

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 34177/22

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
_____ DATE	_____ SIGNATURE

In the matter between:

NONTSASA MEMELA

Applicant

and

THE CHAIRPERSON OF THE STATE CAPTURE

COMMISSION OF INQUIRY

First Respondent

THE STATE CAPTURE COMMISSION OF INQUIRY

Second Respondent

PRESIDENT OF THE REPUBLIC OF

SOUTH AFRICA

Third Respondent

***Delivered:** This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 14 August 2025.*

Summary: Application to judicially review certain findings and recommendations of a commission of inquiry. The chairperson of the commission of inquiry is a judicial officer of a superior Court. The review application was launched without the consent of the head of Court. The respondents contend that this Court lacks jurisdiction to entertain the judicial review application in the absence of the consent of the head of Court to institute the review application, particularly as against the chairperson of the commission of inquiry. Section 47(1) of the Superior Courts Act properly interpreted does not oust the jurisdiction of this Court. This Court retains jurisdiction in terms of section 169(1) of the Constitution. The judicial officer was cited in his capacity as chairperson of the commission and not as a judicial officer. The functions he performed were governed by the Commissions Act and were not judicial in nature. The provisions of section 47(1) do not apply to those functions. Accordingly, the applicant did not require consent of the head of the Constitutional Court to launch a judicial review against the findings and recommendations of the chairperson of the commission.

An application for a postponement is not there for the mere taking. Absent proper grounds, a Court in the exercise of its true discretion must refuse a postponement application.

This being a legality review, the applicant must demonstrate that the findings and the recommendations are reviewable in law and that they are (a) unlawful; (b) irrational; or (c) arbitrary. The applicant failed to demonstrate that the impugned findings and recommendations are reviewable in law; unlawful; irrational or arbitrary. The appropriate standard of review in respect of findings and recommendations of a commission of inquiry has not been properly pleaded nor demonstrated. The review application falls to be dismissed.

Regarding costs, the applicant must bear the costs of the failed postponement application as well as the costs attendant to the review application. The present application is not one that required the employment of two counsel. However, it is a matter that deserved the employment of one senior counsel. Accordingly, the costs will include the costs of employing one senior counsel.

Held: (1) The application for postponement is dismissed. Held: (2) The application for review is dismissed. Held: (3) The applicant must pay the costs attendant to the postponement application and the review application at the scale of party and party taxable or to be settled at scale C, which costs include the employment of one senior counsel.

JUDGMENT

MOSHOANA, J

Introduction

- [1] The State Capture Commission of Inquiry (SCC) captivated the attention of many South Africans as well as the world over. Most South Africans were religiously glued to their television sets for a considerable period to witness telling revelations involving their beloved country. Ultimately, after days of revelations, the chairperson of the SCC, in the name of the then Honourable Deputy Chief Justice RMM Zondo presented his report, which contained findings and recommendations to the President of the Republic of South Africa. Several individuals were implicated in the findings made by the SCC. The applicant, Ms Nontsasa Memela, was one of the individuals against whom findings were made and recommendations were proposed.
- [2] Chagrined by those findings and recommendations, the applicant launched the present application seeking an order setting aside the findings and recommendations made in Part 1 Volume 1, dealing with the South African Airways and its Associated Companies, of the SCC report. The application is opposed by the cited chairperson and the SCC (“hereinafter jointly referred to as respondents”). Surprisingly, the bodies to whom the recommendations of the SCC are made were not joined in the present proceedings. That being the National Prosecuting Authority (NPA) and the South African Legal Practice

Council (SALPC). This simply implies that there is nothing preventing the NPA and the SALPC from actioning the recommendations of the SCC.

