THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS REGARDING EFFORTS OR ATTEMPTS TO STOP THE INVESTIGATION OR PROSECUTION OF TRUTH AND RECONCILIATION COMMISSION CASES (TRC CASES INQUIRY)

HELD AT:

Sci-Bono Discovery Centre, Corner of Miriam Makeba & Helen Joseph Street
Newtown, Johannesburg

BEFORE:

COMMISSIONERS:

The Honourable Ms Justice Sisi Khampepe (Judge Ret.) – Chairperson
The Honourable Mr Justice Frans Diale Kgomo (Judge President Ret.)
Adv Andrea Gabriel (SC)

EVIDENCE LEADERS:
Adv Ishmael Semenya (SC)
Adv Fana Nalane (SC)
Adv Mfesane Ka-Siboto
Adv Nompumelelo Seme
Ms Baitseng Rangata

REPRESENTATIVES
Adv KD Moroka (SC) – DoJ representative
Adv Gwala (SC) – NPA representative
Adv Varney (SC) – The Calata Group
Adv Mpati Qofa-Lebakeng (for Adv Shaun Abrahams)
Mr Mongezi Ntanga (for Adv Shaun Abrahams)
Mr Moray Hathorn
Adv Tlotlego Tsagae (for Department of Justice)
Ms Chuma Bubu (for Helen Suzman Foundation)
Ms Judy Seidman (for Galela Reparations Movement)
Mr Shadrack Ganda (for Joe Xabi)
Adv Sokhela, Phumzile (for Former President Mbeki)
Mr Max Boqwana (for Former President Mbeki)
Mr Nkosinathi Thema
Adv Mpofu (SC) (for former President Zuma)
Adv Muvangua (SC) (for former President Mbeki)
Adv Soni (SC)

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PROCEEDINGS ON 16 JANUARY 2026

CHAIRPERSON: Good morning, ladies and gentlemen, Mr Semenya.

ADV SEMENYA: Good morning to the Chair and co-commissioners and to my colleagues, friends and everybody else. Today is a set-down for the hearing of an application for the recusal of the Chair. I suspect that we will all put our names on record. I represent the evidence leaders together with my team.

CHAIRPERSON: Yes.

ADV MPOFU: Good morning, Chairperson and commissioners and colleagues. My name is Mpofu. I represent former President Jacob Zuma together with my learned friends, Mr Buthelezi and Ms Siunu.

ADV VARNEY: Good morning. We represent the Calata Group. I am here with my learned friend, Samantha Pillay instructed by Webber Wentzel.

CHAIRPERSON: Thank you, Mr Varney.

ADV MUVANGUA: Morning. My name is Nyoko Muvangua. I represent the former president Thabo Mbeki. I am instructed by Boqwana Burns. I appear together with my learned friends, Ms P Sokhela and Dr K Moyo.

CHAIRPERSON: Can I request that you give me the spelling of your surname?

ADV MUVANGUA: Of my one?

CHAIRPERSON: Yes.

ADV MUVANGUA: It is Muvangua [spelt].

CHAIRPERSON: Muvangua. Am I correct?

ADV MUVANGUA: Ja, that is correct.

CHAIRPERSON: Muvangua.

ADV MUVANGUA: That is correct.

CHAIRPERSON: Thank you.

ADV MUVANGUA: I must apologise. I omitted to mention that I also appear on behalf of the former cabinet minister as documented in the papers.

CHAIRPERSON: Yes. Thank you, Ms Muvangua.

ADV SONI: Morning, Chairperson, Commissioners. I will be presenting evidence on behalf of the evidence leaders today, Chairperson.

CHAIRPERSON: And your name?

ADV SONI: Sorry, it is Vas Soni.

CHAIRPERSON: Thank you. I intend to allocate 30 minutes to each counsel for the main argument and 15 minutes for the reply. Mr Mpofu?

ADV MPOFU: Yes, thank you, Chairperson.

CHAIRPERSON: The ball is in your court, sir.

ADV MPOFU: Yes. Thank you very much, Chairperson. Yes, what I will then do is; all right, I am going to sequence the argument slightly differently to what I had planned, given the amount of time allocated.

Chairperson and Commissioners, this is a recusal application brought by the former president. It has always been said that the party that brings a recusal application has a very unenviable task;

and that according to our courts, the motives of such a party should not be likely questioned. This application is particularly in that realm, because firstly, from a public point of view, it involves very serious matters involving the TRC and part of our history which really forms part of the DNA of this country.

So it involves very senior former presidents, very senior judicial officers and very senior practitioners. For me personally it involves my real learned friend, Mr Semenya, and other people that I consider to be brothers and sisters, but enough of the sentimental stuff. We have to get on with the job.

The application is based on three grounds on its merits; and those are as we have spelled out in our heads. We have rolled up the grounds that if you count them mechanically, you will find five separate grounds, but they can be rolled into three and that even includes the overlapping grounds within the Mbeki application.

But before I deal with those, with the permission of the Commissioner, I would like to deal with the preliminary points that have been raised reciprocally by both sides. The one preliminary point raised by us and in the Mbeki application as well is the competency authority and status, if you like, of the answering affidavit to the extent that it was deposed to by Adv Semenya who is the chief evidence leader.

The second preliminary point is raised by the other side; and for shorthand, let us call it undue/unreasonable delay. And it is argued that the so-called undue/unreasonable delay is a complete

bar and necessitates the dismissal of the application upfront.

Needless to say, our position is that the preliminary point raised by us should be upheld and the one raised by the evidence leaders dismissed for the following reasons. In respect of our preliminary point, it is trite that a party that deposes to an affidavit on behalf of another should be properly authorised to do so, number one.

The other very trite or even more trite rule is that when such authority is challenged, then the party whose authority is challenged attracts a duty to then prove that authority. In this case we raised that objection in the answering affidavit and until today there has been no response, no affidavit, no nothing basically to gainsay the challenge to authority. That alone should be fatal on this issue.

But putting aside then one response, the issue is based on the following grounds. Firstly, you would have noticed that in the application the cited respondent is the chairperson of this commission, but the answering affidavit so-called purports to have been done on behalf of the commission. Even if it was done on the commission, our view is that, our submission is that the commission is not per se the respondent. But let us assume for argument's sake that it was; then they would still have to have been an act of granting authority to the deponent, which is sadly lacking in this matter.

It is again trite that where authority is challenged, if it is a juristic person, then the party produces a resolution or whatever it is. Or if it is a human person, then they produce a confirmatory affidavit

from such person. None of that has been done. The second ...[intervenes]

COMMISSIONER KGOMO: So you would have liked to see something like a resolution: 'I, Sisi Khampepe, hereby resolve to authorise Ishmael Semenya SC to depose to the affidavit on behalf of myself and/or the commission.' That is what you wanted to see. What did you want to see?

ADV MPOFU: No, the chairperson is not a juristic person. I said if I it is a juristic person, that means an inhuman agent, then you produce a resolution, because a company does not have life. But if it is a human person, then you produce a confirmatory affidavit. That is what happens every day in our courts. But in any event, the challenge must be met. That is the whole point. Here we do not have to go into whether it is a resolution or whatever. The challenge has simply not been met with any response.

The second ground upon which we base this is that my learned friend, Mr Semenya, says in the relevant paragraph that he has an interest in this matter and then in the heads he says he is a witness effectively; and at the same breath he says he gave legal advice. You cannot do that. If you have an interest in the matter and you are a witness, then my learned friend would know better than me. Then you are precluded from also rendering legal advice in that same matter, let alone to act on behalf of the respondent.

The last ground is that Mr Semenya, to the extent that he is indeed a witness, is for that reason and the one that I have just

mentioned, a witness in the matter and therefore conflicted.

On that basis then, what that means in reality is that the application is unopposed, because if the answering affidavit is incompetent, for whatever reason, then it must be read as *pro non scripto*, but assuming that the commission will find that, despite all those defects, the affidavit is competent; then I move to the next, to the preliminary ground that is raised by them, and it goes like this.

The commission was appointed in May, I think, and then the application was brought in December. Therefore, there was a six months' delay, something along those lines. Firstly, the factual basis of that objection is false in the sense that it is said that the former presidents ought to have known that the commission was appointed in May or whenever it was.

There is no legal basis that is pleaded as to why they attract that duty or why they attracted more than any other South African, because there was no notification given to them. There is no constructive knowledge that can be attributed to them.

Obviously it should be obvious to everyone that the first time at least former President Zuma got wind of the fact that this commission implicates him or needs evidence from him or whatever was when the rule 33 notice was granted. So that is really the starting point. The starting point can never be May. It must be the time of the rule 33 notices.

Speaking specifically for former President Zuma, he wrote to his attorneys, Mr Kwinana. He wrote a letter to this commission, to

the statutory of this commission, stating that he was overseas. I am paraphrasing. It is Annexure B to the founding affidavit. He was overseas. He had not had time to consult with anyone. He would attend to the matter and get legal advice, words to that effect. So again, how can he when he had not even seen the documents or engaged or consulted with anyone, how can he be faulted for not taking steps at that stage?

Then of course the ground or the main ground raised by former President Zuma, namely the alleged misconduct and conflict of interest on the part of the chairperson and/or Mr Semenya; that ground obviously arose only upon in the last couple of weeks before the commission was given.

And to be fair to the evidence leaders, they do not raise the point that on that particular ground it should have been brought earlier than when it was brought, which was, as I say, within a couple of weeks. So even if the so-called unreasonable delay ground was good, which it is not, it would obviously not be, it will not defeat the entire application, particularly the main ground raised by former President Zuma.

But in terms of the law as well, and I am not going to belabour this because we have dealt with it in the heads. There is no law that says that unreasonable delay is a complete bar in recusal applications. It may be a complete bar in terms of reviews, given the 180-day rule and PAJA and so-called unreasonable period in terms of legality, but there is no authority that I know of that can even exist

that says undue or unreasonable delay is a bar. And that is known; I do not have to say that I am preaching to the converted, because this commission dealt with this in November.

When the Semenya SC recusal application was raised here, the objection was undue delay. And this commission dealt with the matter and at the end of its ruling it said: 'well, the delay was undue. We deprecate that.' That was it. In other words, even when the undue delay was found to exist, it was never seen by this commission to be a bar. So it cannot start now to be a bar; so much for the undue delay.

Now coming to the merits of the recusal grounds; assuming again that the affidavit is regarded as authorised. This is what I propose to do. That is the adjustment I was referring to, to save time, because the time is quite short. The main ground raised by former President Zuma is the one that relates to the alleged misconduct, bias in the form of giving advice to the evidence leader on how to succeed in the Semenya SC recusal application.

The second ground is the ground, which again for shorthand I will call the occupational history ground; and that is the ground that deals with the fact that the chairperson was previously employed by the Truth and Reconciliation Commission, its amnesty committee and the NPA as the deputy NDPP.

Now, then the third ground in the Zuma application is of course the utterances, attitude, hostility, vengefulness, hatefulness, all those that are pleaded in the founding affidavit associated with the

detention and the trial of former President Jacob Zuma.

So this is how I propose to deal with the matters and I want to be understood very clearly on this point. The third ground that I have mentioned – that is the Constitutional Court ground; is, if you like, is the alternative ground.

If you go to the notice of motion which you will find not our notice of application, which you will find on page 2 of bundle A; you will see that I think prayer 2 says is for the total recusal of the chairperson and prayer 3 is for the partial recusal, if you like, only in respect of former President Zuma.

So that ground is an alternative ground by any description in the sense that it only talks to prayer 3. If it succeeds, put it this way; if only that ground succeeds, then obviously the chairperson would not recuse herself in total. She would recuse herself "partially" in respect of him.

So, because there is no time, we can park that ground. We are not abandoning it, but we are parking it, because I want to highlight what I call the main ground. The second ground other than the one that I am going to deal with is the one of the occupational history, but that ground for us is; and one can argue these things in any sequence. I am just trying to give a logical sequence.

The second ground that I want to deal with is the occupational history ground. I am not going to dwell much on that ground for two reasons. One, it is the main ground as far as in the Mbeki application. So I am anticipating that my learned friends for former

President Mbeki will speak extensively on it.

Two, our submissions have been extensively put in our heads and in the founding affidavit and all of them must be taken as read. But three, and most importantly, as a matter of law, our ground, main ground which I am going to talk about now is based on actual bias and former President Mbeki's grounds are based on reasonably apprehended bias. Now as a matter of simple logic, if the ground on actual bias is upheld, then one does not have to bother about reasonably apprehended bias at all. I do not think I need to motivate that.

So, as a result, for the three reasons that I have just mentioned, again that second ground, as far as one is concerned, is persisted with full blast, but for the purposes of oral argument, I will simply refer to it at the end to the extent that I will still have time, otherwise we will deal with it in reply. So everything we have said in the affidavits and the heads must be taken as read.

So, that then leaves me with the main ground raised by former President Zuma, which is the actual bias ground. That ground, as I say, is fatal to... if it is upheld, it is fatal to the entire case. Then there will be no need to deal with the other two. Well, there might be a need to deal with them to the extent that the matter might go further than this, but for the purposes of the decision today, there will be no need to deal with them.

Why do I say that? One of the fallacies that appear from the papers of the evidence leaders is to, conflate is an understatement,

but to mix up the test. The test for bias, the test for reasonably apprehended bias must never be conflated with the test for actual bias.

So, a simple example to demonstrate this is that we know that there is the so-called double reasonableness test which comes from SARFU, SACCAWU and that line of cases. It should be obvious to anybody that that test only applies to reasonably apprehended bias, not to actual bias. Why? Because when you talk about double reasonableness, you are already talking about the reasonable person. In other words, you are talking about the objective test. But actual bias has got nothing to do with that. You cannot say someone is actually biased because a reasonable person will think that they are biased. That is just terminological, not even an oxymoron, but it is senseless.

So, the court or rather this forum would then be spared if there is a finding of actual bias. It does not have to go into the double reasonableness test. Similarly, another test which they invoke is the presumption of impartiality. Again, the presumption of impartiality cannot apply in this situation, because here, although the chairperson who is being asked to be recused is judicially trained and held very high and esteemed offices in the judiciary, she is not being asked to be recused as a judicial officer per se. She is being asked to recuse herself as a chairperson of an administrative body.

So, it cannot be that if, let us say this was the recusal of Archbishop Tutu and the TRC, because he was not judicially trained,

a separate test would have to be applied. But simply because the chairperson here happens to be someone who is judicially trained, then the test is different. That is also legal confusion.

So and let me put it very simply. A judge, COA judge is never appointed by the president in the sense, in the way that the chairperson of an administrative tribunal is, number one. Number two, when a person is sitting as the chairperson of a tribunal, they are, as it is said in the heads of argument of the other side, they are in a way, they are subservient to the person who appointed them.

That is why it is said that they can only make recommendations. They cannot act. The only person who can act is the president. Unlike a judge – when a judge issues an order, a judge issues an order. He or she does not depend on the whims of anybody to do so. So, there is a vast difference between someone sitting as a judicial officer and somebody who happens to be a judge sitting as the head of an administrative body.

So, with the greatest respect, a person sitting, chairing an administrative body appointed by the president is in no better position than an advisor to the president. In fact, that is what they do. They advise the president or make recommendations to him. They are in no better position to a director-general who may make suggestions to the principal.

COMMISSIONER KGOMO: But the recommendation is based on finding. Now where does the whim come in or the influence? The chairperson would make a decision fact-based and not on the whim

of the president who appointed.

