

**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 Baitse 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 Vas Soni

**26 NOVEMBER 2025**

**DAY 2**

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**MzansiSA Business Solutions**  
Arbour Square  
Cnr Melle & Juta Street  
Ground Floor, Office 3  
Braamfontein, 2001  
TEL: 011 339 1289  
E-mail: [transcription@mzanzisa.com](mailto:transcription@mzanzisa.com)  
E-mail: [mzanzisa3@telkomsa.net](mailto:mzanzisa3@telkomsa.net)

PROCEEDINGS ON 26 NOVEMBER 2025

CHAIRPERSON: Good morning. We have reconvened today's proceedings in order to hear oral argument in the recusal application of Adv Semenya. Argument will be heard in the following sequence: Adv Moroka on behalf of the Minister, Adv Gwala on behalf of the NPA, Adv Varney on behalf of the Calata Group and Adv Vas Soni on behalf of Adv Semenya. Each party shall be allocated 30 minutes to present its main argument and the applicants will be allocated 10 minutes in reply. Adv Moroka?

- 10 ADV SONI: Madam Chairperson, may I raise on behalf of the evidence leaders a preliminary issue?

CHAIRPERSON: Yes.

ADV SONI: And I raise it not to create controversy, but just in terms of procedure.

CHAIRPERSON: Adv Soni, we cannot hear you; if you could just raise your voice.

ADV SONI: Sorry, Madam Chairperson.

CHAIRPERSON: Now we can hear you.

- 20 ADV SONI: Thank you. I want to raise a preliminary issue; and that relates to who the interested parties are or who the actual parties are in this matter. We have a situation where there is an application for Mr Semenya to be recused; and there are two applicants in that matter – the Minister of Justice and the NPA. In their response to the application, the Calata Group indicated that they would abide the decision of the Court and they did not file an affidavit in support of

either of the positions. The evidence leaders filed an opposing affidavit and indicated that they oppose the application.

What the Calata Group has since though done is; in Heads of Argument submitted they have indicated that they have reluctantly now support the relief that is sought and the basis of that is not set out in any affidavit. It is simply saying: well, it is about time Mr Semenya is recused. And we wonder, Madam Commissioner whether it will be appropriate that they be given a platform to vent that position.

10 CHAIRPERSON: Yes, but we have... (intervenes)

ADV SONI: That is our position. We do not take a stance, but we just in the interest of proper procedure, we want to raise that.

CHAIRPERSON: Yes. I think in the interest of time that issue will be dealt with when it is their turn to present argument. Ms Moroka?

ADV MOROKA: Thank you, Chairperson. I was tempted to stand up.

CHAIRPERSON: No, you may be seated, madam.

ADV MOROKA: My preference is to stand. I will be seated.

CHAIRPERSON: Oh, if your preference is to stand, we will just take your preference.

20 ADV MOROKA: My colleagues tell me that they are all going to sit. So it will be awkward for just me to stand up.

CHAIRPERSON: It will not be awkward. You do what you wish to do.

ADV MOROKA: I think I will stand. If I may, Chairperson and fellow Commissioners; if I may be permitted at the very onset to sketch out

something that is not part of the application, just for the record, because a Commission of Inquiry, as we all know, is for the benefit of seeking the truth and for the public to have confidence in what is happening in the Commission.

There has been a narrative that the Justice Department, and I speak for the Minister of Justice, has been delaying this mission and its work. And we just wanted for the record to put it, the record straight; that the Minister of Justice has been integrally involved in setting up this Commission. She has helped in sourcing this venue,  
10 in making this venue suitable for the hearing of this Commission. She had been involved in the gazetting of the Commission in the rules and the regulations that are going to guide this Commission.

So for the narrative that says that the minister is applying delaying tactics, we for one, want to put it on record that that is far from the truth and we needed to put that straight.

CHAIRPERSON: Yes, but the narrative, Ms Moroka is based on the fact that the minister has known about Mr Semenya's position as evidence leader from as early as September, but did not bring an application for his recusal until when she was directed by this  
20 Commission on 10 December.

ADV MOROKA: If I may, if we could start with that delay argument, learned Commissioner and try to understand, because we do not understand that submission; that the minister knew from September. We made it clear on 27 October that the minister did not know. We made it clear that the communication platform was not accessible.

We were not able to access that, what do you call it; that platform.

In fact, the secretariat then confirmed that there is a problem with that platform; that members of the team were not able to access that. They did not know what was going on. They did not know the communication and the directives that you gave. They only got to know that at the hearing when it was raised by the fact that Mr Varney and Mr Semanya had arranged about how witnesses were to be led. We mentioned it in our affidavit and we did not know. We only knew on 27 October.

10           You then had a meeting, which we were not present. It was just the Commission and the minister; where the minister indicated then that she has issues and she might bring an application for recusal. It was only on the 27<sup>th</sup> and then you gave a ruling and then we responded to that ruling. I think it has to be put on record that it is not correct that the minister knew from September that this issue would be raised. She did not.

CHAIRPERSON: Yes, but she certainly was aware as from 27 October.

ADV MOROKA: Yes, she was; and then having heard that, the first  
20           step was to file an objection, which she did. It was only when you responded to her, Madam Chair that she must bring a substantive application. That substantive application was then brought. We had thought we are going to bring you the objection first and then bring the application. So we do submit that it is fair, unfair to say that the minister had all this time from September to do so.

CHAIRPERSON: Yes, but Ms Moroka, as I understand the papers, the minister was aware. At least she intimated her intention to bring an application for a recusal on 3 November. And from 3 November until when he was directed by this Commission to file her recusal application, nothing was done.

ADV MOROKA: Because she was involved with the objection application and she assumed that the objection question would be heard while the other processes were in place.

COMMISSIONER KGOMO: Ms Moroka, if I can come in. In  
10 addressing the Court on this aspect, it almost seems that you are applying for condonation.

ADV MOROKA: Condonation for what, Chairperson?

COMMISSIONER KGOMO: For what is said to have been the delay, because what you are... (intervenes)

ADV MOROKA: We are not saying there was any delay.

COMMISSIONER KGOMO: What you address us on is really not helpful for what we have to listen to.

ADV MOROKA: Learned Commissioner, what I am trying to say is that the minister has been integral in trying to set up this Commission.  
20 It is not fair to say that she has delayed the process. From 3 November when she was directed to bring an application after that meeting, she assumed that on the 10<sup>th</sup> it would be the hearing of the objection, not the hearing of the application. And I am not trying, I have got 30 minutes. I would rather go there. I was just setting the record straight.

CHAIRPERSON: Yes, we take account of the fact that we have asked questions, Ms Moroka, but was not that a wrong assumption, because on 3 November she did not say 'I will bring a recusal application after I filed my objections'.

ADV MOROKA: She said in due course, Madam Chair.

CHAIRPERSON: Yes.

ADV MOROKA: And in due course is in due course. It may not even happen... (intervenes)

CHAIRPERSON: This is a time-bound Commission.

10 ADV MOROKA: I beg your pardon?

CHAIRPERSON: This is a time-bound Commission, this.

ADV MOROKA: It is time-bound.

CHAIRPERSON: So in due course cannot be indefinite.

ADV MOROKA: I accept that.

CHAIRPERSON: Yes.

ADV MOROKA: If I might then move to our Heads. I will not, given the time limitation and the space limitation, I will not address all the issues that I need to address in these Heads. What we do seek to start off with is to refer the Commission to what we say are the  
20 reasons why we say that Mr Semenya should be recused.

CHAIRPERSON: Please switch off your mic.

ADV MOROKA: Sorry, Chair. I am trying to understand the message. Oh, both mics; apologies about that. We start off with what we say are our grounds, and these are set out in paragraphs 3.1 to 3.3 of the Heads; and there are basically three grounds,

honourable Commission.

The grounds are Mr Semenya's involvement in the Nkadimeng judgment, Mr Semenya's involvement in the Ginwala Commission and the process complained about what happened between Mr Semenya and Mr Varney. And we say these three taken together cumulatively bring or raise an apprehension of bias on the part of Mr Semenya. We then set out a brief background in section B; and the background is really common cause, but we would want to refer the honourable Commission to paragraph 11 of our Heads

10 where we start off by saying:

"The power to appoint a Commission of Inquiry is mandated by the Constitution. It is afforded to the President as part of his executive powers. It is open to the President to search for the truth through a Commission. The truth so established would inform corrective measures, if any, if they are recommended, influence future policy, executive action or even the initiation of legislation."

We underline the following, Commissioners.

20 "Commission's search for truth, also serves indispensable accountability and transparency purposes. Not only do the victims of the events investigated and those closely affected need to know the truth, the country at large also does. So ordinarily a functionary setting up a Commission has to ensure an adequate

opportunity to all who should be (indistinct) by it.

Absent a fair opportunity, the search for truth and the purpose of the Commission may be compromised."

We then move, because we are of the view, Commissioners that the terms of reference, the rules are all common cause. I would submit even the events are common cause. The only event that is not common cause; we say the letter of 18 September is common cause. We did not know about that letter, but all the parties accepted.

10           The Calata Group, if I may call them that, wrote a letter to the Commission. We also accept that on 19 September the Commission then gave a directive about how the further conduct of a particular subset of the Commission was going to be conducted. We again say we did not know about that.

We talk about another letter on 29 September that was addressed to the secretary by Webber Wentzel again, speaking to an arrangement. And it would seem that this arrangement was between Mr Varney and Mr Semanya. Again we do not know about this arrangement, but we hasten to add that the ruling of 19 September  
20           has not been taken up by us as an objection. We accept your ruling. We respect your ruling in that respect.

What then happens is that on 27 October, and that is also common cause about what happened. We all have the transcript of what happened on that day. You again made a ruling that the objections must be made in writing.

What we have differences with we set out at para 23, page 91 where Ms Thokao then writes to talk about our objection. We write back and we say to Ms Thokao: no, you understand, you misunderstand the characterisation of the objection. It is not against leading of evidence by representatives, if so requested. That is not our main gripe with what happened and what we learnt on 27 October. Our gripe or the minister's objection and the minister's gripe is a communication, the private communication with Mr Semenya. And we set that out at paragraph 23 where we say that is our  
10 objection. Other than that, learned Commissioners, we say that the facts at play are common cause, except for that we mention at paragraph 23.

From paragraph 26 to paragraph 35 it is about the delay and we have gone through that debate with the Commission and I will not go through it again, except to point that it is there in the Heads from 25 to 26 to 35.

CHAIRPERSON: Yes.

ADV MOROKA: We then, if I may, move on to the grounds for  
20 refusal. And I wish to say this to the Commission; that I will move on to talk about the role of Mr Semenya in Nkadimeng's case; and that you will find at page 99. I will jump from 94 where I talk about the legal framework, because I wish to do it when I talk about the role of evidence leaders, the role of the Commission and what it is that we say are the distinguishing features about evidence leaders as opposed to, for instance, what my learned friend, Mr Varney and Mr

Semenya and Mr Vas Soni say about the standard.

I will deal with that at the end from page 94 to page 99, but then move to the Nkadimeng case, the Ginwala case and the role that Mr Semenya played when he spoke to Mr Varney, talk to the LPC and what the LPC's expectations are of Mr Semenya, how Mr Semenya is expected to behave as a legal practitioner and then talk to the standard. I hope I am understood.

CHAIRPERSON: Yes, we are with you.