- [3] On 11 July 2025, the applicant, who is allegedly severely prejudiced by the findings and recommendations of the SCC, sought a postponement of the present application, which was effectively ripe for a hearing in that all the relevant heads of arguments were submitted. Barring the President of the Republic of South Africa, the application was opposed by the respondents. The present application was set down on the opposed roll of 4 August 2025. As the allocated judicial officer, I allocated the present application for oral hearing on 5 August 2025. At the commencement of the hearing, Mr Hugo, who emphatically stated that he was only briefed to move the postponement application and not to make submissions on the merits of the review application, sought a postponement of the review application. True to course, Mr Hugo sought to be excused after this Court issued an *ex-tempore* ruling refusing a postponement application, to be reasoned in this judgment.
- [4] Owing to the departure of Mr Hugo, this Court had to rely on the already submitted heads of argument by Mr Hodes SC on behalf of the applicant. Ms Hofmeyer SC orally defended the heads of argument submitted on behalf of the respondents. I pause to mention that ordinarily, motion proceedings may be disposed of without oral submission in an instance where heads of arguments are at hand. At best, there was nothing that would have prevented Mr Hugo to have read into the record, as it were, the heads of argument drafted and submitted by Mr Hodes SC. The applicant was apparently indisposed and sought to be excused from attending the proceedings.

Brief relevant factual matrix

- [5] As a precursor, it is recorded that this case is not about rehashing the evidence extensively processed at the SCC. Thus, only the brief facts relevant to the present review application shall be narrated for the purposes of this judgment. It suffices to mention that the applicant seeks to review and set aside findings and recommendations outlined in paragraphs 1094 to 1105 in the first part of the SCC report dated 4 January 2022. It is unnecessary for purposes of this judgment to

regurgitate those paragraphs. The applicant has annexed an extract thereof to the founding affidavit. To regurgitate the paragraphs will serve no useful purpose but to elongate this judgment.

- [6] Since 15 April 2013, the applicant had been employed by the South African Airways Technical (SAAT). She was employed in the capacity of a Senior Legal and Contracts Management Specialist. In October 2014, she took the role of Head of Procurement. Following a restructuring process, her title changed to Head of Supply Chain Management (SCM). In this role, she reported directly to the CEO of SAAT. She had about six portfolios reporting to her. In the main, the department she headed was responsible for ensuring that aircraft spares were always available.
- [7] In May of 2018, she was placed on a precautionary suspension pending the outcome of a disciplinary hearing. Such a disciplinary hearing was conducted whereat she was found guilty as charged. At the end of 2018, she was dismissed from the employ of the SAAT. Aggrieved by the unfairness of her dismissal, she approached the CCMA and lodged an unfair dismissal claim against the SAAT. The CCMA found that her dismissal was both substantively and procedurally unfair and ordered the SAAT to compensate and reinstate her. She however, opted not to take the reinstatement relief issued to her.
- [8] Around November 2019, she was contacted by the investigators of the SCC. They informed her that they were investigating transactions concluded between the South African Airways (SAA) and the SAAT. She cooperated and gave information regarding four transactions. Those were in relation to (a) the disposal of Ground Power Units (GPUs); (b) the components tender; (c) the tyre tender; and (d) the logistical tender. She provided them with information within her knowledge. In the process, she was questioned about the R2 500 000 that was paid to her alleged transferring attorneys, Mbanjwa Attorneys Inc (Mbanjwa).
- [9] She met with the investigators again on 6 December 2019 and provided the same information she provided before. Ultimately, she received a notice to appear

before the SCC for the purposes of giving evidence. She complied with the notice and appeared on 7 February 2020. For the period of appearances after 7 February 2020, she enlisted the services of Mbanjwa to represent her.

- [10] After tendering her evidence, as indicated above, a report containing certain findings and recommendations against her was made known. She was aggrieved by those findings and recommendations. Resultantly, on or about 27 June 2022, she launched the present application.

Grounds of review

- [11] The applicant raised a barrage of grounds for review. In the main, she griped that the SCC's findings and recommendations were unreasonable, irrational, and unfair. In her founding affidavit, she dissected each of the findings and recommendations and criticised them. In the whole, she suggested that those findings were factually wrong and otherwise. At the end of her founding affidavit, she attenuated the criticism by alleging that the impugned findings and recommendations ought to be reviewed and set aside in that they are (i) irregular; (ii) irrational; (iii) unfair; and (iv) are bereft of factual and legal basis.