ADV MPOFU: Yes. No Justice Kgomo, I think maybe you did not hear properly or I misspoke. If I did, I apologise. The whim is not at the level of the finding. You are quite right. The decision-maker, any decision-maker, whether it is Archbishop Tutu or whoever it is, makes a finding. That you can put aside. The whim comes like this; and this is trite as well.

Once an administrative body makes recommendations to the president, the president can literally take that thing and put it in the dustbin. That is where the whim is. When it is a court order, he cannot do that. So that is the difference here. If I put it the way you are putting it, then I misspoken.

So the whim comes on the end of the implementation; and that is why. You will remember that one of the defences raised in this matter is exactly that; that this commission only makes recommendations and it is correct. So that is where the whim is.

Now, that by the way is another defence which has short legs which does not carry any water, because it is related to the defence that says the commission is inquisitorial and not adversarial. That defence cannot go anywhere. It should die before even arrival. A, because yes, of course the commission itself in terms of its terms of reference carries its work inquisitorially, but this is a *sui generis* application, the recusal application, as was the Semenya recusal application for that matter; and the recusal application is clearly, but 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 advice to one of the adversaries; plain and simple. If the matter is adversarial, as it obviously is, then the rule that applies is the one that was enunciated in the SCA in *S v Roberts* 1999 (4) SA 915 (SCA) at paragraph 23 that you will find in the preamble to our heads; and it says as follows. It is very simple.

> "That justice publicly be seen to be done necessitates as an elementary requirement to avoid the appearance that justice is being administered in secret; that the presiding judicial officer should have no communication whatever with either party, except in the presence of the other."

Now this is what we call an [indistinct] case. So even when that person who is sitting there is chairing an administrative body or even a DC for that matter at work, that they can advise the employer or the employee in that particular adversarial setting. It is plainly; one does not have to be a lawyer to understand that there is something rotten and wrong with that. So this principle is quite clear.

COMMISSIONER KGOMO: 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.

ADV MPOFU: Ja, the content of that; yes, that is one of the

defences. That is wrong, plainly wrong, because if you go to paragraph 38 of the founding affidavit, and you will find that in bundle A. And maybe let me start by explaining the following. The content of the advice, Justice Kgomo, is specified in paragraph 38, 39 and 40 which I am going to read out to you now. One of the things we are told is that we do not say the place, the time or the issue we are raising, the content. It is not true. As far as the time is concerned, this is what 38 says:

> "In the build-up to the hearing of the Semenya recusal application…"

So that is the timing. It is not the date, but we situate when it was.

> "Justice Khampepe as a member of the judiciary and as a decision-maker, who would ultimately make a final ruling, conducted herself improperly and exhibited actual bias in favour of the non-recusal of Adv Semenya."

And here is the important part.

> "A good example or shall we say evidence of this is that Justice Khampepe, without the knowledge of the applicants, privately and secretly gave advice to Adv Semenya SC on certain key witnesses in his case."

That is the content of the advice.

> "…and even advised him on what to look out for and what to convey to his legal representative,

> Adv Vas Soni SC, in order to succeed in the recusal."

That is the content of the advice.

> "This is a case of plain and gross misconduct, irrespective of the merits or demerits of the Semenya recusal application."

Then we said:

> "Purely in order not to jeopardise ongoing investigation into this serious conduct which poses a threat to democracy, I deliberately and consciously refrain at this stage from revealing the complete…"

Underline "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 or provide the evidence. I trust that this will not be necessary."

So, this is what happens here. Surely, but surely it should be sufficient. If you allege that advice was given, one, to advise the person on how to succeed; and secondly, to advise him and what to look out for to convey to his legal representative, Adv Vas Soni; those are specific allegations. How can you preside that the content is not given? Whether at that point the advice was changed, this paragraph or that paragraph or look up this case or that case is neither here nor

there.

The misconduct is in the giving of the advice without the knowledge of the other side. That is where Roberts puts emphasis. There is nowhere in what I read from Roberts that says the judicial [indistinct]. It says should have no communication whatever, right. So whether the commission [indistinct] is X, Y or Z does not matter. Should have no communication whatever with either party, except in the presence of the other. That is the gist of the... it is not even this red herring thing about whether it was secret or whether it was done or whatever.

The point is; the non-disclosure to the other side of such communication. It is not done. Everybody knows that. Again one does not need to have an LLB to know that a decision-maker cannot advise one of the adversaries about anything. It does not matter whether it is a big thing or a small thing or a medium thing. So, that is the gist of the attack.

And to the extent, to anticipate what my learned friends will say on this, to the extent that yes, for reasons that I explained here and in the replying affidavit, some of the evidence, because of what is put in there as ongoing investigations, because some of that evidence might not be complete, that is why I put the emphasis on the word ‘complete’. Well, so be it. It is not presented. But that is not the test of how you test evidence. There is something in law of evidence called the sufficiency of evidence or the cogency of evidence.

So, to make a blatant example; if I have evidence that somebody has stolen bread from a store, I can at that stage lay a charge against them for that. The fact that it might turn out later that they also stole eggs and also stole milk and what have you; well, the point is: is the evidence that is presented at that time sufficient at that time to establish that which I am accusing a person of?

And our respectful submission; this evidence that is here is sufficient. We agree with our learned friends. They say in their answering affidavit: 'well, if you do not give us that further evidence, then your application must be dealt with on the basis of the allegations in the founding affidavit.' We concede that. We cannot expect the tribunal to make a finding on with some withheld evidence.

But the point is that on the evidence that has been presented in the founding affidavit, there is sufficient to allege or not allege, to establish as a matter of fact that the rule in *S v Roberts* was breached; and that is enough.

COMMISSIONER KGOMO: Yes, you have made your point.

ADV MPOFU: Yes, thank you, Justice Kgomo. Now, assume now, I mean the engagements and all of this, but for now I beg the panel to assume that or correct on those facts. In fact, the reason why you must assume that we are correct is because there is nowhere in these papers where the giving of the advice, which is the gist, is denied; nowhere.

You are given a diversionary story about... the only defence actually is that no, the evidence leaders and the commissioners have

frequent interactions. The answer is: so what? Who has disputed that evidence leaders and commissioners have frequent interactions? So it is not the interaction per se. It is the fact that this was an improper communication.

Nobody in their right mind would say evidence leaders must not talk to commissioners about the weather or about the matters to do with the terms of reference. But once there is a specific recusal application for a particular purpose and the commission and the chairperson sends an email that says please watch out for paragraph 45 or this and that which is also there in the affidavits or do this research or whatever; then that is just wrong. I mean honestly. I should not be standing here explaining that that is an affront to the Constitution and an affront to the oath of office to the extent that it is relevant, of any office for that matter.

Right, now, the point is this. In the absence; and my learned friends again to their credit, they say at paragraph 6:

> "A proper consideration of their heads that have been filed suggest that, save for the allegations made by former President Zuma of improper interactions…"

And I will come to that.

> "…and Semenya SC, for the most part the applicable facts are not in essence in dispute."

That is true, except that the exception that they carve out also does not apply. What has been pleaded here in plain and simple terms,

Civil Procedure 101, is what is called confession and avoidance.

Now confession and avoidance means this, to say: yes, the advice was given or I do not dispute that the advice was given, but as they say, there is nothing wrong with it because commissioners speak to evidence leaders all the time, but that is what is called a *non sequitur*, because the fact that evidence leaders; we all know – my learned friend, Mr Semenya and I have been in many commissions together. We know that that happens, but that is not the point. That is diversion. It is called the strongman defence. You create your own case and then you fight that case. That is their case.

Our case is simple. It has got nothing to do with the frequency of interactions or no frequency of interactions. It is that this particular interaction was improper, illegal and against anything that any decision-maker should do.

COMMISSIONER KGOMO: If I may; you are eating into your time.

ADV MPOFU: Pardon?

COMMISSIONER KGOMO: I say you have eaten into your time. You have eaten into your 30 minutes. Carry on.

ADV MPOFU: Okay, thank you.

COMMISSIONER KGOMO: It is just a friendly reminder.

ADV MPOFU: Yes. No, thank you. I take it as such. So, the point really being made and I have to make this point; this is not a complaint about, at least not yet, about misconduct in the JSC sense of the word. Those proceedings, if they happen – and former President Zuma has said that he will institute them; will take their own

course. Here we are only dealing with a narrow issue of whether, assuming that the facts, the confession and avoidance is held to be admitted, because that is really what it is. Okay, let me go to basics and this will be just the point preceding my last point.

CHAIRPERSON: Mr Mpofu?

ADV MPOFU: Justice Kgomo.

CHAIRPERSON: Mr Mpofu?

ADV MPOFU: Yes.

CHAIRPERSON: The time has expired.

ADV MPOFU: And that is what Justice ...[intervenes]

CHAIRPERSON: So you must try and wrap up.

ADV MPOFU: Pardon? Wrap up, yes.

CHAIRPERSON: You must try and wrap up.

ADV MPOFU: Thank you. Thank you, Justice Khampepe. Now, I am saying; in wrapping up, let me say this, because it is very important that these pleadings must be read for what they are. Confession and avoidance is described as follows. You say: I admit your facts, but even based on those facts, I am giving you facts that countervail those facts; and therefore, a different legal conclusion should be reached.

You will find that in Erasmus. I think it is... ja, you will find it in Erasmus. At the end of time, to read it out now, but you will find it at A2, D1-22(8) under “confession and avoidance”. So, if you have a confession and avoidance, but you do not put countervailing facts, because the onus shifts in confession and avoidance. Once you

admit, you then have the onus as the admitter to put those countervailing facts. That is known as the Mabaso Principle. If you fail to do so, then all you have left is the confession without an avoidance. So the confession is otherwise known as an admission. So those facts are admitted.

Secondly and lastly, and I am indebted for the indulgence. This principle of failing to deal with such and a serious accusation has been dealt with in our courts many, many times. It has been said in old cases. There is a case. Just the name just escapes me now. I think it was in the 20's or 30's where it was found that if somebody makes a serious allegation against you and then you do nothing, you just look down; that is as good as an admission. That has been confined by the SCA and subsequent cases.

But the point I am making is simply this. Faced with such serious accusations, as averred out, the absence of a denial or any explanation surely means that those facts are common cause. And none other than Justice Khampepe made that point in the case of *Public Protector v South African Reserve Bank* or the so-called CX case. She said at paragraph 190:

> "The public protector's failure to deal pertinently and responsibly with the serious accusations made against her, her impartiality in light of these meetings that she had allegedly had with the president, meant that the high court was left with only the handwritten notes as evidence of what

> was discussed at the meeting and no countervailing account from the public protector. This led the high court to conclude that: 'The question remains unanswered as to why the public protector acted in such a secretive manner and she does not give an explanation for doing so."

That is good law; and to the extent that it is good law and it is authority of the Constitutional Court, it is my supply here, because Justice Khampepe was quite correct. When somebody faces a serious accusation against her impartiality, the least you can expect is that they will give an explanation.

And absent that explanation with the kind of wishy-washy version that we have been given in the answering affidavit, so-called, then the accusation remains unanswered. And if it remains unanswered, the chairperson must recuse herself on that basis alone – firstly for giving the advice for having the communication undisclosed and for having it in the absence of the other party in these kinds of proceedings.

And the last parting shot is that in the Pinochet case, the famous Pinochet case, the issue of non-disclosure which really is the nub of this; not the secretive what, what. The issue of non-disclosure was held in that case as decisive. And I am aware, before somebody reminds me, that that case was decided on the basis of a reasonable apprehension of bias, but everyone knows that actual bias, the

alternative to actual bias, if the court, if the tribunal does not find actual bias, then of course the reasonable apprehension, such as was the case in Pinochet, is sufficient.

Because I have run out of time, I will, as I said, defer on the question of the occupational history. I will defer on the question of the occupational history to the Mbeki team, but as I say, I stand by whatever is in our papers, so that I am not deprived of dealing with that matter in reply, should it be necessary.

CHAIRPERSON: Yes.

ADV MPOFU: I am indebted for ...[intervenes]

CHAIRPERSON: That is just one aspect that my learned colleague would like to deal with you.

COMMISSIONER KGOMO: Yes.

ADV MPOFU: Thank you.

COMMISSIONER KGOMO: The first one is just for my own understanding. In the paragraph 15 of Mr Zuma's affidavit he refers…

ADV MPOFU: Founding, founding.

COMMISSIONER KGOMO: We can just listen, but it is paragraph 15. You refer to the commission that had to locate the DSO, the Scorpions chaired by Judge Khampepe as the Commission of Inquiry, but at 17 the commission chaired by Chief Justice Raymond Zondo, you say the so-called commission. I do not know; why the distinction? What does that imply, so-called?

ADV MPOFU: No. Well, firstly, I do not know if you are reading the

same paragraph 17. There is no so-called commission there. It says:

> "I was required to appear before the so-called Zondo Commission."

So the 'so-called' is not about the commission. It is about the fact that it is colloquially known as the Zondo Commission, but the name of the commission, it is called the Commission into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State and everyone, to avoid that long thing called the Zondo Commission. So that is why it is called the so-called Zondo Commission ...[intervenes]

COMMISSIONER KGOMO: But the other one was not so-called.

ADV MPOFU: It was.

COMMISSIONER KGOMO: Okay, but you do not see that. Let us go to paragraph 52 of the statement. Can you just read it, because my 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. Can you just read that and speak to it briefly?

ADV MPOFU: Okay, before I even read it. That conclusion is not correct, but let us read it. It says:

> "Last but not least, the previous conduct of the chairperson in relation to my controversial detective without trial and the subsequent negative public commentary make it untenable for

> me to comply with the request to participate in the present commission, as set out in rule 3.3 notice sent to me by the commission and in any process which is tainted by her demonstrable and/or reasonably perceived bias. For ease of reference, refer to the notice."

No, you are reading that paragraph wrong. That paragraph simply says that the... and it goes to what I call the alternative, the narrow recusal which will pertain only to former President Zuma and has nothing to do with former President Mbeki.

All that paragraph says is that it motivates why; it is the same as saying if there is a judge who took a bribe and I am aware that the judge took a bribe, it is untenable for me to be expected to carry on in front of that judge. It is that simple. And that is all he is saying. He is saying given, what he calls, sorry' is tainted by demonstrable and/or reasonably perceived bias, then it would be untenable.

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.

If I may just say one word about the Calata Group; of course our papers cover and our heads also cover the statements made in the Calata Group, but for the record, it must be said here and now plainly that nothing in this application is meant to take anything away from the validity and the concerns of the Calata Group or to divert the serious work of prosecuting murderers who are responsible for vile apartheid atrocities.

But the fact; if that process, important as it is for this country, is done before a tainted commission, then that is what will delay for another 10, 20 years the process which is so important for this country. So, nobody must ever walk away from here. They must disabuse their minds from, one; that there is a need or rather a desire to delay this process other than to cure its imperfections and its taint of bias. Thank you.

CHAIRPERSON: Thank you, Mr Mpofu.

COMMISSIONER KGOMO: Maybe I would probably not expect the Chair to say that, but she could if she wished. There is some strong language you used by Mr Zuma; that the Chair harbours deep-seated hatred and animosity towards him, and another strong word is that she acted with malice. All these words are very strong and it seems it emanates from the judgments that she penned. As I looked through the papers, at least speaking for myself; that is my impression. The

need for those choice of words, if the Chair acted or penned a judgment, a majority judgment, is there justification for that?

ADV MPOFU: Look, Justice Kgomo, I do not know. I am not the one who was sitting in a cell, detained without trial. So, if ...[intervenes]

COMMISSIONER KGOMO: We are not talking about that.