10 ADV MOROKA: Thank you. Then so that, if I move to page 99 at para 48, we talk about Mr Semenya's role in the Nkadimeng case. It is common cause that Mr Semenya represented the NPA in that matter and the Minister of Justice, who is not the present minister. It is common cause that it was 17 years ago, but it is also common cause that Mr Semenya was representing the NPA and the Justice Department on an issue that we submit is central to this fact-finding mission of this Commission today.

20 We say that at page 53; if I may just take a step back. Mr Varney, when he wrote the letter, or Webber Wentzel, I beg your pardon. When Webber Wentzel wrote the letter to the Commission, it was with the intention, I would assume, of alerting the Commission about the fact that Mr Semenya at a point in time, be it 17 years ago, had a role to play in the Nkadimeng matter; and they were uncomfortable about it and they wrote to say: how do we do this? And the ruling then said: we accept, we understand and we will then make sure that he does not lead witnesses in that regard.

We submit that that recognition goes to what we are saying; that at a point in time Mr Semenya represented different parties. Mr Semenya represented the NPA, represented the Justice Department in an issue that is central to the fact-finding mission that you find yourselves involved with. We say at page 53 that... (intervenes)

CHAIRPERSON: Page 53?

ADV MOROKA: Sorry, paragraph 53, page 101. We say that Mr Semenya, and we quote that:

10 "When he defended the NPA, he did it and made the submission that the policies were in accordance with the constitutional mandate placed on the NDPP with the objective of prosecution of crime and that the applicant's contention that the amendments were adopted for an ulterior or improper purpose are without merit."

You are going to be investigating and trying to establish whether indeed these policies were done with an ulterior motive. Mr Semenya had occasion to consult with clients on this issue; and therefore, his instructions were articulated when he went and  
20 addressed the Court and said this is without merit.

So at the centre of all of that is Mr Semenya having an opportunity to speak to his clients about the amendments and why those amendments were put in place, what the rationale was and why they have passed constitutional muster. And to say that I do not remember; and in any event, you have not said what it is that I did.

We would submit that is not particularly helpful. What is true is what he did in that Commission and in that case. And if you look at what is said in the judgment itself, it is apparent and evident that he advanced detailed arguments, defending the policies, internal structure, maintaining that additional criteria introduced under part C of the policy amendments did not create a new form of indemnity.

What he was involved with was unpacking the policy, unpacking the rationale, unpacking where the NPA wanted to take this and unpacking, we would submit, the Justice Department too, 10 unpacking and defending and in that sense convincing the Court that these policies, there is nothing wrong with these policies. They passed constitutional muster. They were done bona fide. They were done not to bring an amnesty through the back door. That is in essence what Mr Semenya did, whether he remembers it or not... (intervenes)

CHAIRPERSON: Yes, but Ms Moroka, was not the point of the Nkadimeng matter about the constitutionality of the amendments?

ADV MOROKA: If you look... (intervenes)

CHAIRPERSON: How do I unpack that to see that he was talking 20 about the genesis of the policy?

ADV MOROKA: M'Lady, Chairperson, when, and some people have appeared many times before you in that court. When you challenge constitutionality, you do not get up and say this thing is unconstitutional. There are factors that must be set in place. You would, for instance, say that it is not arbitrary. Why is it not arbitrary?

Because what the Constitutional Court has said about law or functions of; people with power cannot act arbitrary.

How do you then test that they have acted arbitrary or not arbitrary? There is a whole test that comes in that has to address the constitutionality of any public power or exercise of public power, exercise of legal provisions. You cannot in isolation tell the Court that it is unconstitutional. In the same breath, the Court expects you to set out why is it that you say the act is unconstitutional. The exercise of power is unconstitutional.

10           When you go and you debate these issues with your legal representative as a client, you tell the legal representative: why is it that we moved through and did it the way we did? What was the rationale? Was it justifiable? Was it appropriate? So we are saying that entire conversation, that entire consultation with Mr Semanya happened before he was able to go into court and say to the Court it is constitutional. It does pass constitutional muster.

          And then he must then set out why he says it does, why he says it is not about back-door amnesty provisions. He must justify it in a court of law. He cannot just get up and say it does pass  
20 constitutional muster without the background and the help of what the clients had to say to him, why it served particular government purpose. And that is what we are saying; we are saying in those consultations, in those meetings, in those engagements with his clients, he had to have had opportunity to understand why is it.

          Even if it had nothing to do with political interference, but it

had everything to do with why are you putting, why are you amending these policies? What is the rationale for amending these policies? Does the rationale pass constitutional muster? And Semenya was integrally involved in those conversations.

COMMISSIONER GABRIEL: Ms Moroka, does the policy itself not set out the rationale for the amendments?

ADV MOROKA: The policy will have set it out. The Calata Group would have said 'we do not agree'. In fact, the charge is: there is something untoward about this policy. Therefore, let us unpack it.

10 Let us look at this policy and look at what is the intention behind this policy. You can phrase it in beautiful words and say this is the policy, but at the actual point in time you need to say why was there a need to craft such a policy and does that policy between the four corners of that policy pass constitutional muster? And how do you do that? You have to ask your clients and have an understanding and appreciate why is it that they needed to have amended the policy.

COMMISSIONER GABRIEL: So are those not historical facts?

ADV MOROKA: They are historical facts, but they are there.

20 COMMISSIONER GABRIEL: Which ordinarily, assuming there is an overlap which would have to be placed before this Commission anyway.

ADV MOROKA: That is our point; and that is why when the Calata people tell you, Madam Commissioner that: 'we are going to look at the policy again, because it is central to what then happens.' And as a fact-finder, you need to understand what happened from that year

onwards. Possibly the years before, the years when the policy was adopted and what then followed; what was the impact? What were the reasons why there were delays? We do not know. You do not know. That is why the Commission has been set up, but that issue about the policy is central to what you are investigating today. I am told I have five minutes, but that is minus the interruptions. So I had more than five minutes.

CHAIRPERSON: Yes, I think you have seven minutes, Ms Moroka.

ADV MOROKA: If I may then quickly get to; we have talked about the  
10 Ginwala Commission. We have talked about his role in the Ginwala Commission. Again the issue that Ginwala was about the fitness to hold office of Mr Pikoli; it is true that was the issue about the Ginwala Commission. But if you take a step back, it was also about what the Calata people say in their affidavits, what Pikoli himself says in his affidavits about that policy.

Again, the policy took centre stage in the Ginwala Commission, because Pikoli was of the view that: 'I am being dismissed or I am being held to account because of the policy and how I behaved vis-à-vis the new policy and the old policy.' So again  
20 in the Ginwala Commission it was central. Mr Semenya's role in that Commission was, well, different as Mr Kgomo and you, Madam Commissioner. He was an advisor. He led evidence, but he was central in the Ginwala Commission. And we say in that respect again he cannot be central in this Commission.

We then move to his role, the President's role between

himself and Mr Varney. This is common cause. The Calata Family find nothing wrong in what he did there. They keep insisting there was a letter and a ruling from you or from the Commission that said he can and everybody can lead their own witnesses. We do not have sight of such a ruling from yourselves. The only ruling that we have is the ruling of 19 September; and that is the only ruling that we abide with.

We take issue with the fact that Webber Wentzel and Mr Semenya had a private conversation. And we say people will say  
10 other Commissions, people talk and people do all sorts of things. We are saying the rules of this Commission set out very clearly what is going to happen.

The chairperson and the Commission direct how witnesses are going to be called, direct who gets called, direct; we have now applied for an extension. You are the people who applied for the extension. We did not apply for the extension. It is your Commission. You set the rules. You made the rulings. We abide by those rulings, unless we need to take the rulings on review. We have no intention of doing that.

20 So for Semenya to be on a frolic of his own with Mr Varney, we say that is unacceptable and that raises a perception that he is not going to treat all the witnesses equally and fairly.

COMMISSIONER KGOMO: But just; is there any indication that only Mr Varney can lead his own clients? Is it a closed rule and no one else? And if you, Counsel wish to lead your own client and to apply,

would we have said no, only Mr Varney. So in that sense, in that sense was it preferential and is it discriminatory?

ADV MOROKA: I will answer it in two parts, Commissioner. The first part is that or well, you know that we did not know. We submit that because Mr Varney's witnesses are so central to your fact-finding mission; that the ruling should have come from the Commission. That is what we say.

Simply put; that is what we say. Simply put; we do not have objections with coming to the Commission and say for these reasons  
10 with... and Mr Varney, by the way, has put his reasons why he thinks his clients should be led by him. It is a discussion for another time, but it is a discussion that you listen to. You hear what the other parties have to say and you make a ruling.

That is all we are asking. We are not asking that every witness must be led by the Commission. We are saying any deviation must be in terms of the rules that you gave to us; that you must make the decision. Sometimes it may not be necessary to hear us, but at least we have the confidence that you would have thought about, you would have thought: does this help our fact-finding  
20 mission or does it not help? We are not saying only, but what we are saying is that the way he did it was unfair. We are saying the way that he did it was untenable, but it does not mean that the Commission cannot make a ruling on the issue. That is all that we are saying.

CHAIRPERSON: But Ms Moroka, can we come to your rescue in that

regard, having regard to the fact that the objection issue is yet to be determined by this Commission? Can we come to your rescue? Can we come to your assistance with regard to your submission, with regard to the private discussions that Mr Semenya had with Mr Varney?

ADV MOROKA: Does it mean I do not need to talk about them?

CHAIRPERSON: I want to know how we can assist you when we have yet to rule on that issue.

10 ADV MOROKA: I guess, Chairperson all we are saying is that when you do rule; and it is not even necessary to hear us. All we are saying is that it must be your ruling and not Mr Semenya's. He does not have or the evidence leaders. He does not have the authority to do so. That is all we are saying. And if we could, you could make... the minister, if you see from our Heads, we say she only assumed office in 20... last year.

20 So you would imagine that her affidavit will not be extensive. Mr Semenya and Mr Nalane can lead her evidence. I do not know what the other colleagues want to do (indistinct). We have no issues. Anybody can lead our minister. She is self-confident and she can be led by anybody and she does not need much protection. All we are saying is that it must be a ruling from the Commission.

CHAIRPERSON: Okay.

ADV MOROKA: As regards the standard, very quickly... (intervenes)

CHAIRPERSON: You have two minutes.

ADV MOROKA: We point out... (intervenes)

CHAIRPERSON: Ms Moroka.

ADV MOROKA: We point out, Chair at page...

CHAIRPERSON: You do not have to give us the paragraph.

ADV MOROKA: Rather give you the paragraph. The paragraph will be paragraph 97. And I am very sorry that after 97 you see a 63.1 and a 63.2. Paragraph 97, page 116 we talk about the Code of Good Practise; that all legal practitioners are bound by and it tells you what he can do and what he cannot do and what conflicts he must avoid and what conflicts; when he sees a conflict, what he must then do.

10           And then finally, Chair we talk to his role as evidence leader. We think this is the most important part of our submissions to the extent that it has been suggested that he has a role similar to that of a prosecutor, we say. Some of us have been prosecutors. There is a delineation. Prosecution Authority is set out in the Constitution. The powers are set out in the actual parliament, very different from what an evidence leader in this respect is.

