the those allegations. This is the case especially where she sits as part of a panel of three where the other two panelists did not know the facts relevant to the allegations.[89]

[87] 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 34.
[88] Commission AA CaseLine 015-18 paras 69 onwards.
[89] SARFU para 23.

126 Mr Semenya SC's answering affidavit could not constitute a proper factual response to allegations directed at Justice Khampepe, because he lacked both the authority and the personal knowledge necessary to address matters concerning her prior institutional roles and her decision-making as Chairperson. The Calata answering affidavit suffers the same fate. It is trite that a person such as Mr Semenya cannot testify on behalf of another person, i.e., the Chairperson.

127 We now turn to the Commission's points *in limine*. We submit that they lack any merit.

PERMISSION TO INSTITUTE THE PROCEEDINGS NOT REQUIRED

128 The Commission's reliance on section 47(1) of the Superior Courts Act 10 of 2013 in these proceedings is misconceived. Section 47 protects judges from civil proceedings based on their judicial acts. This is not that case – these proceedings *are not* instituted against Justice Khampepe in her capacity as a retired judge performing judicial functions. She is cited in the proceedings in her capacity as the Chairperson of a Commission of Inquiry, exercising powers derived from the proclamation establishing the Commission and the applicable statutory framework governing commissions of inquiry. The impugned conduct concerns decisions taken by her in that capacity.

129 The distinction between a judge acting in a judicial capacity and a judge acting in another statutory capacity has been recognised by the courts. In *Memela v Chairperson of the State Capture Commission of Inquiry and Others* (34177/22)

[2025] ZAGPPHC 816 paras 21-29, the Court rejected a similar argument that section 47(1) deprived the High Court of jurisdiction to entertain a review application directed at the chairperson of the State Capture Commission. The reasons for rejecting the argument are sound. Section 47(1) is aimed at affording some limited immunity and protection to judges when they perform their official functions.[90] A "judge of a Superior Court" must connote a judge in the exercise of judicial functions. It is important that criminal proceedings are not included in the section. This again points to consent being tied to official judicial function.

130 There is another reason why section 47 cannot apply to recusal applications. The sui generis nature of recusal applications as a readily available mechanism to enforce fair process rights before Courts does not lend itself to the limitation anticipated in section 47.

PAJA IS COMPETENT RELIEF

131 President Mbeki relies on the Promotion of Administrative Justice Act 3 of 2000 ("**PAJA**"), alternatively, legality.

132 It is well-settled that any exercise of public power is subject to judicial review though the form of that review may differ depending on the nature of the decision.[91]

[90] Para 26.
[91] *Pharmaceutical Manufacturers Association of SA and Others; In Re: Ex Parte Application of President of the RSA and Others* 2000 (3) BCLR 241 (CC) at para 20.

133 The Commission contends that Justice Khampepe's ruling refusing her recusal does not constitute administrative action as defined in PAJA and that any reliance on PAJA is therefore misplaced.

134 It is generally established that when conduct involves the exercise of public power, the starting point is to determine whether it constitutes administrative action under PAJA. If it does not fall within the definition of administrative action, the exercise of public power remains subject to review under the principle of legality, which forms part of the rule of law.

135 It is now well-established that it is the function and not the functionary that is important in assessing the nature of the action in question.[92]

136 The Commission's contention proceeds from the premise that the conduct of a commission of inquiry can never constitute administrative action. Such a proposition is broadly stated and therefore wrong in law.

137 A commission, during the conduct of its proceedings, performs a range of functions which may differ in nature. Some of its acts are investigative, others are procedural, and some may be administrative action as contemplated in PAJA where it involves the exercise of powers affecting the rights or interests of persons appearing before it. The impugned recusal ruling is a case in point. The issue turns on the nature of the function and not the functionary. It must be

[92] See *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 59 (CC) at para 36.

distinguished from the executive action of the President establishing the Commission. It must also be distinguished from the making of non-binding findings and recommendations by the Commission at the conclusion of the inquiry.