ADV MPOFU: Pardon

COMMISSIONER KGOMO: We are not talking about that.

ADV MPOFU: But that is what this point is about. This point, I thought we are dealing with a third leg. That is what it is about. The point about the judgments in the Constitutional Court has to do with the detention without trial, unless maybe I am on another page.

COMMISSIONER KGOMO: Carry on.

ADV MPOFU: Yes. So, bringing what the person on whom the shoe pinched, I cannot speak for the deponent's use of ...[intervenes]

COMMISSIONER KGOMO: Of course you can speak.

ADV MPOFU: If I can just ...[intervenes]

COMMISSIONER KGOMO: Because you are counsel. From 1958 in the Mathonsi case you are leadership; and if there are things that you know cannot be backed up even in the rules, LPC rules, you were not supposed to place that.

ADV MPOFU: No, that of course is true, but if you allow me to finish, then I will develop the point. Firstly, that rule applies to all of us. So Mr Semenya in his affidavit says the application for the recusal of the chairperson is spurious, vexatious, scurrilous and even malevolent. That is equally strong language to use the adjective that you used.

Now, the point of the matter is that we should assume again that when Mr Semenya makes this, he is not making them for himself. Those are the views of the chairperson presumably. And therefore, the strong language used on both sides must be looked at in its proper context. What President Zuma says, Justice Kgomo, is that he does not just say you must read the judgment as you say. He says the tone and the posture which was adopted in sending him to jail without a trial, the first of its kind in the new South Africa.

COMMISSIONER KGOMO: Without a trial or hearing.

ADV MPOFU: Without a trial, section 35(3), right to a fair trial. That right to a fair trial which is a right to say I am guilty or not guilty, right to appeal or the right to mitigate, section 35(3) of the Constitution. All those rights to a fair trial were negated. So that is a fact. Now, number one. Number two, he says on top of the tone, something which is... I do not want to suggest any ill-will on the part of the evidence leaders, but you must read the answering affidavit and read their heads.

COMMISSIONER KGOMO: Ja, but Mr Mpofu, you are standing there. The evidence leaders have not come yet. We are on that aspect.

ADV MPOFU: Yes. So, I have not even made the point I am going to make. I must not make the point?

COMMISSIONER KGOMO: Maybe.

ADV MPOFU: Thank you. The evidence leader, the point I was making is that ...[intervenes]

COMMISSIONER KGOMO: At this time.

ADV MPOFU: Yes, the evidence leaders have not said a word, not one word, breathed one word about the allegation in the founding affidavit that Justice Khampepe conducted a publicity campaign on why former President Zuma was convicted without trial. She went and had an interview with Xoli Mngambi of Newzroom Africa and another one with Karyn Maughan of News24. That is not done. So a person who has been subjected to all those things, detention without trial and uncharacteristic publicity campaign about a case and... Sorry, Justice Kgomo; just one second, please.

All I am saying is that it should be understandable. The tribunal will take its own view that why someone views such language, which in my respectful submission is probably more measured than the true feelings of former President Zuma, but Article 13 of the Judicial Code states that a judge must... sorry, Article 11:

> "Save in the discharge of judicial office, no comment public, a judge must not comment publicly on the merits of any case pending before or determined by that judge or any other court, not enter into a public debate. A judge must not enter into a public debate about a case, irrespective of the criticism levelled against the judge, the judgment or any other aspect of the case."

Both of those rules were breached in a superlative way when those

interviews were done. So, how would you feel? And I am not asking you to answer. It is a rhetorical question, Justice Kgomo. How would one person, how would one feel that somebody not only takes you to jail without trial, but goes on forever justifying it in the public domain in breach of the judicial code of practise? Would you give them a hug? No, you will feel strongly about it; and if those strong feelings are reflected in the affidavit of former President Jacob Zuma, then so be it.

COMMISSIONER KGOMO: Yes, you have made your point. Thank you.

ADV MPOFU: I am indebted.

CHAIRPERSON: Thank you. Ms Muvangua?

ADV MUVANGUA: As it pleases the commission.

ADV SEMENYA: Chair, I do not know whether we should not anticipate the tea break, so that we do not interrupt the submissions of my learned colleague.

CHAIRPERSON: We shall take Ms Muvangua's submissions. Ms Muvangua?

ADV MUVANGUA: As it pleases the commission, Madam Chair. Our client's case is based on an apprehension of bias. It is important to make that clear upfront. Our client seeks the recusal of the commission's chairperson on two grounds. The first is a prior institutional role in the TRC and the NPA; and the second is her handling of procedural complaints in this commission that related to the lead evidence leader's conduct.

While these grounds are standalone and independent, we also argue that they are mutually reinforcing. It must be viewed cumulatively in the sense that they create an apprehension of bias. I will provide a road map so that the commission may find it easier to follow where I am going, but before I do that, I want to just state for the record that we do make common cause with the submissions made by my learned friend, Mr Mpofu, relating to the reservations that my clients have about Mr Semenya SC being deposing to an affidavit on behalf of the commission. I do not wish to traverse that, because he has already done that; and in the interest of time I will not.

Safe to say though that the allegations in the founding affidavit must be seen as accepted, because there is no counter-evidence directly from the chairperson. On the road map we propose to present our case as follows. We provide first the legal framework. We accept that it is not disputed, but it frames our argument. So it is convenient to do so.

The second thing we do is to address the first ground of recusal, which is the institutional bias. The third thing we do is to address the second ground of recusal, which concerns the handling of complaints. The fourth is we explain why we say that, even though the grounds remain independent. Viewed cumulatively, they create a reasonable apprehension of bias and it is important that they are also viewed together; and finally we deal with delay.

On the legal framework the point of departure for present

purposes is section 165(2) of the Constitution which requires judicial and *quasi*-judicial power to be exercised impartially and without fear, favour or prejudice. We submit that those provisions apply with equal force to judicial commissions of inquiry, exercising public power. This is so because judicial commissions of inquiry derive the authority from the Constitution and exercise public power. The Constitution subjects them to constitutional constraints which include principles of legality and fairness.

There is authority for the submissions, commissioners and it lies in Corruption Watch, citation: 2020 (2) SA 165. The Court said in paragraph 51 that:

> "In the exercise of its functions, the commission had to act within the confines of legality. It could not, for example, perform its task by demonstrating bias, breaching fundamental principles of fairness or commit significant errors of law, such as refusing to admit evidence or manifestly incorrect legal grounds."

So the point made there is the applicability of the principles to judicial commissions of inquiry.

Now it is common cause that the chairperson of this commission is a retired judge of the highest court in the land. She took an oath of office which requires her to administer justice to all persons alike without fear, favour or prejudice and in accordance with the Constitution and the law. What that does is it imposes a

presumption on impartiality on judicial officers and SACCAWU which we refer to in our heads of argument [indistinct] gives us that principle.

However, the presumption may be dislodged where there is cogent evidence that demonstrates a reasonable apprehension of bias. Masuku referred to in paragraph 13 of our heads of argument gives us that principle. On the test for bias, apprehension of bias, SAFU gives us the principle which is this – whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judicial officer will not bring an impartial mind to bear on the matter.

So there is a double requirement of reasonableness here. The first is the apprehension itself must be reasonable and the second is that it must be held by a reasonable person. So the suspicion of bias must be based on reasonable grounds and not on speculation or unfounded allegations; and that is very important to bear in mind.

I move on though to having laid the framework thus to the first ground of recusal which concerns the chairperson's role in the TRC and the NPA. I must say we deal with this in paragraphs 24 to 27 of our heads of argument as I am flying through it because of time, but I must commence with the principle.

The legal principle is what makes; perhaps institutional, bias of an institutional nature would occur where prior institutional involvement of the presiding officer creates a perception of bias, but

that does not... just because the chairperson was in the TRC or the NPA does not without more give rise to an apprehension of bias. We probably all know the principle.

What must be met as a matter of legal principle is that there must be a connection between that role and the subject matter in this case of this commission. The Constitutional Court in Bernard lays the principle that a reasonable apprehension of bias may arise where a judicial officer in her former institutional capacity, either advised on, participated in or acquired personal knowledge relevant to the issues now before the tribunal; in this case this commission.

SARFU says the same thing. The reasonable apprehension of bias cannot be based upon political associations or activities of judges prior to their appointment to the bench, unless the subject matter of the litigation in question arises from such association or activities.

So, Commissioners, those principles frame the inquiry into the first ground of recusal. The contention by the Calata Group and the evidence leaders and the commission turns on two things, as we understand it. The one is the date of the chairperson's involvement in the TRC and the NPA and the second is the subject matter of her involvement in those institutions.

Now, the argument on the subject matter is that the commission's mandate here is limited to investigating... sorry, is limited to the investigation to the frustration of investigation and prosecution of what we know to be TRC cases. So the question

really is whether and to what extent there was political interference in the prosecution of the TRC cases and that that was not the work of the TRC; the TRC Amnesty Committee and the NPA; that is what the respondents argue, not me. So, on that basis they say the chairperson had no involvement with the matters now under inquiry during her tenure at those institutions.

On the contention about the commission, the temporal confinement of this commission, the argument is that in terms of the terms of reference, the commission is to enquire on political interference commencing in the period 2003 and not before and that the chairperson was involved in those institutions up until 2001. Now Commissioners, with respect to my learned friends for the respondents; that argument is unhelpful. The temporal conscription of the commission is artificial and unhelpful and we say so for at least two reasons.

The first is that the Calata Group itself accepts that limiting the inquiry to events from 2003 onwards is irrational and this concession; and they say they agree with President Mbeki and the ministers that it is irrational. And this is actually consistent with the Calata Group's papers in the high court where they allege that political influence originated in discussions between former Defence Force and Police Force generals and ANC officials and that those commenced in 1998. It would be recalled from my papers that that was the period that Justice Khampepe was in the TRC and the NPA.

The second though is that those same allegations are

repeated in the rule 3.3 notices that at least President Mbeki got, former President Mbeki got from this commission in September. In other words, there was a copy and paste from the Calata Group's papers in the high court into the notice that he got; and that goes as far back as 1998 and does not begin in 2003. And that is why I say we say that the temporal circumscription of the commission is quite frankly unhelpful.

This is also reinforced by the Calata Group's own answering affidavit. There they advance a series of conclusions that fall directly within the commission's mandate and must be investigated. They say that during 1998 and 1999 the NPA was prepared to investigate and prosecute TRC cases until 2003. In other words, before 2003 the NPA pursued serious apartheid era prosecutions without hindrance.

They then say that active interventions, which suggest to us at least that there may have been inactive interventions, which is unclear. To frustrate, such prosecutions only began in 2003 after Justice Khampepe had left the NPA. So that is a proposition that ought to be investigated.

Now, what then of the role of Justice Khampepe in the TRC; and we again deal with this in paragraph 57 to 58 of our heads of argument. Our case is this. Justice Khampepe was no peripheral or administrative person within the TRC. She was appointed as a commissioner at the heart of that process and with that capacity she participated in the formulation of the TRC's findings and

recommendations, including evaluating judgments about responsibilities for gross human rights violations. She assessed. Do you qualify? You do not qualify.

She later sat as a member of the Amnesty Committee in 1996 to 2001 where she assessed and determined amnesty applications brought by perpetrators of apartheid era crimes. Where amnesty was refused, the TRC made recommendations to the NPA to pursue prosecutions. Those functions form the institutional and decisional foundation upon which the present commission's mandate rest. It is the bedrock of why we are all here.

So, this commission is now tasked with examining whether why and how prosecutions flowing from the TRC process were frustrated, delayed or obstructed. The inquiry necessarily revisits the effectiveness, sequencing and implementation of the TRC's prosecutorial recommendations. Must I continue?

COMMISSIONER GABRIEL: So Ms Muvangua, when the amnesty applications were being considered by the Amnesty Committee, was the issue of a failure to prosecute considered in those decisions?

ADV MUVANGUA: It was never the mandate of the TRC Committee and it could never have been. It would be illogical for them to enquire on whether or not there is a failure to prosecute, because that comes later.

COMMISSIONER GABRIEL: So help me determine the link.

ADV MUVANGUA: Yes. So what we submit though is that it starts with... remember the principle is: bias could be apprehended,

because a decision-maker who was involved in that process could have been incentivised to defend the integrity of their processes. The TRC recommended prosecutions. The continuing follows and down the line we are told that there was frustration and the very same person who recommended prosecutions has to enquire one way or the other about the so-called political interferences. It is that continuing that gives rise to an apprehension of bias.

COMMISSIONER GABRIEL: So you see it as a continuing rather than a [indistinct].

ADV MUVANGUA: It is. It is definitely a continuing. That is what they argue, Commissioner Gabriel. This is the bedrock of why we are here. We cannot divorce the two. It will also be recalled – and this is in our papers, I apologise that I did not make a note of it immediately for oral argument; that part of the people who appeared before the TRC Commission was the so-called ANC 37. And what is alleged by the Calata Group is that the political interference came about because the ANC 37 did not want to be prosecuted. Those are the allegations. That is the very thing that this commission has to determine and that comes from there.

So, all of this to say that, appraised with these facts, a reasonable person would apprehend by the person who participated in shaping the TRC's evaluative conclusions and prosecutorial pathways may be proceed as being placed in the position of indirectly assessing the success, failure or derailment – this is what I said earlier; of the process in which she plays a formative role. So, it is

that institutional proximity ...[intervenes]

COMMISSIONER GABRIEL: I have another question. On the question of delay, when is it that President Mbeki knew about all of this that you have just spoken to us about?

ADV MUVANGUA: Would it be convenient if I deal with all of that when I address the question of delay?

COMMISSIONER GABRIEL: Yes, okay.

ADV MUVANGUA: Thank you. And I will not run away from it. I will come to it. On the role of the NPA though, and this we deal with in paragraphs 59 to 61 of our heads of argument, the case is this. It is not disputed that Justice Khampepe was appointed as the Deputy NDPP in September 1998 up until December 1999 and at a time when the HRIU was operational within the NPA.

The mandate of the HRIU was not peripheral to the subject matter of this commission's mandate. The HRI, I am going to say the Human Rights Unit, was tasked with reviewing TRC amnesty records, investigating apartheid era human rights violations and making recommendations on the prosecution of TRC cases. Again that continuing comes back. So in other words, the Human Rights Unit lie at the very heart of the prosecutorial machinery that this commission is now required to scrutinise.

Now Commissioners, the Calata Group tells us that the chairperson of this commission played a role in the work of the Human Rights Unit, including advising the NDPP on the approach to the TRC cases. This assertion was not disputed on the papers.

What is more is that at least my client sought clarity in both in the founding affidavit as well as in the replying affidavit on the specific nature of Justice Khampepe's involvement in the Human Rights Unit. That clarity never came.

So in the circumstances, therefore, a reasonable, objective observer that Justice Khampepe occupied, one of the most senior prosecutorial officers in the country at the time when the NPA was actively shaping its approach to TRC-related prosecutions; now that is direct.

On the issue of the fact that the chairperson's role in the Human Rights Unit was not clarified, notwithstanding request for clarity; potential trouble could also be that once Justice Khampepe, because it lies within her providence, personal knowledge. Once ...[intervenes]

COMMISSIONER KGOMO: Sorry, clarified by whom?

ADV MUVANGUA: Okay, so let me just go back.

COMMISSIONER KGOMO: By whom?

ADV MUVANGUA: Yes, could I go back just to make sure it is logical, our submission?

COMMISSIONER KGOMO: Yes.