Analysis

- [12] In considering the present application, this Court keeps in mind what was said in *Canada (AG) v Canada (Commission of Inquiry on the Blood System) (Blood Systems)*¹, where the following was stated:

“A commission of inquiry is neither a criminal trial nor a civil action for the determination of liability. It cannot establish either criminal culpability or civil responsibility for damages. Rather, an inquiry is an investigation into an issue, event or series of events. *The findings of a commissioner are simply findings of fact and statements of opinion reached by the commissioner at the end of the inquiry.* They are based upon and flow from a procedure which is not bound by the evidentiary and procedural rules of a courtroom. *There are no legal consequences attached to the determinations of a commissioner. They are not enforceable and do not bind courts considering the same subject matter.*”

¹ [1997] 3 SCR 440. See also S Ruel *The Law of Public Inquiries in Canada* (2010) 13.

[13] In *S v Sparks (Sparks)*², Human J, writing for the full Court had this to say: -

“An inquiry before a Commission is not a proceeding in which there are interested individual parties who are entitled to a hearing and a verdict on the evidence. A Commission of Inquiry deals with matters of public interest, frequently matters which have already been publicly ventilated.”

[14] In this judgment, this Court shall *ad seriatim* deal with (a) the postponement application; (b) the issue of jurisdiction; (c) the merits of the review; and (d) the issue of costs.

The postponement application

[15] As indicated at the dawn of this judgment, the postponement application was not granted. As a matter of trite principle, a postponement application is not there for a mere taking. An application for postponement impacts on the principle of finality of litigation and puts a strain on the smooth administration of justice. It is in the interest of both the applicant and the respondents to achieve finality in litigation. This Division is under immense pressure to process opposed motion matters. When a motion is enrolled and allocated for a hearing, a judicial officer is allocated to the matter. The judicial officer, in preparation for a hearing of an application, reads the papers filed by the parties. Given the thinly spread judicial resources, deserving matters fail to make it to the already congested motion court rolls of this Division. Thus, if an application is generously and without regard to the governing principles postponed, this means that a deserving application festering in the office of the Registrar would have lost an available space. This affects the business of the Court to smoothly administer justice. It inevitably leads to undue duplication of functions. Two or three judicial officers may read the same matter repeatedly. This cannot be encouraged.

[16] In motion proceedings, a party is compelled to make out its case in the founding affidavit as opposed to the replying affidavit³. It is no answer for a party seeking

² 1980 (3) SA 952 (T).

³ *Shepard v Tuckers Land and Development Corporation (Pty) Ltd* 1978 (1) SA 173 (W) at 177 and *Swissborough Diamond Mines (Pty) Ltd v Government of the RSA* 1999 (2) SA 279 (T) at 338.

to make out a case in the replying affidavit to submit that the other party failed to seek a striking out of the belated case made out in reply. The striking out procedure is regulated by rule 6(15) of the Uniform Rules. It only happens to a matter which is scandalous, vexatious or irrelevant. Where a party unprocedurally makes a case in the replying affidavit, the disadvantaged party is not compelled to launch a rule 6(15) application since there is nothing scandalous, vexatious or irrelevant in making a case in a wrong affidavit.⁴ Thus, the submission made by Mr Hugo for the applicant, that the respondents ought to have applied for a striking out is without merit.

[17] It is to the founding affidavit in support of the postponement application that this Court must look to, to establish whether a postponement application is properly grounded. The applicant stated the following in her founding affidavit:

“19 It is, therefore, my request to this honourable court to have this matter postponed to a *later date*, to allow me to *collect funds* and *follow up on my unpaid invoices*, as well as *allowing the Senior Counsel to go through the papers and settle my Heads of arguments*.”

