REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: YES

30 March 2026
DATE SIGNATURE

Case Number: 2026-026936

In the matter between:

JACOB GEDLEYIHLEKISA ZUMA	First Applicant
THABO MVUYELWA MBEKI	Second Applicant

and

THE CHAIRPERSON OF THE COMMISSION: COMMISSIONER SISI KHAMPEPE	First Respondent
SECRETARY OF THE COMMISSION	Second Respondent
ADVOCATE ISHMAEL SEMENYA SC	Third Respondent
COMMISSIONER FRANS KGOMO	Fourth Respondent
CALATA GROUP	Sixth Respondent
NATIONAL PROSECUTING AUTHORITY	Eighth Respondent

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT Ninth Respondent

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA Tenth Respondent

This Judgment is handed down electronically by circulation to the parties by email, and by publication on Court Online. The date for the handing down is deemed to be 30 March 2026.

JUDGMENT

MUDAU ADJP (BAQWA J CONCURRING, AND MODIBA J DISSENTING IN A SEPARATE JUDGMENT)[1]

Introduction

[1] The applicants, Mr Jacob Gedleyihlekisa Zuma and Mr Thabo Mvuyelwa Mbeki, have approached this Court on an urgent basis. They seek a range of relief against the first respondent, Commissioner Sisi Khampepe, who, as the President's appointee, serves as the Chairperson of a Commission of Inquiry investigating allegations of political interference in the prosecution of Truth and Reconciliation Commission (TRC) cases. The relief includes a declaration that her dismissal of the first applicant's recusal application is unconstitutional and invalid, a review and setting aside of that decision, and an order for her removal as Chairperson of the Commission. By consent of the parties, Mr Mbeki, previously the seventh respondent, was joined as the second applicant during the proceedings.

[2] The application is opposed by the first to sixth respondents (the Commission and Calata Group respondents). Before the merits can be considered, they

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[1] Ordinarily, the main and minority judgments are released simultaneously. The main judgment is released in the interest of the parties. The minority judgment has no impact on the substantive outcome.

nullity and that this Court lacks the competence to entertain the application. This is because they contend that the applicants have failed to comply with the peremptory provisions of section 47 of the Superior Courts Act 10 of 2013 (Superior Courts Act).

[3] At the outset of the hearing, the applicants sought a ruling in relation to an interlocutory application brought to compel the production of certain documents which were alleged to be missing from the review record. After the argument, the court made a ruling and indicated that it would provide reasons for this in its main judgment. It is to these reasons that I now turn.

The Interlocutory Application to Compel Compliance with Rule 53(1)(b)

[4] It is necessary to set out the procedural history of the interlocutory application foreshadowed in the applicants' notice. On 19 February 2026, the first applicant delivered a notice of interlocutory application seeking to compel the first to fifth respondents to comply with Rule 53(1)(b) of the Uniform Rules of Court. The relief sought included an order compelling the respondents to add to the record:

(a) the alleged email exchanges between the evidence leader(s) referred to in the founding affidavit in the recusal application;

(b) the correspondence from the NPA and/or Department of Justice notifying the Commission of the intention to institute the recusal application;

(c) the email allegedly sent by the Chairperson to Adv Semenya SC on 5 November 2025, dealing with the issues raised in the recusal application;

(d) copies of any research conducted by the Commissioners and passed on to the Evidence Leaders before the arguing of the recusal application;

(e) transcripts or copies of the WhatsApp messages between the Chairperson and the Chief Evidence Leader; and

(f) all other outstanding documents and/or reasons which shed light on the impugned decision and/or alleged misconduct of the first respondent.

[5] This interlocutory application was argued together with the main application at the hearing. The Court was requested to rule on it as a preliminary matter, given its potential bearing on the sufficiency of the record and the applicants' ability to prosecute their case. However, after hearing the argument, the Court concluded that the interlocutory application could not be decided in isolation. The ruling was reserved to be delivered with the main judgment. The reason for this approach is that the interlocutory application is inextricably linked to the merits of the main application. The documents sought relate directly to the applicants' allegations of actual bias and misconduct on the part of the first respondent. To rule on the interlocutory application without determining the threshold question of whether the main application is properly before the Court would be procedurally unsound. If the main application were to be dismissed on jurisdictional or other preliminary grounds, the interlocutory application would become moot.