ADV MUVANGUA: So the Calata Group told us that Justice Khampepe was involved in the Human Rights Unit. We know that the Human Rights Unit advised on policy for effectively prosecuting, related to the prosecution of TRC cases. That is the first block. Once we were told this, my client sought clarity on the particular nature of

Justice Khampepe's involvement in the Human Rights Unit. This he does in the founding ...[intervenes]

COMMISSIONER KGOMO: I hear you.

ADV MUVANGUA: I will get to it, Commissioner Kgomo. This is in the founding affidavit. One would have expected one or two things to have happened by way of clarification. One would have expected that the chairperson herself would have clarified. One would have expected. My learned friend, Mr Semenya, deposes to an affidavit purportedly on behalf of the commission. One would have expected clarity to emerge from that accompanied by at the very least a confirmation from Justice Khampepe. One would have expected the Calata Group itself to provide clarity on what the exact nature of her involvement was.

COMMISSIONER KGOMO: Yes.

ADV MUVANGUA: All right, now, if we could go to the second ground of recusal. That ground has two grounds to it. The first is the chairperson, is that the chairperson approved an irregular arrangement between my learned friends, Mr Semenya and Mr Varney concerning the leading of witnesses in her ruling of 2 December 2025. That is the first, part of the first trunk. The second part of the first trunk is that thereafter she summarily refused to furnish reasons for that decision, despite detailed objections raised by various parties, including the applicants.

COMMISSIONER KGOMO: There I must come in. Where is the list?

ADV MUVANGUA: I beg your pardon?

COMMISSIONER KGOMO: Where is the list? Where is the dispute, because there are concerns of this, an agreement on that aspect. There is no longer a list. It does not exist. It is not alive.

ADV MUVANGUA: Okay, what I have planned to do, which I will get to immediately, is set out a chronology to demonstrate that presented with these facts, a reasonable person would apprehend that the chairperson is predisposed to... I beg your pardon. A reasonable person would apprehend that the chairperson is inclined to preserve Adv Semenya's participation, notwithstanding clear procedural irregularities and attendant unfairness concerns. Remember the test is about fairness. Perception of bias is about fairness. Now, if I could please just go to the chronology, to the sequence of events. This is not… it is see what is presented objectively.

The chronology with respect to the first trunk of the second ground is this. On 18 September there was a letter written by Webber Wentzel – we know that Webber Wentzel is the attorneys of record for the Calata Group; advising the Chair of the potential conflict of interest regarding Adv Semenya SC and requesting that Adv Semenya SC not be involved in any deliberations or leading or cross-examination of witnesses in relation to the amendments of the prosecution policy. That is what the letter does. I am just now telling the narrative of the facts.

On 19 September there was a letter from the commission's chair to Webber Wentzel which assured the parties that Adv

Semenya SC would not engage in deliberations regarding the prosecution policy and that another member of the ...[intervenes]

COMMISSIONER KGOMO: You are saying you are building to a certain point, but maybe if you can make that point, because I am not quite sure whether there is a dispute, because there is an agreement.

ADV MUVANGUA: No, Commissioner Kgomo ...[intervenes]

COMMISSIONER KGOMO: You are building towards that point, but where does it lead us to?

ADV MUVANGUA: We go back to the test. The test is whether a reasonable person and with the particular set of facts would apprehend bias. The submissions is that a reasonable person… Let me finish quickly. I will just tell you one more thing of what happened after that or just ...[intervenes]

COMMISSIONER KGOMO: Okay or maybe let me leave you ...[intervenes]

ADV MUVANGUA: I am going to take two seconds, maybe not.

COMMISSIONER KGOMO: Yes, carry on.

ADV MUVANGUA: So, what happened after that; so there is a complaint by the Calata Group. The justice says: I hear you. I direct that Adv Semenya SC will have nothing to do with the prosecution policy and that somebody else is going to do that, okay. What happens on 13 November though? Evidence leaders led by Adv Semenya SC; what do they do? They interview Mr Silas Ramaite and that interview canvassed the very thing that the chairperson directed against. What happened to, what was the consequence? – None.

That is the complaint. So out of those set of facts a reasonable person would apprehend bias.

COMMISSIONER GABRIEL: And would that reasonable person also consider that that preliminary direction was withdrawn?

ADV MUVANGUA: I beg your pardon? Please say that again.

COMMISSIONER GABRIEL: A preliminary direction was pronounced *pro non scripto.*

ADV MUVANGUA: At that stage it was not.

COMMISSIONER GABRIEL: So my question to you is: would a reasonable person choose the facts upon which to rely or consider the totality of facts?

ADV MUVANGUA: Yes, they would, except that direction was never withdrawn. It is common cause that the NPA filed the supplementary affidavit complaining about the fact and this was before the recusal application was determined. So at that stage the directive remained in place. So when he contravenes [indistinct], when that directive is contravened, it was still in place. It was still in place. So, Commissioner Kgomo, that is the apprehension of bias on that score.

The second trunk of the second ground is that the chairperson effectively sanctioned Adv Semenya's breach. Sorry, I already dealt with that, sorry. I want to go back to…

COMMISSIONER KGOMO: We want you to go ahead, madam.

ADV MUVANGUA: Yes, I do, but I was dislocated. So I must now regain balance, please. The second aspect of the second ground concerns an agreement between again Adv Semenya SC and my

learned friend, Mr Varney.

On 29 September a private arrangement was entered into between the two advocates in terms of which Mr Varney would lead the evidence of the Calata witnesses instead of the commission's appointed evidence leaders. This was only disclosed to everybody else on 27 October here; and the parties objected to the fact that there was this private arrangement.

Parties were then ordered to file formal objections by 5 November and submissions by 7 November. This was duly done. On 2 December Justice Khampepe handed down a ruling on the objections and endorsed the private arrangements between Adv Semenya SC and Adv Varney and provided no reasons.

In anticipation, Commissioner Gabriel, so what; wherein lies this thing? What gives rise to an apprehension of bias? – Two things. The first is; there was no investigation of the private arrangement whatsoever. It was just sanctioned. There were no reasons provided and reasons were refused, notwithstanding their request. Never mind that there were detailed objections, one would, a reasonable observer would at the very least, in light of the totality of the facts including the detailed objections have expected reasons.

COMMISSIONER GABRIEL: Right, and that totality of facts would include the fact that President Mbeki's legal team was part of and formulated a consent order that was brought to Justice Khampepe.

ADV MUVANGUA: Yes, but remember the consent order was not to permit the private leading of evidence. The consent order was to file;

that is why objections were filed, you see.

So the totality of evidence also includes the very fact of detailed objections. The totality of facts also includes the starting point of that private arrangement, which was 29 September. It must be recalled that the Calata Group is one of the people before the commission in the same fashion as my clients are. So the idea that there is private arrangements being made and there is no investigation gives reasonable apprehension of bias to a reasonable bystander.

CHAIRPERSON: Ms Muvangua?

ADV MUVANGUA: Yes, Justice Khampepe.

CHAIRPERSON: I must alert you that your time has expired.

ADV MUVANGUA: Okay, I will move along.

COMMISSIONER GABRIEL: Ms Muvangua, could you please specifically for my purposes deal with when President Mbeki and/or his legal team became aware of the institutional history of Justice Khampepe.

ADV MUVANGUA: Okay, that goes to delay. Let me deal with it immediately. On the question of delay, it has always been known to my clients that Justice Khampepe was involved in the TRC and the NPA, but it was never open to my clients to bring... my learned friends, the respondent is saying that my clients ought to have brought a recusal application in May 2025 at the earliest. We argue that it would never have been open to my clients to do such a thing for a couple of reasons. The first is that it is common cause that my

clients sought to intervene in the proceedings before the high court. Their application was dismissed on the basis that another court had already determined ...[intervenes]

COMMISSIONER GABRIEL: So we are aware of the history.

ADV MUVANGUA: I beg your pardon?

COMMISSIONER GABRIEL: We are aware of that history and that order.

ADV MUVANGUA: Sure. So fast-forward then to the issue of delay. Delay must only be taken into account from September 2025 where my clients are drawn into the commission through the rule 3.3 notices. It is only at that point that it would be open for them to seek the recusal of Justice Khampepe. So where am I going with this?

The test; first of all, delay is not itself dispositive of an application. The overriding factor is interest of justice. The legal principle requires that an application for recusal be brought as soon as reasonably possible. We argue that it was brought as soon as reasonably possible and I will tell you why. I will call into aid some legal principles.

Case law has said that once you consider an application for a recusal, you must factor in a number of things. One is the reasons for the recusal. The other is the extent of the delay and the third – and this is not a closed list; interest of justice does not have a closed list, factual inquiry – is where the proceedings are at that point in time.

It might be recalled, because we deal with this in our heads of

argument that in Bennett the Court rejected an application for recusal which was brought two years late, two years later. Why was it rejected, because by then witnesses were called, evidence was led, people were cross-examined, *et cetera*, *et cetera* and the trial had been going on for four years. So on that basis it was not in the interest of justice to entertain the recusal application.

In this case though, having set out the grounds of recusal, the contrast here is that the commission has not commenced with its substantive work. No evidence was led. In fact, the commission has not yet, the evidence leaders have not yet provided my clients at least with witness statements.

So, substantive work has not been commenced at all and the prejudice would arise, that would arise to my clients would be severe, because any subsequent proceedings that they will be participating in would be a nullity down the line if it is found that Justice Khampepe ought to have recused herself.

And that would also lead to wasteful expenditure if it is so that the commission proceeds or starts its substantive work, notwithstanding the grounds of recusal simply because my clients ought to have, according to, simply because the commission may form the view that my clients ought to have brought this application on 25 September when they received the rule 3.3 notice without more. Does that answer the question? Okay, I really want to go back to ...[intervenes]

COMMISSIONER KGOMO: I may be conflating the statements by

former President Zuma and former President Mbeki, but does your client not say: 'no, I wanted to, I waited to see the outcome of the Semenya recusal application and I tried to draw the link.'

ADV MUVANGUA: No, my client does not say that.

COMMISSIONER KGOMO: Did not say that though.

ADV MUVANGUA: I think that, Commissioner Kgomo, you read from paragraph 64 of my client's founding affidavit and that concerns; that is to do with the condonation for the late filing of this recusal application, because ...[intervenes]

COMMISSIONER KGOMO: You should just have said you are conflating. Okay.

ADV MUVANGUA: I wanted to be polite.

CHAIRPERSON: Mr Muvangua, I must remind you that you are running on more than extra time.

ADV MUVANGUA: Yes, just literally one minute. I just want to draw the Commissioners' attention to an argument that I do not want to seem to have abandoned, which is that it is important that these grounds, although viewed as, although standalone in and of themselves, must be viewed cumulatively; and we deal with this in paragraph 77 of our heads of argument. I will not detain you any further. Thank you.

CHAIRPERSON: Thank you, Ms Muvangua. We will take a tea adjournment and reconvene at 12 o'clock.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: (Indistinct).

ADV MUVANGUA: I should have done this in chambers, but I did not, which is that I may need to be excused if we do no not finish by 2, but my learned junior will do the reply if we get there.

CHAIRPERSON: Come again, Ms Muvangua?

ADV MUVANGUA: I should have done this in chambers, but I did not. I may need to be excused at 2 o'clock if we are not done, and my learned junior will do the reply if we do not manage to finish before 2.

CHAIRPERSON: Okay, that is fine.

ADV MUVANGUA: Thank you.

CHAIRPERSON: Mr Varney.

ADV VARNEY: As the Commission pleases. We have put up detailed heads of argument. Because of time, I am not going to take the Commission through those arguments in great detail. Would it be okay if I sit, Commissioner?

CHAIRPERSON: Yes, if you elect to sit, you may do so.

ADV VARNEY: It will just be easier to deal with my paperwork if I am seated.

COMMISSIONER KGOMO: It is not private or secret, it is in the public, the request. No, no, I am saying the request is not private or secret, it is open.

ADV VARNEY: Yes, indeed, in some Commissions I see counsel stand and in others they sit, so it seems to be a flexible option. Chairperson, commissioners, perhaps I can just kick off by

commenting on the complaint that an answering affidavit was only put up by Adv Semenya SC and by the chair herself. I just make the sharp point that at least in court proceedings judges do not actually put up answering affidavits in recusal applications. The affidavits are put up by the parties.

In terms of a quick roadmap, I am going to deal quickly with the question of delay, the unreasonable delay. We will then look at the question of the previous roles played by the chairperson. We will also take a look at the question of previous adverse findings made by the chair in certain judgments in relation to Mr Zuma. And then, lastly, we will look at the various complaints made in respect of the chairperson's handling of the applications dealing with Adv Semenya.

So turning to the question of delay, or perhaps, actually, before I do that, I should deal a little bit with the question of the law. We agree with Mr Mpofu that there are somewhat different tests in relation to actual bias and reasonable apprehension of bias.

We set those out at page 7 of our heads. I will not waste the Commission's time by going through them. My learned friends have dealt with them in some detail. I will just highlight one aspect, that allegations are biased, particular in relation to actual bias, especially on the part of a judge, must be substantiated by a proper factual basis, and must be proved by the party alleging bias. And I will return to that question a little later.

Coming to unreasonable delay, and starting with Mr Zuma. We have set out in our answering affidavit the period in question, and

we will not repeat those here. In terms of an explanation, we have heard from my learned friend, Mr Mpofu, and Mr Zuma's replying affidavit, and perhaps I can just quote from that replying affidavit, the quote is at the top of page 11 of our heads:

> "The fact that the most recent improper conduct in respect of the Semenya recusal application constituted the last straw and trigger for the refusal recusal application."

Now, chair and commissioners, this is a revealing explanation. It is revealing because it was the alleged improper conduct of the chairperson in the Semenya recusal which was the last straw and the trigger for bringing the application. So Mr Zuma is effectively saying that that, but for the claimed improper conduct in the Semenya recusal, he would not have brought a recusal application.

And, chair, that is an important point to make, because it suggests that all the other grounds that were in possession of Mr Zuma, for example, the adverse judgments, and Mr Zuma claims the chair made against himself and her previous roles in the TRC and the NPA were insufficient to trigger a recusal application.

Indeed, Mr Zuma, knowing that the original hearing was scheduled to start on the 10 November, was happy to proceed without seeking the chair's recusal, notwithstanding his knowledge of her involvement in these judgments and the public position she held previously. That is a point I dare say also applies to Mr Mbeki.

So turning to Mr Mbeki's delay, which we say is equally egregious, and we have set out the different time periods. Now, the explanation offered by Mr Mbeki is in his founding affidavit at paragraph 64, and he said that he could not bring his application because Mr Zuma only filed his application on the 15 December, and he could only act thereafter.

And my recollection is that the Mbeki application was then filed, I believe, on the 19 December, and circulated a few days later. So it is quite clear, commissioners, that but for the bringing of the Zuma recusal application, Mr Mbeki would not have acted, and that is telling.

If he did not see the need to act before then, but was simply prompted by Mr Zuma's application, we suggest that an application brought in such circumstances cannot be taken seriously.

I will deal briefly with the law on recusal and delay. It is trite law that legal applications must be brought as soon as an applicant is aware of the circumstances that warrants such an application.

And this is particularly the case in respect of complaints of bias against judges, and this is because such applications go to the heart of the administration of justice, and must be raised as soon as reasonably practical. We have quoted the case law.

So there was a duty on Mr Zuma to speak up arising out of his long held view that the chairperson was biased against him arising from those judgments. He was not simply permitted to stand by and bide his time. And we submit, commissioners, that bringing

an application for recusal at such a late stage implicates the interest of justice.