138 In the present matter, the impugned decision refusing the recusal application bears the hallmarks of administrative action as defined in PAJA. The ruling was taken in the exercise of a public power conferred upon the Chairperson by the proclamation establishing the Commission and the applicable statutory framework governing commissions of inquiry. It directly regulates the manner in which the Commission will conduct its proceedings in relation to inter alia Mr Mbeki and others and affects their fair process rights in those proceedings. It is also of an administrative nature. In those circumstances, the ruling constitutes administrative action for purposes of PAJA.

139 Stated otherwise, the recusal ruling finally determines President Mbeki's right to procedural fairness. This is so because it finally determines whether a particular decision-maker (in this case, Justice Khampepe) will preside. Such a determination affects the fairness of proceedings and therefore has an immediate direct and adverse external legal effect.

140 In any event, even if Commissions ordinarily make non-binding recommendations, the recusal ruling regulates the process by which evidence

against the applicant will be gathered and assessed. It is not a non-binding recommendation. It determines rights.

141 Even if it were ultimately to be found that the decision does not constitute administrative action for the purposes of PAJA, the ruling remains subject to review under the principle of legality, an alternative ground of review that is relied on. To this extent the debate regarding PAJA is pointless.

MIDSTREAM REVIEW CONTENTION DOES NOT HOLD

142 The Commission argues that the present review application has been brought prematurely because the Commission has not yet finalised its inquiry (paragraphs 22-24). On that basis, the Commission argues that a review of this nature should only be entertained in rare and exceptional circumstances, and that the former presidents neither pleaded nor established the existence of such exceptional circumstances. It further argues that there is no irreparable prejudice to them.

143 While we agree with the submission that courts are *generally* reluctant to intervene in uncompleted proceedings, the rule is neither rigid nor absolute. The decisive consideration is whether the interests of justice justify judicial intervention at that stage. Where the impugned decision concerns the

constitution of the decision-making body itself, i.e., its jurisdiction,[93] or the impartiality of the presiding officer, intervention before the conclusion of the proceedings may be both appropriate and necessary.We submit that the present application falls squarely within that category.

144 The question whether a presiding officer ought to recuse herself goes directly to the lawfulness of the composition of the Commission. If the ruling refusing recusal is unlawful, the continued conduct of the Commission's proceedings before the same presiding officer would be fundamentally irregular.

145 In those circumstances, postponing review proceedings until after the Commission has completed its work would serve little practical purpose, and would (at best) lead to wasted public resources. If the Chairperson ought to have recused herself, the participation of a decision-maker who should not have presided would taint all the proceedings conducted thereafter. The prejudice arising from such circumstances is not merely theoretical. It includes the risk that extensive evidence may be led, witnesses examined, and findings ultimately made by a Commission that was improperly constituted. This goes to competence and jurisdiction and is incurable.

[93] Basson v Hugo and Others (968/16) [2018] ZASCA 1; [2018] 1 All SA 621 (SCA); 2018 (3) SA 46 (SCA) (17 January 2018) paras 18-19 – impartiality goes to the competence of the Commission and jurisdiction. It is incurable if Justice Khampepe ought to have recused herself.

146 The Commission's suggestion that any prejudice can be addressed after the conclusion of the inquiry overlooks the nature of the right implicated. The requirement of impartiality (which is linked to procedural fairness) is not concerned only with the correctness of the final outcome, but with the fairness and integrity of the process itself. Once proceedings have been conducted before a presiding officer in respect of whom a reasonable apprehension of bias exists, the harm to the fairness of the process cannot easily be remedied after the fact.

147 In addition, the Commission itself emphasises the limited duration of its mandate and the public resources involved in its work. If the impugned ruling is indeed unlawful, allowing the proceedings to continue in their present form would risk the very inefficiency and waste of resources that the respondents invoke. It is therefore in the interests of justice that the lawfulness of the Chairperson's refusal to recuse herself be determined now, rather than after the Commission has concluded proceedings that may subsequently be found to have been conducted on an irregular basis.

