IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2026-026936

In the matter between:

JACOB GEDLEYIHLEKISA ZUMA	**APPLICANT**
And	
THE CHAIRPERSON OF THE COMMISSION	**1ST RESPONDENT**
SECRETARY OF THE COMMISSION	**2ND RESPONDENT**
ADVOCATE ISHMAEL SEMENYA SC	**3RD RESPONDENT**
COMMISSIONER FRANS KGOMO	**4TH RESPONDENT**
COMMISSIONER ANDREA GABRIEL SC	**5TH RESPONDENT**
THE CALATA GROUP	**6TH RESPONDENT**
THABO MVUYELWA MBEKI	**7TH RESPONDENT**
NATIONAL PROSECUTING AUTHORITY	**8TH RESPONDENT**
MINISTER OF JUSTICE AND CONSTITUTIONAL AFFAIRS	**9TH RESPONDENT**
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**10TH RESPONDENT**

SUBMISSIONS: TENTH RESPONDENT

Relief

1. The Applicants seek the following relief: [1]

1.1 Review and set aside the refusal by the Chairperson of the Commission to recuse herself.[2]

1.2 Remove the Chairperson as Chair of the Commission. Alternatively, direct that the President remove the Chairperson.[3]

1.3 Declare that all decisions and acts taken by the Chairperson are a nullity and review and set them aside.[4]

2. The relief is sought in terms of PAJA and the principle of legality.[5] The Court is empowered to grant such relief in terms of sections 172(1)(b) of the Constitution and section 8 of PAJA.

3. The President was called on by the applicants, to show cause why the appointment should not be set aside.[6]

4. The President filed an explanatory affidavit in which:

---

1 CL 09-11 paras 20.2 and 20.3
2 The decision was taken on 20 January 2026 and appears at CL 001- 35
3 CL 003-3 para 6
4 CL 003-3 para 7
5 CL 001-4 paras 3 and 4
6 CL 004-9

4.1 He confirms that he does not oppose the relief sought;[7]

4.2 He explains the circumstances under which the Chairperson was appointed;

4.3 He records that he was unaware of facts about the connection between Khampepe J and the NPA and TRC that emerged after her appointment;

4.4 He says that had he been aware of those facts, he would not have appointed Khampepe J, and he explains why he would not have made that appointment.

5. We submit that it is proper not to oppose the relief sought because:

5.1 The President exercised an executive power. His exercise of that power is complete. It could be argued that he is *functus*. [8]

5.2 Therefore, he should abide a ruling by the High Court on the removal of the Chair of the Commission.

5.3 Assume it could be argued that an executive power is not subject to the *functus* rule. It seems appropriate that the

7 CL 009- 300

8 Mncwabe v President of the RSA [2023] ZACC 29 at [42]-[60]

High Court, rather than the President, decides on the removal of a Chair. That is because that decision, does not call for the exercise of an executive power. It calls for the exercise of a judicial power of review on whether it is lawful to remove the Chair. The High Court, not the President, exercises judicial powers of review. Therefore, the President should decline to remove Khampepe J.

5.4 Serious (disputed) allegations are made. They include a referral for misconduct,[9] and a violation of section 8 of PRECCA.[10] Those allegations are not made by the President. Findings on those allegations should be made by the High Court. It is proper for the President to stay out of that dispute.

6. Mr Semenya SC submits that the President should have self-reviewed. That submission does not assist the Court, in light of the following:

6.1 The President was faced with an application calling upon him to show cause why the refusal by Khampepe J to recuse herself should not be reviewed and set aside.

6.2 He informed the Court that he does not oppose the

9 CL 001- 28 para 83
10 CL 001-28, para 84

application. He also delivered an explanatory affidavit. The submission of an explanatory affidavit in the current context is proper and commendable.[11] He has not intervened as an applicant. Nor has he brought a counter-application. The Court will decide the review brought by the applicants. The President will abide that decision and the eventual outcome, should the matter go on appeal.

6.3 There is therefore no need for a further application incorporating a self-review.

7. Should the review succeed, then it would not be just and equitable to set aside the evidence already led at the Commission. There has not yet been cross-examination. The applicants will not be prejudiced by an order that the evidence already led should stand and can be relied on in a reconstituted Commission (in the event that Khampepe J is removed.) They would be entitled to cross-examine witnesses who have already testified.