And it is not just the interest of justice of the parties, but also the wider public, and the late bringing of recusal applications can have quite a massive impact. It can delay proceedings further, it can even derail them, and this would not be in the interest of justice.

And it would definitely be a problem for the families and the wider public to have to wait even longer, given how long they have waited for this commission. And there is a duty, of course, on both courts and the commissions to ensure that such abuses are curtailed.

We are not arguing that Mr Mbeki and Mr Zuma, you know, have waived their rights in bringing such an application. But we do urge this Commission to look at the circumstances of the delays, because our argument is that the long delay suggests the apprehension of bias is not a reasonable one.

I am now going to turn to the question of the historical proximity, the occupational history, the former roles of the chairperson in the TRC and the NPA. Now, according to Mr Zuma, the mere holding of these positions make her distinctively unsuitable, and I am quoting here, "distinctively unsuitable and/or automatically disqualified for her present position". We have quoted the paragraph numbers in the footnotes.

He is concerned that witnesses before the Commission could include her former colleagues and superiors, and that the issue of prosecution is directly linked to the granting or refusal of amnesty.

However, Mr Zuma has overlooked the fact that the subject matter before this Commission is not just a question of the history and what happened at the Truth Commission, and that the cases arise from the Truth Commission for prosecution, those cases that were not amnesty.

That is not the subject matter of this Commission. The subject matter of this Commission is whether the TRC cases were blocked and undermined as a result of political or other form of interference. There is no allegation that such interference took place during the chairperson's tenure at the TRC and NPA.

Mr Mbeki make similar assertions. He notes, for example, that Judge Khampepe was party to findings made by the Truth Commission against the African National Congress, having been involved in gross human rights violations. But they rather conveniently do not highlight the fact that the commissioners, including the chair, were also involved in making findings against other parties.

Indeed, the primary finding, the main finding of the Truth Commission was not against the ANC, but was against the former Apartheid regime. It made findings against various other groups as well, and we suspect that Mr Mbeki raised that point to put up an insinuation that the chair would be predisposed against the ANC on that basis for that insinuation.

Mr Mbeki also suggests that, because of her role in the TRC and making these findings and recommendations regarding

prosecutions of those with declined amnesty, that she would be predisposed in favour of justifying or defending prior institutional conclusions in which she played a role. Paragraph numbers are in the footnotes.

Mr Mbeki also refers to the chair's role in the NPA, and again raises the question of institutional interest. Again I have to say that the question of whether apartheid-era crimes should be prosecuted is not before this Commission. And accordingly, those recommendations from the TRC do not have to be defended or justified.

Perhaps here I would just like to refer to some of the case law raised by my learned friends for Mr Mbeki in their heads. The first case they refer to is *Dumbu v Commission of Prisons*, it is a 1992 Eastern Cape case, dealing with institutional bias.

In that matter the presiding officer, who happened to be the head of personnel in the prisons, had been actively involved in suppressing the grievances of the employees who were being disciplined.

Now, commissioners, that is obviously distinguishable from this matter. In that matter the presiding officer played a direct and active role in acting against the interests of the employees who were before that tribunal. There is no allegation that Judge Khampepe, whether in the TRC or the NPA, played such a role in respect of the TRC cases.

Mr Mbeki seems to be saying that merely occupying senior roles in the two organisations is sufficient. He attempts to add colour to this by claiming that discussions between the ANC and the former apartheid generals about the TRC cases overlapped with the period that Judge Khampepe was at the TRC and the NPA, that period during the late 1990s.

But these interactions occurred quite separately from the TRC and the NPA. Nobody from the TRC and the NPA were present at those meetings or even aware that they were happening. Yet, somehow Mbeki will have us believe that the mere overlap in time introduces a form of institutional bias is a fanciful claim.

The second case raised by my learned friends for Mr Mbeki is *Council of Review and SADF v Monarch*. And in this matter, disciplinary action was taken against a soldier for disclosing a dirty tricks campaign by the army against the in-conscription campaign, and that senior army officers who were sitting in that disciplinary council were never likely to be loyal to the organisation. And that was the founding of the court in that matter.

The matter is also distinguishable from our matter. There are no issues before this Commission which are connected to the chair's time at the TRC and NPA that would cause her to be loyal to those bodies to the detriment of any party. Questions of loyalty simply do not arise in this matter.

And then lastly on that point, Mr Mbeki suggests that simply advising or acquiring personal knowledge relevant to the subject

matter before this Commission is a disqualifying factor. But the operative word again is "relevance".

The chair did not advise either of those bodies on the question of political interference, and nor did she have any political interference, nor did she have any personal knowledge of political interference at that time, because clearly it had not started as yet.

So we would suggest that the claim of this unavoidable overlap between her past role and her present fact-finding responsibilities is neither here nor there. It is settled law that mere overlap between cases is not a grant of recusal.

Turning briefly to the law on previous positions and how that impacts recusal. My learned friends have conceded that mere association without more is not a ground of recusal, and reference has been made to the *SARFU* judgment, so I will not repeat that.

We do refer the commissioners to the matter of Ex Parte: Goosen. It is a full bench, a full court matter of the Gauteng Division, where that court quoted an Australian case by the name of *Ebner,* the citation is in the footnotes. And there the following quote, which has also been approved by the Constitutional Court in *Masuku*, stated that:

> "There must be an articulation of a logical connection between the matter and the feared deviation from the courts of deciding the case on its merits."

And in this matter, the applicants have failed to articulate a logical connection between the chairperson's former positions and the apprehension of bias. They failed to explain why her former roles will prevent her from adjudicating impartially on the question of political interference.

Turning to Mr Zuma's remaining grounds for recusal and the question of the earlier judgments, one of which resulted in his imprisonment, citations are in the footnotes. Here we refer to the *Electoral Commission* matter. I am not going to take you through the citation, it is all there. I will just highlight one extract. The Constitutional Court stated:

> "Judges often hear different matters relating to the same applicant without that providing a justifiable basis for a recusal."

And on this score, we note that Mr Zuma has not explained what it is in that judgment that gave rise to his reasonable apprehension of bias or actual bias. He has not put up any specific examples or quotes from those two judgments. So there are no facts to consider, apart from his bare assertion.

And our complaint in that regard also applies to his reliance on these interviews with Newsroom Africa and News24. He does not provide any quotes, he does not put up the interviews in evidence. All we got was a headline. I can see that he did attach it in argument, but that is, strictly speaking, not before this Commission.

So turning lastly to the chair's alleged bias in favour of Semenya, and this is the claim of private and secret advice allegedly provided by the chair to Adv Semenya.

Now, again here, we do not have factual evidence, we simply have allegations. And we are told in Mr Zuma's founding affidavit that at some future point the Commission will be referred to the relevant evidence. Well, that evidence has still not been supplied.

Mr Zuma claims that the decision to withhold the evidence, and this is in the replying affidavit, is to protect ongoing sensitive investigations, and that at some undisclosed future time the evidence will be made available to the JSC or even this Commission once safeguards have been negotiated.

Now, it has not been explained how Mr Zuma came into possession of these alleged communications and whether such means were legal or not. And indeed there is a possibility that the possession, the securing and possession of such communications may very well have been illegal.

And in footnote 69 we have set out the law in that regard. But it is trite law that the test for recusal is objective and it assumes that a reasonable litigant is in possession and has put up all the relevant facts.

The test has to be applied to the true facts of which the recusal is based. The test emphasises reasonableness in light of the true facts, not the technical legal nuances of the particular matter. In other words, if the factual foundation has not been put up or is

wanting in a *fortiori*, the apprehension is misplaced and that brings an end to the inquiry.

Now in this matter allegations have been made, but the true facts and the evidence has not been put up. An allegation of bias has to be substantiated and proved by the party alleging it. And there is an interesting academic piece which is quoted in our footnote 74 dealing with problems proving actual or apparent bias in South Africa.

And there the learned author suggests that actual bias as alleged against judges, that is as heavy as the burden of proof of fraud, bad faith or miscreance in public office. Meaning that the party alleging it must support it with cogent evidence, not mere assertion.

So Mr Zuma has failed to put up the evidence to support this claim, and this is a theme that has run through his recusal application because he has also failed to provide the specific points from the judgments he relies on.

And he failed to put up the media articles which he also failed to rely on. And my learned friend, Mr Mpofu, spoke about the cogency and sufficiency of evidence, and we agree that, you know, one has to look at whether the evidence put up has been cogent or sufficient.

So has the evidence, is the evidence sufficient at the time, the allegation regardless? And what we say is that, regardless of how specific the allegation is, if the evidence has not been put up, then you cannot claim that that is sufficient or cogent, and the evidence has not been put up.

I just want to deal with a few matters that arose in argument, commissioners. My learned friend, Ms Muvangua, states that in relation to the recommendation by the TRC that amnesty was declined, prosecution should follow. And she said in argument that, you know, this is the bedrock as to why we are here.

But at the same time, and I believe it is either in the written heads or in reply, Mr Mbeki concedes that the prosecution of serious crimes, such as murder, kidnapping, crimes against humanity, and the like, is a function of the rule of law and has to follow.

This is because of our new constitutional order. and the mere fact that the judge may have been party to such a recommendation simply does not implicate the fact that the Commission here has to deal with political interference. As we have said time and time again, political interference simply was not on the table, it had not occurred at that time.

Much has been said about the judge's role at the Human Rights Investigation Unit, that, you know, that unit had to make recommendations to the NDPP about the TRC cases. But again, not about the subject matter. The subject matter before us is political interference. The judge was not working on that subject matter at that time, it had not even arisen.

And then finally turning to what was alleged in relation to Mr Semenya's conduct around the leading of witnesses and the fact that the judge approved that request. From our perspective, this is an

improper attempt to litigate that whole issue, and we may as well ask why is that happening at this late stage.

And we would suggest that it is because Mr Mbeki wished to distinguish his application for recusal from that of Mr Zuma. He did not wish to make common cause with Mr Zuma, he wished to bring his own application. And since Mr Zuma had not raised that particular issue, that would be a distinguishing feature.

It would also provide some kind of justification for the late bringing of the application because that was a more recent issue. It would allow them to then talk about the fact that over time these different facts crystallised, forcing them to take this 11th hour action on the 19 December.

Much reference was made to privacy, at least a private and secret arrangement. And if it was a secret arrangement, then the relevant correspondence would not have been forwarded to the NPA's council on the same day the request was made.

It would not have been placed on the shared drive at that time. Indeed, it would not even have been disclosed at the 27 October meeting. It would only have emerged at the hearing itself.

I will deal quickly with the claim that Mr Mbeki only realised that he was seized with this Commission of Inquiry when he was issued with his rule 3.3 notice in September of last year.

Commissioners, that is a strained argument to suggest that he would only learn after receiving his notice that he would be involved in the Commission of Inquiry. He was deeply involved in the

intervention application and indeed even in those papers he indicated that he would be engaging vigorously in the Commission of Inquiry once set up.

But frankly, even if one takes the time period from the issuing of the September rule 3.3 notice, we are talking of a period of some 12 weeks. And to top it all, my learned friends even rely on those statements in their applying affidavits and arguments, and this is the question of a claim that they have that they are still waiting for written statements.

It is a spurious claim, Commissioner, they have statements. Their main complaint appears to be that they were afforded the affidavits before the High Court. Those affidavits are before this Commission as well.

Confirmatory affidavits have been put up by all those witnesses confirming their earlier statements, and updating those statements to the extent necessary with new information. To the extent needed, when those witnesses testify, they will confirm these different statements.

So it is a spurious claim to say that they are still waiting for the statements, and indeed they relied on these very same statements in their arguments and affidavits.

So in conclusion, Commissioners, we believe that the recusal applications are without merit. It is quite apparent that Mr Zuma would not have brought his application for recusal but for the claimed information that they have in relation to Mr Semenya's

recusal, and yet they have not put up the evidence or the facts to support that particular claim.

In relation to Mr Mbeki, it is more than apparent that they would not have brought their application but for the bringing of Mr Zuma's recusal application. And, commissioners, such an opportunistic application cannot be taken seriously.

For those reasons, we suggest that they have fallen short, hopelessly short of dislodging the presumption that the chairperson, as a senior experienced judge, given her legal training, oath of office and intellectual discipline, would not bring an impartial mind to this matter, and the relief should be dismissed.

CHAIRPERSON: Thank you, Mr Varney. Mr Soni.

ADV SONI: Thank you, Commissioners. Is it (indistinct) if I sat as well?

CHAIRPERSON: Yes.

ADV SONI: (Indistinct).

CHAIRPERSON: Yes, you may.

ADV SONI: (Indistinct), we have submitted our heads and we have addressed all the issues that we regard as relevant. We ask you to take all that into account. During the course of this presentation, out of no disrespect, out of no disrespect, we will refer to the applicants respectively as "Zuma" and "Mbeki".

Having regard to the issues raised on the papers, and especially the heads of argument, in our presentation today we will address the following matters.

First, the more relevant applicable principles applying to this application for recusal, the status and weight of the affidavits made by Semenya SC, whether the evidence presented by the applicants on the following matters is cogent enough to require the chairperson to recuse herself.

First, the alleged institutional bias concerning the chairperson in respect of the TRC and the NPA, the chairperson's so-called handling of the application for Semenya SC's recusal, and the chairperson's alleged giving of advice to Semenya SC. We also will deal shortly with the undue and unexplained delay by the applicants in bringing their applications.

Chairperson, I must say, I had intended dealing also with the serious allegations made in the Zuma papers in respect of the two Constitutional Court judgments that you penned. In light of the fact that it is not being dealt with by our learned friends for Mr Zuma, we do not persist in that, except I will make a reference to it when I deal with the other matters.

But I intended to deal with it, and we deal with it quite extensively in our heads, and we ask that what we said there be taken into account. I also simply point out that the fact that it is not being pursued does not in itself mean it should be ignored for the purposes of the overall impression of the application by especially former President Zuma for your recusal.

Now, chairperson, as regards the relevant principles, they are trite, but I would like to state the following. Firstly, an applicant

must establish, and it is the applicant who must establish, one, the facts relied upon and a reasonable and objective, sorry, and that a reasonable objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an independent mind, an impartial mind to bear on the adjudication of the case.

The point I want to stress, chairperson, is the impartial mind, and that obviously for the purposes of all application would indicate a partiality in respect of one party as opposed to the other. But you would have heard this morning, chairperson, that both the Zuma contention and the Mbeki contention is that their complaint is that you displayed partiality towards Semenya SC.

The question I ask myself, and I ask that it be considered is, is that a proper basis for an application for recusal? But I will deal with that more fully, but it is something that has worried me throughout the working through the papers in this matter. There is no indication that your partiality, chairperson, relates to any of the parties at all, and it is a matter that needs to be taken into account when a ruling is made.

Having said that, chairperson, the second point I want to make is that the facts that need to be taken into account are the true facts as they emerge at the hearing of this application. That was emphasised by the Constitutional Court in *SARFU 1* at paragraph 45, chairperson.

And I make that point because you have heard, especially in

the Zuma contentions, that we have held back information, but on what we have given you, you must make certain findings.

The point I will want to make, chairperson, is that, even when one looks at what they (the Zuma people) say about those facts, they have no confidence that those facts take them over the line in regard to having presented the proper facts on which to bring an application for your recusal.

Chairperson, in addition, we must accept, and even the Zuma applicants do not appear to dispute this, except they put a caveat to it, that when one is dealing with the application for the recusal of a judge, there are several different considerations that arise.