[18] The above averment illuminates only two grounds in support of the postponement application: namely, the collection of funds and allowing senior counsel to settle the heads of argument. As a departure point, these are not proper grounds for a postponement application. Howbeit, as at the hearing date, Mr Hodes SC had settled the heads of arguments on behalf of the applicant. This Court fails to understand how the collection of funds relates to the hearing of the review application. If it relates to financial quandaries, as argued by Mr Hugo, such a ground has not been properly motivated. Given the applicant's alleged financial difficulties, it is perplexing why she insists on being represented by a senior counsel, regard being had to her state of impecuniousness. The right to legal representation does not mean that a litigant must insist on a Rolls-Royce when he can only afford a Mazda. Having settled the heads of argument, on the appointed day for a hearing, Mr Hodes SC failed, for reasons not apparent to this Court, to appear and defend the settled heads of argument. It is not averred by

⁴ *Beinash v Wixley* 1997 (3) SA 721 (SCA).

the applicant in the founding affidavit that Mr Hodes SC was briefed to appear or not. It was only in the replying affidavit and some correspondence that it was mentioned that Mr Hodes SC was incidentally not available to appear on behalf of the applicant in the week of 4-8 August 2025. Perplexingly, the applicant managed to source the services of Mr Hugo and instructed him to only move the postponement application. The Constitutional Court has already decreed that counsel must not attend Court only to ask for a postponement⁵. Counsel must be prepared to assist the Court if a postponement sought is not granted. I understand this decree to underscore that it is inappropriate for counsel to accept a brief only to seek a postponement of a matter. When counsel does that, he or she departs from an erroneous premise that a postponement is there for the mere taking. Such is an unacceptable departure. Counsel must accept a full brief considering the eventualities mentioned by the Constitutional Court.

[19] Mr Hugo, when confronted with the decree of the Constitutional Court, hoisted the cab rank rule and the voluminous record in this matter, which was impossible to read owing to his late brief. He submitted that the record is constituted by about 19000 pages. It is doubted that all the 19000 pages are relevant to the impugn hoisted by the applicant in this application. The applicant, as a *dominis litis*, is obliged in terms of rule 53(3) and (4) to provide each of the parties with the relevant portions of the record of the proceedings sought to be reviewed and set aside. The applicant, for reasons that are not apparent anywhere, failed to do so.

[20] The averment of the unavailability of Mr Hodes SC appears nowhere in the founding affidavit as a ground for a postponement application. It is by now trite that the unavailability of a preferred counsel is not a ground for a postponement.⁶ This Court is uncertain as to whether Mr Hodes SC is on brief to appear. On the one hand, an allegation is made that an unnamed senior counsel, presumably Mr Hodes SC, who was prepared to argue the case demanded a R100 000 upfront payment which the applicant was unable to raise. There is no evidence

⁵ *National Police Services Union and Others v Minister of Safety and Security and Others* [2000] ZACC 15; 2000 (4) SA 1110; 2001 (8) BCLR 775 (CC).

⁶ *I.K.B v C.A.B* [2023] ZAGPJHC 636; *Centirugo AG v Firestone (SA) Ltd* 1969 (3) SA 318 (T); 1969 (3) All SA 330 (T).

presented before this Court as to whether Mr Hodes SC ultimately accepted the brief without the upfront payment. All there is, is an allegation that he incidentally became unavailable. As to why he incidentally became unavailable, this Court is in the dark. This Court is not satisfied that good and sufficient reasons existed for the postponement application to be granted. As a parting shot, the applicant is a *dominis litis* who is allegedly severely prejudiced by the findings and recommendations of the SCC. With this postponement application, the applicant is effectively stating that she wishes to continue having a proverbial sword hanging over her head for more days to come. This conduct is inconsistent with that of a party seeking to remove an albatross from around their neck. It was for all the above reasons that this Court refused to exercise its discretion in favour of postponing the ripe review application.

The issue of jurisdiction

[21] It is to this issue that I now turn my attention. The factual basis of the objection to the exercise of jurisdictional powers by this Court is simply that the chairperson of the SCC is a judicial officer of the Superior Court. As at 2022, when the review application was launched, the chairperson of the SCC was, by appointment, a Deputy Chief Justice (DCJ) of the Republic of South Africa attached to the Constitutional Court of South Africa. The respondents contend that section 47(1) of the Superior Courts Act (“the SC Act”)⁷ prevents the institution of the present application against the chairperson of the SCC in the absence of the consent of the head of the Constitutional Court.