[6] As will become apparent from the discussion that follows, the Court has upheld the jurisdictional point raised by the first to sixth respondents. The main application is a nullity. It follows that the interlocutory application to compel compliance with Rule 53(1)(b) falls away. There is no competent main application in respect of which further discovery or record supplementation can be ordered. Accordingly, no ruling on the merits of the interlocutory application is necessary or competent. The ruling reserved on that application is hereby discharged, and the application to compel is dismissed as moot.

[7] Before proceeding with an analysis of the jurisdictional point raised by the first to sixth respondents, it is prudent to place the first respondent's role within its proper constitutional and legal context and to address the unique position adopted by the tenth respondent, President Ramaphosa. I do so in turn.

The Nature of the Commission and the First Respondent's Status

[8] The Commission, over which Justice Khampepe presides, was established by the President of the Republic of South Africa, the tenth respondent, President Cyril Matamela Ramaphosa, in terms of section 84(2)(f) of the Constitution, read with section 1 of the Commissions Act 8 of 1947, on 29 May 2025. Its mandate, as defined in its Terms of Reference, is to investigate whether there was political interference in the prosecution of apartheid-era cases, particularly those arising from the TRC process, during a specified period.

[9] The first respondent is cited in the founding affidavit as "Commissioner Sisi Khampepe, who is a retired Judge and former Constitutional Court Justice". The applicant expressly states that she is cited "in her non-judicial capacity as the Chairperson of a Commission of Inquiry". This distinction lies at the heart of the dispute regarding section 47. However, it is noteworthy that in her confirmatory affidavit attached to the answering papers, the first respondent herself states: "I depose to this affidavit in my capacity as the Chairperson of (the Commission), as appointed by the President of the Republic of South Africa, President Cyril Ramaphosa." She does not disavow her status as a retired judge; rather, she acts in that capacity while performing the functions of Chairperson.

The Tenth Respondent's Intervention

[10] President Ramaphosa has filed an explanatory affidavit and comprehensive heads of argument, and the National Prosecuting Authority (NPA), the eighth respondent, has likewise done so. Critically, the President does not oppose the relief sought by the applicants. His note is not one of opposition, but of explanation and, in certain respects, support for the concerns underlying the recusal application.

[11] In his explanatory affidavit, the President confirms that he established the Commission and appointed Justice Khampepe. He considered her a suitable appointment because he wanted a judge to chair the Commission, and she was a former Justice of the Constitutional Court. However, he deposes that at the time of her appointment, he was unaware of her alleged prior involvement with

the TRC and the NPA, as well as the allegations which are the subject matter of the recusal application in the Commission proceedings. He states, in no uncertain terms:

> "Had I been aware of these allegations at the time that I appointed Justice Khampepe as Chair of the Commission, I would not have appointed her. That is because I would have sought to avoid potential public criticism of the Commission, or the inquiry, or a review attack on the appointment of Justice Khampepe as Chair, arising out of those allegations."

[12] The President further states that he requested that the Minister of Justice, the ninth respondent, approach Justice Khampepe to consider standing down as Chair, considering the controversy and the damage to the Commission's public image. He informs the Court that she declined to step down. He concludes by stating unequivocally: "I have no objection to the Court ordering the removal of the Chairperson."

[13] In his heads of argument, counsel for the President submits that it is proper for him not to oppose the relief because his exercise of executive power is complete and that the Court best adjudicates the disputed allegations. It is also submitted that his filing of an explanatory affidavit is "proper and commendable" as it assists the Court. The President abides by the decision of the Court.

[14] The President's intervention is significant in several respects. It provides context to the public importance of the matter and confirms that the highest office in the land has serious concerns about the first respondent's position. However, the jurisdictional point raised by the Commission respondents is dispositive of the matter. The President abides the decision of this Court. He does not, and cannot, waive the statutory requirement of section 47. The question of whether this Court has jurisdiction to hear the matter must be decided on the law, not on the stance of any party. The President's intervention will, however, be considered in the context of the appropriate order for costs.

Discussion of the jurisdictional point raised by the first to sixth respondents

[15] Section 47(1) of the Superior Courts Act,[2] provides:

> "Except for an application made in terms of the Domestic Violence Act, 1998 (Act 116 of 1998), no civil proceedings by way of summons or notice of motion may be instituted against any judge of a Superior Court, and no subpoena in respect of civil proceedings may be served on any judge of a Superior Court, except with the consent of the head of that court or, in the case of a head of court or the Chief Justice, with the consent of the Chief Justice or the President of the Supreme Court of Appeal, as the case may be."