Namely, that judges take an office to administer justice without fear, favour or prejudice, and it must be taken into account that they have the ability to carry that out by reason of their training and experience.

Now, chairperson, we accept, chairperson, that this is not a commission of law and you do not sit as a judge, but nevertheless, this is a judicial commission. It is a judicial commission precisely because it is a matter of public importance.

That is why the President chose yourself and the two learned commissioners to assist you in advising him on the facts and providing him with recommendations. So the fact that you still hold the office of a judge is a factor that must be taken into account, and all the caveats in relation to recusal of presiding officers must apply to

you in respect of your judicial office.

Now, chairperson, we then deal with the question of the status of the Semenya affidavits. Chairperson, when one reads the Zuma complaint about Semenya SC, you will see that serious allegations are made.

It is said he received secret and private advice from you. It is said that, in a sense, he relied on your goodwill to continue as the evidence leader. But having made all those allegations, the Zuma contention is that Mr Semenya is not qualified to file an affidavit. Mr Chairperson, that is astonishing ...(intervenes)

COMMISSIONER KGOMO: Your voice must not drop, Mr Soni. No, I was saying your voice must not drop.

ADV SONI: Oh, sorry, sorry. That, chairperson, is an astonishing and astounding statement, that somebody who holds the position of an evidence leader in a commission like that can be maligned the way Semenya SC was maligned, but must sit back and await his fate, as it were, without things being placed on record.

And the only other person in regard to the serious allegations made against Semenya SC who would be able to deal with that matter would be yourself, chairperson. And so what we see is an attempt to bring you into the fray.

But once that attempt succeeds, chairperson, it would mean you would not, properly speaking, be able to preside at this particular inquiry. And, chairperson, we submit, wisely, you did not enter the fray. But we say, chairperson, that all the complaints about

Mr Semenya's incapacity, as it were, to file an affidavit are without foundation.

Let's just take one complaint referred to by the Zuma counsel, and that is that Mr Semenya is conflicted. But, chairperson, one just has to look at a situation where allegations are made in court proceedings against a lawyer. That lawyer must be entitled, notwithstanding that he gives advice to the client, he must be entitled to put his version across.

And so the issue of conflict can never arise in that situation. Yes, he is an advisor, and in respect of the advice, he cannot depose to an affidavit. But in regard to allegations relating to him personally, he would be doing himself an injustice if he did not place the facts on record.

Then, chairperson, if he said that Mr Semenya cannot make an affidavit without, in a sense, a confirmatory affidavit from yourself. That too, chairperson, is an astonishing statement. The allegation made, and we will submit that there is no proper facts to back that allegation, but once that allegation is made – the allegation is there was an email from yourself to Mr Semenya.

Take that, and Mr Semenya is as well qualified to talk about that issue as you are. And so to say there must be a confirmatory affidavit from you, again, is to require that you eventually recuse yourself from listening to this recusal application, and again, chairperson, wisely, you did not.

But putting everything else aside, chairperson, what this

Commission is required to do, or what you, chairperson, in regard to this application is required to do, is look at all the facts that are properly presented to yourself.

Assuming that the Zuma contention is upheld, that Mr Semenya's affidavit be disregarded, we do still have the affidavit of the Calata Group. And those are all the facts, and in a strange way when one looks at the two affidavits, they are very similar in regard to the denials.

And in regard to the denial relating specifically to Mr Semenya and yourself, chairperson, what is said both by the Calata Group and the evidence leaders coincides. And so we say that would not be to the disadvantage of the Commission, whatever decision it took.

Now, the Mbaki objection, chairperson, in regard to that issue is that there must be a confirmatory affidavit from yourself, because Mr Semenya is not in possession of all the facts. If they are talking about the facts or the allegations presented by Mr Zuma, they have no right to deal with that.

But clearly they are talking about Mr Semenya's approach to yourself in regard to your involvement with the TRC and as deputy NDPP. Now, those facts are on the table, it does not require a confirmatory affidavit from yourself dealing with your involvement. Those are matters of public knowledge, none of the parties has disputed it.

Back in the *SARFU* matter, M'Lady, where the facts not in

dispute are what the Constitutional Court in that case took into account. And we say that that is the approach you should adopt in relation to the allegations Mr Semenya makes relating to your past involvement with the TRC and the NDPP.

Chairperson, the next topic that I intended dealing with was the two Constitutional Court judgments. I am just going to spend two minutes on that issue, Chairperson. One is, Justice Kgomo asked my learned friend for President Zuma, but is the language not strong?

Well, that is what I intended saying in my heads. What is important about what is said both in the heads of argument and in Mr Zuma's papers about those judgments, in a sense indicates, and to some extent our learned friend for the Calata Group has touched on this, the manner in which Mr Zuma makes allegations. If you look at the language, and it is not necessary for me to raise it, we have raised it in our heads.

And yet, chairperson, in the minority judgment on which Mr Zuma relies, Justice Jafta says in his minority judgment that there is no doubt that Mr Zuma's defiance of the Constitutional Court order that he had penned is deserving of punishment, which might include imprisonment, and he describes Mr Zuma's conduct as egregious.

Now, I merely point this out, chairperson, to say that Mr Zuma's conduct in regard to what happened in the Constitutional Court was also criticized by the Constitutional Court. Except that, as presented in our heads, the difference between the majority and the minority was, can imprisonment be based upon an application by way

of notice of motion, or need there be a criminal trial in terms of section 35 of the Constitution.

It was the sole difference between the two, the majority judgments and the minority judgment, both in the contempt application and the rescission application. And so my last word on that is, the complaints that Mr Zuma made, or the terms in which he brought it, are, with respect, highly regrettable.

Now I deal, chairperson, with the allegation relating to Mr Semenya made by Mr Zuma. Now, in his founding affidavit, chairperson, the allegation is that there was a private and secret communication by you to Mr Semenya.

Mr Semenya responds to that and says but I find it offensive that you say this is private and secret. I am in regular contact, that is how commissions work. That is my role as the commission leader, I deal with the chairperson, I deal with the other commissioners, that is how all commissioners work.

And so that is now described in the replying affidavit as a red herring, and so now the allegation is but there was a communication. But the caveat is there is this communication, which I call "secret and private advice", but I am not going to tell you about it.

And Mr Semenya in response, and properly so, says but how do you expect me to respond to this. You have described this as something private, as something secret, it is not that. Tell me what it is so that I can properly respond, and you, in any case, bear the burden, tell us what it is ...(intervenes)

COMMISSIONER KGOMO: Yes, if a party says that, usually it is said that Mr Semenya was required to prove a negative. You see, if you have to prove what you do not know, you are required to prove a negative. How do you do that?

ADV SONI: Indeed, and Justice Kgomo, in fact, perhaps it was at the back of my mind, but I have never articulated it that way, but that is exactly what it is, putting a party at a disadvantage. And perhaps I fell into that because of something else that I wanted to say, but that is not to take away from the point you make.

Thereafter, seeing that the affidavit disarms the communications between the chairperson and Mr Semenya, in reply the contention is, and I say "contention", or allegation is that there is an email of the 5 November which proves, according to the affidavit, proves this communication between the chairperson and Mr Semenya.

The problem with that assertion is that the application for recusal was only, the papers were first filed on the 12 November. So on the 5 November it is highly, highly unlikely, I am not going to say impossible.

But there is no basis on which this Commission could find that there is an affidavit on the 5 November dealing with a recusal, advice on a recusal application which is only going to be made on the 12 November. But the problem does not end there, chairperson. In the reply, at paragraph 23.5 of the reply President Zuma says:

"The decision not to provide some of the

> evidence pertaining to that allegation was not without cause (as he describes it), but based on the pleaded imperative to protect, *inter alia*, ongoing sensitive investigations and the like. Such evidence will be made available to the JSC or even this Commission once specific safeguards have been negotiated."

The implication of that, chairperson, is, we submit, clear. We accept that what we have presented will not satisfy the reasonableness test. But we ask you to take into account that we have a just cause, namely, we need to protect someone.

Well, that may be so, chairperson, but that is not the basis on which your decision must be made. As I have stressed, and that is paragraph 45 of *SARFU*, the evidence on which your decision must be based is the evidence that is presented before this Commission.

The evidence that is presented before this Commission indicates that, in Mr Zuma's own mind, he is aware that what he has presented is inadequate. It would not satisfy any reasonable test, and so we submit that on that issue the finding is that no case has been made out in regard to the communication between you, or the alleged communication between you and Mr Semenya.

Now, we also point out that in regard to the position of Mr Semenya, the Mbeki position is quite different. They say that, or their complaint is, as they call it, the manner in which, chairperson, you handled the recusal application.

Now, our learned friend, Mr Varney, made the point, and I will just accept that he has made it sufficiently well, except to say this, that effectively they want to re-argue that point again. There was an agreement between the parties as to how the evidence of anybody would be dealt with.

And there was a subsequent decision by yourself, chairperson, as to the fact that the Calata Group or Calata's counsel could lead that evidence. And that was all agreed, that matter is done and dusted with ...(intervenes)

COMMISSIONER KGOMO: And it was open to the others to do the same, the other legal representatives to do the same ...(intervenes)

ADV SONI: Indeed…

COMMISSIONER KGOMO: If they wished, if they are so minded.

ADV SONI: Yes, but I also want to make the following point, which we make in our heads. If you look at the Maritz judgment which we refer to in our heads, their complaint, chairperson, is, you did not handle the matter properly.

But the fact that a matter is not handled properly is not a ground for recusal. It can be dealt with on some other occasion. Your right as a litigant affected by that judgment in a case like this is to take it on review. This does not form a basis for recusal or a ground for recusal, no matter how strongly one feels, the law does not allow that ...(intervenes)

COMMISSIONER GABRIEL: Mr Soni, as I understand it, the argument from Mr Mbeki's team is even more. It says it was a failure

to provide reasons.

ADV SONI: Sorry, a failure?

COMMISSIONER GABRIEL: A failure to provide reasons.

ADV SONI: Yes, well, Commissioner Gabriel, the same would apply if you do not have that and you are prejudiced by it. It is a ruling, you cannot do anything at this stage. At the appropriate stage you would take the matter on review and indicate why that ruling would affect you, but it does not provide a basis for recusal.

And if I could just, there is a judgment, the *Take N Pay* judgment which is referred to at, I think, paragraph 18 of the Mbeki list of judgments, *Take N Pay versus,* I cannot remember.

But at paragraph 5 Justice Harms, it is *Take N Pay v Standard Bank,* Justice Harms refers to a judgment of Justice Schreiner in the *Silber* case, *S v Silber,* where exactly that same point is made that in certain instances what happens in court is not a basis to apply for recusal of the presiding officer.

Now, the Mbeki case is, and in some way the Zuma case is, even if some of our allegations are not good enough, when you look at them collectively, or as they put it, "cumulatively", the effect is to justify the recusal.

Well, that approach was first dealt with in the *SARFU* matter, where Justice Chaskalson or the Court dealt with it as saying that the contention was that all the complaints should be put into a "basket", and the approach was that the only complaints that will be put into the "basket" are the complaints that passed the test for reasonableness

and what would pass the *SARFU* test in each case.

That issue was also, in the recent Maritz judgment the same approach was used, where there were about five complaints against the judge, and the same approach was asked to be adopted.

And the court said it cannot be that a complaint that does not pass muster reinforces a complaint that does not pass muster, but the two together do pass muster. And we asked the court to adopt, we ask you, chairperson, to adopt that approach? Chairperson, I know I am past my, or fast approaching ...(intervenes)

CHAIRPERSON: You are fast approaching.

ADV SONI: I will make two further points, chairperson. One is the issue of delay has been dealt with quite adequately in the presentation of our learned friend for the Calata Group, and we align ourselves with what is said in that regard. But finally, chairperson, may I just say this…? (intervenes)

COMMISSIONER GABRIEL: Mr Soni, could I ask you please to come forward a bit to the mic?

ADV SONI: I am sorry. Can I conclude with two propositions I want to make, and they are contained in paragraphs 87 to 92 of our heads? It has been held that the presumption in favour of impartiality must always be taken into account when conducting an inquiry into whether a reasonable apprehension of bias exists, and we submit that that would apply to bias as well.

And we say the assumption that judges are individuals of careful conscience and intellectual discipline, and a judicial officer will

not likely be presumed to be biased is a presumption that is not easily dislodged.

And one final proposition, the bias in this case, as I stated right at the outset, is a very strange one. It is against the Commission's or in favour of the Commission's evidence leader, but no bias against any of the parties who complained about all the matters that have been dealt with. And we suggest that that is because there is no bias against them and no reasonable apprehension of bias. Chairperson, those are our submissions.

COMMISSIONER KGOMO: Can I just, I am not so sure how you can deal with this, but because Mr Mpofu raised it, you know, there is this rule of *compensatio*. He says, basically, I point out that Mr Zuma used strong language, but equally, Mr Semenya compensated by also using scurrilous what-what language.

What do you say about that, because Mr Semenya cannot answer, but you need to say something, if you can say something about that at all?

ADV SONI: Justice Kgomo, I listened to that exchange, and my response is this. Mr Semenya was talking about litigants who appear before this Commission complaining about what happened during the course of proceedings. The complaints, the Zuma complaints are against a Constitutional Court judge, but not alone, but the six other judges or justices who concurred in that judgment.

That is what is regrettable about the nature of the language used, and we submit that such, if I can put it properly, "intemperate"

language ought not to be used when describing persons who form an important part of our democracy and undermine, in fact, the entire judicial system.

So the point I want to make is, it is so that the language is strong, but what one must ask is: is a litigant not entitled to speak in that language against another litigant, as opposed to a litigant speaking in that language about a person who held office in the highest court of our land? That, we submit, is an essential difference which all reasonable people will accept and make.

KGOMO J: Thank you. Thank you, chair.

CHAIRPERSON: Thank you, Mr Soni. We will adjourn for lunch and we will reconvene at 10 past 1.

ADV SONI: As you please.

[End of recording]

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ADV MPOFU: (Indistinct).

CHAIRPERSON: Yes. Ms Muvangua.

ADV MUVANGUA: Yes, I would need to leave here at 2, I have a doctor's appointment that I cannot miss, so I would have to leave here by 2.

CHAIRPERSON: Yes. Is it possible? [BACKGROUND DISCUSSION] ...(intervenes)

ADV MPOFU: Chair ...(intervenes)

COMMISSIONER KGOMO: Mr Mpofu…

ADV MPOFU: Yes, I was going to make a proposal that maybe she

could reply now, and then we take the lunch adjournment.

CHAIRPERSON: Is that fine, Ms Muvangua?

ADV MUVANGUA: Yes, I am deeply indebted to my learned friend and to the Commission. I will be very brief, though, in reply ...(intervenes)

COMMISSIONER KGOMO: You have to.

ADV MUVANGUA: I will, I promise, subject to your questions. So I would like to start by replying to my learned friend for the Calata Group, who says that Mr Mbeki says in his affidavit, well, the proposition that was postulated was that, had it not been for former President Zuma's application, President Mbeki would not have brought the application for the recusal, and reliance was placed there on paragraph 64 of the founding affidavit. Commissioner Kgomo spoke about that earlier.

That affidavit does not say what my learned friend says it says. The affidavit, that particular section is headed, "Condonation", and there former President Mbeki explains the delay and what happened during the entire time period.

He does not say he would never have brought the application but for President Zuma's application. To say that would be to be a misrepresentation. If I may, the paragraph reads as follows, for those following, it is at page 22 of the founding affidavit, and it says midway:

> "I am advised by my legal representatives that the application on behalf of Mr Zuma was filed on

> 15 December 2025. It was necessary for the legal representatives to consider the substance of the grounds of recusal so that a decision could be made whether or not to support the application. Once that assessment was made, was done (I beg your pardon), this application was finalised and delivered as soon as possible."