20           You cannot, when you want to go and see a magistrate or a judge in chambers, march in as a prosecutor to go and talk to the judge and tell him: 'I think I will lead this witness today and do the following.' The prosecutor cannot do that. The prosecutor cannot leave his colleague to go and talk to the judge. A prosecutor prosecutes with the best of his or her ability in the prosecution. The evidence leader, according to the rules of this Commission, leads under the direction of the Commission.

CHAIRPERSON: Yes, Ms Moroka, I am just reminded that you have

already gone through your time allocation. You may proceed.

ADV MOROKA: I was going to say time allocation minus the questions, but...

CHAIRPERSON: That included.

ADV MOROKA: That included.

CHAIRPERSON: That included.

ADV MOROKA: Oh, then that is serious, Madam Chair. We are just saying that, in this regard that to the extent that the evidence leaders are in extension, a non... they do not have the power to make  
10 decisions. They are a non-decision making arm of the Commission. They act under the direction of the Commission. They are there to assist the Commission. They are there to lead witnesses on behalf of the Commission, so that the work of the Commission is made easy. That is the standard. Therefore, that standard, we would submit, implicates all the cases that we have cited in our Heads. It implicates *SARU*, it implicates *Bennet* and all of those cases, because.

CHAIRPERSON: It would implicate *SARU* notwithstanding that the evidence leaders are not judges.

ADV MOROKA: Notwithstanding that, because they are assisting the  
20 judges. They are there to talk to the judges... (intervenes)

CHAIRPERSON: But they do not make the ultimate recommendation.

ADV MOROKA: No, they do not. I started there, Madam Commissioner, that they do not. They are a non-decision arm of the Commission. They do not make the decisions.

CHAIRPERSON: They shape the evidence of the Commission.

ADV MOROKA: 'Shape' is a strong word. I would not want to say they shape. They assist with the evidence and take it to, and address you on it, so that you... if you look at the Arms Deal case. I do not know what the official definition of the Arms Deal. It was that the evidence leaders themselves did not help the Commission. They asked questions that were non-helpful. They were not robust enough. They were not; and the Commission itself did not do the job.

So we are saying the two parties, the evidence leaders and  
10 the Commission are there to assist each other in getting to the truth. And there is not a line such as you find in the prosecution where the prosecutor and the defence lawyer are in the midst of, as we call them, descended into the arena. The judge does not descend. The prosecutor descends. The defence advocate descends.

The Commission is a different animal, but the Commission, the judges that sit there and the senior counsel that sit there must bring to bear an impartial, open and, as it were, fact-finding mission to the Commission; and you cannot do that where you have stories and history from Ginwala, from Nkadimeng. You cannot do that,  
20 because you are not free. You are not open. You are not unaffected. Those are our submissions.

CHAIRPERSON: Thank you.

COMMISSIONER GABRIEL: Can I ask a question? Ms Moroka, how does that impact on the position of the Commissioners, if you accept that the evidence leaders work subject to the direction of the

Commission? As I understand, the problem is with the evidence leader. How does that impact on the ability of the Commissioners, this panel, to do its work fairly and properly?

ADV MOROKA: I would say it does impact, because he or she as the evidence leader will go and interview the witnesses, will in fact formulate the questions once there is an interview; formulate the questions, formulate to what extent he probes that statement and you as the Commissioners are listening to that. You are affected by what you are hearing. At the end of the day, the evidence leader then  
10 summarises all of this evidence and give it to you and say: 'look at what I found out. Look at what the evidence presents.' But he is the one who went and interviewed and probed and looked. You as members of the Commission are not doing all of that. That is why you need the assistance.

COMMISSIONER GABRIEL: But that is to suggest that we have a passive role when we listen to the evidence.

ADV MOROKA: And that is why, Madam Commissioner I referred you to the Arms Deal case where the complaint there was that the Commissioners were too passive, too uninterested, too willing to  
20 believe everything that they heard without probing. Your duty is to probe, but you probe with the assistance of the evidence leader.

CHAIRPERSON: Thank you, Ms Moroka. Thank you, thank you. We will take a short adjournment whilst they are trying to attend to the sound system. We will adjourn until 11:05.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Mr Gwala?

ADV GWALA: Thank you Chairperson and members of the Commission. We have submitted our written submissions and they are before the Commission for reading. I intent not to repeat exactly what is said in our written submission, but we stand by them. But what I propose to do, I just want to give a summary of the background and then point out two issues out of that, and then I will then just point out the test which we have already set out in the Heads and  
10 make submission as to why it should be the *SARFU* test that is applicable than the prosecutor test as such is head by the evidence leaders. And after that I will briefly deal with some of the arguments that I have picked up in the Heads of Arguments of the evidence leaders.

Commissioners, may I begin? It is common knowledge that this, the terms of reference in this Commission include determining whether there was any political interference in the investigation and the prosecution of the TRC cases. Central to that Inquiry is the Prosecution Policy Amendment of 2005. The Prosecution Policy  
20 Amendment as other parties contend, was the principle instrument through which the Executive influence the prosecutorial decision making. At least we understand that to be the case of the Calata Families.

It is common cause Commissioners, that the Prosecution Policy was taken to court in which its constitutionality was challenged

and it is common cause that the NPA and the Department of Justice were presented in those proceedings in court by Adv Semenya (SC) who... (intervenes)

COMMISSIONER KGOMO: Yes, let us, sorry if possible, you can take us along to indicate more or less where you are up in your Heads.

ADV GWALA: Well Commissioner... (intervenes)

COMMISSIONER KGOMO: I know you are making a summary, but... (intervenes)

10 ADV GWALA: Commissioner, that is what I indicated, that I intend not to repeat what is the Heads of Argument. We stand by everything that is in the Heads of Argument.

COMMISSIONER KGOMO: Okay.

ADV GWALA: Unfortunately my planning was not to go line by line or theme by theme in the Heads of Argument.

COMMISSIONER KGOMO: Okay.

ADV GWALA: I took a view that the Heads of Arguments are there and need not be repeated in argument.

COMMISSIONER KGOMO: Okay.

20 ADV GWALA: But what I say, indeed is covered in the Heads of Argument in the summary that I am giving.

COMMISSIONER KGOMO: Yes, thank you, thank you, Commissioner.

ADV GWALA: I was at a point where I was saying Adv Semenya represented the NPA and the Department of Justice in those

proceedings, defending the constitutionality of the and the lawfulness of that policy. The memoranda prepared by Adv Semenya who have placed them before you, he was the Acting NDPP at the time, those memoranda demonstrate that Adv Semenya not only did he represent the NPA and DoJ at the court or at court, he also advised the NPA that it should appeal the judgment. We say that in paragraph 23 of, the of the... (intervenes)

CHAIRPERSON: Yes Mr Gwala, I would like to hear you more with regard to your reliance on the memoranda.

10 ADV GWALA: Yes.

CHAIRPERSON: In particular the one that was prepared for former Minister Jeff Radebe.

ADV GWALA: Yes.

CHAIRPERSON: You seem to place reliance on that memoranda to show that Adv Semenya had put confidential information about Nkadimeng, né.

ADV GWALA: But what, the point we are making Chairperson and members of the Commission is this, an advocate who appears in court on behalf of a party, certainly does not move from chambers to  
20 court. That is not the first thing that warned us. You first consult with the client, get to know the case of the client. Even at that stage of consultation as you prepare, to prepare for filing of the affidavit, you advise the client. You strategically give guidance on the case of the client, but more importantly, a client will not simply say we have got a case, please go to court.

The client is going to tell you the genesis of, in this case for instance, there has to be given a genesis of the policy, why was this policy conceived? How is it going to be implemented and everything that is confidential around, even everything that is confidential around that policy. So it cannot. What those memoranda demonstrate is that indeed there were discussions between Adv Semenya and the client. That is never... (intervenes)

CHAIRPERSON: Did they indicate the nature of the discussions?

ADV GWALA: They do, but what they do... (intervenes)

10 CHAIRPERSON: But if they do, please refer me to the relevant parts of the memoranda, whether this is done.

ADV GWALA: What they do not do though which is something that I wanted to address, is that they do not tell you that this confidential information was mentioned, but I would not imagine, it is something that I was going to argue later, I would not imagine in a hearing such as this, that you would require a client to say, I object to the judge presiding, for instance in the disciplinary. Let me make an example that I thought of.

20 Suppose an advocate represents a client in a criminal proceedings and that appeal says actually I did kill the person, being the deceased, we know the ethical implications of that. And now the advocate becomes a judge or the attorney becomes a judge and would you expect that client when he applies for the recusal of that judge to say remember, on 18 September I told you that I killed this person? Then that confidentiality is gone.

So the point I am making is, you would not expect as the evidence leader suggest, that we state that this is the confidential information. We said X, Y, Z, that it should not go to that extent.

CHAIRPERSON: Yes.

ADV GWALA: All we need to do is to demonstrate by evidence that there was information that was given and if you contend that it is confidential, then just gives surrounding evidence to show that, so... (intervenes)

CHAIRPERSON: So you would submit that the memorandum does  
10 not disclose the confidential information that is alleged to have been obtained by Semanya?

ADV GWALA: Ja, I am saying it should not, it should not even go tot that extent, that the Inquiry... (intervenes)

CHAIRPERSON: Yes.

ADV GWALA: Should not go to that extent, because then it is no longer confidential, the confidentiality is lost. And particularly the example that I give, then that accused is still going to be tried and what, it is on record now that he has said I have committed this crime. So then what? That is why we submit that you would not go to the  
20 extent of spelling out that this particular information was disclosed. So to, for them to say we are not making a case because we do not set out the confidential information, I... (intervenes)

CHAIRPERSON: Yes... (intervenes)

ADV GWALA: I submit it is wrong.

CHAIRPERSON: The reason why I was asking that, is because in

your written submission, I think it is paragraph 30 of your written submission, you rely on the memoranda as an indication of such consultations.

ADV GWALA: As an indication of those consultation, as an indication of the advice... (intervenes)

CHAIRPERSON: And hence an indication of the privileged information that was shared with Adv Semenya.

ADV GWALA: It goes without say Chairperson, that in a litigation there would be information that would be disclosed. There would be  
10 confidential information that would be disclosed.

CHAIRPERSON: Yes.

ADV GWALA: By the client.

CHAIRPERSON: And it does, the memoranda does nothing more than that.

ADV GWALA: The memoranda does nothing more than that, ja.

CHAIRPERSON: Thank you.

COMMISSIONER GABRIEL: Mr Gwala? Mr Gwala, are not many of the things set out in that memorandum, just a matter of historical fact anyway? There were these amendments, the amendments set out  
20 the rationale, the procedure, there was a court case, the judge struck it down.

ADV GWALA: Adv Semenya represented the...

COMMISSIONER GABRIEL: Adv Semenya gave advice, the NPA gave advice, the PCLU according to this memorandum, disagreed with that advice and it would seem that the minister himself disagreed

with that advice because there was no further appeal. Are these not historical facts?

ADV GWALA: Be that as it may, the point we are dealing with here is whether Adv Semanya is conflicted. That is the issue that we are dealing with. We say it is conflicted because he has had an opportunity to gain access to those privileged information and to represent... (intervenes)

COMMISSIONER GABRIEL: What privileged information?

ADV GWALA: That is the point, that is the point I have just  
10 addressed now Commissioner, to say if we are to, if we are to say an applicant for recusal must then in the affidavit write down and say he is conflicted, I have given him privileged information which is A, B, C, D, that then infringe on that privilege itself. It and the point I am making is, it would not be expected that such an applicant go to that extent, because for instance in the example I have made of the accused, that person is still going to be tried.