[16] The Commission respondents submit that the first respondent, Justice Khampepe, is a retired judge of the Constitutional Court, a fact which is not in dispute. They argue that section 47 applies with equal force to retired judges who continue to perform judicial or public service, such as chairing a commission of inquiry. It is common cause that the applicants did not seek or obtain the consent of the Chief Justice, as the head of the Constitutional Court, before instituting these proceedings against the Chairperson. The central question for determination at this preliminary stage is whether this failure is fatal to the application.

The Applicable Legal Principles and Binding Precedent

[17] Section 47 of the Superior Courts Act is the successor to section 25 of the now-repealed Supreme Court Act 59 of 1959. Its main purpose is to protect the independence of the judiciary in a modern constitutional democracy based on a separation of powers and the rule of law. Section 165 of the Constitution is the cornerstone of this protection, providing:

> "(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

[2] Act 10 of 2013.

> (3) No person or organ of state may interfere with the functioning of the courts.
>
> (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts."

[18] These constitutional imperatives are reinforced by international instruments such as the Bangalore Principles of Judicial Conduct, which this Court may have regard to in interpreting the scope of judicial protection. The Preamble to the Bangalore Principles states that they are intended to:

> "provide a framework for regulating judicial conduct [and] also to assist members of the executive and the legislature, and lawyers and the public in general, to better understand and support the judiciary."

[19] This provision is of particular relevance here. It underscores that the protection of the judiciary is a shared responsibility, extending beyond the judges themselves to all branches of government and society. The President's conduct in filing an explanatory affidavit to assist the Court, rather than opposing the relief, and in seeking to avoid public criticism of the Commission, is entirely consistent with this principle of supporting the judiciary. Value 1 of the Bangalore Principles, dealing with Independence, further provides in clause 1.6:

> "A judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary which is fundamental to the maintenance of judicial independence."

[20] These principles underscore that the maintenance of judicial independence requires both that judges act with propriety and that other branches of government and the public support the judiciary. Section 47 is a legislative mechanism that gives effect to this duty of support. It ensures that judges are not drawn into costly, distracting, and unwarranted personal litigation arising from the discharge of their official duties, thereby reinforcing public confidence in the judiciary. Section 47 provides an important control mechanism to ensure that abusive proceedings are not brought against judges and that the dignity of

the judiciary, which is the primary force behind the legitimate judicial power, is at all times preserved. The rule of law is promoted by upholding the dignity of courts, as the courts have no army or police force at their disposal to execute court orders.[3]

[21] Section 47 (1) is clear and precise in relation to which proceedings it applies and those to which it does not apply. The proceedings in respect of which it does not apply are identifiable with precision at the commencement of the section. These are: "an application made in terms of the Domestic Violence Act, 1998 (Act 116 of 1998)". No other proceedings are specified. The express exclusion of a particular type of proceedings by the Legislature clearly indicates the narrow scope of application of the provision, with express reference to the proceedings that would otherwise be covered. The provision is broad in its reach. Section 47 (1) applies to "civil proceedings by way of summons or notice of motion instituted against any judge of a superior court". There is no denying that these are civil proceedings brought by notice of motion in terms of Rule 53 of the Uniform Rules of Court. In the first applicant's founding affidavit, the first respondent is described as Commissioner Sisi Khampepe, a retired Judge and former Constitutional Court Justice.

[22] It is trite that the interpretation of legislation must be faithful to the text, notwithstanding that the text is to be interpreted in context and with due regard to its purpose[4]. The adoption of an interpretation by a court that is not sustainable on the text "is to cross the divide between interpretation and legislation"[5]. To do so would be a classic example of breaching the separation of powers between the legislature and the judiciary.

[23] The ambit of section 47(1) has been addressed on various occasions in our Courts, specifically in this Division. In *Soller v President of the Republic of South Africa and Others*[6], Ngoepe JP firmly rejected the contention that section 25 of the Supreme Court Act (the precursor to section 47(1)) vitiated a

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[3] *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 CC, para 33.
[4] *Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* (CCT 77/08) [2009] ZACC 11; 2010 (2) SA 181 (CC) ;2009 (10) BCLR 978 (CC) (7 May 2009) at para 21
[5] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) ([2012] 2 All SA 262; [2012] ZASCA 13) at para 18.
[6] 2005 (3) SA 567 (T).

complainant's right of access to court under section 34 of the Constitution. He held that the consent requirement is not an obstacle to meritorious claims, as a preliminary investigation would be conducted and leave granted if a prima facie case is shown.

