

## The Chairperson

### Justice Sisi Khampepe

Commission of Inquiry, Stopped TRC Investigations and/or Prosecutions

## Commissioner Justice Frans Diale Kgomo

## Commissioner Adv Andrea Gabriel

c/o The Secretary

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Your reference  
TRC Cases Inquiry

Our reference  
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4017862

Date  
7 April 2026

Dear Justice Khampepe

## URGENT OBJECTION TO SEMENYA SC QUESTIONING WITNESSES ON THE AMENDMENTS TO THE PROSECUTION POLICY

1. We act for the Calata Group.
2. It has come to our attention that Semenya SC will be posing questions to former Acting NDPP MJ Mpshe on behalf of the evidence leaders when he testifies on 7 April 2026.
3. The evidence leaders' bundle of documents suggests particular attention will be given to the amendments of the Prosecution Policy during questioning.
4. Semenya SC acted as lead counsel for the NDPP and the Minister of Justice in *Nkadimeng and Others v National Director of Public Prosecutions and Others* [2008] ZAGPHC 422 (*Nkadimeng*) in which the prosecution policy amendments were declared unconstitutional by the Pretoria High Court.
5. In that matter, then Acting NDPP Mpshe signed the answering affidavit on behalf of the NPA, which would have been settled by Semenya SC.<sup>1</sup> Semenya SC would have consulted with Mpshe and taken instructions from him.
6. We are aware that the Commission has previously dealt with this matter. On 18 September 2025, we wrote to the Commission requesting that Semenya SC not be involved in any

<sup>1</sup> Calata Group, bundle 4, page 1186

deliberations or leading or cross-examination of witnesses in relation to the amendments to the prosecution policy. This suggestion was made in order to avoid public perceptions of partiality or conflict on the part of the Commission and its senior staff.

7. On 19 September 2025, the Chairperson responded to our letter after receiving a response from Semenya SC. The Chairperson's response recorded that

“The concerns expressed by your client are noted. I make no decision on them. I will have another member of the Evidence leader deal with this aspect.”

8. However, in a ruling delivered by the Chairperson on 30 January 2026 pursuant to applications for the recusal of Semenya SC, that direction was withdrawn. The ruling stated at paragraph 67(b) that:

“The preliminary directions previously issued by the Chairperson on 19 September 2025, concerning the restriction of Semenya SC's participation in deliberations, questioning or cross-examination relating to the amendments to the prosecution policy are hereby uplifted.”

9. Our clients respected the Chairperson's ruling. However, the perception of the objectivity of Semenya SC was brought into question through his line of questioning of Adv Vusi Pikoli on 13 March 2026.

10. Semenya SC's questioning left a distinct impression in the minds of our clients that he remained intent on defending the prosecution policy amendments.

11. In this regard we refer the Chairperson to the following questions that were posed to Pikoli by Semenya SC regarding the amendments:

ADV SEMENYA: And you correctly say or at least you say in your evidence-in-chief, you did have concerns about the Prosecution Policy, but in furtherance or in amelioration of the difficulties you had with that, at least the prosecutorial independence was safe. Am I right? (Transcript, p 175, line 5).

ADV SEMENYA: [A]ll of these efforts are done in public, there is nothing clandestine about it. (Transcript, p 175, line 20)

ADV SEMENYA: And it may be open for argument to others, to say these were efforts intended to widen the ambit of opportunities to reconcile the reconciliation effort. Am I right? (Transcript, p 176, line 6)

ADV SEMENYA: As opposed to being efforts at stopping the work of the NPA. Am I right? (Transcript, p 176, line 10)

ADV SEMENYA: Neither being an effort to stop the investigation of TRC cases that required investigation. Am I right? (Transcript, p 176, line 14)

ADV SEMENYA: Ja, okay. Lastly, the fact is that no beneficiary came out of a process by which the Prosecutorial Policy as amended, was derived. Am I right? Nobody got the benefit of an amnesty through those efforts. Am I right? (Transcript, p 177, line 15)

12. We maintain that the questions are misleading given that:
  - 12.1 The High Court in the *Nkadimeng* matter found that the prosecution policy amendments seriously undermined prosecutorial independence;
  - 12.2 The High Court also concluded that the pursuit of reconciliation was not the business of prosecutors;
  - 12.3 The claim that there was nothing clandestine about the process is belied by the fact that the deliberations behind the prosecution policy amendments were secretly conducted without any public participation;
  - 12.4 The suggestion that the policy amendments did not stop any investigations is contradicted by the fact that no further investigations were pursued while the amendments were in place;
  - 12.5 The assertion that there was no beneficiary, and nobody was granted amnesty through this process, is undermined by the fact that the amendments were struck down in 2008, and the next TRC prosecution only took place some 10 years later.
13. While we regard the questions mentioned above as misleading in the absence of the actual context, the evidence leaders are entitled to hold these views and put such questions. However, it is entirely improper for such questions to be put on behalf of the Commission by an evidence leader who previously defended the very same policy on similar grounds.
14. Permitting this practice to continue invites criticism at an inopportune time and brings the credibility and integrity of this Commission into doubt.
15. We had hoped that the five evidence leaders would adopt a nuanced approach to avoid unnecessary controversy and amongst themselves organize a division of labour in which other evidence leaders could deal with this particular aspect.
16. Since this has not happened, we are instructed to request the Chairperson to consider this matter afresh and direct that Semenya SC not be involved in questioning of witnesses in relation to the prosecution policy amendments.

Yours faithfully



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