

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2026-026936

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: NO
	
21 April 2026	_____
DATE	SIGNATURE

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

ADVOCATE ANDREA GABRIEL SC

Fifth 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

Judicial Commission of Inquiry – Recusal of Chairperson – Review of refusal to recuse – Section 47(1) of Superior Courts Act 10 of 2013 – Applicability – Collective decision-making – Reasonable apprehension of bias – Past institutional roles – Duty of disclosure – Application to compel under Uniform Rule 53 – Separation of powers

Summary: Section 47(1) of the Superior Courts Act does not apply to the review of a recusal ruling arising from proceedings already under way and does not require consent to challenge such a ruling. A recusal application directed at the Chairperson of a commission of inquiry is not new civil proceedings against a judge but a defensive mechanism aimed at safeguarding institutional impartiality. Where all members of a commission hear argument on a recusal application, the application must be determined collectively in accordance with the commission's rules. A unilateral ruling by the Chairperson constitutes a structural defect rendering the decision unlawful. A reasonable apprehension of bias may arise where the Chairperson's past institutional roles in the TRC and NPA overlap with the subject matter of the commission's inquiry and where adequate disclosure of those roles is not made. Temporal distance does not neutralise apprehended bias where the inquiry flows from or implicates earlier institutional involvement. Allegations of actual misconduct must be supported by evidence and cannot be sustained on speculation. An application to compel production of documents under Uniform Rule 53 fails where the alleged documents were not shown to form part of the record before the decision-maker or to exist; Rule 53 does not authorise speculative discovery. Executive appointment of a commission chairperson does not displace the court's constitutional duty to determine recusal objectively. Retrospective executive views on suitability or appointment cannot substitute for, or intrude upon, judicial determination of reasonable apprehension of bias.

On 30 March 2026, the majority judgment was handed down while the dissenting judgment was still being written. The dissenting judgment is handed down electronically by circulation to the parties by email, and by publication on Court Online and release to SAFLII. The date for the handing down is deemed to be 21 April 2026 at 10am.

DISSENTING JUDGMENT

MODIBA J

Introduction

- [1] I had the benefit of studying the first judgment. It proceeds from the premise that the first to fifth respondents' (the Commission) contention regarding the applicants', Mr Jacob Gedleyihlekisa Zuma (Mr Zuma) and Mr Thabo Mvuyelwa Mbeki's (Mr Mbeki), non-compliance with section 47(1) of the Superior Courts Act 10 of 2013 (the section 47(1) objection) is dispositive of the application. It upholds the section 47(1) objection, finds that the need to deliver judgment in Mr Zuma's application to compel compliance with uniform rule 53(1)(b) (the application to compel) has fallen away and dismisses the application.
- [2] In my view there are various compelling reasons why all the issues that arise between the parties ought to be determined. For that reason, I adopt a different approach. And for reasons I articulate at the relevant point, I am also of the view that the first judgment is open to dissent.
- [3] First, prior to oral argument, as requested by the parties, the Court considered the sequencing of the preliminary issues raised by President Zuma and the Commission namely: the application to compel and the section 47(1) objection. It concluded that it was bound by the rule against piecemeal adjudication and accordingly heard argument on all the issues over two days.¹ Therefore, the parties are entitled to a ruling on all the issues.

¹ *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* (288/11) [2012] ZASCA 15; 2012 (3) SA 486 (SCA); [2012] 2 All SA 345 (SCA); 2012 (6) BCLR 613

- [4] Second, this Court heard oral arguments in the application to compel and reserved its ruling. The relief sought in the application to compel is directed not only at the Chairperson but also at the second to fifth respondents, each of whom remains seized with the obligation sought to be enforced in terms of uniform rule 53(1)(b) and none of whom alleges that those obligations are negated or suspended by non-compliance with section 47(1).
- [5] Even if the section 47(1) objection is not upheld, the judgment in the application to compel is not necessarily negated, particularly if this Court finds that the second to fifth respondents have the authority and capacity to comply with the compelling order if granted. Therefore, President Zuma's entitlement to a determination of the application to compel does not necessarily depend on the outcome of the section 47(1) objection.
- [6] Third, if the application to compel is dismissed, President Zuma's right to supplement his papers, which he reserved in case the application to compel is granted, would not arise. Fourth, if the section 47(1) objection is dismissed, as I do in the second judgment, the review proceedings are not vitiated. Regardless which scenario ultimately prevails, the rule against piecemeal adjudication, the injunction against placing the appeal court in a position where it must determine issues in the first instance and the interests of justice are all encompassing.
- [7] Several applications are referred to in the second judgment. To avoid any ambiguity, I assign specific nomenclature to each. The first is the application brought by the National Prosecuting Authority (NPA) and the Department of Justice and Constitutional Development (the Department) before the Commission for the recusal of its Chief Evidence Leader, Mr Ishmael Semanya SC (Mr Semanya SC, the Semanya recusal application).

(SCA) (20 March 2012) para 49; *Louis Pasteur Holdings (Pty) Ltd and Others v Absa Bank Limited and Others* 2019 (3) SA 97 (SCA) para 33.

- [8] The second is the applications President Zuma and President Mbeki (the applicants) brought before the Commission seeking the recusal of the Commission's Chairperson, Justice Sisi Khampepe (the Khampepe recusal application(s)). These applications feature predominantly in the second judgment, as the applicants impugn the Chairperson's ruling in the present review application. Accordingly, any reference in this judgment to "the recusal application(s)", unless the context indicates otherwise, is a reference to the Khampepe recusal application(s).
- [9] The third is the application to compel, to which I have already alluded. The fourth is the present application, in which the applicants challenge the Chairperson's ruling in the Khampepe recusal applications (the review application or the present application).

Factual Background

- [10] I briefly recount the factual and procedural history giving rise to the present application. I do so for the limited purpose of situating all the issues that are addressed in the second judgment.
- [11] The President of the Republic of South Africa, President Ramaphosa (President Ramaphosa) established the Judicial Commission of Inquiry into Allegations Regarding Efforts or Attempts Having Been Made to Stop the Investigation or Prosecution of Truth and Reconciliation Commission [TRC] Cases (the Commission), on 29 May 2025 with Justice Sisi Khampepe as its Chairperson (the Chairperson) and Judge President Frans Kgomo² and Advocate Andrea Gabriel SC as Commissioners (the Commissioners). The establishment of the Commission arose from a partial settlement concluded in litigation the Calata Group instituted in the High Court, Gauteng Division, Pretoria. In those proceedings, the Calata Group sought various forms of relief, including constitutional damages against the State and an order compelling President Ramaphosa to establish the Commission.

² Judge President Frans Kgomo is the former Judge President of the Northern Cape Division of the High Court.

- [12] During September and October 2025, the Commission issued notices to President Zuma and President Mbeki in terms of rule 3.3 of its Rules, as promulgated in the Government Gazette.³ Those notices informed the applicants as affected persons of the establishment of the Commission, the manner in which they are implicated in its subject matter, and the procedural rights available to them in the course of the inquiry.
- [13] On 3 December 2025, President Zuma, having received such a notice, addressed correspondence to the Chairperson. In that letter, he objected to being subjected to the Commission's jurisdiction with Justice Khampepe as its chairperson, identified the grounds upon which he contemplated seeking the Chairperson's recusal, and requested guidance as to the procedure he ought to follow in pursuing that relief.
- [14] The Chairperson responded by inviting President Zuma to bring a formal application for her recusal and by issuing directives governing the filing of affidavits. President Zuma filed his application on 15 December 2025. President Mbeki lodged a similar application on 19 December 2025. The Commission and the Calata Group opposed both applications. Oral argument was heard on 16 January 2026. On 30 January 2026, the Chairperson delivered a written ruling dismissing the applications.
- [15] It is against this backdrop that, during February 2026, President Zuma instituted the present application, later joined by President Mbeki as co-applicant with this Court's leave. The substantive allegations they make in the present application are similar to those they made in the recusal application.
- [16] They allege that the Chairperson's previous roles as a TRC Commissioner between 1995 and 2001, a member of the TRC Amnesty Committee between 1996 and 2001 and her employment as Deputy Director of Public Prosecutions at the NPA between September 1998 and December 1998 (past institutional roles) gives rise to a reasonable apprehension of bias. President Mbeki also alleges that the irregularities in her handling of conflict-of-interest objections

³ Published in terms of Proclamation Notice 285 of 2025 under Government Gazette No. 53251 on 29 August 2025.

involving Mr Semenya SC also give rise to a reasonable apprehension of bias. President Zuma further alleges actual bias arising from the Chairperson's handling of the Semenya recusal application.

- [17] The applicants contend that the alleged disqualifying bias imperils the fairness of the Commission's proceedings. In this review application, the applicants seek an order reviewing and setting aside the recusal ruling and directing that Justice Khampepe be removed as the Chairperson and/or member of the Commission, alternatively that President Ramaphosa be directed to terminate her appointment with immediate effect.
- [18] The Commission and the Calata Group oppose the review application on several preliminary grounds and on the merits. Although the NPA and President Ramaphosa later filed explanatory affidavits, they abide the decision of this Court. I address these affidavits where relevant. The Minister of Justice and Constitutional Development (the Minister) also abide the decision of this Court.
- [19] As mentioned, President Zuma raises the application to compel as a preliminary issue. The second preliminary issue both applicants raise is that the Chairperson's ruling in the Khampepe recusal application is invalid as it was only made by her notwithstanding that the other Commissioners also heard oral argument (the invalid ruling ground). The Commission and the Calata Group oppose these preliminary points.
- [20] The Commission and the Calata Group's preliminary points include the section 47(1) objection. They also contend that the application constitutes an impermissible midstream review, brought while the Commission's processes are ongoing (the midstream review ground). The applicants dispute this characterisation and maintain that the circumstances justify immediate judicial intervention.
- [21] These respondents also allege that the application constitutes an abuse of court process and that there has been unreasonable or undue delay in bringing the Khampepe recusal applications (the delay ground). The applicants expressly oppose these contentions. Lastly, President Ramaphosa contends that the relief

contemplating the removal or termination of the Chairperson by the direction of the Court impermissibly infringes the doctrine of separation of powers.