[22] The contention is raised as a lack of jurisdiction. The allegation is that the consent of the head of Court contemplated in section 47(1) is a jurisdictional requirement. This Court does not believe that the issue is truly a jurisdictional point. Jurisdiction is about the power of a Court to hear a matter. Generally, jurisdiction is established in the pleadings.⁸ The pleaded case of the applicant is that of a legality review. Based on the pleadings, the High Court retains jurisdiction to hear

⁷ Act 10 of 2013.

⁸ *Baloyi v Public Protector and Others* [2020] ZACC 27; 2022 (3) SA 321 (CC); 2021 (2) BCLR 101 (CC).

the application. Jurisdiction of the High Court arises from section 169(1) of the Constitution.

The reach and purport of section 47(1) of the SC Act

[23] Effectively, this section prevents the institution of civil proceedings against a judge in the absence of the consent of the head of Court. In my considered view, it affords South African judges a limited immunity from being sued by litigants. All the section implies, in my view, is that civil proceedings instituted against a judge without consent are procedurally defective in a sense. However, to my mind, the veritable question is whether the present application is instituted against a “judge” or not. Undoubtedly, the chairperson of the SCC in the name of the Honourable Mr Justice R M M Zondo is a judicial officer or a judge. However, the present review application is not launched against him in his capacity as a judicial officer. When regard is had to the preamble of the Commissions Act (CA),⁹ a commission is appointed for the purposes of investigating matters of public concern. On the other hand, a judge or judicial officer as contemplated in section 165(2) of the Constitution is appointed to apply the law impartially and without fear, favour or prejudice.

[24] When the chairperson of the SCC made the impugned findings and recommendations, he did so as part of investigating matters of public concern and could not have been a judge as contemplated in section 165(1) of the Constitution. Thus, in my fervently held view, the present civil proceedings are not instituted against a judge, but a chairperson of a commission as established by the CA to carry out the functions contemplated in the CA. To buttress this point, the Court in *Freedom Under Law v Motata (FUL)*,¹⁰ with sufficient sagacity expressed itself in the following felicitous terms. The learned Mlambo JP, as he then was, said:

“[26] ... The *core function of Judges is the adjudication of disputes* involving competing interests daily. The judgments they hand down as well as the statements they make in their judgments invariably displease some litigants and sometimes their legal representatives. *It is integral to the adjudication*

⁹ Act 8 of 1947.

¹⁰ [2021] ZAGPPHC 14.

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.” (Emphasis added.)

[25] The learned Mlambo JP further reached the following apt conclusion, which, in my considered view, underscores the reach and purport of section 47(1). He said:

“[34] The objective of the review proceedings is therefore aimed at asserting the proper standard by which *Judges’ misconduct* should be dealt with by the JSC. *Issues of judicial integrity and accountability* will of necessity be ventilated in the review proceedings. It is common cause that the Judicial Conduct Tribunal, established to investigate allegations of gross misconduct against the respondent, had recommended that the respondent *be found guilty of gross misconduct which carried with it the prospect of impeachment*, but the JSC rejected that recommendation opting instead to return a verdict of misconduct *simpliciter*. The review is aimed [at] testing the appropriateness of that finding.

[35] *This is, in my view, a clear case where consent is warranted.*
“(Emphasis added.)

[26] What is perspicuous in the *FUL* matter is that consent is required in an instance where a judge had performed the functions of a judge. The corollary of that must be that, where a judge functions in a different capacity, consent will not be required simply by virtue of their judicial status. There is no doubt that the purpose of section 47(1) is to afford some limited immunity and protection to judges when they perform their official functions. This, to my mind, is underpinned by the express exclusion of the application of the section to an application brought in terms of the Domestic Violence Act. Nevertheless, the point made herein was somewhat confirmed by the United States Courts in *Mireles v Waco (Waco)*.¹¹ In the United States, unlike in South Africa, judges enjoy full immunity against lawsuits¹².

¹¹ 502 US 9 (1991).