[24] In *Engelbrecht v Khumalo*[7] Mlambo JP provided a comprehensive exposition of section 47(1). He held that the provision applies to civil proceedings intended to be instituted against a judge in the judge's personal and/or judicial capacities, and that it has been interpreted expansively to also cover actions arising from their personal interactions.[8] Critically, he described section 47(1) as playing a "gatekeeping function" that does not provide a complete bar against the institution of legal proceedings against judges but rather ensures that only meritorious claims proceed.[9]

[25] In *Freedom Under Law v Judge Motata*[10] (*FUL*), Mlambo JP delivered a seminal judgment on the reach of section 47 to retired judges. He held that section 47(1) does not distinguish between active and retired judges. Importantly, he engaged with the statutory definition of judicial service in section 1 of the Judges' Remuneration and Conditions of Employment Act 47 of 2001, which defines "service" to include "service as a chairperson or a member of a commission as contemplated in the Commissions Act, 1947". The *FUL* judgment also held unequivocally that "[r]eview proceedings are civil proceedings and that is the only interpretation that applies."[11]

[26] The *FUL* judgment also articulated the purpose served by section 47 in a manner that resonates with the Bangalore Principles:

> "In essence the section seeks to insulate judges from unwarranted and ill-conceived legal proceedings aimed at them. The need to protect judges from unwarranted litigation is not difficult to fathom. The core function of Judges is the adjudication of disputes involving competing interests daily. The judgements they hand down as well as

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[7] 2016 (4) SA 564 (GP).
[8] *Id* at para 5.
[9] *Id* at para 3.
[10] [2021] ZAGPPHC 14 (28 January 2021).
[11] *Id* at para 32.

> the statements they make in their judgements invariably displease some litigants and sometimes their legal representatives. It is integral to the adjudication function of Judges that they should be free from any fear of repercussions for doing their work. It is necessary therefore that Judges be protected from the ever present threat of legal proceedings directed at them arising from the execution of their official responsibilities. This is necessary to ensure that they adjudicate disputes unhindered and that they do so 'without fear, favour or prejudice'."

[27] In *Amalgamated Lawyers Association v Judicial Service Commission and Others*[12], Sutherland DJP held that a review application, in the context of section 47(1), instituted without the requisite consent is "ipso facto invalid" and that there is no room for condonation.[13] The combined effect of these authorities - *Soller*, *Engelbrecht*, *FUL,* and *Amalgamated Lawyers Association* - establishes a clear and consistent line of precedent within the Gauteng Division. The principles derived from these cases are:

(a) Section 47 applies to all civil proceedings, including review applications;

(b) It applies to judges in both their judicial and personal capacities;

(c) It applies equally to retired judges who continue to perform judicial service;

(d) The definition of "service" includes chairing a commission of inquiry;

(e) The consent requirement is a jurisdictional prerequisite; non-compliance renders proceedings void *ab initio*; and

(f) There is no room for condonation for failure to obtain prior consent.

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[12] [2023] ZAGPJHC 1312.
[13] *Id* at para 4.

The Mantashe Judgment

[28] The most recent and directly applicable authority is the judgment of Dippenaar J in *Mantashe v Justice Raymond Zondo N.O and Another*[14]. That case concerned a review application brought against former Chief Justice Zondo in his capacity as Chairperson of the State Capture Commission. The applicant in that matter, like the applicants here, argued that section 47 consent was not required because Justice Zondo was cited in his capacity as Chairperson of the Commission and not as a judge.

[29] Dippenaar J comprehensively rejected that argument. She held:

> "I conclude that Justice Zondo, acting as the Chairperson of the Commission, was thus performing a judicial function. Even if a distinction were to be drawn in s 47(1) between judicial and non-judicial functions, which the provision does not do and which the authorities do not support, the chairing of a commission of enquiry falls squarely within what are ordinarily and legally considered to be judicial functions. Consent under s 47(1) of the Act was thus required."[15]

[30] The *Mantashe* judgment engaged extensively with the statutory definition of service in the Judges' Remuneration Act,[16] which explicitly includes service as a chairperson or member of a commission. The court held that this definition demonstrates that when a judge serves as a commissioner, he or she is performing a judicial function for which he or she is remunerated as a judge.