Now what is he going to say to court further if he comes to court and say, "Judge So-and-So, recuse yourself because I told you X, Y, Z?" We say it should not go to that extent, suffice to  
20 demonstrate that one has represented and two, that he was given a privileged information should also be inferred from the facts because there is no advocate who goes to court without having had a consultation. And when you get to consultation, we have all been practitioners including those who, who have retired, we have all been practitioners, we know what happens during consultation. You can...

(intervenes)

CHAIRPERSON: Yes.

ADV GWALA: You can take judicial notice of that.

CHAIRPERSON: But should we not be entitled to information with regard to the nature of the consultations that were heard, to be able to see that those consultations impinge on the Terms of Reference of this Commission?

ADV GWALA: But what we know, what we know from the facts is that, what we know from the facts is that the NPA had a policy, the  
10 policy was challenged, Adv Semenya was brought in to advice on that policy, he has given an advice on that policy. That you need to appeal, at least it appears clearly from the... (intervenes)

CHAIRPERSON: Yes.

ADV GWALA: From the... (intervenes)

CHAIRPERSON: As Commissioner Gabriel has just stated.

ADV GWALA: Yes, that... (intervenes)

CHAIRPERSON: Those are historical facts.

ADV GWALA: But, but his was not just to say appeal and making a –  
he was actually defending the very Prosecution Policy that is before  
20 you.

COMMISSIONER KGOMO: You see absent, what the Chair has said and what Commissioner Gabriel has said, would steer us towards the realm of speculation, would it not? Because the facts are not there, not in the memorandum, not in the historical facts. So where are we?

ADV GWALA: We are not in the realm of speculation, Justice

Kgomo. We cannot, we cannot be speculating. We even see what Adv Semenya argued in court, we see it, it is before us. It cannot be speculation.

CHAIRPERSON: What is before us is the judgment in the Nkadimeng matter.

ADV GWALA: Yes, in paragraphs 11 to 12 and 16 of that judgment, the judge tells us what, what submissions.

CHAIRPERSON: Yes, so are we, are we to confine ourselves to that or should we extend it to how you have suggested to us that we  
10 should extend to the memoranda that you have submitted?

ADV GWALA: All this must be taken together, all this must be looked at together. You have got to look at the, you have got to look, the memoranda is proof that there was a representation. Obviously the court, the court judgment proves that there was a representation, there was submission that were made. The memoranda's tell you that he even gave an advice that we should appeal.

CHAIRPERSON: Which advice was not taken up... (intervenes)

ADV GWALA: Ja... (intervenes)

CHAIRPERSON: By your client.

20 ADV GWALA: Yes, it does not matter. It does not matter. What matters is that he did give an advice. What matters is that he did appear in court and represented the NPA.

CHAIRPERSON: Yes.

ADV GWALA: That, that word did not action the advice, it is neither here nor there.

CHAIRPERSON: Yes.

ADV GWALA: For purposes of the time determining whether there could be a conflict of interest.

CHAIRPERSON: And then there was the issues that he gave an opinion to your clients and that opinion has not been discovered.

ADV GWALA: Ja we, we say so also in the – they say so also in the affidavit that they are looking for that. Remember Commissioner, Commissioners, this thing arose 17 years ago. It is not unreasonable to expect that some of the document may disappear, given the time  
10 lapse that has, that has occurred, but accept that for now we have not provided you with that opinion because it is not before you at the moment. We are hoping to, they were hoping to get it and they could not, but does that take away from the fact that Adv Semenya represented the NPA, he gave advice to the NPA? We submit it does not.

COMMISSIONER KGOMO: Yes and Mr Gwala, I see that the DoJ and the NPA were not in an adversarial situation or a conflictual situation and there is no suggestion from your side that because there is a conflictual situation, you are being prejudiced. That is not,  
20 that is not your case, that is not what is coming out. Am I right?

ADV GWALA: No, you are not right, sir. You are not right, Commissioner. That is the essence of this application.

COMMISSIONER KGOMO: Say, say again, sorry?

ADV GWALA: That is the essence of this application, that to have, to have Adv Semenya presenting evidence, is going to prejudice the,

the NPA. That is the essence of this application.

CHAIRPERSON: How will it prejudice?

ADV GWALA: He has got confidential information that was given to him during those consultations.

CHAIRPERSON: What, what confidential information is this? Why can it not be disclosed in your founding papers?

ADV GWALA: Well for the reasons that I have... (intervenes)

CHAIRPERSON: You are saying for the mere fact that he was briefed on an issue that related to the constitutionality of an amendment of a policy, he had confidential information?

ADV GWALA: What, what I, yes that is what I say but what we, what I say is that you will take, you may take a judicial notice yourselves that a counsel does not just go to court, he consults with the relevant people and he gets impacted with knowledge, not only the knowledge that you see in papers, there will be... For instance the rationale of the policy will have to be disclosed to him. It may, it may even have been negative for the NPA why they, they raised the policy, but... (intervenes)

CHAIRPERSON: Suppose it was not?

ADV GWALA: So if it was not, it was not, but what, what the NPA says is, we have given him confidential information.

CHAIRPERSON: Without disclosing the nature of the confidential information it has given him?

ADV GWALA: Justice Khampepe, I have made a submission as to why... (intervenes)

CHAIRPERSON: That is fine.

ADV GWALA: As to why one would not have to go to that extent.

CHAIRPERSON: That is fine.

ADV GWALA: Yes, but so I was saying central to this Inquiry then is that policy that we are debating, which Adv Semenya has, has advised on. Now the issues developed, the Calata Families, we can call it the Calata because it is a group of families but led by the Calata, they realised that Adv Semenya was a party or was representing the NPA in the, in court and they, they realised that they  
10 intend to place this policy as evidence of political interference and they say because Adv Semenya has this prior engagement with the NPA on this policy, he is likely to be conflicted.

Then they wrote to you, they requested that he be excused for that purposes. A ruling was made. I made no moment of the fact that we were not copied or it was not communicated with us for present purpose, for purposes of my argument. They wrote and raised this concern. The Chairperson considered the concern, consulted with Adv Semenya and then the Chairperson issued a directive. The directive was to the effect that he is not, he is going to  
20 be severed from participating in matters relating to the policy.

Now two things arise, or sorry before I say two things arise, we now know that subsequent to the objection by the NPA, by us so to say and after the last meeting, the last, after the 10 November when we were here, we know that Adv Semenya did consult with the former Acting NDPP on matters relating to the policy. Now I say two

things arise from this background, the first is this, there is already a public perception that the participation of Adv Semenya at least insofar as it relates to the Prosecution Policy Amendment, we will raise a public perception of bias. Why do I say this? I say this because the Calata Families saw it as such, so somebody else will see it as such, so there is a, there will be that public perception.

That is the first issue. The second issue is that the caveat or the protection that the Commission saw it necessary to put in place so that the public perception of bias is avoided, has shown that it is  
10 not workable, not workable in the sense that we now know that Adv Semenya consulted with the former NDPP on a matter relating to the policy which it was indicated or it was directed that he would not participate.

So just on those two aspect, the fact that someone already – Calatas are informed, they objectively, they are informed, they know the facts, they saw the potential of a public perception of biasness and I submit they meet the *SARFU* test. But we know that what was intended as a protection against that, is not workable, hence we have a record of Adv Semenya having consulted with a former NPA, an  
20 Acting NDPP. Chairperson and Commissioner... (intervenes)

COMMISSIONER KGOMO: Can I just enquire about this interview by Adv Semenya with Adv... (intervenes)

ADV GWALA: Misha. Sorry, Ramaite, Ramaite.

COMMISSIONER KGOMO: Sorry?

ADV GWALA: It is Adv Ramaite.

COMMISSIONER KGOMO: Yes. Supposing Advocate, let us say Adv Nalane or Adv Soni interviewed, would you have said anything different?

ADV GWALA: I do not, I do not think that should be the basis of the Inquiry, Justice Kgomo. The... (intervenes)

COMMISSIONER KGOMO: No, particularly that he, he would not be involved in the leading of evidence as regards the Calata Family Group, that that is a given.

ADV GWALA: Particularly the what?

10 COMMISSIONER KGOMO: Adv Semanya would not be... (intervenes)

ADV GWALA: Involved?

COMMISSIONER KGOMO: Involved in leading the evidence relating to the Calata... (intervenes)

ADV GWALA: No, no, no... (intervenes)

COMMISSIONER KGOMO: Group.

ADV GWALA: It is about the policy, Justice Kgomo, not, not the Calata Group, people. If the, the objection was that, the objection by the Calata Family was that you have been involved in representing  
20 the NPA in a matter that relates to this policy which we intend to put up as evidence to demonstrate that there was political interference. It was not so much... I think the objection about who leads evidence or not, is something else.

The direction that the Chairperson gave, it is on the subject that I am discussing, was in relation to whether Adv Semanya would

lead evidence insofar as it relates to the Prosecution Policy.

COMMISSIONER KGOMO: Okay.

ADV GWALA: Thank you, thank you, Justice. I am moving to the next point. The next point now relates to the test... (intervenes)

CHAIRPERSON: Having regard to your time that is left, having regarding to the time that is left Mr Gwala?

ADV GWALA: I do not know how much time I am left with Commissioner, but, but can I just make this point? The test is set out in *SARFU* and in the matter of *Masuku*. Chairperson, we have said in  
10 the Heads of Argument we accept that Adv Semenya is not the decision maker, the Commission is. Although he does make decisions in the process like who, which witness to call and so on, but we accept that point, ultimately he is not going to make a decision on the issue.

However, Adv Semenya controls the evidential record. Adv Semenya is part of the Commission. We, if I, if we, if we get to paragraph, I think it is paragraph 74, I hope I am right, paragraph 74 of their Heads of Argument, I hope I am... (intervenes)

CHAIRPERSON: Whose Heads of Argument?

20 ADV GWALA: Of the evidence leaders' Heads of Argument, but I will get to that. They even say he gives advice to the, to the Commission. But I will get to that, it is in my notes.

CHAIRPERSON: It starts at paragraph 73, the role of evidence leaders.

ADV GWALA: Yes, I think it is, it is paragraph 74 but, but

Commissioner... (intervenes)

CHAIRPERSON: And in paragraph 74. Paragraph 74, it deals with the issues identified by Mr De Beer.

ADV GWALA: Commissioner, what I am saying is in my notes, it is paragraph 74 of their Heads of Argument.

CHAIRPERSON: Yes?

ADV GWALA: Where they say one of his role is to provide legal advice... (intervenes)

CHAIRPERSON: Yes.

10 ADV GWALA: To the panel.

CHAIRPERSON: Yes, yes, it is so.

ADV GWALA: I think it is paragraph 74.

CHAIRPERSON: It is 74.

ADV GWALA: Thank you, thank you, Commissioner. So what, what we say Commissioner, is that he controls evidential record.

CHAIRPERSON: Mm.

20 ADV GWALA: He decide and determines what goes into the record, he structures the questioning of the witnesses. In this way he shapes the material that must form part of the record. His position as evidence leader is sufficiently linked or connected to the adjudicators. There, there is, there is not a far distance between, between evidence leaders in general and the Commissioners. He is appointed... (intervenes)

CHAIRPERSON: Is it not so that the evidence leaders do not make a recommendation with regard to the evidence that is presented before

the Commission?