- [22] Apart from the section 47(1) objection, the invalid ruling ground, the application to compel and the merits which I dedicate distinct parts of the second judgment to, I address the rest of the issues in relevant parts of the judgment.

Section 47(1) objection

- [23] The first judgment adopts an unduly formalistic reading of section 47(1) with reference to previous judgments without engaging with the procedural and contextual character of recusal proceedings. By treating the review of a refusal to recuse as the institution of “civil proceedings” against a judge, it fails to give due recognition to the distinction between the initiation of litigation targeting a judge and interlocutory or defensive mechanisms aimed at safeguarding adjudicative impartiality within existing proceedings.

- [24] This approach overemphasises the protective purpose of section 47(1) while marginalising its textual limits and ignoring the unintended consequences that flow from extending the consent requirement to recusal reviews. In doing so, the first judgment risks insulating recusal rulings from ordinary judicial scrutiny and introducing a procedural barrier which the legislature in enacting section 47 could never have contemplated.

- [25] Recusal applications are not ordinarily new proceedings. Judges are normally not cited in such applications. This remains the case when such rulings are appealed or reviewed.

- [26] Justice Khampepe is cited because the proceedings occurred before a Commission rather than a court. That procedural peculiarity is irrelevant. The recusal order was sought against the Commission, not against her. A recusal application is directed at the decision-making body and not necessarily at the individual presiding officer in their official or personal capacity. The application arose in Commission proceedings rather than litigation does not. These factors do not, without more, change the context in which recusal applications are brought.

- [27] Most notably, the first judgment also fails to grapple with the defensive and jurisdictional nature of the recusal applications triggered by the Commission's own Rule 3.3 notices, and with the Chairperson's contemporaneous conduct in issuing directives consistently with rule 11. Her conduct is consistent with interpreting section 47(1) as excluded in that context given the purpose of the provision which is clearly not served by its application. This results in an interpretation that is difficult to reconcile with the contextual, purposive methodology articulated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*⁴ (*Endumeni*) and that stretches section 47(1) beyond its language, purpose and context.
- [28] The Commission contends that in terms of section 47(1), civil proceedings may not be instituted against any Judge of a Superior Court except with the consent of the head of that court. The Commission further contends that this principle applies to retired judges and encompasses proceedings of the present nature. And the Commission also submitted, the applicants' failure to obtain the requisite consent renders them non-suited, and the review application falls to be dismissed solely on this basis.
- [29] President Zuma contends that this point in limine must fail because section 47(1) does not apply to retired judges cited nomine *offici* as a Commissioner in a commission of inquiry performing non-judicial functions – and not cited in their capacity as judges or in their personal capacities. President Mbeki advances a similar argument. He further contends that section 47(1) read with 47(2), in the scheme of the Superior Courts Act as a whole, does not apply to a retired judge whose recusal ruling in her capacity as a Commissioner of a commission of inquiry is being reviewed in the High Court.
- [30] The question whether a review of a recusal application requires Heads of Court consent is novel and has not been answered by our courts. President Mbeki submits that it ought to be answered in the negative.

⁴ 2012 (4) SA 593 (SCA)

[31] Section 47 provides as follows:

“Issuing of summons or subpoena in civil proceedings against judge

(1) 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.

(2) Where the issuing of a summons or subpoena against a judge to appear in a civil action has been consented to, the date upon which such judge must attend court must be determined in consultation with the relevant head of court.”

[32] Over the years, *Endumeni* has become instructive on the approach to interpreting text. There, the Supreme Court of Appeal (SCA) held that to derive meaning from a statutory provision, the words used in the provision are to be read in context having regard to the purpose of the provision.⁵ The SCA further held that meaning is ultimately the most compelling and coherent account the interpreter can provide, making use of these sources of interpretation. It is not a partial selection of interpretational materials directed at a predetermined result.⁶

[33] The purpose of section 47(1) has been extensively dealt with in several decided cases which are extensively dealt with in the first judgment. In essence it is twofold. First, it is to protect judges against frivolous and vexatious litigation in which they are targeted due to their work on the bench.⁷ Second, to ensure that appearance by a Judge in court does not disrupt court proceedings.⁸

⁵ *Id* at para 18. See also *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) para 51 and *Mbambisa and Others v Nelson Mandela Bay Metropolitan Municipality* [2024] ZASCA 151; (2025) 46 ILJ 277 (SCA); 2025 (3) SA 112 para 41

⁶ *Endumeni* at para 18.

⁷ *Soller v President of the Republic of South Africa and Others* 2005 (3) SA 567 (T). See also paragraph 45 of the main judgment

⁸ *Freedom Under Law v Motata* [2021] ZAGPPHC 14 at para 26

- [34] I am not persuaded that Justice Khampepe should be deprived of the protection Judges enjoy in terms of section 47(1) simply because she is a retired Judge. One of the grounds on which President Zuma sought her recusal as Chairperson, which he has since abandoned, stems from a judgment she handed down against him when she was a member of the Constitutional Court (the contempt judgment). What this demonstrates is that the work of a Judge is not obliterated by her retirement. And that adverse decisions may render her vulnerable to litigation even post-retirement.
- [35] The first judgment places considerable emphasis on President Zuma's reliance on the contempt judgment in support of the Chairperson's recusal, as well as on his request in the review application for a punitive personal costs order against her, as reinforcing the need for the protection afforded by section 47(1). While these considerations carry weight, the significance of the contempt judgment is diminished for several reasons.
- [36] The Chairperson was aware of President Zuma's reliance on the contempt judgment before the recusal application was filed, as it was mentioned in President Zuma's letter of 3 December 2025, yet she did not invoke section 47(1) at that stage. President Zuma has since abandoned reliance on that issue and has confined the present proceedings to the substantive issues requiring determination.
- [37] Moreover, the contempt judgment should not be extended to colour President Mbeki's recusal application with allegations of vexatiousness or vindictiveness, given that he is not implicated in it and does not rely upon it. Finally, the question of costs sought by President Zuma stands to be determined on its own merits and should not be allowed to prejudice President Mbeki, who does not seek such an order and to displace the other substantive issues that arise for determination.
- [38] The novel issue raised by President Mbeki does not, without more, discount the purpose that section 47(1) serves in protecting both Judges in active service and retired Judges from frivolous and vexatious litigation. The second purpose, which section 47(2) provides for, obviously does not serve retired Judges. Their

appearance in court proceedings will not cause any disruption in the work of courts as they are not rostered.

[39] I now turn to the context in which I am required to give meaning to the words “civil proceedings” and the residual text in section 47(1). A recusal application is a formal request for a judge or judicial officer to step down from a case due to potential bias, conflict of interest, or prejudice. It ensures a fair trial by requiring an impartial adjudicator, as it is a fundamental legal principle that one cannot be a judge in their own cause.

[40] A recusal application is never brought as new proceedings. It always arises from proceedings that are underway. Since a notice of motion or summons is not issued, it is hardly surprising that section 47(1) has never been raised in any of the judgments relied on by the parties in these proceedings and those referenced in the first judgment. Hence, ordinarily when the recusal of a Judge is sought, it is raised in proceedings in which she is not cited as a party. An order for her recusal is sought notwithstanding that she is not cited as a party.

[41] In such proceedings, a party who is aggrieved by the Judge’s refusal to recuse herself has the right to appeal such an order. In the appeal proceedings, the Judge is also never cited. It would be absurd for the Judge to claim protection from section 47(1) at that stage of the proceedings. It is in this context that the character of the present review application ought to be understood and the meaning of the words in section 47(1) interpreted for application in recusal proceedings.

[42] On 3 December 2025, in response to the Rule 3.3. notice the Commission issued to President Zuma, his attorney addressed an elaborate response to the Commission. I quote his response in relevant parts below:

“For now, it is sufficient to register, as we hereby do, our client’s objections as a result of which and/ or until the issues are addressed, it would be premature to submit to the jurisdiction of the Commission by participating in its obviously tainted activities. ...

The purpose of this letter is therefore to demand the immediate recusal of the Chairperson in respect of any process which involves the rights and interests

of our client, alternatively from the Commission itself, further, alternatively to exempt our client from any participation in the Commission as presently constituted.

Kindly bring this letter to the attention of the Commission and advise us as to how it is proposed our client's objections may be taken forward and/or whether and if so in what form our client will be afforded the opportunity to make more detailed submissions in support of his stance as outlined above.

Needless to say, our client is willing to be guided by the Commission regarding the way forward, if any, in the handling of the matter. He specifically reserves all his rights and will pursue any legally available avenues in order to protect his threatened and/ or violated rights."

[43] On the same day, in response to the above letter, the Chairperson issued the following directives:

"1.1 Your client is directed to file his application for my recusal to the Commission by no later than 11 December 2025;

1.2 Any answering affidavit by the Commission to be filed no later than 17 December 2025;

1.3 Any reply to be filed no later than 22 December 2025;

1.4 Written submissions to be filed by your client no later than 31 December 2025;

1.5 Written submissions to be filed by your client no later than 6 January 2026;

1.6 The Commission will decide my recusal on the papers filed with the Commission."

[44] The attorneys for President Zuma subsequently served a notice of motion styled "NOTICE OF APPLICATION FOR THE RECUSAL OF THE CHAIRPERSON" on the Commission on 15 December 2025. President Zuma is cited as the applicant. The respondent is cited as "Justice Sisi Khampepe, The Chairperson of the Commission". President Mbeki served his notice of motion on 19 December 2025.