148 For these reasons, the respondents' reliance on the so-called "midstream review" principle is misplaced.

149 In any event, President Mbeki has pleaded circumstances which justify the Court's intervention at this stage, including the risk that proceedings conducted thereafter may be tainted by the participation of a decision-maker who ought not to preside over them, at considerable public expense. He is not compelled by

law to participate in a proceeding that is tainted by a reasonable apprehension of bias in breach of his constitutional rights. It is also in the interests of justice and the public interest to determine the issue now to avoid a potential waste of time and significant public resources in proceedings that may be a nullity.

150 A similar objection was rejected by the High Court in *Basson* after the matter was referred back to the High Court for determination.[94]

151 Importantly, the Commission's contention does not engage with the practical consequences of the position advanced. If the Commission's approach were correct, a party who becomes aware of facts giving rise to a reasonable apprehension of bias would be required to wait until the conclusion of the proceedings before raising the issue. Such an approach would undermine the very purpose of the recusal doctrine, which is to ensure that proceedings are conducted from the outset before a decision-maker who is, and is perceived to be, impartial and that the issue must be raised before that decision-maker.

SEPARATION OF POWERS IS NOT VIOLATED

152 The respondents' argument seems to be that the relief against the President of the Republic, President Ramaphosa, impermissibly intrudes upon the powers

[94] Basson v Hugo and Others (29967/2015Â) [2019] ZAGPPHC 98; 2019 (5) SA 142 (GP) (27 March 2019) paras 17-21. See Basson v Hugo and Others (968/16) [2018] ZASCA 1; [2018] 1 All SA 621 (SCA); 2018 (3) SA 46 (SCA) (17 January 2018) paras 17-22 on similar circumstances for the existence of exceptional circumstances.

given to the President by section 84(2)(f) of the Constitution (paragraphs 25-30). On that basis, the Commission argues that it would be inconsistent with the doctrine of separation of powers for this Court to direct the President to terminate the appointment of the Chairperson.

153 Such a characterisation misconstrues the nature of the relief that Mr Mbeki seeks in this regard.

154 The present application concerns the lawfulness of Justice Khampepe's refusal to recuse herself from presiding over proceedings that adversely affect President Mbeki's rights. The relief sought against the President is consequential and arises only if this Court finds that Justice Khampepe ought to have recused herself. In those circumstances, the purpose of the relief is simply to ensure that the Commission is properly constituted. It is consequential corrective relief and the Court may grant it. In considering whether to grant it, the Court must show due deference to the President's decision to appoint Justice Khampepe with due regard to the separation of powers, as in the case of the remedy of substitution – albeit that here the President's to appoint is not under review. It is the suitability of Justice Khampepe to remain on the Commission. If she is disqualified to sit, vindictating the Constitution requires that she be removed or her appointment terminated under the order of this Court. The separation of powers doctrine does not rigidly preclude the grant of such corrective relief.[95]

[95] Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another (CCT198/14) [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) (26 June 2015) para 45.

155 The President has placed his view on oath before this Court in the light of the facts that have emerged. The corrective relief does not, on the basis of what the President says on oath, undermine the President's powers and decision to appoint Justice Khampepe.

156 The relief may become unnecessary if the Court directs Justice Khampepe to recuse herself from the Commission. She could reasonably be expected to oblige.

THESE PROCEEDINGS ARE NOT AN ABUSE OF COURT

157 It is trite that an abuse of process exists only if a litigant uses the procedures provided by the Rules of Court not for the purpose for which the Rules were established. Here Former President Mbeki uses the Rules of Court to review a ruling that he contends was unlawfully reached. That is not an abuse of court process.