ADV GWALA: Can, can I ask the Chairperson to repeat?

CHAIRPERSON: Is it not so that the evidence leaders do not make a recommendation with regard to the evidence that has been presented before the Commission?

ADV GWALA: That is the recommendation that will ultimately go to the President.

CHAIRPERSON: Yes.

ADV GWALA: But, but there is a process... (intervenes)

10 CHAIRPERSON: This is a role assigned to the Commissioners.

ADV GWALA: It is a process, it is a process, it starts with him. It starts with him by presenting that evidence, by giving advice on that evidence. The Commissioners will make a recommendation but he is part and parcel of the machinery that lead to the producing of that record.

COMMISSIONER GABRIEL: And Adv Gwala, what is the role of the Commissioners when it comes to the evidence? Do you see any role at all?

ADV GWALA: Of the Commissioners?

20 COMMISSIONER GABRIEL: Or are we just beholding to what the evidence leaders put before us?

ADV GWALA: No, no. I am not arguing a case that says you, the Commissioners have no role or have a passive role. The, the authorities in the *Amstel* case for instance, it is set out. You are not going to be passive. The point we are making is, in you not being

passive, there is a connection, a strong connection with you and the advocate and, and the evidence leaders. I am not suggesting that you are going to sit there and take everything that the evidence leaders are saying. That is not, that is not what I am saying.

CHAIRPERSON: Yes, as I understand your submission Mr Gwala, is that the *SARFU* case is on point.

ADV GWALA: I am going to submit especially when I am reading, I am dealing with their submissions that the test that rather should be applied is the *SARFU* test, not the test relating to the recusal of the  
10 prosecutors. And I am saying it for these reasons that I have just said, the evidence leaders are sufficiently closer to the adjudicators than the prosecutors are.

CHAIRPERSON: But not the ultimate decision maker.

ADV GWALA: That decision... (intervenes)

CHAIRPERSON: That is the problem that we have.

ADV GWALA: That decision, that decision is shaped and informed by the material that is presented to you by the evidence leaders. When you get to that stage of making the decision, you will have had acted even, even on their submission that they will even give legal advice to  
20 you. If they were not that material, they would not have been appointed at all. The Commissioner would, the Commission would just have seen how to deal with the matter, but I am saying, I am not saying it is redundant to appoint them. What I am saying is, I am demonstrating that they are an important part of the machinery that leads to the recommendations... (intervenes)

CHAIRPERSON: Yes.

ADV GWALA: That will be made at the end of the time.

CHAIRPERSON: Your time is up Mr Gwala, so if you would make your concluding submissions?

ADV GWALA: Can I, can I, can I quickly make the conclusions, Chairperson? I will, I will, I will be selective then because then because of, of the time and I say the Heads are already there. What they argue is that you should accept the test that applies to the prosecutors. For these reasons we say no, the case about the  
10    recusal of the prosecutors are not of assistance in this case. Prosecutors for instance do not give advice to the accused person, they do not even represent the accused person, but we know that Adv Semenya is going to give advice to you and we know that he gave advice to the, to the NPA.

Chairperson, they have in their, in their Heads of Argument quoted paragraph 79 of *SARFU* where, where they say the President of the... It was an application for the recusal of the President of the Court and the Court said the relationship between the State President and the President of the ConCourt had ended a long time ago and so  
20    on. We submit in that regard that the issue that was before the Constitutional Court, was not an issue where the President of the Constitutional Court would have given advice on, but the issue that is before you is an issue that Adv Semenya has given advice on. So that, that is not, is not of assistance.

COMMISSIONER KGOMO: But you are not suggesting that

evidence leaders could manipulate the evidence or suppress some evidence, not suggesting them?

ADV GWALA: I do not want, I do not want to go, we know their role.

We know their role but what, what we are saying is, you have got a person now who has on the very same policy, given advice on. He has got some information about that policy. He has been given, that is the case we are making, he has been given confidential information relating to, to that. We are not, we are not accusing Adv Semanya of intending or appearing as if he is going to suppress some evidence.

10 We are not there, we are on the facts and the facts are simply that he has represented the NPA and by virtue of that he is conflicted.

We are not accusing him of anything further than that. There is, there is something that I must leave though Commissioners, in paragraph 34 I will not go to all of these because of time, in paragraph 34 they say we do not set up, they say, I am paraphrasing it as well, "We do not set out precisely what role he played in the development of the policy". That is mischaracterisation of the issue, the issue is not about the role he played in the development of the policy, the issue is that he represented NPA in defending the  
20 constitutionality and legality of the process.

This is what he is contended for in the, in the founding affidavit of the NPA in paragraphs 18 to 29 and we remind the Commissioners that pleadings define the issues, so the issues are as defined in those...

CHAIRPERSON: Yes.

ADV GWALA: Lastly, lastly... (intervenes)

CHAIRPERSON: Please Mr Gwala, you are now on borrowed time and it would be unfair to other parties.

ADV GWALA: I will leave it there Commissioner, but can I just make this point? The argument about the lapse of time as 17 years ago and so on, is not the test. *SARFU* does not go to that extent, the test is... (intervenes)

CHAIRPERSON: Yes.

ADV GWALA: Is *SARFU*.

10 CHAIRPERSON: Thank you.

ADV GWALA: Thank you, thank you Commissioner.

CHAIRPERSON: Thank you, Mr Gwala. Mr Varney?

ADV VARNEY: As the Commission pleases. Chairperson, we will try to be as brief as we can. We would like to address the Commission on, on three matters, one, the role of the NPA in the recusal, secondly the, what we believe the test for recusal of an evidence leader ought to be, then lastly we would like to address the Commission on the question of the evidence leader, Semenya (SC).

20 Starting with the role of the NPA as the Chair and Commissioners can see from our affidavit and our submissions we, we are somewhat troubled about the conduct of the NPA in, in this particular matter. In the NPA's affidavit they admit that (indistinct) from September the position of Adv Semenya and the role that he had played in the (indistinct) matter, the challenge to the Prosecution Policy, to explain their inaction, Adv Mhaga in his affidavit says that

they were unaware of the extent and dept of the involvement of Adv Semenya in that matter, that only came to light apparently recently.

Our submission in that regard is that that is a contrived statement. As a matter of course, advocates representing parties involved in constitutional matters will be involved in providing advice. They will be involved in consultations, they will be involved in providing opinions and the like. And so far we have heard nothing from the (indistinct) to suggest that anything was out of the ordinary.

10 We have heard the suggestion this morning that there are confidential matters that they are not able to, to put up.

We doubt that there as such confidential matters. They might have been confidential back then, but we do not believe that there is any claim to confidentiality now and if there are such matters, they should have been put up and in fact truly confidential, then they could have been put up in an in camera affidavit and, and none of that has, has taken place. What is also concerning to us is that the allegation in relation to Adv Semenya with regard to his involvement in the challenge, is that he would be perceived to be biased against  
20 the families, given what the families argued in, in that case.

We are told by Adv Mhaga in his affidavit that the matter is only crystallised to, to use his phrase, when the issue about the Calata Group leading their own witnesses, came to light. That was on the 27 October and, and we are concerned with the timing because it suggests that the NPA was happy to live with the conflict

that they would have been aware of or the alleged conflict from September they admitted knowledge of Mr Semenya's position from September, but they are happy to live with that.

However, when – it emerged that the Calata Group had been given permission to lead their own witnesses and that of course is a, is an argument for a separate occasion and I do not want to go into the ins and outs of exactly who gave permission, but it was only them that the issue of the Prosecution Policy challenge and Semenya's representation of the NPA and the minister then became an issue and  
10 we, we suggest that this was an afterthought and that but for the leading issue, the NPA would have been happy to live with that alleged conflict in relation to the Prosecution Policy challenge.

Adv Mhaga also denies that the NPA is responsible for precipitating the collapse of three weeks of hearings and we, we point out that if the application for recusal was a serious one with real intent, then it should have been brought during September or October or at least some time before the first day of the first hearing. The law is clear that when you become aware of circumstances that warrant an application, you have got to bring it at that time and not simply on  
20 the very first day where the NPA sought, sought directions.

So from the perspective of the families, we believe that that conduct in fact did precipitate, the fact that they did not bring their application in good time that did precipitate the collapse of the hearings on the 10 November.

We now want to turn to what we phrase as the

mischaracterisation of the Prosecution Policy challenge and we regard this as equally serious. Now Adv Mhaga denies that in his affidavits he mischaracterised the, the Prosecution Policy. The Commission will recall that there are several paragraphs which we referred to.

In Mr Venter's affidavit as well as in our submissions, where Adv Mhaga appeared to be paraphrasing and at times quoting. It was said in the challenge to the Prosecution Policy, the 2007 challenge, and there it was, it was dressed up as a whole-scale attack on the  
10 grounds of political interference. In his replying affidavit, Adv Mhaga says no, no, no, it is, we were not referring to the 2007 challenge, we were referring to the founding affidavit of the Calata application brought earlier in 2025 as well as the stay application brought by the President later this year.

And yet when we look at Adv Mhaga's affidavit, nowhere does he even mention the Calata application or the stay, so it is difficult to, to take that claim seriously. But even if we were to accept the claim that Adv Mhaga was relying on the 2025 Calata application, and for example he says when he refers to the replying affidavit, he is  
20 actually referring to the answering affidavit in the stay which was heard just a few months back and yet if you go to the answering affidavit and the stay, the quote and Chairperson, I am now looking at paragraph 35 of our Heads that does not appear in the answer to the stay and in fact, the words "Prosecution Policy" do not even feature in that affidavit.

Assuming that he was referring to perhaps the founding affidavit of the Calata application and that application very serious allegations of political interference were put up and the Prosecution Policy was but one measure that we, that was pointed to by Lukhanyo Calata in that founding affidavit. Those allegations were not made in the 2007 challenge, you will not find the words "political interference" in that challenge, because at that time the applicants were not in possession of, of any evidence suggesting that there was political interference. It was simply a constitutional challenge as well as a  
10 challenge under the Promotion of Administrative Justice Act, PAJA.

And our problem is, is that we regard that as a misrepresentation because the NPA or at least Adv Mhaga is attempting to paint a picture of a hopelessly conflicted Semenya who at the time was disputing allegations of political interference when in fact none were made in 2007. And that Chairperson in our view, it probably was done inadvertently but, that that is mislead the Commission as to the state of mind of Mr Semenya back in 2007 when he was representing the NPA and the Minister of Justice.

We now turn to the, now the test to apply. We have learned  
20 from my learned friends who are arguing that this Commission should adopt the test laid out in *SARFU* and we are all aware that that applied to judges, judicial offices and decision makers. We have set out from page 10 from paragraph 46 in our Heads the test that we believe ought to be applied. We referred to *S v Zuma and Another*.

The citation is there, 2002, and, and we believe that the

position of a prosecutor is close to that of an evidence leader. Rather the position of an evidence leader is closer to that of a prosecutor than that of, of a judge. And we have quoted from *S v Zuma*, the test in respect of the apprehension of bias and the prosecutor is not that which applies to a judicial officer. The test of fundamental difference and it is not axiomatic that a perception of biasness against a prosecutor will lead to an accused not having a fair trial.

CHAIRPERSON: Mr Varney, what do you say to the submissions made by the applicants that with regard to a prosecutor, he does not  
10 give legal advice?