[45] The effect of the Rule 3.3 notices the Commission issued to President Zuma and President Mbeki is to subject them to its jurisdiction. They are akin to a summons

in legal proceedings. The applicants sought her recusal as an objection to the Commission's jurisdiction chaired by her as the Chairperson. They had initiated no proceedings against the Chairperson. President Zuma's attorneys had sought advice from the Chairperson on how to object to the Commission's jurisdiction by seeking her recusal. In that letter, the adverse judgment she handed down against President Zuma was mentioned as one of the grounds on which her recusal is sought.

[46] As already mentioned, she did not assert the cover she enjoys under section 47(1) to protect herself from President Zuma using the contempt judgment to object to the Commission's jurisdiction chaired by her. The fact that the Chairperson did not at that stage object to the recusal application in terms of section 47(1) is consistent with the context in which recusal applications ordinarily arise and excludes such applications from the scope of section 47(1).

[47] But for the Rule 3.3 notices which the Commission issued to President Zuma and President Mbeki informing them that they are implicated in the subject matter of the Commission, they would not be subject to the Commission's jurisdiction. Their recusal applications are mechanisms they resorted to in objecting to the Commission's jurisdiction. In essence, they resorted to the recusal applications as a defence apparatus for resisting the Commission's jurisdiction chaired by Justice Khampepe. The recusal applications are not new proceedings as foreshadowed in section 47(1).

[48] To the extent that the review application impugn the Chairperson's ruling in refusing to recuse herself, it does not morph into new proceedings as foreshadowed in section 47(1). It is akin to an appeal against a decision by a Judge refusing to recuse herself. To regard these proceedings otherwise would permit an objection during secondary proceedings and place a hurdle that potentially insulates recusal decisions from judicial scrutiny. This is manifestly at odds with the purpose, context and language of the provision.

[49] Even if section 47(1) can apply, in appropriate circumstances to retired Judges *nomine officii*, that does not advance the case of the Commission and the Calata Group. On the present facts, the determinative consideration is not the status of

the decision-maker, but the nature of the proceedings. A review of a recusal ruling does not fall within the category of civil proceedings regulated by section 47(1).

[50] For these reasons, section 47(1) does not apply to an application to review a ruling refusing recusal. The objection raised on the present facts fails.

The application to compel

[51] President Zuma seeks an order compelling the Commission, in terms of uniform rule 53(1)(b), to supplement the record it filed on 13 February 2026. He contends that the Commission failed to include certain documents which, according to him, ought to form part of the review record. These are said to include:

- a. Alleged email exchanges between evidence leader(s), referred to in paragraphs 38 to 40 of the founding affidavit in the Khampepe recusal application and discussed in section H of the impugned ruling of the Chairperson;
- b. Correspondence from the National Prosecuting Authority and/or the Department of Justice notifying the Commission of an intention to institute the Semenya recusal application;
- c. An email allegedly sent by the Chairperson to Adv Semenya SC on or about 5 November 2025, dealing with matters raised in the Semenya recusal application, as referred to in paragraph 23.6 of the replying affidavit in the Khampepe recusal application;
- d. Copies of any research allegedly conducted by Commissioners and furnished to the Evidence Leaders prior to the hearing of the Semenya recusal application;
- e. Transcripts or copies of alleged WhatsApp communications between the Chairperson and the Chief Evidence Leader, also referred to in paragraph 23.6 of the replying affidavit and in section H of the impugned ruling; and
- f. Any other outstanding documents and/or reasons said to shed light on the alleged misconduct or the impugned decision.

- [52] President Zuma accuses the Commission of “actively concealing” these documents. His complaint is premised on the contention that the Commission did not expressly deny their existence either in the Khampepe recusal application or in the review application. He further contends that the Commission’s reference to alleged unlawful interception of private communications constitutes an indirect admission of their existence, while simultaneously avoiding a substantive response to his allegations.
- [53] A close reading of the founding and replying affidavits in the Khampepe recusal application reveals, however, that the documents President Zuma now seeks to compel were never part of the record in those proceedings. They were relied upon by him merely as alleged facts in support of his accusation that the Chairperson coached and assisted Adv Semenya SC in an application over which she presided. Their mention in section H of the impugned ruling does not render them part of the review record. In analysing and rejecting the allegations levelled against her, the Chairperson necessarily had to refer to the content of those allegations, including the documents said to underpin them.
- [54] Contrary to President Zuma’s contention, the Commission did respond substantively to the application to compel. In paragraphs 206 to 217 of its answering affidavit, the Commission expressly denied improperly withholding any portion of the record. It unequivocally denied that the Chairperson coached Adv Semenya SC, furnished him with research, or engaged in conduct that compromised the integrity of the Semenya recusal application. It further rejected the contention that uniform rule 53(1) imposes an obligation on a decision-maker to disclose private communications in the absence of any factual basis establishing their relevance or existence. These denials were clear, directed at the gravamen of the allegations, and cannot be characterised as evasive.
- [55] The Commission further contended that uniform rule 53 is not a mechanism for speculative or inquisitorial discovery. It does not impose a residual or reverse onus on a decision-maker to disclose documents merely because their existence is alleged. According to the Commission, uniform rule 53 is concerned with placing before the court the record that served before the decision-maker, and

not with compelling disclosure of documents invoked only as allegations by a litigant.

[56] The dispute between the parties is thus not whether the Commission responded to the application to compel, but whether that response was legally sufficient to trigger any additional obligation under uniform rule 53(1). The Commission disputes a foundational premise of the application, namely that uniform rule 53 obliges disclosure of documents whose existence has not been established and which were not before the decision-maker at the time the impugned decision was taken.

[57] That distinction is decisive. Uniform rule 53 exists to facilitate judicial review by ensuring that the court has before it the relevant record of the decision under review. It is not intended to compel the reconstruction or creation of a record after the fact, nor to authorise fishing expeditions into speculative material. The Commission's response engages directly with this doctrinal limitation.

[58] I accordingly find that the Commission did respond to the application to compel. Its response was substantive, addressed the core allegations, and included unequivocal denials of improper conduct, concealment of documents, and alleged coaching of counsel. Its contention that uniform rule 53(1) does not require disclosure of documents whose existence has not been established is legally sound and consistent with the purpose of the rule.

[59] The allegation that the Commission indirectly admitted the existence of the disputed documents is not borne out by the pleadings. There is accordingly no factual or legal basis for the claim that the Commission failed to engage with or improperly avoided the application to compel.

[60] It is apparent that President Zuma appreciated this difficulty. In his heads of argument, he sought to invoke uniform rule 35(13), which permits a court, in appropriate circumstances, to direct that the rules relating to discovery in action proceedings apply to applications. He relies on uniform rules 35(3) and 35(7).

[61] Uniform rule 35(3) provides a mechanism for the discovery of additional documents where discovery has already occurred, while uniform rule 35(7)

furnishes a remedy for non-compliance with discovery obligations. President Zuma's reliance on these provisions is misplaced. He resorts to them precisely because he cannot, under uniform rule 53(1)(b), compel the production of documents merely based on a belief that they exist.

[62] His reliance on *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* is similarly misplaced. That decision concerned discovery properly invoked under uniform rule 35(3). Even applying the principles articulated in *Swissborough*, President Zuma fails at the threshold requirement of demonstrating, on a factual basis, the existence of the documents sought. The mere ability to describe documents does not establish that they exist.

[63] Moreover, he did not seek discovery in terms of uniform rule 35(1), nor did the Commission make discovery under uniform rule 35(2). In the absence of primary discovery, a demand for further and better discovery under uniform rule 35(3) is unsustainable. For the same reason, no case has been made out for relief under uniform rule 35(7).

[64] The attempt to invoke the discovery regime of uniform rule 35 to compel the production of documents whose existence remains unproven must therefore fail. The application to compel is further undermined by the fact that the documents sought did not form part of the record in the Khampepe recusal application. Consequently, no basis exists to compel the Commission to produce them in terms of uniform rule 53(1)(b).

Impermissible Midstream Review

[65] The Commission contends that the present application constitutes an impermissible midstream review, brought while the Commission's proceedings are ongoing, and ought therefore to be dismissed. That contention cannot be sustained.

[66] Prudential restraint against midstream reviews, rooted in considerations of efficiency, institutional comity and the avoidance of piecemeal adjudication, is well established. It serves to prevent the undue disruption of proceedings and to ensure that decision-making processes run their proper course before judicial

intervention is sought. However, the rule against midstream review is not absolute. Our jurisprudence recognises that immediate judicial intervention is justified where the impugned decision goes to jurisdiction, legality, or the fundamental fairness of the process itself, and where declining intervention would permit an allegedly unlawful process to continue, thereby compounding the very harm complained of.

[67] A ruling on recusal is paradigmatically such a decision. Recusal is not an ordinary procedural ruling regulating the conduct of proceedings. It concerns the composition, authority and impartiality of the decision-making body itself. Once recusal is refused, the applicant is compelled to participate in proceedings presided over by a decision-maker whose impartiality is reasonably apprehended to be compromised. Any further participation occurs under a cloud of alleged institutional illegitimacy.

[68] In these circumstances, the characterization of the present application as an impermissible midstream review is inconsistent with both the nature of recusal and the basis upon which judicial intervention is sought. The applicants do not seek to pre-empt the substantive outcome of the Commission's work, nor do they invite this Court to pronounce on issues entrusted to the Commission's investigative mandate. They challenge the lawfulness of the ruling dismissing the recusal application, alleging that it was taken by an improperly constituted decision-maker and in a manner inconsistent with governing rules and constitutional principles of institutional impartiality.