Appointment of the Chairperson

8. In his affidavit, the President explains: he appointed Khampepe J as Chairperson because he wanted to appoint a judge to chair the Commission; she was a former Justice of the Constitutional Court; at

[11] The Camps Bay Residents & Ratepayers' Association v Hartley (Unreported, Western Cape High Court 3430/2010) at [21]

the time of her appointment, he was unaware of her work history or connection with the Commission.

9. We submit that there is nothing surprising about that explanation because:

9.1 By appointing Khampepe J to Chair the TRC Commission, the President exercised his executive power under s84(2)(f) of the Constitution.

9.2 Appointing a Judge as Chair of a Commission is not the same as making an appointment of an employee in a job.

9.3 The President is entitled to assume that the judge is fit and proper and that when the judge accepts the appointment, there are no potential conflicts of interest.

9.4 He should not be expected, to do a due diligence exercise on that Judge. Nor should he be expected to investigate potential conflicts of interest that may arise during the discharge of that Judge's duty as Chair of a Commission.

9.5 It is reasonable of the President to expect a Judge whom he appoints as Chair of a Commission to alert him of any

potential conflicts of interest.

10. In that regard, two provisions of the Bangalore Principles of Judicial Conduct are relevant:

10.1 Clause 2.3[12] provides:

> A judge shall, so far as is reasonable, so conduct himself or herself as to minimise the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases.

10.2 Clause 2.5 provides:

> A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where:
>
> 2.5.1 the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;

---

12 Clause 2.3 of the Bangalore Principles of Judicial Conduct was affirmed in a resolution of the United Nations Economic and Social Council adopted in July 2006. The Code materially informs the content of the Code of Judicial Conduct promulgated in October 2012 to regulate the conduct of judges in the superior courts of South Africa and is an accepted tool of interpretation. See, Communicare NPC v Acting Magistrate Burgins [2023] ZAWCHC 117.

2.5.2 the judge previously served as a lawyer or was a material witness in the matter in controversy; or

2.5.3 the judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy:

Provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.

10.3 These provisions require that a Judge (not the President) disqualifies herself, where a reasonable, fully informed President may be concerned about her impartiality due to previous involvement as a lawyer in TRC matters. That rule applies, even if the judge suspects that the President is aware of her prior involvement. That is because the rule imposes a duty on the judge, regardless of what third parties know.

11. These principles are incorporated in the Code of Judicial Conduct.[13] Article 13 provides for recusal as follows:

[13] A copy is annexed.

A Judge must recuse him or herself from a case if there is a -

(a) real or reasonably perceived conflict of interest;

(b) reasonable suspicion of bias based upon objective facts

and shall not recuse him or herself on insubstantial grounds.

12. Note 13(iv) to Article 13 provides:

> If a judge is of the view that there are no grounds for recusal but believes that there are facts which, if known to a party, might result in an application for recusal, such facts must be made known timeously to the parties, either by informing counsel in chambers or in open court, and the parties are to be given adequate time to consider the matter.

13. Article 13, like the Bangalore Principles, impose the duty on judges to disqualify themselves from deciding matters where reasonable, fully informed parties may be concerned about their impartiality, due to previous involvement as lawyers in those matters.

Allegations Against the President

14. There is no dispute between the President and Khampepe J or the Commission. They are all respondents. Khampepe J (and the Commission) oppose the application for her recusal. The President abides.

15. Allegations are made against the President in an answering affidavit by Mr Semenya SC, ostensibly on behalf of or in support of Khampepe J. That affidavit was delivered after the President delivered his. He did not have the benefit of considering the allegations against him, before signing his affidavit.

16. The two are not opposing parties. If findings are sought against the President from the review Court, then a respondent party seeking such findings should bring an application against the President. Or it should invoke the third-party procedure provided for in rule 13. Neither has been done.

17. Consequently, the President does not respond to the allegations in the affidavit of Mr Semenya SC. We submit that it would be inappropriate for a President and a former Justice of the Constitutional Court (or the Evidence Leader on her behalf) to be engaged in a public spat in affidavits. Nor can the Court grant in relief in favour of the Commission or Khampepe J and against the President, based on the allegations in the affidavit of Semenya SC.