ADV VARNEY: Well... (intervenes)

CHAIRPERSON: Whereas in the position of the evidence leader, he gives legal advice to the Commissioners?

ADV VARNEY: Yes, an evidence leader will give legal advice to the Commissioners, a prosecutor in the course of his or her duties will make legal submissions to the court for the court's decision. We would suggest that the role of an evidence leader and a prosecutor, well different, are not so far apart as, as to be completely non analogous. So for example if we look at the Prosecution Policy under  
20 the heading of the role of a prosecutor and here I am referring to the main Prosecution Policy, not the amendments, it says:

"A member of the NPA must serve impartially and exercise, carry out or perform his or her powers and duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution

and law. They should not allow their judgment to be influenced by factors such as their personal views."

And then under the heading a trial process and related matters:

"Prosecutors must present the facts of a case to a court fairly. They must disclose information favourable to the defence even though it may be adverse to the prosecution case."

And of course there is a heightened duty when it comes to  
10 unrepresented accused. So we would suggest that there are similarities between the role of a prosecutor and the role of an evidence leader. They are required to act fairly and impartially, and we suggest that neither are decision makers, so that the test to be applied is rather that is set out in the matter of *Killian and Porritt*. And with the leave of the court we would like to deal with what the test is in *Porritt and Another v NDPP*, it is a 2015 (SCA) case.

The citations are at paragraph 51 of our Heads. There the SCA talks about why the judiciary is held to a higher standard, because they are decision makers. Prosecutors do not make a final  
20 decision on whether to acquit or convict, their role exclude any notion of winning or losing. It is to be efficiently performed with an ingrained sense of dignity and seriousness. And Chairperson, the SCA there relies on the Canadian Supreme Court case of *Boucher v The Queen* [1955] SCR 16.

So in that matter, Porritt suggested that the test in *SARFU*

was not the test to be followed but rather the test laid out in *Killian* that is *Director of Public Prosecution Western Cape v Killian*, 2008 1 SACR 247, also a SCA matter and I will just cut to the chase to say what the test *Killian* set out:

"The question remains whether the prosecutor's dual role in this case created a substantive unfairness *per se*."

And we would suggest that the test in this matter for an evidence leader should be similarly framed. It should be whether the  
10 role of Semenya and the Prosecution Policy challenge would result in substantive and unfairness in the ensuing Commission of Inquiry and certainly in *Perrott* and in other matters, in fact it did involve prosecutors who had been involved in litigation connected to the accused, because there was no allegations of improper conduct in that matter. The SCA found that there would be no substantive unfairness.

And again no impropriety has been levelled against Mr Semenya in that matter. It cannot be claimed that he has been dishonest, that he has misled the Commission or that he has, he has  
20 acted vindictively. In passing we note that both the NPA and the minister alleged that Semenya is biased because he has expressed or he has claimed to be having favouritism for the families because he was involved in, in the deliberations in relation to the leading of the Calata Group witnesses and at the same time he is biased against them because he was defending the Prosecution Policy challenge

and we suggest that there is an element of irrationality and logical inconsistency in that claim. How does one have a reasonable apprehension of bias if one was using the higher threshold in those circumstances? So we, we would urge this Honourable Commission to apply the, the *Killian* test as set out.

Then lastly let, let us turn to the question of Mr Semenya himself. We do not believe a case had been made out for his recusal on the basis of bias. We do not see him as being biased against or for any party in these proceedings. We believe he is more than  
10 capable of acting impartially and objectively and it is not for that reason that we suggest that he ought to be, he ought to stand down, so we, we do not agree with Mr Soni when he says that we are seeking his recusal. We are not seeking his recusal, we do not believe a case has been made out for his recusal at least on the basis of bias.

However, there are two reasons which give us pause. Firstly the Chairperson's ruling on the 19 July stated that other evidence  
leaders would deal with all deliberations in relation to aspects and matters arising from the Prosecution Policy Amendments and in  
20 engaging in the interview with Dr Silas Ramaite (SC), he was at material times a senior official in the NPA, he was also an Acting NDPP at relevant times.

Mr Semenya ought to have known that the Prosecution Policy Amendments would cropped up in that meeting and he therefore placed himself in breach of the Commission's decision

handed down on 19 July. Now we, we do not say this was an intentional breach, it was inadvertent but nonetheless, it does warrant have him stepping down because it is a serious matter. Secondly, we turn to be questioned of whether he is able to... (intervenes)

COMMISSIONER KGOMO: Stepping down, what does that... Sorry, stepping down, what does that mean?

ADV VARNEY: Well preferably we would urge Mr Semenya to act in the greater good and interest of the Commission by stepping down, but if he declines to do so, we are of the view that it is a decision that  
10 this Commission should take and require him to be, require him to stand down.

COMMISSIONER KGOMO: Yes?

ADV VARNEY: The other reason is equally important, perhaps even more important. If one looks at the role of an evidence leader, the role of an evidence leader is to put evidence before the Commission that is relevant to its mandate and such function ought to be efficiently performed. Now given that the Chairperson's ruling excludes Mr Semenya from all deliberations in relation to the Prosecution Policy Amendments and this includes interviewing and  
20 leading or cross-examining witnesses who are likely to deal with those amendments, that excludes him from interacting with many key witnesses, particularly those from the NPA who dealt with the policy amendments over those years and this really include some of the most key witnesses that the Commission has to hear from. So at a practical level it means he cannot participate in some of the most

important deliberations of, of the Commission and that is why Chairperson and Commissioners, we are of the respect view that the Commission should take the pragmatic decision of asking Mr Semenya to stand down or require him to stand down in the greater good of the Commission.

CHAIRPERSON: Yes. Mr Varney, you will recall that at the commencement of these proceedings, there was a point *in limine* that was raised by Mr Soni.

ADV VARNEY: Just remind me of that point, Chairperson?

10 CHAIRPERSON: With regard to the basis on which you are now making these submissions.

ADV VARNEY: Yes, yes, yes, let me deal with that.

CHAIRPERSON: Yes.

ADV VARNEY: Chairperson, we are a party to this Commission and we are entitled to be heard on these very important matters. We are told that these matters are not in the affidavit that we filed. In actual fact in the affidavit of one of our attorneys, Mr Venter, he pointed out in no uncertain terms that there had been a breach and that we regarded the interviewing of Mr Ramaite, knowing that he would deal  
20 with the Prosecution Policy as a breach of the Commission's decision, and so we are simply making submissions on those facts and one of our submissions is that for the efficient running of this Commission not because he is in our view bias, but for the efficient running of this Commission that he will be required to stand down.

CHAIRPERSON: And on what basis would the Commission have to

find your favour without any application having been made in regard to the issues you are now raising?

ADV VARNEY: Chairperson, the Commission does not need a formal application, this is not a court of law. The Commission is entitled to make decisions that are in the best interest of the Commission and to determine its own procedure and ways of reaching decisions, so the suggestion which we have heard from some of our learned friends that at every decision the Commission has to make, has to be on the basis of an application, the founding papers, answering papers, arguments and oral submissions. We suggest that that is simply not as what anticipated in typical Commission proceedings.

CHAIRPERSON: Yes, thank you, Mr Varney. Your time is up.

ADV VARNEY: As the Commission pleases.

CHAIRPERSON: Thank you. Mr Soni?

ADV SONI: Thank you Commission, learned Commissioners. Chairperson, you already have the Heads of Argument of the evidence leaders.

CHAIRPERSON: You are inaudible. Put the mic closer.

ADV SONI: Oh.

20 CHAIRPERSON: Pull it closer to you, Mr Varney, Mr Soni.

ADV SONI: Okay. Is this better, Chairperson? Is this better?

CHAIRPERSON: Yes.

ADV SONI: Okay. Chairperson, we have listened to, with great interest to the issues that have been raised both in the papers, in the Heads of Argument and the oral submissions made. We submit that

there are effectively four issues that the Commission should look at in making a decision on the application that Mr Semenya be recused, and the first issue is, what is the test that would apply to an evidence leader as opposed to a decision maker?

The second issue and perhaps it is an issue that I should deal with first is, whether or what are the issues that arose in the Nkadimeng matter and what are the implications of that for the Commission and in particular, is there an overlap between the issues that arose in the Nkadimeng matter and the issues that are likely to  
10 arise before the Commission?

The third issue is whether Mr Semenya, whatever the position is, was in possession firstly of information which therefore disqualifies them of information relating to some of the issues that might come up in this Commission and does that call disqualify him? And if it does not, was such information confidential?

And the fourth issue which perhaps I would just deal with very briefly is, does his agreement with Mr Varney, that Mr Varney's clients could be led by Mr Varney, justify a basis for recusal? And of course what I would also need to deal with very briefly Chairperson,  
20 is the submissions made by Mr Varney as to the approach the Commission should take to Mr Semenya's further participation in this Commission.

Now Chairperson, in the and I am going to deal with the Nkadimeng mater first, we deal with that at paragraphs 21 to 25 of our Heads, Chairperson. You would have heard Chairperson, both in

the papers, in the Heads of Argument and the submissions of our learned friends, what happened in the Nkadimeng matter. Chairperson, what we do know and what we know objectively, is what Legodi J said in his judgment.

That is what we submit should be the basis on which the Commission should look at what the Nkadimeng issue, what the issues were before that Court and effectively what the arguments were. The judgment is quite lengthy, it deals with facts. I will give just one example, Chairperson. It was submitted on behalf of the  
10 minister that Mr Semenya, one of the things he said in that Commission was that the amendments were instituted *bona fide*.

Now if you look at the judgment, you do not find that word, it is, there is the word *male fide* used in the judgment. Now the point I am trying to make Chairperson is, once one quotes what was said in the judgment out of context, it creates a different impression because the point I want to make and I think it is a point made by all the Commissioners, how does one decide precisely what were the issues before Mr Semenya, before Judge Legodi for one, and what is it that Mr Semenya said?

20 Now we know what Mr Semenya said from the judgment, because the judge records it and nobody has challenged that. We also know what the judge thought the issues were and the issues were very simple, is the, were the issues before him academic, did the change in policy require or trigger the constitutional violation? We know that the Court found in regard to the second issue, that that

is the position and he sets out his reasons for it.

Now what is it that goes beyond that that the judge captured that would be of a confidential nature which is what we are told would have been told in regards to Mr Semenya? But Chairperson, this is not a matter that we addressed in the Heads. I want to say that what we need to understand about the Nkadimeng matter is how it arose and that is only, that only emerged when one looks at paragraph 70 of the minister's submissions and she says what Mr Pikoli said in an affidavit I cannot remember in which application it was, but Mr Pikoli  
10 says in that affidavit which is quoted at paragraph 70 of the minister's submissions, that this Commissioner, I mean the amendments were passed by Parliament on the 1 December 2005 and the reason that is important Chairperson is, because the Nkadimeng case and that one gets from the case number, was only instituted in 2007.

Now that is when Mr Semenya's involvement with the NPA in regard to the Nkadimeng matter, would have taken place. Now at that time all the justification for the policy would have been before Parliament and Parliament would have decided what it is. What is it that Mr Semenya would know about the policy except at  
20 Commissioner Gabriel has pointed out, that it is public knowledge? All of that is public knowledge.