[69] Importantly, a recusal ruling is not capable of later cure. If the decision-maker ought to have been disqualified at the outset, every subsequent step taken in the proceedings is tainted by that defect. To require an aggrieved party to await the conclusion of the Commission's work before seeking judicial review would be to compel participation in a process alleged to be unlawful for want of impartiality, and to render any eventual relief largely illusory.

[70] Nor can this objection be answered by pointing to the availability of post-hoc judicial review. The constitutional injury occasioned by adjudication or investigation conducted by a tainted decision-maker lies not merely in the

outcome, but in the process itself. The right to an impartial and lawful decision-maker is infringed the moment a party is required to submit to a process over which such a decision-maker presides. That infringement is immediate and ongoing.

[71] For these reasons, our courts have consistently held that challenges directed at recusal decisions, jurisdictional rulings, or defects going to the authority of the decision-maker do not fall within the category of impermissible midstream reviews.⁹

[72] In the present matter, the applicants' challenge is confined to the lawfulness of the ruling dismissing the recusal application. It raises a discrete and anterior question of legality that can be determined without trenching upon the merits of the Commission's substantive inquiry. Entertaining the review does not fragment the Commission's work in any meaningful sense; rather, it serves to determine whether that work may lawfully continue under its present constitution. Accordingly, the objection that the application constitutes an impermissible midstream review is without merit. The challenge falls squarely within the recognised exceptions to the rule against interlocutory review and must therefore be dismissed.

Validity of the Impugned Ruling

[73] The applicants impugn the Chairperson's ruling in the recusal application on the common cause material facts relevant to this issue. What is contested are the legal consequences flowing from those facts.

[74] The common cause facts are that the answering affidavit filed by the Commission in opposition of the Khampepe recusal application was deposed to by Mr Semenya SC. The Chairperson did not place any version before the Commission in response to the allegations of reasonable apprehension of bias founded on her past institutional roles. When oral argument was heard on 16 January 2026,

⁹ See *SARFU* paras 32, 34–35, 76 and 79, 48; *Bernert* paras 28, 32–35; *Masuku* para 67; *Gqwetha* paras 22–24; *Khumalo* paras 44–46.

all three members of the Commission presided. However, the recusal application was determined solely by the Chairperson by way of a written ruling.

[75] The applicants contend, relying primarily on *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*¹⁰ (SARFU), that the ruling is invalid because the recusal application ought to have been determined collectively by all three members of the Commission. Therefore, they further contend, the impugned ruling issued by the Chairperson alone, is a nullity.

[76] The Commission, on the other hand, contends that its quorum is prescribed by law and that rule 3 of its rules empowers the Chairperson to determine interlocutory applications. It argues that an application for the recusal of the Chairperson falls within this category and was therefore properly determined by her alone. On behalf of the applicants, it was countered that recusal applications are regulated by rule 11, which expressly requires such applications to be determined by the Commission as a whole, and not by the Chairperson acting singly.

[77] In *SARFU*, the Constitutional Court articulated the approach where the recusal of one of its members is sought and that member declines to recuse herself. The Court held that whether a judicial officer is disqualified on account of a reasonable apprehension of bias is an objective enquiry and one that calls for collective determination.¹¹ The Court emphasised that where a judicial officer who ought to have recused herself fails to do so, her decision may contaminate the ultimate decision of the Court¹² For this reason, the remaining members of the court may have a duty to refuse to sit with the affected member.¹³

[78] This approach has since been affirmed by the Constitutional Court in *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another*¹⁴ (*Masuku*) and by the SCA in *AfriForum v Economic Freedom Fighters and Others*¹⁵ (*AfriForum*), both of which endorsed the principle

¹⁰ 1999 (4) SA 147 (CC)

¹¹ *Id* at paras 34 and 48

¹² *Id* at para 32

¹³ *Id*

¹⁴ 2022 (4) SA 1 (CC)

¹⁵ 2024 (6) SA 1 (SCA)

that a recusal application implicates institutional integrity and must, where applicable, be addressed collectively. The Commission's contention that rule 3 empowered the Chairperson to determine the recusal application cannot be sustained.

[79] Rule 3 regulates the presentation of evidence by the Commission's Evidence Leaders, the rights of implicated persons, and the procedures governing the presentation of such evidence. It empowers the Chairperson to make specified rulings in that narrow context. It does not regulate general interlocutory applications. Those, including other applications are expressly governed by rule 11 which, as its heading indicates, applies to "general applications". Rule 11 provides that such applications are brought to the Commission. The Khampepe recusal applications were brought to the Commission.

[80] Being a creature of statute, the Chairperson enjoys no powers beyond those conferred by law. Rule 11 does not clothe her with authority to determine such applications unilaterally. A purposive and contextual interpretation of the rules supports this conclusion. This interpretation accords with the structure and purpose of the Commission, which comprises three members and not only its Chairperson, as well as with the language employed in the rules themselves.

[81] Notably, the directives the Chairperson issued on the conduct of the Khampepe recusal application at President Zuma's request are consistent with the procedure set out in rule 11 and do not support the Commission's line of defence. The preambles to President Zuma and President Mbeki's respective notices of motion unequivocally state that the applications were directed to the Commission and sought the recusal of the Chairperson from the Commission. Furthermore, they sought no relief from her as the Chairperson.

[82] Recusal is not an ordinary procedural issue. It is a matter that goes to the proper constitution of the Commission, legality, and institutional legitimacy. The interpretation advanced by the Commission — namely that nothing in the rules precluded the Chairperson from singularly determining her own recusal — also undermines the duty resting on the other Commissioners. That duty arises

where, on an objective assessment of the facts underpinning a recusal application, they may conclude that a reasonable apprehension of bias exists and that they should not sit with the affected member. This duty is paramount. Its purpose is to safeguard the integrity of the Commission's work and, ultimately, the legitimacy of its findings and recommendations. It should not be attenuated by an interpretation of the rules that is at odds with their text, purpose and context, merely to excuse the plainly irregular way the recusal application was decided.

[83] Even had the recusal application been nominally determined by the Commission – which is arguable because the other Commissioners are cited and not opposing the review – the way the proceedings unfolded deprived them of the material necessary to make an objective determination. And their objective determination is not manifest in the ruling itself. Although Mr Semenya SC filed an answering affidavit on behalf of the Commission, the Chairperson herself did not respond to the allegations directed at her. The facts relevant to the alleged apprehension of bias lay peculiarly within her personal knowledge.

[84] It is no defence that information on her past institutional roles is in the public domain as the publicly available information lacks detail of the specific matters and collective decisions she was involved in. The record reflects that President Mbeki had to sift through archives to find some of the information and the Chairperson disputes its accuracy. She did not have to wait to place such information in dispute as the details of her role are in her personal knowledge. While a formal affidavit was not indispensable, she could, at the very least, have placed a statement before the Commission, as was done by the President and the members of the Constitutional Court in *SARFU*.

[85] Unlike in *Masuku* and *Afriforum*, where the courts were able to rely on transcripts reflecting the objective facts, no comparable material existed in this matter. The failure of the other Commissioners to determine the recusal applications leads to an inescapable conclusion that the Commission, as a collective, did not rule on the applications. This is a decisive flaw as all three Commissioners heard oral argument; and the application concerned the recusal of the Chairperson herself.

- [86] The reliance on *SARFU* is entirely apposite. Although *SARFU* concerned a court and not a commission, the principle is institutional rather than forum-specific: where a decision-maker's impartiality is challenged on objectively reasonable grounds, the determination cannot be personal or unilateral. This is not a matter of imperfect process, but of structural failure as the Commission was not properly constituted. Accordingly, no lawful ruling by the Commission was made.
- [87] The applicants seek an order reviewing and setting aside the ruling and substituting this Court's decision for that of the Commission, rather than remitting the matter for reconsideration. Substitution is an exceptional remedy, but one expressly contemplated by section 8(1)(c)(ii)(aa) of PAJA and, under the principle of legality, by the Court's inherent remedial discretionary powers in terms of s 172(1) of the Constitution.
- [88] The governing principles are well established in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd*¹⁶ and subsequent authority. In determining whether substitution is just and equitable, a court must consider, inter alia, whether it is in as good a position as the administrator to make the decision; whether remittal would serve any practical purpose; whether substitution risks usurpation of administrative functions; and whether considerations of delay, prejudice, and fairness militate against remittal.¹⁷
- [89] The issue before this Court is a discrete and frontal legality question: whether the recusal application was lawfully determined by the Commission in accordance with its constitutive rules and the requirements of institutional impartiality. That question turns largely on undisputed material facts and the proper interpretation of the Commission's rules, read through the lens of settled constitutional principle. No evaluative or policy-laden judgment remains to be exercised by the Commission.
- [90] Moreover, the defect identified is jurisdictional and concerns the composition of the decision-making authority and the locus of power to determine a recusal application directed at the Chairperson herself. No further factual enquiry by the

¹⁶ 2015 (5) SA 245 (CC)

¹⁷ *Id* paras 41-55

Commission could retrospectively cure the absence of a lawful collective determination. In these circumstances, this Court is in at least as good a position as the Commission to determine the matter. Remittal would also serve no legitimate or curative purpose. The Chairperson whose impartiality is objectively impugned would remain institutionally embedded in the Commission to which the matter would return.

[91] Any reconsideration under such conditions would reproduce, rather than remedy, the reasonable apprehension of bias that vitiated the original process. Recusal is not an ordinary interlocutory issue. It goes to the proper constitution of the Commission, a factor that implicates its statutory authority, legality, and its institutional integrity. Where its composition is tainted by allegations of reasonable apprehension of bias grounded on amongst other factors, decisions it made while it is not properly constituted, remittal to the Commission cannot restore legality or public confidence.