At no point does he say I was not going to bring it but for that application at all; he says something completely different.

The second point I want to respond to is, there was an assertion made that the TRC made findings against other parties as well, and not just the African National Congress. So to say that the TRC pronounced on the amnesty applications of the African National Congress is at best hysterical.

Well, the problem is that the Calata Group alleges that the TRC cases were frustrated because the ANC 37 were denied amnesty and did not want to be prosecuted. So the claim is that they then engaged in political interference of the prosecution and investigation of the TRC cases, so the ANC is definitely relevant.

It is not my client's case that the TRC only made pronouncements in relation to the ANC, but the ANC is very much relevant because it is centralised by the Calata applicants' claim itself.

The third point is on the issue of the private arrangement. My learned friend for the Calata group said that the arrangement was

never private because it was disclosed to the parties. It would be recalled that the correspondence that I referred to earlier was only made, became known to the parties on 27 October.

Not even the NPA had it, and the convention in any event is once proceedings are underway to copy everybody. My clients were not in September before the Commission, but the NPA was. The NPA was always a party cited in the court papers.

The NPA did not have the correspondence, so it is not correct that it was not private. Had it been not private, everybody would have been copied and been provided with the correspondence as soon as it was made on 18 September.

On the issue of witness statements, I do not wish to belabour this point. The fact is that there are no witness statements that were created for purposes of this Commission, the record speaks for itself. If I could perhaps just invite the commissioners to make a note?

In the replying affidavit to Mr Semenya's answering affidavit, I attached the following documents, and I will say what the purpose is. The purpose of those letters from my client's legal representatives was to ask repeatedly that witness statements please be provided because it was difficult for them to answer on the basis of copy and paste from high court papers.

Those are TMM2, dated 3 November 2025, TMM3, dated 7 November 2025, and TMM4, dated 9 December 2025. So that is as far as the reply goes for the Calata Group.

With respect to my friend for the evidence leaders of the

Commission, he posed the question: is partiality towards Mr Semenya SC a cause for recusal? We say, yes. The context Commissioner Gabriel and I had a conversation earlier about taking into account the totality of the available evidence and, information rather, I cannot remember the language we used, but the totality of that context is very much relevant.

It is relevant that the making of a private arrangement with one of the parties before the Commission would give rise to an apprehension of bias without the inclusion of all other parties. So that must be taken into account, and that is why we say yes.

And number two, it is also relevant, the acting and disregard of the Commission's directive without consequence. That would also give a reasonable apprehension of bias, and that is why we say yes. We say yes for the further reason that procedural fairness is an aspect of fairness, and it was not there.

Can I just draw attention, because I am not quite understanding the synthesis here, but draw attention to the replying affidavit to Mr Semenya SC's answering affidavit, and I am being told to draw attention to paragraph 31, which is at page 15, as well as paragraph 32. It speaks to the required independence of evidence leaders ...(intervenes)

COMMISSIONER GABRIEL: So how does that translate into bias on the part of the chair?

ADV MUVANGUA: Yes, so the fact that there were complaints about conduct by the evidence leader which implicates one of the parties

before the Commission and there was no consequence, gives my client the apprehension of bias in the sense that the – so let me take a step back.

There are a multiplicity of parties before this Commission. The Commission is the adjudicator, if you will. The evidence leader is an extension of that adjudicator, if you will. It is the evidence leader that is to remain neutral, elicit information in a balanced fashion.

Now, if you have that very same person engaging in private correspondence arrangements with one of the very parties before a Commission, that does give a reasonable apprehension of bias. Especially more so in circumstances where, in the case of my clients, they are accused of having broken the Constitution, and the consequences for them are really high.

I cannot take the point any further than that but to underline the fact that there is a lack of – and that there was no consequence, which means that the lack of consequence on the part of the evidence leader indicates that the chair is predisposed to permitting the evidence leader to continue regardless ...(intervenes)

COMMISSIONER GABRIEL: But do you accept that it Is the chair who is the trier of fact?

ADV MUVANGUA: I accept that it is the chair who is the trier of fact, but I also accept, as advanced earlier, that the evidence leader is an extension, if you will, of that very entity, the Commission. And that is why the evidence leader deposed to an affidavit on behalf of the Commission. Okay, I am now told by my boss to please read this

because it answers the question directly, so I will do that ...(intervenes)

COMMISSIONER KGOMO: You do not have to accept it ...(intervenes)

COMMISSIONER GABRIEL: What paragraph?

ADV MUVANGUA: Paragraph 31 of the replying affidavit to ...(intervenes)

COMMISSIONER GABRIEL: You have taken us to that at page 15.

ADV MUVANGUA: I did.

COMMISSIONER GABRIEL: Ja, and the other one?

ADV MUVANGUA: And paragraph 32.

COMMISSIONER GABRIEL: You have taken us there.

ADV MUVANGUA: I need not read it? Could I read it?

COMMISSIONER GABRIEL: No.

ADV MUVANGUA: No, thank you. Okay, they said no. And then on the role of the chairperson in the NPA. So one example I will say is this, it was claimed that the Human Rights Commission, no, sorry, the claim was that the role of the chairperson in the NPA was a matter of public record. We disagree.

It was claimed that the Human Rights Commission advised on policy. We then queried on what exactly the chairperson's role was. The fact that there was a query and never a response means that it was never a matter of public record, because had it been, my clients would never have queried.

Advocate Semenya SC, who deposed on behalf of the chair

and the Commission would have answered the question, the Calata applicants would have answered the question, the Group would have answered the question, so that is all there is to say about that.

And then the last point I will make, oh, sorry, two more points. My learned friend for the evidence leader said that nothing turns on the fact that no reasons were provided. If we were disgruntled, my clients were disgruntled, they could have brought a review.

That is no answer, and I will say why. The test for apprehension of bias is not whether there is an alternative remedy somewhere. It is simply whether, armed with the information that you have as a reasonable person, a reasonable apprehension of bias would ensue. Whether there is another remedy somewhere else is of no moment whatsoever.

The last point I make is on this idea of cumulative assessment of the ground. That is not our case. We were very clear to say our grounds are one and two.

The third thing in my chronology was to say, never mind that they stand alone, I also want to invite the Commission to do this one other thing. It was never my client's case to say they only make a ground once you bundle them up, and those are the submissions in reply.

CHAIRPERSON: Thank you, Ms Muvangua.

ADV MUVANGUA: Thank you so much.

CHAIRPERSON: I hope everything goes well with you with your

doctor's appointment.

ADV MUVANGUA: Thank you so much, Justice Khampepe.

CHAIRPERSON: We will adjourn and reconvene at 20 past 2.

INQUIRY ADJOURNS

INQUIRY RESUMES

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CHAIRPERSON: Adv Mpofu, the "ball is in your court, sir, for a reply.

ADV MPOFU: Thank you very much, chairperson. Thank you, chairperson, I am going to deal with – I just changed the sequence this time. I will deal with the second ground first, which is the reasonable apprehension of bias ground, which I said earlier I was not going to deal with extensively because the Mbeki applicants obviously accept that as their main ground.

And I just want to make one point before I come back to the main issue of actual bias. It is very clear that both the Calata Group and the evidence leaders, despite professing otherwise, and especially the evidence leaders still do not appreciate the distinction between reasonable apprehension of bias – sorry, thank you, good – the reasonable apprehension of bias test and actual bias test.

So the record will show that Mr Soni, my learned friend, conflates the test more than five times, I stopped making notes, because he says, no, you cannot say that there was this advice given, and so on, because a reasonable person would not apprehend so for this and that other reason.

That is mixing up the test. When it comes to the actual bias

test, there is no question about any reasonable person. But let us come to the reasonable apprehension test in relation to the second ground. We do, by the way, in respect of the occupational history ground rely only on reasonable apprehension of bias. As far as that ground is concerned, we do not assert actual bias, so that is what I want to address.

So we are told that one of the defences, or actually probably the only defence, apart from the 2003 thing, is that the subject matter of this Commission is different from what was being dealt with by the TRC Amnesty Commission.

But that argument misses the point about what the essence of the complaint is. And you cannot expect the so-called "reasonable person" to make all these nice, fine distinctions about, you know, where, the mandate of this one stopped there, the other mandate stopped there.

The reasonable person will ask in broad terms: is it reasonable to apprehend a perception of bias if you have somebody who is a decision maker now in relation to decisions that he or she was part of making? They are not going to, you know, do the fine nitpicking that Mr Soni is inviting us to do.

We know it has been said, one of the most famous quotes about the reasonable person comes from Justice Holmes in *S v Burger*, and he said, quote:

> "One does not expect of the reasonable man or the *bonis paterfamilias* any extremes, such as

> Solomonic wisdom, prophetic foresight, chameleonic caution, headlong haste, nervous timidity or the trained reflexes of a racing driver."

In other words, the reasonable person must be taken as the man in the omnibus or the woman in the omnibus who takes a globular view of these issues.

So even if you use the reasonable person test in relation to the occupational history ground, it should be self-evident that when there is a Commission whose key function is to investigate reasons as to why the NPA did not follow the recommendations of the TRC Amnesty Commission, *ag,* Committee to prosecute certain murderers.

Somebody who is associated, it is a double whammy, associated both with the NPA that allegedly failed to prosecute and the Amnesty Committee whose recommendations the failure to prosecute was not carried out.

To ask the reasonable person to think, oh, no, you know, there is a comma here and another subparagraph is really just playing games and not applying the proper test, so that is the one thing.

So the TRC association and the NPA associations are, in our respectful submission, themselves grounds which, and we accept that this is not for this Commission, the president is the one who did the appointment, but that appointment, for what it is worth, in the correct forum is itself to be criticised.

Now, then we come to the other ground, I want to come last to the actual bias ground. Justice Kgomo says to my learning friend

Ms Muvangua, that what we expect is that Adv Semenya must prove a negative. But where does that come from?

Nobody is expecting Adv Semenya to prove any negative. There are positive pointed assertions that are made about being given advice, or what that advice is about, or how it should be conveyed to Adv Soni. And so where is the negative?

Those are positive assertions. If someone wants to disprove that, it is simply to say I do not, it has never happened or I was never given such advice, I do not know what you are talking about. It is not as impossible as it is portrayed to be, that is all you do.

If I receive an affidavit today that says today I was in Cape Town doing this and the other, I will say, no, I was at the Commission, I was arguing a matter, and so on and so on, I am not proving any negative.

If somebody makes any assertion positive that I was doing something right at this hour, it is within my gift to oppose that. So let us not again create a case that is not there, because the case is here in front of us and it is very simple.

Then there is the issue about the so-called "language" issue. Firstly, I do not know what this language, we are not told what the language that Mr Soni is complaining about is.

But assuming it is contained in the affidavit, I honestly do not know what it is, except for what I explained this morning to Justice Kgomo about the fact that somebody who has been subjected to, what I have described as "detention without trial", is entitled to feel

strongly.

And if they are entitled to feel strongly, well, then they are entitled to express those feelings strongly. I do not know what it is like, I was only detained without trial under apartheid. But if somebody had asked me to describe that experience, I do not think I would do it in hush-hush tones, so that is really the only answer.

And it is very rich coming from Mr Soni to complain about language when he has, in their papers have accused us of the things that I cited earlier, Justice Kgomo. And not only that, sitting there, in the same breath, he was casting aspersions on President Mbeki as being basically devious and disingenuous.

Because the only reason that he wanted to do this application was because he did not want to, because there is the Zuma application and so on, all the things, the ill will that he was ascribing not only to President Zuma, but to President Mbeki.

And by the way, he says the reason why he takes exception or why there must be different treatment is because Mr Semenya is making comments about a litigant, and Mr Zuma is making comment about an esteemed judge who held high office.

Well, both President Zuma and President Mbeki held high office as well. So if it is going to be a contest as to which office is higher than which, well, then so be it. So you cannot be entitled to castigate people who held high office if your philosophy is that people who hold high offices should not be castigated. But "sauce for the goose is sauce for the gander".

Now, the issue of another mistake that, to put it politely, that the evidence leaders are making is the issue of the context. You know, it has been said that, in law, context is everything. So we are told, for example, that Adv Semenya, in relation to the issue about the affidavit, is entitled to do the affidavit because judges typically do not do affidavits, particularly in matters that concern them, which is true.

But that is not the point we are making. The point, firstly, the point is that counsel also does not make affidavits for the same reason. Counsel ordinarily does not make affidavits about cases that they are involved in.

But in this particular case all we are saying is that you have a situation, and this cannot be controverted, you have a situation where somebody says I am acting on behalf of X. Everyone is entitled to act on behalf of anybody.

But once that authority is challenged, you cannot keep (indistinct), I mean, I do not know, you cannot then – if someone says I am authorised by my learned friend and someone challenges it and then I do nothing, then that challenge is unrequited or unanswered, and therefore, it remains like that.

There was nothing stopping the evidence leaders from putting an affidavit or saying, no, this and that and the other as an explanation. So every allegation – and Mr Soni really, really, really is testing our intelligence, because he says that, he concedes, he says, yes, we accept that Adv Semenya could not make an affidavit about the matters raised in the application. But he can make an affidavit

about matters that affect him personally, in other words, the allegations of giving advice and all that.

But that submission can only be made by somebody who has never read the affidavit of Adv Semenya, because that affidavit says zero, but zero about what he says it is entitled to do. It says exactly the one that he has considered, because it says no about the judge and her history and so on; things that are clearly in the personal knowledge only of the judge and not Adv Semenya.

The part that Adv Soni says Adv Semenya is entitled to attest about, he does not, because he is right. He could have said, no, I did not receive that advice, or, no, I was not in South Africa at the time, or whatever, but he says nothing about that.

So that is a concession by the evidence leaders that the affidavit in front of us, the one here, is of the prohibited kind, and the one that they say is of the allowable kind is not this one. So what more do we really need?

And that is why I was saying when you do a confession and avoidance, if you do not have the avoidance, you are only left with the confession, and that is what we have in this case. There is a confession that says, effectively, the defence being given to you, this panel, is, yes, the advice was given, yes, because those are not disputed.

Yes, it was to say, to tip or to coach Adv Semenya to give advice to Adv Soni as to how to argue the case. Those are the allegations: coaching, collusion, but no, the avoidance, attempted

avoidance is, no, but they talk all the time. Really?

How does that address the pointed accusation of giving advice, whose content is given and whose impropriety is patent? It does not, and therefore, those allegations must be taken as given.

Then Mr Soni says that, correctly says that, and I think it was Mr Varney, a predetermined outcome, I mean, the most typical manifestation of the Nemo Judex Rule is arguing a case in front of somebody who has a predetermined outcome in their head. That is - because what is the point then?

You might as well just keep quiet and say nothing, because whatever you say, you can quote a thousand books, and what have you, if the person has a predetermined outcome, it is not going to succeed.

That is what is called "bias". And what is better bias or demonstration of a predetermined outcome than somebody saying when there are two adversaries you must do this, you must do that, you must do that, for what reason? So that you can win, so that my predetermined outcome must prevail.

So, you know, sometimes lawyers complicate things, the simple example is this. You have a soccer game and the referee goes to the changing room of the other side and say, no, you must change, you must play this one, be careful of that striker, and so on. Who does that?