[31] Most pertinently, Dippenaar J also addressed the consequences of non-compliance:

> "Proceedings cannot be saved absent consent prior to commencement of the proceedings. Several decisions of the courts have come to the conclusion that such proceedings are irregular...

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[14] (Case No. 007263/2022) 12 October 2025.
[15] *Id* at para 46.
[16] Judges Remuneration and Conditions of Employment Act 47 of 2001

There is no room for condonation and therefore no room for latitude. The proceedings are void ab initio."[17]

The Memela Judgment and the Doctrine of Precedent

[32] The applicants rely on the judgment in *Memela v Chairperson of the State Capture Commission of Inquiry and Others*[18], where a court in the Gauteng Division, Pretoria, held that the chairperson of the State Capture Commission was not contemplated in section 47(1) and that consent was therefore not required.

[33] This Court is duty-bound to consider whether to follow *Memela*. The doctrine of *stare decisis* is fundamental to the rule of law. A court may depart from precedent only if the earlier decision is clearly wrong, arrived at on some fundamental departure from principle, or a manifest oversight or misunderstanding amounting to a palpable mistake.

[34] The *Mantashe* judgment comprehensively analysed the *Memela* judgment and its relationship to the binding authorities in this Division. Dippenaar J held:

> "Insofar as Memela concluded that the jurisdiction of the High Court is not ousted, I am in respectful agreement. However, in the light of binding precedent in this Court, I respectfully cannot agree with the conclusion that consent in terms of s 47(1) was not required...
>
> The nub of the judgment in Memela concerns the finding that the immunity protection afforded by s 47(1) is limited to judges performing the functions of a judge and that the chairing of a commission of enquiry is not a judicial function but a public or statutory function. That does not accord with the authorities referred to in this judgment, which give s 47(1) an expansive definition which includes affording protection to Judges in both their judicial and private capacities. With respect, the judgment fails to take these considerations and precedent into account.

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[17] *Id* at para 47.
[18] [2025] ZAGPPHC 816 at para 29.

> I agree with the respondents' submission that the Learned Judge was bound by the previous decisions in this Division, unless he found them to be clearly wrong. He did not."[19]

[35] The *Mantashe* judgment also observed that *Memela* disregarded the statutory definition of service in the Judges' Remuneration Act, which explicitly includes service as a chairperson or member of a commission. The court concluded that *Memela* is "clearly wrong" and declined to follow it.

[36] I am in full agreement with the reasoning and conclusion in *Mantashe*. The *Memela* judgment is, in my respectful view, an outlier that failed to engage with binding precedent from this Division. It did not find the prior judgments to be clearly wrong, and it provided no reasoned basis for departing from them. This court is bound by the decisions in *Soller*, *Engelbrecht*, and *FUL*. To the extent that *Memela* conflicts with these authorities, it is duty-bound to follow the established line of precedent

Support from Other Divisions

[37] The interpretation of section 47 adopted by this Court is not unique to the Gauteng Division. Other divisions have reached similar conclusions, reinforcing the correctness of this approach.

[38] In *Maluleke v National Director of Public Prosecutions and Others,*[20] Hendricks J, sitting in the Limpopo Division, considered the application of section 47. The applicant contended that no relief was claimed against the Judge President, who was merely cited as an interested party. Hendricks J rejected this argument, holding:

> " ...That the relief sought will have a bearing on the person of the Judge President, who is cited in his personal capacity, is beyond question... The case law makes it undoubtedly clear that once a Judge/Judge President is cited in his/her personal capacity, the provisions of section 47 (1) become applicable."

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[19] *Mantashe* at paras 34-36.
[20] [2018] ZANWHC 32 at para 7.

[39] This reasoning is directly applicable. The applicants have cited Justice Khampepe as the first respondent, and the relief sought includes a declaration that her conduct is unconstitutional and an order for her removal. This unquestionably affects her person. The purpose of section 47 - to guard the integrity of the judiciary as an institution - would be defeated if judges could be compelled to participate in proceedings without the protective filter of prior consent.

[40] In *Mthenjwa v Steyn and Another,*[21] Tlaletsi JP in the Western Cape Division held that an objection of non-compliance with section 47(1) is significant and is not a matter of form over substance or simply a procedural issue, as it has procedural and substantive elements. The court rejected the argument that it was unnecessary to seek permission to institute proceedings against a judge, on the ground that doing so would contravene section 34 of the Constitution.