[92] As the Constitutional Court has repeatedly emphasised, once such institutional taint arises, effective relief may require judicial intervention rather than administrative reconsideration. There is no risk of improper usurpation in this case. The Court is not intruding upon administrative discretion or deciding matters of policy entrusted to the Commission. It is determining a threshold question of legality that lies squarely within the judicial function. The consequence of that determination is merely to declare the legal position and grant effective relief flowing from it. No balancing exercise or discretionary choice remains open. Either the recusal application was lawfully determined by the Commission as a collective, or it was not. Having found that it was not, substitution does not displace administrative authority; it vindicates the rule of law.

[93] Another reason why remittal is not apt in this case is that it would occasion further delay in proceedings already burdened by procedural and structural irregularity, while yielding no prospect of a lawful or legitimate outcome. More significantly, it would perpetuate irreversible institutional taint. Continued participation of a decision-maker whose impartiality is reasonably questioned undermines the legitimacy of the Commission's work, entails a waste of public resources, and

erodes confidence in its eventual findings and recommendations. In this context, later correction would be illusory.

[94] Legality, once compromised at the level of institutional composition, cannot be restored by repetition of the same flawed process. In all the circumstances, remittal would neither vindicate legality nor restore public confidence in the Commission's work. It would perpetuate the very defect that gave rise to the review. This is accordingly one of the rare cases in which substitution is not only justified but required to ensure effective and meaningful relief. An order setting aside the impugned ruling without remittal is the only remedy consonant with the Constitution, the principle of legality, and the interests of justice.

[95] In the premises, the recusal application falls to be determined in light of the findings already made.

The merits

Guiding legal principles

[96] Our law on recusal of Chairpersons who preside over an inquisitorial investigative Commission is still in a state of development. It is for that reason that the parties largely relied on judicial pronouncements where the recusal of Judges from adjudicative *fora* was sought. In that context, recusal is grounded in the constitutional imperative that adjudicative processes be independent, impartial and be seen to be so, as this underpins public confidence in the administration of justice and the rule of law. The rule against bias applies not only to courts, but equally to tribunals, commissions, and other decision-making forums, as affirmed in *Basson v Hugo and Others*.¹⁸

[97] Judicial officers enjoy a presumption of impartiality, deriving from their oath of office and their constitutional obligation to administer justice without fear, favour, or prejudice. Consequently, they are urged not to recuse themselves on insubstantial grounds, while at the same time bearing a duty to do so where actual or reasonably apprehended conflict of interest or bias exists, lest the

¹⁸ 2018 (3) SA 46 (SCA) at paras 25-26.

proceedings be rendered a nullity. These principles are reflected in Article 13 of the Judicial Code of Conduct¹⁹, which mirrors the Bangalore Principles of Judicial Conduct²⁰.

[98] The Constitutional Court has consistently held that the test for reasonable apprehension of bias is objective. The question is whether a reasonable, objective and informed person, in the position of the litigant and on the correct facts, would reasonably apprehend that the decision-maker will not bring an open and impartial mind to bear on the adjudication of the matter.²¹ The onus rests on the applicant, and the assessment must be made against the established facts, taking into account the presiding officer's oath, training and experience, and her duty to sit in matters where recusal is not legally required.

[99] In *S v Zuma and Another*²², drawing on *S v Dawid and R v Barnsley County Borough Licensing Justices, Ex Parte Barnsley & District Licensed Victuallers' Association*, the court emphasized that justice must not only be done but must be seen to be done, and that bias may be unconscious. Where circumstances give rise to a reasonable doubt about impartiality, disqualification follows as a matter of course, without further enquiry.

¹⁹ Article 13 of the Judicial Code of Conduct adopted in terms of section 12 of the Judicial Services Act, 1994 provides as follows:

“A judge must recuse himself or herself from a case if there is a—
(a) real or reasonably perceived conflict of interests; or
(b) reasonable suspicion of bias based upon objective facts,
and shall not recuse himself or herself on insubstantial grounds.”

²⁰ Value 2.5 of the Bangalore Principles of Judicial Conduct as revised at the Hague (2002) provides as follows:

“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:

(a) The judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;
(b) The judge previously served as a lawyer or was a material witness in the matter in controversy; or
(c) 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.”

²¹ *SARFU* at para 48; See also *S v Zuma and Another* 2023 (1) SACR 621 (KZP) at paras 26-27.

²² 2023 (1) SACR 621 (KZP) at paras 44-45

[100] In *Masuku*, the Constitutional Court clarified that judges do not operate in a vacuum and inevitably bring personal and professional experience to bear.²³ What must be shown, however, is that the subject matter of the proceedings in which recusal is sought flows from the Judge's past institutional roles that gives rise to a reasonable apprehension of bias. The Court further recognized that factors which may be insufficient individually can, when considered cumulatively, justify a reasonable apprehension of bias and that importantly, recusal jurisprudence does not constitute a closed list; each case turns on its own facts, and evolving circumstances may give rise to new instances warranting disqualification.

[101] Where the recusal sought concerns the Chairperson of a commission of inquiry, the assessment must be undertaken with due regard to the fact that such commissions are not courts, do not exercise judicial power, or make factual or legal findings which are enforceable and binding on subsequent legal proceedings. They are also governed by a flexible, context-specific standard of procedural fairness.²⁴ These institutional features form part of the objective enquiry into whether a reasonable apprehension of bias has been established.

Recusal and opposition grounds

[102] There are two grounds on which the applicants based their application for the Chairperson's recusal. The first is the Chairperson's past institutional roles. They are common cause. The applicants take issue with her failure to disclose details of these roles. The parties also differ on the bearing these past institutional roles have on the Chairperson's alleged disqualifying bias. I conveniently refer to this ground of recusal as the past institutional roles ground.

[103] Against the institutional roles ground, the opposing respondents raise the delay ground. They also contend that the applicants failed to establish facts that justify her recusal (insufficient facts ground), the mandate of the TRC and the Commission is different, and the latter's mandate relates to events that transpired from 2003 (temporal time bar ground).

²³ *Masuku* at para 67

²⁴ *SARFU* at para 35

[104]The second ground raised by President Zuma is the Chairperson's alleged improper conduct and bias in favour of Mr Semenya SC in an application for his recusal which she ruled in his favour (misconduct ground). He contends that it forms the basis for alleged actual bias on the Chairperson's part. The second ground raised by President Mbeki relates to the Chairperson's alleged improper handling of his conflict objections (conflict objections ground). The Commission and the Calata Group opposed both on the basis that there are no facts that establish misconduct by the Chairperson and there is nothing improper in the way she handled the conflict objections.

Review and opposition grounds

[105]Since I am determining the recusal applications on the papers as they served before the Commission, I should only be confining this judgment to the recusal and opposition grounds. However, there is a substantial overlap between the grounds advanced in support of recusal and those raised in the review proceedings and the opposition thereto, The latter fit neatly with the recusal grounds to which they relate. I address the additional issues that arise in the review in the interests of justice.

[106]In the review application, the applicants rely on the following additional grounds of review: the application of the wrong legal test on delay, the application of the wrong test for recusal based on apprehension of bias arising from past institutional roles and they persist with the issue regarding the Chairperson's failure to clarify past roles. The Commission and the Calata Group contend that the Chairperson did not misapply the law on these issues, the duty to disclose was not pleaded and she was under no legal obligation to make any disclosure as the information on her past institutional roles is in the public domain.

The Chairperson's past institutional roles

[107] In what follows, I set out the contentions advanced on behalf of President Mbeki, President Zuma and the Commission in the recusal application, the Chairperson's ruling on these issues, the grounds of review raised in this application and the parties' respective contentions in respect thereof. I also set out President Ramaphosa's submissions on the removal relief which, as already stated, the applicants seek as an alternative to the recusal relief. I then analyse these with reference to the applicable legal principles and make findings.

Contentions in the recusal applications

[108] The applicants contended that:

- a. As a TRC Commissioner, the Chairperson was part of the panel that concluded that the ANC had committed gross human rights violations as part of its political activities during the armed struggle. This determination lies at the heart of the TRC recommendation that those who applied and were refused amnesty and those who did not apply for amnesty must be prosecuted.
- b. Her role as TRC Commissioner (1995 - 2001) overlapped to some extent with her senior NPA role. During this time, she was simultaneously TRC adjudicator and advised Advocate Bulelani Ngcuka (Advocate Ngcuka) then the National Director of Public Prosecutions (NDPP) on the prosecution of the same matters by the NPA. During the period in which the Chairperson served at the NPA under Advocate Ngcuka from September 1988 to December 1999, the Human Rights Investigation Unit (HRIU) was established and started operating at the NPA. The TRC finalized its report in 1998 after which it was expected that the prosecution of TRC cases would begin. The HRIU mandate was to review TRC Amnesty records, investigate apartheid-era human rights violations and make recommendations on the prosecution of TRC cases. She played a role in the HRIU including providing advice to the NDPP on the approach to TRC matters.

- c. The cumulative effect of her past institutional role in TRC proceedings, the determinations in respect of which some of the victims and implicated persons are before the Commission she now chairs and her authorship of findings which have not been implemented gives rise to a reasonable apprehension that she may not bring an impartial mind to this enquiry.
- d. The requirement of partiality is heightened by the fact that some participants before the Commission were involved in TRC proceedings in which the Chairperson was involved. Among these, they referenced the family of Richard and Irene Motasi.
- e. Advocate Bulelani Ngcuka and Judge Vincent Saldanha who is the former head of the HRIU are lined up to testify at the Commission. This renders the Chairperson a competent witness in a Commission in which she is Chairperson.

[109] President Mbeki called on the Chairperson to clarify the precise nature of her involvement in the HRIU, the overlap between her past institutional roles and the current Commission mandate and the untenable intersections of her role as a potential witness and that of a fact finder. He concluded that a reasonable observer would apprehend that a person who held those institutional roles would find it difficult to approach with neutrality an enquiry whether the NPA failed, neglected or improperly refrained from pursuing TRC cases which she, as a member of the TRC Amnesty Committee referred to it for prosecution.