<u>The Applicable Legal Standard</u>

18. Even though he abides by the decision of the Court, the President is under a duty to assist the Court. Consequently, we make submissions on the standard to be applied by the High Court, when

considering what is required of a Chair of a Commission of Inquiry relating to prior involvement as a lawyer, and when considering the removal of a Commissioner for perceived bias.

19. The standard has been set by the Full Bench in the Seriti Commission[14] review. The Full Bench set aside the findings of Seriti J (the chair of that Commission). Seriti J chaired the Arms Deal inquiry.

20. The Full Bench held that inquiries must be conducted as follows:[15]

    20.1 Fairly and in accordance with the rules of natural justice;

    20.2 Impartially, and without association with the interest of any party at the Commission;

    20.3 With an impartial open and enquiring mind; and

    20.4 To restore public confidence in the situation under investigation and in governments' role in the situation and in governmental or state processes.

21. We submit:

    21.1 A reasonable perception of bias held by a party at the

---

14 Corruption Watch v The Arms Procurement Commission [20219] ZAGPPHC 351

15 Corruption Watch v The Arms Procurement Commission at [6]-[16]
See also, Jan Abraham Du Preez v TRC [1997] ZASCA 2 on the requirement of fairness.

Commission, would be a ground for recusal of a commissioner.

21.2 The test for bias is: would a reasonable, objective person informed of the true facts, reasonably apprehend that a chair of an inquiry will not bring an impartial mind to bear on the issues before them?[16]

21.3 Prior involvement by a judicial officer as a lawyer on or for one side in the matter under scrutiny, is likely to be perceived as or give the appearance of partiality.

21.4 Here, Khampepe J decided amnesty applications and refused amnesty involving the following parties at the Commission:

- 5, out of the ANC 37 – Messrs Mbeki, Zuma, Nqakula, Kasrils and Ms Mabandla;

- The family of the Pebco 3 – Ms Kubheka, Ms Hashe and Mr Godolozi;

- The family of Irene and Richard Motsatsi – Mr Motsatsi.

16 President of the RSA v SARFU 1999 (4) SA 147 (CC)
BTR Industries (Pty) Ltd v Metal and Allied Workers' Union [1992] ZASCA 85; 1992 (3) SA 673 (A) at 693I-J; Moch v Nedtravel (Pty) Ltd 1996 (3) SA 1 (A) at 8I; S v Shackell 2001 (4) SA 1 (SCA) at 9.Abrahams v RK Komputer SDN BHD 2009 (4) SA 201 (C) at 208-11

21.5 All the family members seek findings of unlawful interference and constitutional damages in a High Court application. The 5 of the ANC 37, were all members of Government. Some are expressly accused of interference with TRC prosecutions.

21.6 It is consequently reasonable of them to apprehend that prior involvement of Khampepe J in the TRC amnesty hearings of the persons identified in 22.4 above, would prevent an impartial mind at the Commission. Importantly, it does not restore public confidence in TRC matters where the Chair of the Commission has had prior involvement in TRC matter.

21.7 Judicial officers appointed to a Commission of Inquiry are under a duty to avoid the appearance of partiality or the breakdown of public confidence in the Commission's process. They should declare their prior involvement before appointment and disqualify themselves, rather than wait for recusal applications.[17]

Applying the Standard to the Facts

22. A letter sent on 11 November 2025, by Webber Wentzel, on behalf

[17] See, paragraphs 9.5 - 11 above.

of the families to the Chairperson of the Commission, *inter alia*, purports to prevent any late recusal applications by identifying other potential grounds of conflict.[18] That was after an application was brought for the recusal of the Evidence Leader, Mr Semenya SC.

23. Specifically listed are the following:

"12.1 In 1995, Chairperson Khampepe was appointed by former President Mandela as a TRC Commissioner and in the following year she was appointed a member of the TRC's Amnesty Committee.

12.2 Between September 1998 and December 1999, Chairperson Khampepe was a Deputy National Director of Public Prosecutions. During this period, she apparently played a role on the Human Rights Investigation Unit (HRIU), established by then NDPP Bulelani Ngcuka to advise him on how to handle the cases referred to the NPA by the TRC."

24. That letter resulted in further investigation, after which the facts set out in 22.4 above were brought to the attention of the President.