¹² See *Randall v Brigham* 74 U.S. 523, 537 (1869) and *Bradley v Fisher* 80 U.S. 335, 347 (1872).

[27] Waco, a public defender, sued Judge Mireles out of an episode in which the judge had Waco frog-marched backwards to his courtroom. Waco had earned the ire of the judge for failing to appear in his courtroom as scheduled. The irate Mireles J ordered the police officers on duty to forcibly bring Waco back to the courtroom. The Federal District Court dismissed the action against Mireles J on the grounds that the judge enjoyed complete immunity from civil claims. The Court of Appeals disagreed and held that Mireles J was not acting in his judicial capacity when he ordered the police and had lost immunity which came with his office. At the United States Supreme Court, the Court differed with the Court of Appeals only on the basis that it classified the actions of Mireles J as non-judicial¹³.

[28] Grippingly, at the United States Supreme Court, the Honourable Mr Justice Stevens dissented on the basis that one of the acts had no relation to a function normally performed by a judge. A judge enjoys absolute protection in respect of all conduct which is judicial in the sense that it accords with the normal judicial function.¹⁴ If the approach followed in *Mireles* is adopted, which I suggest it should be, where a judge performs non-judicial functions, the limited immunity contemplated in section 47(1) of the SC Act finds no application. The chairperson was not cited in his capacity as a judge but as the chairperson of the commission. The chairperson in the commission performed a public or statutory function. Section 172 of the Constitution endows a Court with an obligation to declare any conduct that is inconsistent with the Constitution invalid to the extent of the inconsistency. The chairperson functioning as a statutory functionary cannot be insulated by section 47(1) for the purposes of enforcing section 172 of the Constitution. If it is found by a Court of competent jurisdiction that the chairperson of the SCC has transgressed, it would not have been a transgression within the parameters of his judicial function. The protection in the section is a procedural mechanism against meritless lawsuits against judges and not statutory functionaries. The Court in *FUL* confirmed that section 47(1) covers retired judges as well. If wearing a badge of a judge affords the limited immunity, one

¹³ See 1799-1800 of McCreath & Koen.

¹⁴ McCreath & Koen "Defending the absurd: the iconoclast's guide to section 47(1) of the Superior Courts Act 10 of 2023" (2014) 17(5) *P.E.R* 1789.

imagines a situation where a retired judge is contracted as a private arbitrator, as it occasionally happens, and the arbitration award of the retired judge is impugned on review, as it usually happens. Does it mean that an applicant for review of the private arbitration award must first obtain consent from the head of the Court where the retired judge last served, before instituting a review application? To my mind, such will be stretching the limited procedural immunity contemplated in the section beyond what the section seeks to achieve. This Court is doubtful that such practice of obtaining consent to cite private arbitrators exists. If it does, the heads of Courts are certainly inundated with consent applications from the private arbitration sector. Ordinarily, judges who acted as arbitrators do not even oppose or get embroiled in review litigations.¹⁵

[29] In summary, this Court concludes that the chairperson of the SCC is not contemplated in section 47(1), as such consent is not and was not required to institute the present application. The jurisdiction of this Court is not in any manner or shape ousted by the lack of consent from the head of the Constitutional Court.

Merits of the review application.

[30] Turning my attention to the merits of the review application. It is apparent from the grounds putted for that the present is a legality as opposed to a Promotion of Administrative Justice Act (PAJA) review. This Court must, without hesitation, point out that regard being had to the barrage of criticisms levelled against the SCC's findings, the applicant is effectively seeking an appeal disguised as a review. A review is different from an appeal. In a review, correctness plays no role, whereas in an appeal, correctness plays a major role.

[31] It may be helpful to first recognise the role of the SCC in terms of the CA. Its role is investigative in nature, and it investigates matters of public concern. The way and the powers of the commission in investigating matters of public concern are governed by the provisions of the CA, in particular sections 2, 3, 4, 5 and 6 of the CA. It has not been contended in the founding affidavit by the applicant that the

¹⁵ See for instance *Corruption Watch and Another v Arms Deal Commission and Others* [2019] ZAGPPHC 351; 2020 (2) SA 165 (GP); [2019] 4 All SA 53 (GP), where the Honourable retired justices were cited without any consent of the head of Court.