[110] In opposing the recusal application, the Commission contended that:

- a. President Mbeki knew about the Commission and the subject matter of its investigation before it was established. Since he has a keen interest in its work, he knew about the appointment of the Chairperson when it was published in May 2025 but did not seek her recusal then. President Zuma was served with a Rule 3.3. notice in September 2025 but did not seek the Chairperson's recusal then. Instead, the applicants participated in the Commission and were legally represented throughout without raising any issue about the Chairperson's past institutional roles, information in respect of which is in the public domain.

- b. The applicants have not alleged nor proved facts that warrant a recusal; the Commission is required to enquire into what transpired over a period of more than 20 years ago; persons whose conduct is in issue are in various government departments and the matters in which adverse comments about the applicants are made are limited as appears from the Rule 3.3 notices.
- c. The TRC's mandate was entirely different from that of the Commission; it was not tasked with investigating whether there was interference in the prosecution of TRC cases, an issue which arose in 2003 and there is no confluence between the Commission's terms of reference and the work of the Commission. The Chairperson's prior work at the TRC and NDPP some 27 years ago does not constitute a basis for her recusal, more so that the Commission is enquiring into events that occurred five years after she left the NPA.

[111] On behalf of the Calata Group, it was contended that in the absence of a specific allegation of an inappropriate relationship or undue dependency with anyone in the TRC or NPA that directly implicates the Chairperson's role in the Commission, there is no merit to this ground of recusal.

The Chairperson's ruling

[112] In her ruling, the Chairperson accepted her past institutional roles as common cause. She observed that from 1998, she held these positions over 28 years ago. She rejected President Zuma's contention that she has disqualifying bias as the alleged political interference in the prosecution of TRC cases were not pertinent issues in the TRC or NPA during her tenure there. She also found that President Zuma has not pointed to any aspect of her work at these institutions that can be said to constitute a logical connection to the Commission's investigation.

[113] She rejected President Mbeki's contentions as a far-fetched inference that she might have a predisposition in favour of justifying or defending conclusions reached during those times. She also rejected the allegation that she made a finding that the ANC had committed gross human rights violations as a one sided assessment of the TRC report as the report made a finding that the primary perpetrators of violence and murder during the apartheid era was the apartheid

regime itself and that several other groups were also responsible for committing gross human rights violations.

[114] She disavowed being involved in any specific policy on TRC cases at the NPA emerging from the HRIU during 1998 or 1999. She accepted the contention of the Calata Group that this is mere speculation as it is not supported by facts. She found that the alleged overlap between her past adjudicative role at the TRC and her present fact-finding responsibilities is not spelt out and she cannot divine what it might be. She also found that the claims were based on generalised suspicions and claims with no attempt to set out what she did that is relevant to the work of the Commission.

[115] She held that the question whether apartheid crimes should be prosecuted is not before the Commission and therefore the recommendation of the TRC that offenders who were not given amnesty must be prosecuted does not have to be defended or justified, nor should such questions feature at all in the Commission's work, and there is no evidence that work at the NPA during 1998 to 1999 is of direct relevance to the work of the Commission. She concluded that apprehension of bias based on her past institutional roles is not reasonable as facts that ground it were not established by the applicants.

[116] Quoting from *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Limited Seafoods Division Fish Processing (Irvin and Johnson)*,²⁵ she observed that it is established law that past institutional roles will not, without more, be indicative of actual or reasonable apprehension of bias as Judges are products of their life experiences and are not expected to occupy a place of utter isolation from an issue or from a party. Rather, based on the judgment in *Masuku*, she observed that courts have recognised that judicial personal and professional experience play a role in the adjudicative function and it is appropriate for judges to bring their life experiences into the adjudication process.²⁶

²⁵ 2000 (3) SA 705 (CC). Paragraph 60 of the ruling on recusal quoting *Irvin and Johnson* at para 13.

²⁶ Paragraph 61 of the ruling on recusal referring to *Masuku* at para 25.

[117] The additional issues arising in the review application and the parties' respective contentions are those already briefly set out.

President Ramaphosa's submissions on past institutional roles

[118] President Ramaphosa was called on by the applicants, to show cause why the relief they seek in the alternative in the review application – that the Chairperson's appointment be set aside – should not be granted. In his explanatory affidavit, he confirms that he does not oppose the relief sought; he explains the circumstances under which the Chairperson was appointed; he records that he was unaware of facts about the connection between the Chairperson and the NPA and TRC that emerged after her appointment; had he been aware of those facts, he would not have appointed her, and he explains why he would not have made that appointment. Ultimately, he abides the Court's decision but also made submissions to assist the Court in its determination of the recusal related relief.

[119] He submits that the applicable standard, drawn from *Corruption Watch and Another v Arms Procurement Commission and Others*²⁷, requires commissions of inquiry to act fairly, impartially, with an open and enquiring mind, and in a manner that restores public confidence. A reasonable apprehension of bias is sufficient for recusal, assessed objectively. Prior involvement by the chairperson in matters involving parties before the Commission creates an appearance of partiality. Her prior TRC roles — including deciding and refusing amnesty for several parties now before the Commission — were not disclosed and give rise to a reasonable apprehension of bias. She ought to have disclosed and recused herself before appointment; her failure to do so undermines impartiality and public confidence.

²⁷ 2020 (2) SA 165 (GP) at para 15.

Analysis

a. The facts

[120] The material facts concerning the Chairperson's prior institutional roles are largely common cause. From 1995 to 2001, the Chairperson served as a Commissioner of the TRC. In that capacity, the TRC made findings that the apartheid regime was the primary perpetrator of gross human rights violations, while also concluding that other actors, including members of the ANC, were responsible for such violations.

[121] Between 1996 and 2001, she further served on the TRC Amnesty Committee, which was tasked with adjudicating applications for amnesty arising from apartheid-era crimes. In that role, the Committee refused amnesty to several perpetrators, including those responsible for the murders of Richard and Irene Motasi. Members of the Motasi family are participants before the Commission. Some of the applicants before the Commission, including former Presidents Mbeki and Zuma, formed part of the so-called "ANC 37", whose amnesty applications were refused.

[122] During 1998, the Amnesty Committee recommended the prosecution by the NPA of cases in which amnesty was either refused or not sought. From September 1998 to December 1999, the Chairperson was appointed as Deputy Director of Public Prosecutions at the NPA. During this period, the HRIU was established to review TRC amnesty records, investigate apartheid-era crimes, and make recommendations on prosecutions. It is undisputed that the Chairperson played an advisory role in the HRIU, including advising the then NDPP Advocate Ngcuka, on the handling of TRC prosecutions. Advocate Ngcuka and Judge Vincent Saldanha, the former head of the HRIU whose tenure overlapped with that of the Chairperson, are among the witnesses expected to testify before the Commission.

[123] Although the Commission's formal mandate concerns alleged political interference in the prosecution of TRC cases from 2003 onwards, the Rule 3.3 notice issued to President Mbeki trace such interference to engagements between the ANC leadership and apartheid-era security officials that

commenced as early as 1998. Similar contentions are advanced in affidavits filed by the Calata Group.

b. The Duty of Disclosure

[124] Where apprehension of bias is grounded in prior institutional roles, a duty of disclosure arises. This duty flows from the obligation to safeguard public confidence in the integrity of the process in any subsequent role.²⁸ Disclosure is particularly warranted where the facts concerning prior involvement are not fully in the public domain and reside uniquely within the knowledge of the presider. In *SARFU*, the Constitutional Court emphasised that disclosure enables the objective assessment of alleged bias and may well allay unfounded apprehensions.²⁹

[125] Here, the Chairperson was expressly called upon in the founding affidavit to clarify the nature and extent of her role in the HRIU and in TRC prosecutions. She did not make disclosure and the Commission's answering affidavit did not dispute her involvement in the HRIU or in work directed at prosecuting TRC cases. In these circumstances, the refusal to disclose further particulars undermined, rather than protected, the integrity of the Commission's process.

c. Temporal distance and its significance

[126] The reliance placed by the Commission on temporal distance is misplaced. Temporal remoteness may diminish the weight of past roles where actual bias is alleged. It does not, however, neutralise their significance in an apprehension-of-bias enquiry, particularly where the subject matter of the enquiry arises from earlier decisions or failures connected to those associations.

[127] The Rule 3.3 notices which the Commission drafted and issued to President Mbeki, setting out the allegations he is called upon to answer to and affidavits before the Commission trace the genesis of the alleged interference to events commencing during the very period of the Chairperson's involvement at the NPA.

²⁸ *SARFU* at para 79; *Bernert* at para 35

²⁹ *SARFU* at para 79

This renders the Commission's temporal bar assessment, notwithstanding that its mandate relates to the period from 2003, inconsistent with its own conduct.

[128] Further, the relevance of the period before 2003 to establish context cannot be discounted, otherwise the inclusion of the pre-2003 allegations in President Mbeki's Rule 3.3 notice would defy common sense. He is not unreasonable in asserting that the period prior to 2003 and as far back as the Chairperson's tenure is relevant to the Commission's enquiry.

d. Application of the test for reasonable apprehension of bias to the facts

[129] The applicable principles are settled. In *SARFU*, the Constitutional Court held that a reasonable apprehension of bias cannot be founded on past institutional roles alone. It arises only where the subject-matter of the litigation flows from those roles, or where the judge, through it, either advised a party or acquired personal knowledge relevant to the issues for determination.³⁰ That position was reaffirmed in *Bernett*³¹ and endorsed by the SCA in *Absa Bank v Arif*³², which refined the enquiry to whether the litigation arose from the past roles or whether the judge, during such roles, acquired personal knowledge of the dispute.