[41] In NP v LP[22] relied upon by the applicants, the court clarified that section 47(1) aims to protect judges from unmeritorious claims and to prevent disruptions to their judicial functions. In that case, the applicant had sought leave to sue the respondent, a retired Judge, for a protection order in terms of the Domestic Violence Act[23] specifically excluded by section 47 (1), (thus making that case clearly distinguishable), and for the applicant's spousal maintenance, and that of the parties' minor offspring. The court concluded, correctly, that consent was not required for a protection order. However, the court was of the view that this immunity is limited to judges acting in their official capacity; it does not extend to retired judges unless proceedings arise from their judicial functions as acting judges or from matters allocated to them during active service. I deal with this below.

Section 47, Judicial Independence, and the Bangalore Principles

[42] Section 165 of the Constitution enshrines the independence of the judiciary. This independence is not a personal privilege for the benefit of judges, but a cornerstone of constitutional democracy for the benefit of all who seek justice.

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[21] [2017] ZAWCHC 161 at para 5.
[22] 2021 (4) SA 559 ECE para 48-49.
[23] Act 116 of 1998.

As the Bangalore Principles make clear, judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial.

[43] The Bangalore Principles further provide in Principle 2.2:

> "A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute which he or she has to adjudicate."

[44] Section 47 gives effect to this constitutional and international law imperative by providing a procedural filter that protects judges from unwarranted litigation that could compromise their independence or distract them from their duties. As McCreath and Koen argue: Others

> "The jurisprudential crux of section 47(1) of the Superior Courts Act is embedded in the nature of the judicial office and its core value of judicial impartiality. The procedural immunity which the section affords South African judges is a mechanism for sparing them the nuisance of having to deal with frivolous litigation, either as defendant or as adjudicator... the doctrine of leave to sue seeks to ensure that judges do not have to adjudicate claims which resort beyond the compass of their judicial capacity."[24]

[45] The first respondent, though retired, continues to perform public service as Chairperson of a Commission of Inquiry. In doing so, she remains bound by her judicial oath and the ethical standards that attach to her office. She is entitled to the same protections as a judge in active service, precisely because the threats to judicial independence - vexatious litigation, personal attacks, and attempts to influence or intimidate - are no less real in the commission context. The President's own concerns about potential "public criticism of the Commission" and a "review attack on the appointment" underscore the very real pressures to which a judicial officer in this position is subject.

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[24] MCCREATH, H and KOEN, R. *Defending the absurd: the Iconoclast's guide to Section 47(1) of the Superior Courts Act 10 of 2013* PER/PELJ 2014 (17)5 at p 1817.

Application to the Present Facts

[46] The applicants' founding affidavit demonstrates the very need for the protection afforded by section 47. The first applicant makes serious personal accusations against Justice Khampepe. At paragraph 36 of the founding affidavit, he refers to "my own personal reluctance to the Chairperson given her leading role in writing and handing down the two judgments which led to my unfair, improper and irregular detention without trial in July 2021." At paragraph 39, he alleges "actual bias" and "gross misconduct." At paragraph 43, he refers to "the attempts to criminalise the exposure of corruption." At paragraph 84, he alleges "prima facie violation of the provisions of section 8 of PRECCA, which is a criminal offence."[25]

[47] These are not mere administrative gripes; they are direct attacks on the character and integrity of a retired judicial officer. They are precisely the kind of proceedings for which the legislature, through section 47, intended to create a filter. The first respondent is entitled to the protection of this provision, not as a personal privilege, but because the independence and dignity of the judiciary as an institution require it.

[48] The applicants' attempt to distinguish between Justice Khampepe's role as a commissioner and her role as a judge is illusory. The attacks in the founding affidavit are directed at her conduct as a judge of the Constitutional Court. The first applicant complains about judgments she wrote and her alleged bias in judicial proceedings. This is precisely the kind of litigation section 47 was designed to screen.

[49] The second applicant, Mr. Mbeki, advances similar arguments about the non-applicability of section 47 in these proceedings. The fact that two former Presidents join forces, and in the case of the first applicant, to attack a retired judge of the Constitutional Court, only underscores the need for the protective mechanism of section 47. If such powerful litigants can take legal action against a judge without prior consent, the potential for abuse is manifest.

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[25] Prevention and Combatting of Corrupt Activities Act 12 of 2004.