SCC straddled outside the parameters of the CA when it conducted the investigations.

[32] Regarding the applicable standard of review, it is of significance to state that generally, at the judicial review stage, only evidence relied upon in the decision under review must be considered¹⁶. Differently put; in assessing the impugned findings and recommendations, reliance can only be placed on the evidence tendered at the SCC and nothing more. Such must be the case because the purpose of a judicial review is not to determine whether the decision of the SCC was correct in absolute terms but rather to determine that it was correct based on the record before it¹⁷.

[33] The CA does not afford any aggrieved party a right to appeal the findings and recommendations of the SCC. Thus, the only available remedy to an aggrieved party is to seek a review. Since the SCC performed investigative functions, the PAJA review is unavailable as a judicial review pathway¹⁸. With regard to a standard of review, it must follow that the applicable standard of review is that of reasonableness.¹⁹ In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs (Bato)*²⁰, the Court confirmed that the reasonableness test implies that in order for the decision to be reviewed, it must be demonstrated to be one that is so unreasonable that a reasonable decision maker would not make. Applying the *Bato* test, the findings and the recommendations of the SCC are firstly consistent with the tendered evidence and secondly, they fall within the bands of reasonableness²¹.

[34] To the extent that the applicant alleges that the findings are irrational. The applicant does not allege any procedural irrationality. The Constitutional Court clarified the principle of legality in the following terms:

¹⁶ *Smith v Canada* 2001 FCA 86.

¹⁷ *Chopra v Canada (Treasury Board)* 1999 CanLII 8044 (FC).

¹⁸ See *AGSA v MEC for Economic Opportunities, Western Cape and Another* 2022 (5) SA 44 (SCA).

¹⁹ *Canadian Federation of Students v Natural Science and Engineering Research Council of Canada* 2008 FC 493 (CanLII).

²⁰ [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).

²¹ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; 2008 (2) SA 24 (CC); 2008 (2) BCLR 158 (CC).

[40] What we glean from this is that the exercise of public power which is at variance with principle of legality is inconsistent with the Constitution itself. In short, it is invalid... Relating all this to the matter before us, the award of the DoD agreement was exercise of public power. The principle of legality may thus be a vehicle for its review. The question is: *did the award conform to legal prescripts? If it did, that is the end of the matter*. If it did not, it may be reviewed and possibly set aside under legality review.²² (Emphasis added.)

In *Minister of Defence and Military Veterans v Motau*²³ it was said:

The principle of legality requires that *every exercise of public power*, including every executive act, *be rational*. For the *exercise of public power* to meet this standard *it must be rationally related to the purpose for which the power was given*.” (Emphasis added.)

In *Democratic Alliance v President of the Republic of South Africa* ²⁴, Yacoob ADCJ, as he then was, stated the following about rationality:

“[27] The Minister and Mr Simelane accept that the ‘executive’ is ‘constrained by the principle that [it] may exercise no power and perform no function that conferred... by law’ and that the power must not be misconstrued. It is also accepted that the decision must be rationally related to the purpose for which the power was conferred. Otherwise, the exercise of the power could be arbitrary and at odds with the Constitution. I agree.” (Footnotes omitted.)

It has been confirmed that rationality and reasonableness, although they overlap significantly, are conceptually different²⁵. In *Albutt v Center for the Study of Violence and Reconciliation and others*²⁶, the following was said:

“The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is

²² *State Information Technology Agency SOC Ltd v Gijima Holding (Pty) Ltd* [2017] ZACC 40; 2018 (2) SA 23 (CC); 2018 (2) BCLR 240 (CC).

²³ [2014] ZACC 18; 2014 (5) SA 69 (CC); 2014 (8) BCLR 930 (CC).

²⁴ [2012] ZACC 24; 2013 (1) SA 248 (CC); 2012 (12) BCLR 1297 (CC).