[130] As contended on behalf of President Mbeki, read together, these cases confine a reasonable apprehension of bias based on past association to three recognised situations: where the subject matter of the litigation arises from the past role, or where the judge previously advised a party in relation to the matter. Mere past role, absent these elements, is insufficient.

[131] It is against these principles that the alleged apprehension of bias based on past institutional roles must be assessed. The argument that the Commission's subject matter is not amnesty or the prosecution of cases in which amnesty was not sought or was refused, but political interference in the prosecution of TRC cases which was not in issue either at the TRC or NPA during the Chairperson's tenure, rests on an unduly narrow and formalistic characterisation of the enquiry. Properly understood, the Commission is concerned with the prosecutorial

³⁰ *SARFU* at paras 76 and 79

³¹ *Bernett* at para 78

³² 2014 (2) SA 466 (SCA) para 25

treatment of TRC-related cases following the TRC process. It is unfathomable to exclude from the enquiry, whether decisions were made not to prosecute such matters and whether those decisions were influenced by improper considerations. Political interference is therefore not a distinct or collateral subject; it is a possible explanation for particular prosecutorial outcomes in respect of those cases.

[132] The enquiry thus traverses the same prosecutorial history and the same body of TRC-related cases that formed the context of the Chairperson's past roles. To suggest that the Commission's mandate is divorced from the prosecution of TRC cases is to elevate form over substance. Alleged interference is integral to, not separate from, the exercise of prosecutorial discretion in relation to those matters.

[133] The present case accordingly engages recognised grounds for a reasonable apprehension of bias. The concern does not rest on the mere fact of prior association. The subject matter of the Commission arises from that association, in that it entails scrutiny of decisions taken in relation to TRC-related prosecutions and within the prosecutorial framework. In addition, the Chairperson previously advised Advocate Ngcuka in relation to that subject matter, the conduct and decisions of Advocate Ngcuka fall within the ambit of the Commission's enquiry, and he is a witness before the Commission together with the Chairperson's prior superior in the NPA HRIU, Justice Saldanha. It is correctly pointed out that these factors render the Chairperson a competent witness in a Commission in which she is chairing.

[134] The authorities do not require identity between the proceedings and the past role. They require that the issue in the proceedings flow from past associations. Viewed through the eyes of a reasonable, objective and informed observer, the distinction sought to be drawn between amnesty and prosecution on the one hand, and alleged political interference in decisions relating to those very prosecutions on the other, would not be regarded as meaningful. Both concern the same prosecutorial terrain arising from the TRC process. On a proper appreciation of the Commission's mandate and the nature of the Chairperson's

prior roles, the subject matter of the Commission does arise from her prior roles. The contention to the contrary cannot be sustained.

[135] Nor does the temporal distinction relied upon by the respondents displace the apprehension contended for. The fact that the Chairperson served at the TRC between 1996 and 2001, and at the NPA between 1998 and 2001, and that allegations of political interference are said to have crystallised only from 2003, does not sever the requisite connection.

[136] The Commission is not concerned solely with acts of interference in the abstract, but with whether, and how, prosecutorial decisions in TRC-related matters were shaped, deferred or abandoned over time. That enquiry necessarily traverses the earlier period in which those cases were under consideration, the prosecutorial framework within which they were handled, and the decisions taken or not taken at that stage.

[137] This conclusion is reinforced by the Rule 3.3 notice issued to President Mbeki, which raises allegations extending back to 1998. The Commission's own process thus recognises that the enquiry is not temporally confined to a post-2003 period but implicates prosecutorial conduct and decision-making during the very period of the Chairperson's prior institutional involvement.

[138] The question whether political interference later operated upon an existing prosecutorial landscape cannot sensibly be examined in isolation from the formation of that landscape. From the perspective of a reasonable, objective and informed observer, the lapse of time and the asserted later emergence of interference would not neutralise the concern arising from the Chairperson's prior involvement with the same category of cases and the same prosecutorial processes that now fall under scrutiny.

c. The Commission's context and impartiality

[139] It is correct that a commission of inquiry is not a court, does not exercise judicial power, and does not finally determine rights. However, this does not mean that constitutional fairness standards do not apply. The Constitutional Court has made clear that the appearance of impartiality remains a foundational requirement, even in investigative forums, albeit applied contextually and flexibly.³³ The fact that a commission's findings are advisory does not render apprehended bias constitutionally insignificant, particularly where its work may trigger future legal, political or even reputational consequences.

[140] The need for impartiality is further heightened by the nature and sensitivity of the interests at play. For the Calata Group and other victims of apartheid-era crimes, the Commission represents an opportunity — after decades of delay since the TRC referrals — to secure truth, dignity, and accountability amid the loss of witnesses and fading prospects for prosecution.

[141] The personal and reputational interests of former Presidents Zuma and Mbeki, whose administrations are implicated in alleged interference with TRC-related prosecutions are also at stake. Although no longer politically accountable, their status as former Heads of State heightens the public interest in institutional scrutiny. Their role in the fight against apartheid premised in these proceedings in their inclusion in the ANC 37 who were refused amnesty by the TRC Amnesty Commission calls for a sensitive balance between political accountability and their reputational interests.

[142] While not mutually exclusive, properly construed, all these interests require a constitutionally sensitive balance that affirms procedural fairness for former Presidents while ensuring that victims' longstanding claims for the truth and accountability are meaningfully addressed. The interests must therefore be assessed against foundational constitutional values — national unity, reconciliation, and the rule of law — that underpinned the TRC's restorative justice framework.

³³ See *Basson v Hugo* at paras 25-26

[143] In that context, commissions of inquiry serve as essential mechanisms for transparency and accountability, ensuring restorative justice for victims of apartheid and promoting the constitutional values of national unity, reconciliation, and the rule of law particularly where ordinary political accountability has expired. The Commission's integrity enhanced by its appearance of impartiality is therefore indispensable to ensuring that the Commission is seen as a credible forum for truth rather than a vehicle for impunity or retribution.

[144] Given the significant public resources invested, any compromise of impartiality would render the process futile, squander public funds, and further erode trust in democratic institutions. Precisely because the stakes are so high for all concerned, impartiality remains a pivotal constitutional requirement that should not be compromised due to the investigative nature of the Commission and the fact that its findings and recommendations carry no legal effect.

Misconduct

[145] President Zuma contends that, in or about November 2025, a whistleblower furnished him with information alleging that the Chairperson had engaged in conduct constituting bias, gross misconduct and/or corruption. At the core of these allegations is the claim that the Chairperson improperly coached and/or colluded with Mr Semenya SC in relation to his application for her recusal, by drawing his attention to perceived deficiencies in that application and by sharing research and tips for use in his defence in a recusal application in which the Chairperson presided. It is further alleged that this conduct operated to the prejudice of the opposing parties in the Semenya recusal application, other interested parties, and the public at large.

[146] President Zuma failed to place before the Commission even an iota of evidence in support of these allegations. There is no legal duty on a respondent to establish the absence of evidence. It is important to delve into President Zuma's case in the review application to buttress the meritless nature of this ground. Particularly because he insists that the Commission has failed to answer to his allegations and this ground of review should be upheld.

[147] He persisted in advancing the same allegations in the present proceedings. In response, Mr Semenya SC, in the answering affidavit filed on behalf of the Commission, stated that he had no personal knowledge of the allegations and emphatically denied them. In his founding affidavit, President Zuma additionally asserted that the information in question had not been unlawfully obtained and maintained that any attempt to criminalise the exposure of alleged corruption on the part of the Chairperson ought to be resisted. This assertion appears to have been prompted by observations in the Chairperson's earlier ruling that the allegations were of a sinister character, given that unauthorised access to another person's electronic communications constitutes an offence under the Cybercrimes Act 19 of 2002; that she had given no consent for President Zuma to access any such communications; and that, even on the assumption that the alleged information existed, he had failed to disclose any lawful basis upon which it had been acquired.

[148] At paragraph 41 of his founding affidavit, President Zuma undertook to place before this Court certain WhatsApp messages and emails said to substantiate the allegations, subject to the adoption of measures to protect his sources. No such measures were proposed, and no such material was disclosed. Instead, President Zuma subsequently instituted an interlocutory application — wholly devoid of merit — seeking to compel the Commission, by way of the uniform rule 53(1)(b) record and the uniform rule 35 discovery procedure, to produce the very information he professed to possess.

[149] In these circumstances, President Zuma has failed to establish any factual substratum capable of sustaining a finding of actual bias on the part of the Chairperson. This ground of recusal and review must accordingly fail.

Conflict objections

[150] President Mbeki's objections arose from events that came to light during a pre-hearing meeting convened by the Commission on 27 October 2025. At that meeting it emerged that, contrary to rule 3.1, which vests overall responsibility for the presentation of evidence in the evidence leaders, a private arrangement had been concluded on 29 September 2025 between Mr Semenya SC, acting for the Commission, and Mr Varney, acting for the Calata Group, in terms of which Mr Varney would lead all of the Calata Group's witnesses. This arrangement had been concluded without inviting the views of other interested parties and had not been disclosed to them. Once it became known, most of the interested parties objected to it on grounds of lack of transparency and procedural unfairness.

[151] At the same meeting, a further concern arose regarding a potential conflict of interest on the part of Mr Semenya SC, who had previously advised the NPA on matters relevant to the Commission's work. In response, the Calata Group's attorneys wrote to the Chairperson requesting that Mr Semenya SC not lead any evidence relating to the NPA's prosecution policy, in order to avoid any perception that the Commission was not acting independently. The Chairperson referred the letter to Mr Semenya SC, who responded that his prior involvement with the NPA did not concern political interference in prosecutions and was not an issue determined in *Nkadimeng v NDPP*. The Chairperson accepted the Calata Group's proposed division of labour at that stage, without ruling on whether Mr Semenya SC was in fact conflicted.