[50] The current President's intervention, while supportive of the concerns raised, does not alter this analysis. The constitutional duty of this Court is to apply the law. Section 47 is intended to protect the judiciary from all litigants, regardless of their status or the perceived merit of their claims. The fact that the President now shares those concerns cannot cure a fundamental jurisdictional defect.

[51] In the Corruption Watch case, it was held that a court has the power to review the findings of a judicial commission of inquiry because the Commission had: (i) exceeded its terms of reference; (ii) committed an error of law; (iii) breached the principles of natural justice or procedural fairness; and (iv) shown bias against certain witnesses.[26] Although the decisions and findings of a commission of inquiry may be reviewable, it is ultimately the character of the decision that "defines what type of decision a review audits for rationality."[27]

The Consequences of Non-Compliance and Conclusion

[52] It is common cause that the applicants did not seek or obtain the Chief Justice's consent before instituting these proceedings. The provisions of section 47 of the Superior Courts Act are couched in peremptory terms. They required the applicants to first obtain the consent of the Chief Justice. They did not do so. Instead, the applicants submit that they were not required to seek permission to cite Justice Khampepe as a party to these proceedings because she is not cited in her personal capacity, but in nomine officio as the Chairperson of the Commission. The authorities are clear as to the consequences of such non-compliance. In the *Amalgamated Lawyers Association* case, Sutherland DJP held that proceedings instituted without the requisite consent are "void ab initio" and that "there is no room for condonation." This was affirmed in *Mantashe*.

[53] Consent must be obtained *before* proceedings are instituted. The requirement is jurisdictional and peremptory. Once proceedings are launched without consent, they are a nullity from the start and cannot be validated.

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[26] Corruption Watch and Another v Arms Procurement Commission and Others 2020 (2) SA 165 (GP) ("Corruption Watch"), paras 5-10.
[27] Masuku v Special Investigating Unit 2021 JDR 0720 (GP) ("Masuku"), para 18.

[54] I therefore conclude that Justice Khampepe, as a retired judge of the Constitutional Court serving as Chairperson of a Commission of Inquiry, is a "judge" for purposes of section 47. The applicants were required to obtain the Chief Justice's consent before instituting these review proceedings. They failed to do so. This failure is fatal. Leave to cite in terms of section 47(1) must be obtained. This is so regardless of whether the matter relates to either a judge's judicial functions and activities or private affairs. It applies to civil proceedings, as in this instance, intended to be instituted against the judge in the judge's personal or judicial capacities. This requirement also applies with equal force to retired judges as it does to other judges in active service.

[55] The proceedings are void *ab initio*. As they were a nullity from the start, this Court lacks the jurisdiction to entertain them. It follows that the application must be dismissed on this basis alone. It is neither necessary nor competent for the Court to consider the other grounds of review raised by the applicants or the question of urgency.

The Application for Punitive and/or Personal Costs

[56] Considering the conclusion that the proceedings are a nullity, it is strictly unnecessary to consider the applicants' prayer for punitive and/or personal costs against the first respondent. However, given the seriousness with which this prayer is advanced, and the fact that it is intertwined with the applicants' attack on the first respondent's conduct, I make the following observations.

[57] At paragraph 98 of the founding affidavit, the first applicant prays for "punitive costs in the case of opposition, including personal costs against the first respondent." In his replying affidavit, he elaborates on this prayer at paragraphs 92-93, listing grounds that include "the spurious and patently meritless technical points taken" and "the intransigent refusal to comply with Rule 53(1)(b)." In his heads of argument, counsel for the first applicant submits at paragraphs 150-169 that exceptional circumstances justify a punitive costs order, relying on *Public Protector v South African Reserve Bank.* [28] Additionally,

[28] 2019 (6) SA 253 (CC).

she must have "a taste of her own medicine" with obvious reference to the punitive costs order made against the Public Protector.

[58] The irony of this application for costs *de bonis propriis* on a punitive scale cannot escape notice. The applicants seek punitive and personal costs against a retired judge of the Constitutional Court for, among other things, raising what they call "technical points" in her defence. Yet the "technical point" that has succeeded in this case - the section 47 point - is not a mere technicality. It is a jurisdictional prerequisite that goes to the very competence of this Court to hear the matter. The fact that the applicants chose to ignore this requirement and now seek to punish the first respondent for raising it is further evidence of the need for the protective mechanism provided by section 47. In any event, it can never be said that the first respondent's conduct - in raising what essentially amounts to a point of law - materially deviated from what is expected of a professional in her position, such as to warrant censure in the form of a de bonis propriis costs order.[29]

[59] In *Public Protector v South African Reserve Bank*, the Constitutional Court held that a failure to produce a complete record under Rule 53 could attract punitive costs.[30] But that case presupposes that the court has jurisdiction to hear the matter. Where, as here, the proceedings are a nullity from the start, there is no competent application in which a costs order can be made, save for the costs of the jurisdictional point itself.