25. It is not unreasonable for parties at the Commission (including the President appointing her) to suspect that Khampepe J might not

[18] CL 009-124

bring an impartial, open and enquiring mind to the investigation. Khampepe J admitted that she had prior involvement in TRC matters as a lawyer. Not only was she a lawyer. She was involved in and made findings in matters relating to at least 8 of the parties before the Commission. In all those matters, Khampepe J was part of a panel that refused amnesty. She should have disqualified herself before appointment. Having not disqualified herself, she should at least have informed all parties at the Commission of her prior involvement in TRC matters as a lawyer. The failure to do so, itself, is a basis for a reasonable apprehension of bias.[19]

Strike-Out

26. Mr Semenya SC seeks the striking out of the allegations in paragraphs 18.1 and 19 for being vexatious.[20] The main reason that they are alleged to be vexatious seems to be that the President did not raise them during the recusal application.

---

19 Bernert v Absa Bank Ltd (CCT 37/10) [2010] ZACC 28; Bernert v ABSA Bank Ltd 2011 (4) BCLR 329 (CC) ; 2011 (3) SA 92 (CC) (9 December 2010) para 56:
"However, even in those situations where there is no realistic possibility that the outcome of a case would affect a judicial officer's interest or shareholding, it is nevertheless desirable that the judicial officer should disclose the nature, extent and value of his or her interest to the parties. Disclosure should be made no matter how small the interest may be. Litigants should not be left with the impression that the judicial officer is hiding his or her interest in the case from them. This is likely to be the case where there was no prior disclosure and the parties subsequently discover that the judicial officer had an interest. This may raise questions about the impartiality of the judicial officer in circumstances where this would not have been the case if there had been prior disclosure. And this may well undermine public confidence in the judiciary."
Basson v Hugo and Others 2019 (5) SA 142 (GP) (27 March 2019) para 30:
"I am in agreement with Bam J that: "*In view of the contents of the petition and the first respondent's relation to SAMA I am satisfied that both first and second respondents were obliged to furnish a proper explanation of their possible involvement and/or knowledge of the petition."* By refusing, objectively a reasonable informed person would wonder why is there such refusal; is there something to hide that will confirm bias."

20 CL015-60 para 249

27. We reiterate, there is no dispute between the President and Khampepe J or the Commission. If an application to strike out is sought, a proper application should be brought. That requires intervention as an applicant for the purpose of a striking out application. Or it requires the invocation of the third-party procedure in rule 13.[21] There is neither. Therefore, striking out cannot succeed here.

28. Even if striking out were permissible, the application cannot succeed because:

    28.1 Whether the allegations in 18.1 and 19 above were made or not by the President in the recusal application, is not the test for vexatiousness.

    28.2 Courts may strike out allegations in affidavits, if they are irrelevant, scandalous, vexatious or hearsay and if they cause prejudice to a litigant.[22]

    28.3 A party bringing a strike out application must establish both requirements; i.e. irrelevance, scandal, vexatiousness or hearsay and prejudice.

---

21 Minerals Council of South Africa v Minister of Mineral Resources & Energy [2021] ZAGPPHC 623 at [65]

22 Helen Suzman Foundation v President of the RSA **2015 (2) SA 1** (CC) at [27]-[28]
Clairson's CC v MEC for Local Government,
Environmental Affairs and Development Planning 2012 (3) SA 128 (WCC) at [8]

29. Allegations are –

29.1 scandalous, if they may or may not be relevant but are so worded as to be abusive or defamatory;

29.2 vexatious, if they may or may not be relevant but are so worded as to harass or annoy;

29.3 irrelevant where they do not apply to the matter at hand or do not contribute one way or another to a decision of that matter; [23]

29.4 hearsay, if the probative value depends on the credibility of someone other than the deponent.[52]

30. Except for the allegation that the Chairperson played a role at the HRIU, the rest of the allegations about the prior involvement of Khampepe J in TRC matters, are admitted.[24] Not only are they admitted. They are not worded in a way to harass or annoy Khampepe J. On the contrary, the allegations are made to explain her appointment, what the President knew when he appointed her, and his stance now that he knows the facts. Therefore, they cannot be vexatious. Nor do they justify striking out.

---

23 NDPP v Zuma [2009] ZASCA 1 at [23]

24 See, CL 0015-60 paras 250, 251, 186 (which follows on paragraph 251).

TJ Bruinders SC
Irene de Vos
12 March 2026