That is what Mr Semenya would have argued and we know Chairperson, that when one looks at whether, where there is a constitutional challenge for example to legislation to policy and so on, that is what one goes on, one goes on the text of the policy. The

policy itself is not a mystery because the policy is contained in Judge Legodi's judgment, the whole policy is set out, A, B and C of the policy. That policy tells you why it was necessary on the basis of what was said in the policy why the government found it necessary to change the NPA Policy.

So at the time that Mr Semenya entered the scene, the policy was already at least 18 months old. So we have the situation that it is unlikely, in fact it is impossible that Mr Semenya would have been told what the purpose of the policy was because the purpose of the policy Chairperson, we know this, comes from a reading of the text of the policy, unless there is further information. But Judge Legodi does not mention any of that information and that is what distinguishes what happened in the Nkadimeng matter with what is likely to happen in the Commission.

The Calata Group says now and I am not, I am not challenging what they say, and I say we now realise or we are now of the view that that policy was introduced for a different purpose and we think that that policy, those are the issues that we will bring to the Commission. So what is going to be brought before the Commission which was not brought before the Nkadimeng matter, Court, is people who formulated the policy and those who know why it was formulated, they are the ones who will come and give evidence. None of them appeared in the Nkadimeng matter, none of them deposed to affidavits of that matter and I say that confidently because that does not appear in the judgement of Legodi J.

Now what is it... (intervenes)

COMMISSIONER GABRIEL: Mr Soni.

ADV SONI: Sorry, ja?

COMMISSIONER GABRIEL: Would that also include evidence about the use to which the policy was put?

ADV SONI: Between the period that it was in, in place ja... (intervenes)

COMMISSIONER GABRIEL: No, I am talking about now sitting as a Commission, would that be the kinds of evidence that we would  
10 receive?

ADV SONI: If that is the evidence that is available, that would be the nature of the evidence, but in a – I want to also then address an issue that comes out Commissioner Gabriel, from your question, and that is in deciding what the purpose, I mean what, whether the policy was constitutional or not, it would not have been necessary to look at the intention or the motive for the policy. All that one looks at in the modern (indistinct) is what was the purpose of the policy, having regard to the text and the context within which it was introduced.

And so I must make this point, the issue of the  
20 constitutionality of the policy is *res judicata*. Chairperson and I said this and Commissioners, I say this with the greatest of respect, it will not be appropriate for this Commission to look into the constitutionality of the policy. The only issue that one would look at now, are matters seemingly raised by the Calata Group that they perhaps have information to say that the policy was introduced no

matter what it says was introduced for a different purpose than appears on the policy itself.

CHAIRPERSON: And that is the decision that the Commission will ultimately have to reach... (intervenes)

ADV SONI: Absolutely... (intervenes)

CHAIRPERSON: At the end of its, at the end of the presentation of evidence.

ADV SONI: And Chairperson, may I, may I put this in context? That is not the only issue that the Commission will look at. The NPA  
10 seems to say that is the central issue but that is not what the Terms of Reference say. The Terms of Reference are much, much wider. The Terms of Reference says is there any evidence that people interfered with or stopped police work from interfering, from investigating TRC complaints or as a TRC, I mean violations of human rights... (intervenes)

CHAIRPERSON: Yes, yes.

ADV SONI: Prior to 1994 and in addition, did if there were such investigations, were prosecutors discouraged from doing so? So it is much, much wider, it does not even – even if one did not have what  
20 the Calata Group is now saying, the Commission would still be dealing with those matters and we know there is evidence to this effect where prosecutors says we were told not to do this, we were told not to do that. So that is the nature of the evidence and it has, it is not central, the Nkadimeng case is not central to the Terms of Reference of the Commission. The Commission has much, much

wider references. In fact, I would be surprised if the Calata complaint occupied more than a small section of the Commission's work that will unfold in the coming months, Chairperson.

Then Chairperson, let me get to the second issue that which I indicated was the first issue. What is the test in regard to an evidence leader? Chairperson, we have said so in our Heads and we say so again, that we know as a fact what the test in itself is and I say it is a fact because that is a principle of our law, is the test set out in *SARFU*, would an objective reasonable person believe that the  
10 decision maker would not bring an independent mind to be on the decision that he or she would be making?

COMMISSIONER KGOMO: Do not swallow your words, Mr Soni.

ADV SONI: I beg your pardon?

COMMISSIONER KGOMO: I said do not swallow your words.

ADV SONI: I am so sorry, Commissioner. I say the *SARFU* test is essentially this, that would a reasonable person knowing all the facts, come to the conclusion, a reasonable conclusion that the decision maker will not bring an independent mind to bear on the decision he or she is required to make? That is the *SARFU* test. Now we know  
20 also that the Supreme Court of Appeal on two occasions has said that the *SARFU* test does not apply to the, to public prosecutors and it would be in a sense set in stone as well when it comes to questions of the removal or recusal of public prosecutors.

We say that is relevant for this reason, that there are similarities between the role of public prosecutors and of evidence

leaders. They both do not make decisions, they are in charge of leading evidence. We have set out quite extensively in our Heads what the role of an evidence leader is and we have also set out what the courts have said are the roles of decision, of prosecutors and we believe there is a great deal of similarity, but we accept and we make this point, we accept that it does not mean it needs to be, what the test needs to be applied in, in the same way as if, if we are dealing with the public prosecutor.

The... We submit it would not be necessary for this  
10 Commission to have a standard test that becomes the test for  
recusal. We said this on the basis of the decision in *Branco* where  
the Supreme Court of Appeal, it is a matter we have addressed in our  
Heads, where the Supreme Court of Appeal said that a tribunal or a  
court must be cautious about adopting a particular set of standards  
that would come back to haunt a different Commission or whatever it  
is.

And so what we say is, that what the Commission is required  
to do in deciding what the test in this matter is, is to look at the  
particular circumstances and say is there a way that Mr Semanya's  
20 continued participation in the work of the Commission is going to be  
unfair to the public, to any participant or to the Commission itself?  
And that is the decision that would have to be made. And we say in  
making that decision, one of the things that must be taken into  
account is the test cannot be as high as in regard to judicial office or  
decision making.

There is another reason why the test for prosecutors is an important yardstick. Prosecutors are not on the basis of the judgments in *Porritt* and *Killian*, prosecutors are not disqualified from participating in a case where they have participated in earlier proceedings against the same accused and both the *Porritt* and *Killian* cases, we know that there were hearings in which prosecutors had interrogated the persons involved.

Not the *Porritt* judgment talks about the dual role of the prosecutors in that case and says that did not disqualify them. The  
10 reason that is important is, that both the minister and the NPA says the fact that Mr Semenya represented them, the NPA and the minister in the Nkadimeng matter, is a justification for his being excluded. Now but with respect that cannot be true, it is because if the test of prosecutors is applied in regard to the dual role and prior knowledge.

In fact we submit that it may become unworkable for Commissions to say that somebody who has had some knowledge of this matter may be excluded as an evidence leader, because it would just create chaos, one needs to adopt a common sense approach to  
20 this. And the approach really is, what is it that would disqualify a person? We submit it cannot be prior knowledge of the case because there is no basis to saying that an evidence leader with prior knowledge would act in an unfair manner. And that is Mr Semenya's position... (intervenes)

COMMISSIONER KGOMO: So the common sense approach must

also be principle, must it not?

ADV SONI: Yes, yes, on the basis of what yardsticks would one use to disqualify a person. Let, let us say that exactly the same issues that arose in the Nkadimeng matter are going to arise here, maybe a basis to say well, there should be concerns about the participation and that is why I started off by saying there is very little in common, except the fact that the Nkadimeng case dealt with the Prosecution Policy on one issue, namely its constitutionality and this Commission would deal with that issue in regard to was there an ulterior motive to  
10 bring about that policy?

COMMISSIONER KGOMO: Ja.

ADV SONI: And we submit that at the end of the day if the test, the *SARFU* test is applied and some of the questions raised by the Commissioners brings this out and there is an interaction between evidence leaders and Commissioners which would happen in all Commissions, what would the positions of the Commissioners be, because they would also be privy to previous (indistinct)? And the...  
(intervenes)

COMMISSIONER GABRIEL: Can you pull the mic closer to you,  
20 please? Mr Soni, can you pull the mic closer to you?

ADV SONI: Oh, sorry, sorry.

COMMISSIONER GABRIEL: Okay.

ADV SONI: Perhaps I should get closer to the mic. The point I am trying to make is, can it be said that if the evidence leaders say something to the Commissioners during a meeting to decide on which

witnesses to call and so on, the Commissioners are, are thereby excluded? And so we submit that if one adopts a common sense approach, one looks at to the extent to which that knowledge is going to impact on the decision that is likely to be made, because the position of Commissions of Inquiry as was said by Justice Nugent in, and we quote this at paragraph 88 of our submissions, that while often called evidence leaders, that is a misnomer.

The process of a Commission of an Inquiry is inquisitorial, unlike that of a court. That means it must make its own Inquiry, seek  
10 out evidence itself and interrogate the veracity of evidence where that is required. Counsel appointed by the Commission, facilitates the performance of all those functions under the direction of the Commission. We submit that that properly sets out the roles of the different role players and at the same time, ensures that the decisions, that your decisions would in fact comply with the *SARFU* standard.

CHAIRPERSON: Mr Soni, we bring to your attention that your 30 minutes is about to expire.

ADV SONI: As My Lady please. There are two issues then that I  
20 should raise. The first issue is and it has been banded around all the time, Mr Semenya was subject to a conflict of interest, may I just say that in the *Wishart* judgment which is referred to in the Heads of Argument of either the minister or the NPA, the matter at paragraph 34, the position of what it means to be involved in a conflict of interest is set out and it says:

"Where the court's intervention is sought by a former client, however, the position is entirely different. The court's jurisdiction cannot be based on any conflict of interest, real or perceived, for there is none [that is the former client]. The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence."

10

And so the test is not the possession of prior information, but is it confidential? And that is what I started with on a count of this issue, that at the end of the day is there any evidence that there was confidential information? And one looks at what those two memos from the Acting... (intervenes)

CHAIRPERSON: You are (indistinct) time, Mr Soni.

ADV SONI: Can I just finish this part?

20 CHAIRPERSON: Yes, we are interested to hear you with regard to the issue raised as a preliminary issue.

ADV SONI: Oh, on (indistinct)? Yes, okay. Chairperson I, I accept Mr Varney's submission that they have an interest in this matter, but at the same time what they did, was when the matter came up and they filed their papers, they adopted the stance that they abide the

decision of the Commission. Now in their Heads of Argument, they say no, but we say that if Mr Semenya does not recuse himself, then he should be recused by the Commissioner. We submit or firstly we submit there can be no basis for that, but we submit it is unfair that Mr Semenya has not been given an opportunity to deal with this issue in an affidavit and the Commission does not know what Mr Semenya's stance on that is and has not heard his answer, and it would be unfair to make a ruling on that issue.

CHAIRPERSON: Thank you, Mr Soni. Ms Moroka, any reply?

10 ADV MOROKA: Yes, maybe short. Very shortly, Chair. Commissioner Gabriel has asked a question twice I think about, you have talked about the role of... You see, when I sit down I cannot talk.

CHAIRPERSON: Yes.