158 The Commission contends that the present review application constitutes an abuse of the process of this Court and that the applicants seek to delay or avoid appearing before the Commission and to be held accountable. That assertion is based on a mischaracterisation of both the nature of this application and the purpose for which it has been brought. The present proceedings are directed at a discrete question of lawfulness, namely whether the Chairperson ought to have

recused herself in circumstances giving rise to a reasonable apprehension of bias. That issue goes to the integrity of the Commission's process itself.

159 The rule against bias is a fundamental principle of our law. It exists not merely to protect the interests of individual litigants, but to safeguard public confidence in the fairness and integrity of public processes. Where a party reasonably apprehends that a presiding officer may not approach the issues with the required impartiality, the law entitles that party to raise the issue and, if necessary, to approach a court for relief. The mere invocation of that right cannot, *without more*, constitute an abuse of process.

160 A fair reading of the papers before the Commisison and this Court demonstrates that the review application is brought *bona fide* and for the purpose of securing the integrity of the Commission's proceedings. It is not brought for any dilatory or ulterior purpose. Mr Semenya SC's answering affidavit before the Commission, captures – chapter and verse – President Mbeki's cooperation in the Commission since receiving the Rule 3.3 notice. The undermines the claim of abuse of process.

161 The Commission performs an important public function. This is clear. However, the present application concerns the lawfulness of a particular ruling made by the Chairperson and the fairness of the proceedings in which Mr Mbeki is required to participate. Ensuring that such proceedings are conducted by an impartial decision-maker is itself an essential component of public accountability

and the rule of law. The Commission's attempt to characterise the review application as obstructive overlooks the nature of the right implicated. It also overlooks its earlier evidence that captures Mr Mbeki's participation before the Commission.

162 The question whether a decision-maker ought to recuse herself must be determined objectively and on the basis of the applicable legal test for reasonable apprehension of bias. It cannot be dismissed as abusive simply because it may have implications for the conduct or timing of the proceedings before the Commission or because Justice Khampepe takes a sensitive and different view.

162.1 The Commission relies on broad assertions regarding the public interest and the importance of its work. While those considerations are undoubtedly significant, they cannot override the requirement that the Commission's proceedings be conducted in accordance with the principles of fairness and impartiality. Public confidence in the Commission's work is not enhanced by dismissing legitimate concerns regarding the impartiality of its presiding officer without proper judicial scrutiny.

163 For these reasons, the Commission's allegation that the present application constitutes an abuse of this Court's process cannot be sustained. The application raises *bona fide* and substantial legal issues concerning the lawfulness of the

impugned ruling and the fairness of the proceedings before the Commission. It is brought for the purpose of vindicating those rights and ensuring the integrity of the Commission's processes.

CONCLUSION

164 We have demonstrated the following:

164.1 The evidence presently before the Commission, including the material placed before it by other witnesses, demonstrates that matters falling within the Commission's mandate arise from institutional processes, policies and decisions in which the Chairperson herself was previously involved. That circumstance gives rise, at the very least, to a reasonable apprehension that the Commission's proceedings may not be conducted with the requisite appearance of impartiality by the Commission. That these processes, policies and decisions date back almost 30 years ago is of no moment. They are now live before the Commission and gave rise to the very existence of the Commission and its subject matter.

164.2 The principle that justice must not only be done but must also be seen to be done is of particular importance in proceedings of this nature. A commission of inquiry established to investigate matters of profound public importance must command the confidence of all participants and of the public at large. In the present circumstances, the manner in which the procedural issues described above have been addressed by the

Chairperson, viewed cumulatively, gives rise to a reasonable apprehension of bias and undermines the integrity of the process.

164.3 Delay alone is not decisive. There are prospects of success, the issues are important and there is a clear basis to overlook the delay from September 2025 to December 2025.

165 For the reasons advanced above, it is respectfully submitted that the ruling of the Chairperson dated 30 January 2026 is unlawful and falls to be reviewed and set aside in terms of PAJA, alternatively under the principle of legality.

166 There is no basis to deny Mr Mbeki the costs of the application if he succeeds. The costs should include the costs of three counsel at scale C.

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9 March 2026

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