²⁵ See *Pharmaceutical Manufacturers Association of SA In Re: Ex Parte Application of the President of the RSA* 2000 (3) BCLR 241 (CC)

²⁶ [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) at para 51.

challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking they are not, they fall short of the standard demanded by the Constitution.”

[35] A submission was made in the heads submitted by Mr Hodes SC that SCC and its chairperson failed to execute the investigation within its terms of reference in that it overlooked critical evidence and demonstrated bias. Having scoured through the founding affidavit of the applicant, this Court was unable to identify any allegation of an oversight of critical evidence or demonstration of bias. An applicant for review is not permitted to make a case only in argument when such a case is not foreshadowed in the founding papers. On proper consideration of the applicant’s founding affidavit, it is replete with statements like “my version” and it is “not true”. Contending that a version is true and the other is not true does not amount to an oversight of evidence. Put to its lowest ebb, it may mean that the alleged truthful evidence is rejected as opposed to being overlooked. The conclusions reached in the *Corruption Watch*²⁷ case, heavily relied on by the applicant, are not apposite in the present application. In *Corruption Watch*, a finding was made that the commission failed to conduct the task assigned to it through its terms of reference. In the present application, this Court is unable to reach the same conclusion. In fact, the Court in *Corruption Watch* cautioned thus:

“[70] We accept that Courts must be cautious before exercising a power of review over the proceedings of a commission. To exercise a review power in an overzealous fashion would be to subvert the flexible nature of a commission’s choice of procedure and constrain many decisions that a commission must make along the way to its ultimate findings. *However, where the uncontested evidence reveals so manifest a set of errors of law, a clear failure to test evidence of key witnesses, a refusal to take account of documentary evidence which contained the most serious allegations which*

²⁷ *Corruption Watch and Another v Arms Procurement Commission and others* [2019] ZAGPPHC 351; 2020 (2) SA 165 (GP); 2019 (10) BCLR 1218 (GP).

were relevant to its inquiry, the principle of legality dictates only one conclusion, that the findings of such a commission must be set aside.”

[36] With regard to the ripeness argument, on the strength of the decision of *Peters v Davison (Peters)*²⁸ and *Fay, Richwhite and Co Ltd v Davidson (Davidson)*²⁹ this Court takes a view that to the extent that the applicant alleged some irrationality in the findings, she was entitled to impugn the findings, even in the circumstances where the recommendations do not adversely prejudice any of her rights. On application of the legality principle, a party is entitled to a rational decision. However, the rationality test, as demonstrated in the *Albutt* case, is a low threshold test. What is to be investigated by a Court of review is the means employed as opposed to the correctness of the decision. The applicant failed to demonstrate that the findings or recommendations suffer from any form of irrationality. The consequence of that failure is that her legality review falls to be dismissed.

The issue of costs

[37] The respondents employed the services of three counsel. The respondents sought an order of costs to include the costs of employing two counsel. It may well be so that the present application is an offshoot of the much-popularised SCC inquiry, but the present is confined to a portion of the humongous report. It remains an ordinary run-of-the-mill review application. The employment of two counsel was not warranted. However, this Court takes the view that the employment of a senior counsel was warranted. Ms Hofmeyer SC was steeped in the matter, and for her, it was a reinvention of the wheel, having been the evidence leader at the SCC.

[38] Because of all the above reasons, I make the following order:

Order

1. The application for postponement is dismissed.
2. The application for review is dismissed.

²⁸ [1999] 3 NZLR 744.

²⁹ [1995] 1 NZLR 517 (CA) at 524.

3. The applicant must pay the costs attendant to the postponement application as well as the review application on a scale of party and party to be settled or taxed at scale C. The costs include the costs of employing one senior counsel.

GN MOSHOANA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

For the Applicant:	Hugo (postponement only) Heads, L Hodes SC
Instructed by:	L Mbanjwa Inc, Pretoria.
For the Respondents:	K Hofmeyer SC, M Mbikiwa and A Molver
Instructed by:	Molefe Dlepu Inc, South Kesington
Date of Hearing	5 August 2025
Date of judgment:	14 August 2025