ADV MOROKA: About the role of, of the Commissioners and then I did refer her to the, the case of, the Arms deal case that sets out what, what the inquirers or the Commissioners' role would be to enquire, to test, to prod and poke. And I agree fully with Mr Soni in the case that he has just quoted about the Nugent judgment where it  
20 also sets out what that role is. And he underscores and emphasises what we also say about the role of evidence leaders, that they in a sense are the conduit through which you do your work. They lead the evidence, they test, they interview and therefore to say that, they are like prosecutors, we would again beg to differ because the role of a prosecutor is completely different. There is no way that a prosecutor

and a judge can have such a symbiotic relationship, it would be an, it would be highly unlawful and untenable. That is the only point I wish to make in that regard. Mr Soni also talks about the fact that if you have some knowledge or prior knowledge, that in a sense does not impact your, your ability to be fair and I would want us to return to their Heads, the evidence, I mean not the evidence, yes it is the evidence leaders, paragraph 44.3 of their Heads which is on page 91, where the evidence leaders say to this Commission:

10            "That unlike decision makers which evidence leaders are not and we agree they are not, they are not decision makers, there is no obligation on evidence leaders to bring an impartial mind to bear on the proceedings."

              We are horrified by such a submission, that an evidence leader would be im-... would be partial to one or other parties and then the only proviso is that they are fair. I mean fairness and impartiality we would submit, go hand in hand and it is a very odd submission from the evidence leaders who are supposed to work under the direction of the Commission to say we do not need to be impartial, we can be as partial as we, as we please. I think that  
20            statement tells you why we are worried about the impartiality of one evidence leader.

              And again we wish to emphasise that we have not said that Mr Semenya has done anything wrong, except with the, with the connection, well the discussion with Mr Varney. Other than that we, we make no submissions about his conduct. The only submission is

that it is an apprehension of bias that we are concerned with. The questioning of Mr Gwala by Commissioner Kgomo and I cannot remember who else, talked about prejudice. Our submission is that the test is not about prejudice, the test is about apprehension of bias. If there is an apprehension of bias but from previous conduct... (intervenes)

COMMISSIONER KGOMO: Apprehension of bias or reasonable apprehension?

ADV MOROKA: Reasonable apprehension, thank you, I am indebted to you. I nearly said to you (indistinct) but I am saying it is an apprehension and it is a reasonable apprehension and the standard is an objective one, that a reasonable person would hold that this person by the conduct or his former conduct, there would be an apprehension of bias. So and the Inquiry, all I was saying is that the Inquiry is not about prejudice to, to the question that was asked about Mr, to Mr Gwala.

But having said that, if I may again talk to conflict of interest, that Mr Semanya is a practitioner who is, who is obligated, obligated by, by the code of, his code of conduct by the Legal, by the Legal Practice Council, but he, he has himself not, not to make himself open to the, to the, to any conflict, that where is, where there is an apprehension he must then ask himself that question and as Mr Varney would say, step down. We are not sure what step down means, but it is a question where he asks himself should I step down because of a reasonable apprehension that might be held by any

party to the Commission?

Lastly if I may, the question that arises about the policy and the fact that this is historic, the letter that was written by, by the 18 September letter, if I may just rush to that letter, it talks about the concern that the applicants have. It says, that letter says at paginated 62 of which bundle, of bundle D. Is this bundle A? Oh my apologies, it is bundle A and it is page 62 at para 5 and 6:

10 "Our clients intend to put up the amendments to the Prosecution Policy as a key example of how the South African Government sought to intervene and block the bulk of the TRC cases from proceeding."

They tell you today that they do not agree with the, the applicants as it were, this is Mr Varney, they do not agree, but at paragraph 6 they themselves say:

"In order to avoid any public perception of partiality or conflict, we respectfully submit Mr Semanya should not be involved."

20 I was asked at a point in time, not today, whether I am blowing hot or cold. I would submit this is blowing hot and cold, because in one, in one sense they are saying that in order to avoid public perception or perception of partiality or conflict, which is what we are claiming they today say they do not agree with us when we say to avoid this, Mr Semanya must recuse himself.

So in, inclusion really it is not about whether Mr Semanya had confidential information that he shared with the Minister of

Justice, it is about the fact that in terms of the very definition of conflict of interest, Mr Semenya represented the minister in two separate occasions, represented the Ministers of Justice who were then in Office in two separate occasions and therefore we are of the view that he is conflicted or there is an apprehension of conflict and he must be recused.

CHAIRPERSON: Thank you, Ms Moroka. Mr Gwala?

ADV GWALA: Thank you Chairperson and members of the Commission. Just one point to make, may I take you to page 94  
10 of...? May I take you to the Heads of Arguments of the evidence leaders? They summarise what I want to say and I take paragraph 49, it is page 94 of the bundle, paragraph 49. It is a reference to *SARFU* case. If the Commissioners are on that page, the quotation is paragraph 79 of that judgment. Just below the bolded part where they say, "There have been countless cases in our history where judges have adjudicated dispute in which party has been a client prior to their appointment", that is appointment as a judge, then the judges say, the Court says:

20 "Of course where judges in their former capacity as advocates either advised or acquired personal knowledge relevant to the case before the Court, it would not be proper for them to sit in such a matter."

We say Adv Semenya has advised the NPA. At least that one is, is there. On the lower test the, the common sense test as Justice Kgomo puts it, if it, if we do not apply, well I would accept that

but if we do not apply the *SARFU* test, then it means the test is much lower, anybody can come and say because Adv Semenya represented and advised NPA and the Department of Justice, therefore he should have, he should have been recused, but we, we say the, we still say the test to apply, it is better that the *SARFU* test or yardstick sets a better standard than opening it for everyone, but if that is the case, it is even worse.

Lastly, the counsel for the Calata Families was dealing with what he calls a misquotation which ultimately leads to misleading of the papers and the Commissioners will remember that argument. I do not need to deal with that, I just want to give the Commissioners the references in the replying affidavit where that aspect is dealt with. It is... (intervenes)

CHAIRPERSON: We have read the replying.

ADV GWALA: Thank you.

CHAIRPERSON: The replying affidavit.

ADV GWALA: Thank you, thank you, Commissioners. That would be all.

CHAIRPERSON: Thank you, Mr Gwala. Are you fine?

20 COMMISSIONER KGOMO: Yes, I am.

CHAIRPERSON: That concludes the proceedings?

COMMISSIONER KGOMO: Ja.

CHAIRPERSON: These proceedings stand adjourned for the day, the ruling is reserved.

INQUIRY ADJOURNS

INQUIRY RESUMES

COMMISSIONER KGOMO: Silence, sorry.

CHAIRPERSON: Where is Ms Moroka? Okay, call her.

COMMISSIONER KGOMO: Housekeeping.

COMMISSIONER GABRIEL: I think the housekeeping (indistinct).

CHAIRPERSON: Yes. Ms Moroka and Mr Gwala, yes.

COMMISSIONER GABRIEL: Okay.

CHAIRPERSON: Mr Gwala is missing.

COMMISSIONER KGOMO: But his, his junior is here.

10 CHAIRPERSON: His junior is here?

COMMISSIONER KGOMO: Mm.

CHAIRPERSON: It is not?

COMMISSIONER KGOMO: Oh, okay sorry.

MS RANTHO: Chair, I am for the SAPS.

CHAIRPERSON: Okay, do we know where Mr Gwala is?

FEMALE SPEAKER: He (indistinct) left, Chair.

CHAIRPERSON: Okay. Sorry about that, I forgot some housekeeping announcement to make. I want to make enquiries from counsel whether they would be available to argue the objection tomorrow. May I just make enquiries? Ms Moroka? Yes?

MS RANTHO: Chair, (indistinct) is on record (indistinct).

CHAIRPERSON: Pardon, just speak a... (intervenes)

MS RANTHO: Chair, I will check with my (indistinct).

CHAIRPERSON: Oh, okay.

MS RANTHO: You see, for me I am not available, it is not

(indistinct)... (intervenes)

CHAIRPERSON: You are not available... (intervenes)

MS RANTHO: To argue it, yes.

CHAIRPERSON: Yes. Mr Varney?

ADV VARNEY: We are available, Chair.

CHAIRPERSON: Ms Moroka?

ADV MOROKA: We are available Chair, and if I could have a word with my, my junior here because at the point in time I was representing both the police and justice, so it might just be that I will if

10 her leader is not available... (intervenes)

CHAIRPERSON: Yes.

ADV MOROKA: So that I can, thank you.

CHAIRPERSON: Yes.

ADV VARNEY: I will be available, Commissioner.

CHAIRPERSON: Mr Varney. Mr Soni or Mr Nalane?

ADV NALANE: Yes, I will be available.

ADV SOKHELA: Commissioner, on behalf of President Mbeki, I am not sure if it is audible?

CHAIRPERSON: Yes.

20 ADV SOKHELA: On behalf of President Mbeki and the Executive, I have just asked my leaders their availability, I am waiting to hear from them but one of them is not available... (intervenes)

CHAIRPERSON: Okay.

ADV SOKHELA: I am waiting for Mr Ngwako (SC), Maenetje (SC) to, to inform me.

CHAIRPERSON: You are waiting for?

ADV SOKHELA: Adv Ngwako Maenetje (SC) to provide a view of his availability.

CHAIRPERSON: Okay. Should we take a short adjournment then?

ADV SOKHELA: Yes, please.

CHAIRPERSON: Of how, how many minutes?

ADV SOKHELA: If he is in court now, I assume he will be available in about five minutes. I will give him a call, I would say maybe 10 minutes for me to get back.

10 CHAIRPERSON: We take a 10-minute adjournment.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Yes, madam?

ADV SOKHELA: Thank you, Commissioner. My, I have spoken with my leader, Adv Maenetje, and Ms Muvangua. They are both in a Special Motions Court tomorrow. It might spill over to Friday, but one of them can avail themselves for Friday if that is the date that we consider... (intervenes)

CHAIRPERSON: On Friday?

20 ADV SOKHELA: Yes.

CHAIRPERSON: Friday?

ADV SOKHELA: Yes.

CHAIRPERSON: Okay. Yes?

MS RANTHO: Chairperson, from the SAPS side, tomorrow again is a challenge similar to... (intervenes)

CHAIRPERSON: You have a similar challenge?

MS RANTHO: The same, we are in the same matter tomorrow.

CHAIRPERSON: Okay.

MS RANTHO: But Friday we are also flexible because I can avail myself.

CHAIRPERSON: So you can be available on Friday?

MS RANTHO: If it has to be on Friday, yes.

CHAIRPERSON: So shall we agree then that the objection will be argued on Friday at 10:00? Ms Moroka?

10 ADV MOROKA: The old lady is available, Chair.

CHAIRPERSON: You are available? Okay. Mr Varney?

ADV VARNEY: We are also available, Chair.

CHAIRPERSON: Okay. Mr Gwala?

ADV GWALA: I will make myself available, Chair.

CHAIRPERSON: You are available. Mr Nalane?

ADV NALANE: We will make ourselves available.

CHAIRPERSON: Okay. Okay fine, thank you very much for your patience, we are adjourned.

[End of recording]

20 INQUIRY ADJOURNS TO 28 NOVEMBER 2025

## CERTIFICATE OF VERACITY

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

**JUDICIAL COMMISSION OF INQUIRY INTO TRC  
DAY 2  
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**MzansiSA Business Solutions**  
**Arbour Square**  
**Cnr Melle & Juta Street**  
**Ground Floor, Office 3**  
**Braamfontein, 2001**  
**TEL: 011 339 1289**  
**E-mail: transcription@mzansisa.com**  
**E-mail: mzansisa3@telkomsa.net**