Which team, once it gets to know that knowledge that the referee went to the changing room of the other side and advised them

on how to win the game, would you continue playing the second half? I would not, because what is the point? You might as well give them 10-0, we are not going to waste our time playing this game.

And that is all we are saying, really, to simplify it. We are saying we cannot be expected to play a game that is fixed. And it is not true that, or rather, it is mistaken for my lawyer friend, Mr Soni, to make the following submission: that simply because the alleged bias is in favour of Mr Semenya, then what are we complaining about?

I mean, that kind of submission boggles the mind. How can parties that are going to be subjected to a process in which Mr Semenya is the evidence leader, is going to be questioning those parties, be told that, well, so what if Mr Semenya is favoured?

And yet, the same parties say that in their heads of argument, Mr Semenya must be regarded as a prosecutor. They say the best way to understand his role is you must regard him as a prosecutor in a case.

Now, if we follow their own analogy, which litigant would say, no, only the prosecutor is biased and the judge is in favour of that prosecutor, but that bias is not against me, I mean, what is that? I cannot even work it out in my own head what that submission is.

In other words, in short, the mere fact that there is bias to do with one of the players, whether they are a prosecutor or an evidence leader or whatever, it affects both presidents directly because they are the implicated parties.

And just on the jeopardy, I think in the heads of Mr Mbeki

this point is made even better, which is that one of the mandates of this Commission is to recommend criminal prosecutions. So the prejudice to those people facing possible criminal prosecution is clear and manifest. Really, I do not think I need to belabour that point.

And at paragraph 43 of our heads of argument we make the point, and we quote the famous case of *Re Pergamon Press Ltd*. And this covers both the point that I just made and also the so-called "inquisitorial process" point, which is that simply because the Commission makes only recommendations, it does not matter, it can be biased, basically.

That is not true. This is what Lord Denning said in *Pergamon Press*, talking about something even less than this Commission:

> "It is true, of course, that inspectors are not a court of law…"

We concede that, this is not a court of law. Well, actually, that is a point we made earlier:

> "Their proceedings are not judicial proceedings. They are not even *quasi-judicial*, for they decide nothing…"

The point made by my learned friends in their heads:

> "They determine nothing. They only investigate and report…"

Like this Commission: investigate, make findings and report. But here is the thing:

> "But this should not lead us to minimise the significance of their task. They have to make a report which has wide repercussions. They may, if they think fit, make findings of fact which are damaging to those whom they name. They may accuse some, they may condemn others. They may ruin reputations or careers…"

And Lord Denning went therefore to say:

> "Therefore, they must be held to the standard of fairness."

The standard of fairness is manifested in the two rules of natural justice. The most well-known is the *audi alteram partem*, but its other "cousin" is the *nemo judex*. And if those standards have been breached, or perceived to be breached reasonably so, then that should be the end of the matter, honestly.

And if, on top of that, the allegations that have been made are not disputed, then the case, that case, whether it is the actual bias or the other case, must be then decided on the admitted facts. The admitted facts are set out clearly in the affidavits. The admitted facts in relation to the actual bias are set out in paragraph 38, 39, and 40, and they have not been denied.

And my learned friends, both Mr Varney and Mr Soni, thankfully agree with me, or at least expressed agreement on the issue of the sufficiency or cogency of evidence. And the only question that stands before you, honourable commissioners, is

whether on the evidence that is presented, not the evidence that is not presented, on the evidence that is presented… Sorry, and you will find that summarised, sorry, in our heads of argument at paragraph 56.

So on this argument, is there a case or not a case for actual bias, alternatively, reasonably apprehended bias? And we say, under this topic, two pointed accusations have been levelled against the chairperson, namely, collusion, in the form of, one, collusion by giving legal advice, two, and/or sharing helpful research with one party to the dispute before her.

Two, coaching in the form of pointing out potential pitfalls to the implicated party, and even going as far as to propose what instructions are to be given to the legal representative of that party, Adv Soni SC.

Three, doing all of the above without the knowledge of the applicants, privately and/or secretly. In short, the conduct was undisclosed. I dealt with this earlier. Four, doing so with the intention to assist Adv Semenya to succeed in the recusal application, which was yet to be argued before the very same chairperson.

And five, to indicate knowledge of unlawfulness, conveying the impugned message from her private email address and not the one officially assigned by the Commission. And you can add there, six, what is referred to in the replying affidavit, which has not been disputed, that there were not only those emails, but there were also WhatsApps. So the point is that, is this ...(intervenes)

COMMISSIONER KGOMO: What about the WhatsApps?

ADV MPOFU: If you go to the replying affidavit – sorry, Justice Kgomo.

COMMISSIONER KGOMO: That is your point 56.6.

ADV MPOFU: That was the heads, but now I am going to the affidavit. The reply... I will find it now, Justice Kgomo. Let me just paraphrase, what we say in the reply is that – I had to read it as it is put here ...(intervenes)

COMMISSIONER KGOMO: Yes, you MAY paraphrase, if you wish.

ADV MPOFU: Yes. Please find the reference to the WhatsApps. Sorry. I will paraphrase it so long, my learned junior will find the passage. What is alleged in the reply is that, firstly, it says the email was sent on the 5 November, as my learned friend alluded to.

And then, secondly, it says it was sent on the private email, but then it says, if this is denied, which was the same thing as in the founding affidavit, then the challenge is made for the Commission to produce the relevant emails and WhatsApps.

My learned friend is not finding it, I will find it myself. Paragraph 23.6. Thank you very much, I am indebted to the Calata Group. Yes, this is what it says, we say at 23.5, just for context:

> "The decision not to provide some of the evidence pertaining to that allegation was not "without cause", but based on the pleaded imperative to protect, *inter alia*, ongoing sensitive investigations, and the like."

If I may pause here? We all know that certain information might be withheld to protect investigations, whistleblowers, and all sorts of things, in general. And there is no basis for Mr Varney's suggestion that that would be illegal:

> "Such evidence will be made available to the Judicial Service Commission, or even this Commission, once specific safeguards have been negotiated."

Obviously, these are to do with confidentiality, and all that:

> "For now it is sufficient…"

This is the paragraph:

> "To reiterate that I maintain (says President Zuma) that the chairperson indeed gave alleged advice in writing, and it will become available once the necessary discovery processes have been followed in the appropriate forums. To be more specific, on 5 November 2025, the chairperson personally wrote to Adv Semenya SC, advising him of research which would be helpful to his case, and proposed that he should share with Vas Soni SC (who was representing him in the Semenya recusal application), which was scheduled to be adjudicated before the very same chairperson.
>
> This correspondence was notably not sent from

> the official Commission email, but from the chairperson's private email address. On another occasion, the chairperson specifically advised Adv Semenya to watch out for and/or deal with paragraph 45 of the founding affidavit in the Semenya recusal application, which alleges that Semenya SC had violated a directive of the Commission.
>
> Again, if all of the above is denied, I invite the commission and/or respondents, in the interest of transparency and openness (which are values of our constitution), to disclose to the public all the email and WhatsApp correspondence exchanged in the relevant period between the two individuals."

So that is the reference to the WhatsApps, Justice Kgomo. So the point being made, again, by the way, this was the second time this challenge was being made. In the founding affidavit we say, if you deny this, then you must provide the information, the avoidance, quote/unquote. That is not done.

In reply this challenge that I have just read out is made again. Until today, none of that has been forthcoming, and there is no denial. Again, of course, if all this was just mumbo-jumbo that is made up, people would say what are you talking about, what email? There has never been such an email or there has never been such

WhatsApp communication.

That is specifically and actively not done, you know, it is actively avoided to deal with these allegations, whether you combine this with the ones that were made, the five that I read from paragraph 56, and until today, nothing has been said.

Which decision maker can say, in the face of a one-sided serious accusation, which has not been responded to, that that accusation must be wished away? It cannot be. You have no choice, the three of you, commissioners, but to accept that the facts, as alleged in the founding affidavit and the replying affidavit, are there.

Your only job is to say, if these facts are true, if such advice was given from a private email, and so on and so on, does that not, is that not evidence of actual bias, one? If it is not, would a reasonable litigant in the position of former President Zuma not reasonably hold a perception of bias or apprehension of bias? Those are the only two questions.

And the answer to those questions is yes and yes. In any world anywhere, whatever anybody wants to say, the answer to those questions will always be yes. There is nobody who is allowed to be a decision-maker, and yet participate. You cannot "be a referee and a player", as the saying goes, you must choose which one you want to be ...(intervenes)

CHAIRPERSON: Mr Mpofu ...(intervenes)

ADV MPOFU: Yes, I…

CHAIRPERSON: I must draw your attention to ...(intervenes)

ADV MPOFU: To the time, yes.

CHAIRPERSON: Yes.

ADV MPOFU: Thank you, thank you, Justice Khampepe, yes, I will wrap up. Let me just check my notes.

CHAIRPERSON: You are actually 15 minutes over.

ADV MPOFU: Yes, okay. Well, all right, I was not counting. I will take your word for that, Justice Khampepe. Yes, okay, the point I made, well, I do not have to reply to this because there was no countervailing argument.

But the point about, the only problem is that Mr Soni, I think, just ignored what I was saying about the fact that this is not about the recusal of a judge, this case, the one we are talking about now. It is about the recusal of the chairperson of a tribunal, who happens to be a judge.

So the test is not the test of somebody sitting in judicial proceedings, that must be made clear, and therefore, the presumptions do not apply mechanically, as Mr Soni would like us to believe.

Then Mr Soni says, or one of them says that Mr Zuma has not put up the evidence. I think I have answered that, he has put up the evidence. Is the evidence complete? We are the first ones to say it is not complete because of the withholding of some of the evidence.

But that is not the question. Is the evidence sufficient for the finding that we want this tribunal to hold? The answer is, yes, it is sufficient. And then, sorry, yes, the last point, hopefully. The

...(intervenes)

CHAIRPERSON: Not hopefully, Mr Mpofu ...(intervenes)

ADV MPOFU: Okay, the last point…

CHAIRPERSON: But it should be the last point. I think ...(intervenes)

ADV MPOFU: Yes, no, no, no, it is, justice ...(intervenes)

COMMISSIONER: Hope springs eternal.

ADV MPOFU: Yes, well, we live in hope. Oh, yes, I will hold this, this is the very last point. The point I wanted to make – no, this point is not mine. Ms Sokhela wanted to just make one point, in fact, I should have allowed her to do that before I started. So with your permission, when I finish, she just wanted to, I completely forgot. She assured me that it is really one minute, not a "Mpofu minute".

Now, the last point I wanted to make is this, Justices Kgomo and Commissioner Gabriel, and it has to do with the issue of the so-called "unreasonable delay".

It is now common cause between us, as parties, from what I heard, that even if, let me put it that way, even if the unreasonable delay point was good in relation to the occupational history, which obviously was known before.

And in relation to the, ja, both the TRC and, or in relation to the judgments of the Constitutional Court, obviously, that point cannot be good in relation to the main point that is raised by President Zuma, which is the giving of the legal advice.

So even if, one, that it was correct, and (b), even if it was a

complete bar, it obviously has no effect. So really, there is no escaping dealing with the actual bias point and the point that is made.

Now, I am going to sit down, justices, but please allow me just to say this in relation to the Calata Group, that, yes, there is nobody more than President Zuma, and I presume the other applicants as well, who would like this matter to be resolved.

These are people who are freedom fighters themselves, and these are people who want the outcome to be as clear and pure as it should be. Very few people, anybody who has any sense of what has happened in this country, would say otherwise.

I might be the only person in this room who attended the funeral of Matthew Goniwe, Calata, Mhlauli and Mkhonto. And anybody who knows the level ...(intervenes)

COMMISSIONER KGOMO: You were still very young.

ADV MPOFU: Pardon?

COMMISSIONER KGOMO: You were still very young.

ADV MPOFU: I was, but I was at university. It was in July 1985, and the State of Emergency was declared on that day, and we were arrested without trial by PW Botha, but that is another story. But anyone who even remotely had any sense of the amount of atrocity involved in those evil deeds, cannot even for any selfish reasons want to stop a process that goes to dig into that process.

AfriForum was here, I suppose they represent those people. Maybe they would want to delay it, but certainly not President Zuma, because these were his comrades. And the issue about going to the

bottom of this issue must be done, but it must be done in a commission that is with integrity, that is beyond reproach, and that is neutral and able to give South Africa the answers that it needs in relation to those atrocities. Thank you very much, I am indebted for the extra time.

CHAIRPERSON: Thank you, Mr Mpofu. Ma'am, I did not get your name.

ADV MPOFU: Sokhela.

ADV SOKHELA: Thank you, chair, it is Phumzile Sokhela.

CHAIRPERSON: Sokhela. Yes, Ms Sokhela.

ADV SOKHELA: Chair, I will, and commissioners, I will be very brief. Mine is just to seek to clarify an issue that my learned colleague, Adv Soni, had raised in his submissions, and my colleague, because of time, did not deal with it.

And it relates to – oh, it is on – it relates to the issue of the consent ruling, the consent ruling that was done on the 27 November. And it was in relation to the Calata Group's request for the leading of evidence. I hope I understood correctly what Adv Soni said in relation to that.

My summary of it is this, it is that the complaint about how the evidence would be handled, the Calata evidence, or the leading of the evidence had been settled in the ruling. So the matter is done, and there is no controversy about that, and we are in effect seeking to rehash a settled issue.

I just wanted to correct what it is that the ruling consented

for, and I will invite the commissioners to go to the Calata Group's answering affidavit, to our founding affidavit. It is at page 20, paragraph 86, and there they quote the ruling in full. In paragraph 2 of that ruling it is said that:

> "After having heard the parties, the Commission makes the following ruling:
>
> 2. There is currently a request by the Calata Group to lead the following witnesses…"

And then it lists those witnesses. Paragraph 3 of that ruling says that:

> "The reasons for the Calata Group's request to lead the witnesses are set out in their submissions."

And then paragraph 4 says that:

> "The substantive objections of other parties to the request are set out in their submissions."

And then it goes on to deal with how future asks will be dealt with. The Calata Group explains it the same way in their answering papers. They say in paragraph 87:

> "After that ruling the Commission adjourned to consider, one, the Calata Group's request, as set out in their submissions, and then, two, to consider the substantive objections of the parties."

Now, we have dealt with this to seek to clarify in our

answering affidavit to Mr Semenya's answering affidavit, in our reply, pardon me. And it is at page 37, paragraph 121, where we, in essence, explain or confirm what it is that the Calata Group's understanding is about what the consent order does. We say that:

> "The agreed-upon order was not to settle the issues, but to allow the chairperson to consider the request made to her for the first time, and the objections raised by the parties."

So I hope it is now clear that, to the extent that there is a consent ruling, it was not to seek to settle the dispute about the leading of witnesses. That was an issue still for the Commission to determine. I hope that that is now clear.

CHAIRPERSON: Yes, thank you, Ms Sokhela.

ADV SOKHELA: Thank you, chair, thank you so much for the time.

CHAIRPERSON: Well, I thank the parties for their argument in this matter. The ruling is reserved, and we are adjourned for the day.

ADV MPOFU: Thank you, we are indebted to the Commission.

INQUIRY ADJOURNS ON 16 JANUARY 2026

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CERTIFICATE OF VERACITY

I, the undersigned, hereby certify that **as far as it is audible**, the aforegoing is a true and correct transcript of the digitally recorded proceedings in the matter of:

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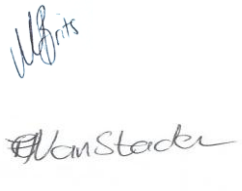
TRANSCRIBERS	**:**	

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