[60] Moreover, the applicants' attack on the first respondent's conduct - including allegations of misconduct, bias, and potential criminality - is precisely the kind of allegations that require the protection of section 47. A judge should not have to defend herself against such serious accusations in open court without the prior screening mechanism provided by the legislature. To grant a punitive costs order against a judge for invoking a statutory protection designed for her benefit would turn the purpose of section 47 on its head and would seriously undermine, rather than reinforce, public confidence in the judiciary.

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[29] *Badenhorst N O v Manyatta Properties Close Corporation and Others* (Case no 049/2024) [2025] ZASCA 194 (17 December 2025)
[30] *Id* at para 237.

[61] The President's intervention, while commendable and consistent with the duty of all organs of state to support the judiciary as articulated in the Bangalore Principles, does not alter this conclusion. The President does not oppose the relief, but his stance cannot confer jurisdiction where none exists. His explanatory affidavit, filed to assist the Court, is precisely the kind of conduct the Bangalore Principles encourage. It does not, however, transform a nullity into a valid proceeding.

Costs of the Jurisdictional Point

[62] The general rule is that costs follow the result. The respondents who raised the Section 47 point have succeeded in establishing that this Court lacks jurisdiction. The applicants are therefore liable for the costs of the first to sixth respondents in relation to this point.

[63] Given the complexities involved and the extensive legal argument presented, I am satisfied that the employment of two counsel was justified. The costs should therefore include the costs of two counsel where so employed. The matter is sufficiently complex and important to warrant costs on Scale C.

[64] The prayer for punitive and/or personal costs against the first respondent is refused. The first respondent was entitled to raise the section 47 point, and her success on that point demonstrates that it was not spurious or meritless.

[65] Regarding the costs of the tenth respondent, President Ramaphosa, he filed an explanatory affidavit and heads of argument in a commendable effort to assist the Court. So did the eighth respondent, the NPA. This conduct is entirely consistent with the duty of all organs of state, as expressed in the Bangalore Principles, to "better understand and support the judiciary." They did not oppose the relief and took no active part in the litigation of the jurisdictional point. In the circumstances, it would not be just and equitable to mulct them with costs. No order is made as to their costs.

Order Zuma vs The Others

[66] In the result, the following order is made:

1. The point *in limine* raised by the first to fifth respondents is upheld.

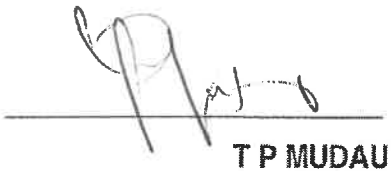
2. The applicants' non-compliance with section 47 of the Superior Courts Act 10 of 2013 renders these proceedings a nullity.

3. The application is dismissed.

4. The first and second applicants are ordered, jointly and severally, the one paying the other to be absolved, to pay the costs of the first to sixth respondents, such costs to include the costs of two counsel where so employed, on Scale C.

5. The applicants' prayer for punitive and/or personal costs against the first respondent is refused.

6. No order is made as to the costs of the eighth and tenth respondents.



T P MUDAU
ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

I agree

SELBY BAQWA
JUDGE OF THE HIGH COURT

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	Adv P Sokhela
Instructed by:	Boqwana Burns Attorneys
For the First to Fifth Respondents:	Adv T Ngcukaitobi SC
	Adv M Lengane
Instructed by:	Seanego Attorneys Inc
For the Sixth Respondent:	Adv H Varney
	Adv D Pillay
Instructed by:	Webber Wentzel Attorneys

For the Eighth Respondent:	Adv M Gwala SC
	Adv Y S Ntloko
Instructed by:	Office of the State Attorneys (Pretoria)
For the Tenth Respondent:	Adv T Bruinders SC
	Adv I de Vos
Instructed by:	Office of the State Attorneys (Pretoria)
Date of Hearing:	16 March 2026 to 17 March 2026
Date of Judgment:	30 March 2026