[152] These developments culminated in a formal application by the NPA and the Department for the recusal of Mr Semenya SC as evidence leader. He opposed the application, while the Calata Group abided the Commission's decision. President Zuma and President Mbeki did not participate in these recusal proceedings. While the application was still pending and exchanges of affidavits were ongoing, Mr Semenya SC interviewed former Acting NDPP Dr Silas Ramaite on 13 November 2025, traversing aspects of the NPA Prosecution Policy and related matters that lay at the heart of the recusal application.

[153] On 4 December 2025, the Commission dismissed the recusal application, holding that Mr Semenya SC's prior involvement in the Nkadimeng matter did not disqualify him from acting as evidence leader. Two days earlier, on 2 December 2025, the Chairperson issued a ruling permitting the Calata Group to lead its eight witnesses. When President Mbeki requested reasons for this ruling, she declined to provide them.

[154] President Mbeki regarded this ruling as an endorsement of the private arrangement between Mr Varney and Mr Semenya SC and contended that the arrangement was irregular because it was not the product of a formal application under rule 3.1, lacked transparency, violated the *audi alteram partem* principle, and was sanctioned without proper engagement with the objections raised. He further contended that the Chairperson either misunderstood these complaints or failed to deal with them, rendering her ruling irrational, procedurally unfair, and inconsistent with constitutional standards of lawful and reasonable administrative action.

[155] In seeking to review the Chairperson's ruling, President Mbeki advanced the contention that her assertion that there was no *lis* on the issue was incorrect. The consent to which she referred related only to the procedure for the determination of the conflict objections, not to the substantive dispute itself. He maintained that she failed to address the conflict objection and overlooked Mr Semenya SC's failure to comply with an earlier directive.

[156] He argued that her handling of the matter was subjective and created a reasonable apprehension of bias, particularly when viewed through the lens of her acknowledgment that evidence leaders operate under her control and that she bears responsibility for the conduct of the Commission. He rejected her view that procedural directions seldom require reasons and should be challenged only by review, contending instead that such directions can materially affect fairness, participation, and public confidence, and that the absence of reasons in such circumstances may offend constitutional rationality and administrative justice norms.

[157]The Commission and the Calata Group responded that President Mbeki's objection related to the procedure leading to the arrangement rather than to its substance. They contended that the Calata Group followed an appropriate process by making a written request to the Chairperson, that the correspondence should ordinarily have been uploaded to the Commission's website and made available to all parties, and that any initial failure to do so was later corrected.

[158]The Chairperson subsequently invited formal objections, considered them, and ruled upon them. Given the inquisitorial nature of the proceedings, they contended that there was no inherent anomaly in permitting the Calata Group to lead its own witnesses. They further maintained that the dispute regarding procedure had been cured once interested parties were afforded an opportunity to lodge objections and those objections were considered.

[159]The record reflects that the Chairperson did not expressly address the allegation that Mr Semenya SC acted contrary to an earlier directive by interviewing Dr Ramaite while the recusal application was pending. However, this omission could not be considered in isolation. When properly interpreted, the Chairperson's communication of September 2025 did not amount to a binding ruling excluding Mr Semenya SC from engaging with issues concerning the Prosecution Policy. It was a preliminary and pragmatic arrangement, explicitly not a decision on the merits of the conflict allegation. In that context, the interview with Dr Ramaite did not constitute a proven breach of an operative ruling.

[160]The gravamen of President Mbeki's complaint concerning the Ramaite interview was that it was impermissible because Mr Semenya SC was allegedly conflicted by reason of his prior involvement with the NPA. That premise was directly addressed and rejected in the Commission's ruling on the recusal application. A reasonable, objective, and informed observer would therefore appreciate that the substance of the complaint was disposed of by a dispositive ruling on recusal. The absence of an express rebuke of Mr Semenya SC did not, without more, establish unfairness or partiality.

[161]The Chairperson was engaged in the procedural management of inquisitorial proceedings, which necessarily involved the exercise of discretion in relation to

interlocutory matters, including whether reasons were required for every procedural directive and whether alleged procedural breaches warranted separate rulings. While a reasonable observer may have preferred more explicit engagement with certain aspects of the objections, particularly given the sensitivity of the issues raised, the mere fact that the Chairperson elected to treat those complaints as resolved by the outcome of the recusal application did not, standing alone, meet the stringent threshold for a reasonable apprehension of bias.

[162] Viewed in isolation, the Chairperson's handling of the conflict objection and the procedural irregularities complained of did not justify a finding of bias. The shortcomings identified were capable of criticism but fell within the permissible bounds of procedural discretion in inquisitorial proceedings. However, bias must be assessed cumulatively and contextually. When these procedural concerns were considered together with the prior finding of disqualifying bias arising from the Chairperson's past institutional roles, they assumed greater significance. Although not independently decisive, they did not cure or neutralise the earlier apprehension of bias. Instead, taken together, they reinforced the conclusion that a reasonable, informed observer might harbour concerns about the Chairperson's ability to bring an impartial and unbiased mind to bear on the proceedings, with the result that the apprehension of bias rooted in her past roles remained undisturbed.

The delay

[163] In the recusal application, the Calata Group and the Commission took issue with what they contended is President Zuma's delay in bringing the recusal application. They persist with this ground of opposition in the present application. They contend that overlooking this delay does not serve the interests of justice because they brought an application in the High Court on 17 January 2025, alleging a connection between the President Zuma and the alleged political interference in the prosecution of TRC cases. That application culminated in the establishment of the Commission with Justice Khampepe as its Chairperson on 29 May 2025. The Commission's establishment was widely published in the media and President Zuma ought to have been aware thereof.

[164] They submitted that he was served with a Rule 3.3 notice on 19 September 2025. He sought the recusal of the Chairperson in a letter dated 3 December 2025. He made no effort to explain the 75 days in raising the issue. It was further contended that steps to remove Advocate Semenya SC commenced in October 2025, and the Commission's hearings began on 10 November 2025. Despite this, no earlier attempt was made to seek the Chairperson's recusal.

[165] Both applicants resisted the delay ground on the basis that delay is not, in itself, dispositive, and that it would be in the interests of justice for the recusal applications to be determined on their merits.

[166] The proper approach to delay is well settled. The enquiry entails a two-stage analysis, as articulated in *Gqwetha v Transkei Development Corporation Ltd and Others*³⁴ and endorsed in *Khumalo and Another v Member of the Executive Council for Education, KwaZulu Natal*³⁵. The first stage requires a factual assessment of whether the delay complained of is unreasonable. If the delay is found to be unreasonable, the second stage calls for an evaluation of whether, notwithstanding that unreasonableness, the delay ought to be condoned in the interests of justice.

[167] In *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*³⁶, the Constitutional Court emphasised that the first stage involves a value judgment, informed by all the relevant circumstances. Central to that assessment is the explanation tendered for the delay. The explanation must cover the entire period of the delay. Where a delay is properly explained and justified, it may be regarded as reasonable. Conversely, where no explanation is given, unreasonableness will ordinarily follow as a matter of course. The Court may nonetheless overlook the delay if it is in the interest of justice to do so.

[168] The second stage requires a flexible, interests of justice enquiry. Relevant considerations include the nature of the impugned decision, the potential consequences of setting it aside, the extent of any prejudice to affected parties, and whether such prejudice may be ameliorated through appropriate remedial

³⁴ 2006 (2) SA 603 (SCA)

³⁵ 2014 (5) SA 579 (CC)

³⁶ 2019 (4) SA 331 (CC) at para 48

action. Importantly, as *Buffalo City* makes clear, this stage is closely intertwined with a consideration of the merits of the underlying application itself.³⁷

[169] Although the Chairperson concluded that the applicants had delayed unreasonably in bringing their review applications, she did not apply the delay enquiry in a rigid or formulaic manner. Consistent with this Court's jurisprudence, she considered the relevant factors holistically and proceeded to assess the recusal applications on their merits. Her approach to this issue does not disclose a reviewable misdirection or incorrect application of the law.

[170] In the present application, the seriousness of the issues raised — particularly the Chairperson's prior institutional roles — carries decisive weight. Once that ground of review is upheld, any delay on the part of the applicants is outweighed by the strength and importance of the merits. In these circumstances, overlooking the delay is warranted in the interests of justice.

Removal relief and separation of powers

[171] The President's power to appoint the Chairperson of a commission of inquiry is an executive function, exercised pursuant to section 84(2)(f) of the Constitution. Once that power is lawfully exercised, the conduct of the Commission, including rulings on recusal, falls within a quasi-judicial domain governed by principles of administrative justice, legality, and fairness, and is ultimately subject to judicial, not executive, control.

[172] Permitting an appointing authority's retrospective evaluation of its own decision based on information or legal conclusions that emerged after the appointment to assume determinative weight in review proceedings would risk blurring the separation between executive action and adjudicative independence. In particular: the President's after-the-fact view on whether the Chairperson ought to have been appointed cannot substitute for the objective test for reasonable apprehension of bias, which is a legal standard to be applied by a court. Further, it cannot operate retrospectively to invalidate the appointment without collapsing executive preference into judicial decision-making.

³⁷ *Id* at para 52

[173] The relevance of the President's submissions is therefore contextual and limited. They may illuminate the factual matrix surrounding the appointment and underscore the importance of disclosure in preserving public confidence. They cannot, however, be treated as dispositive of either (a) the lawfulness of the appointment at the time it was made, or (b) the correctness of the Chairperson's recusal ruling.

[174] To do otherwise would impermissibly allow the appointing authority to intrude, albeit indirectly, into the adjudicative sphere, contrary to the foundational constitutional principle that it is courts that determine disputes concerning legal rights and obligations.

[175] The President's submissions are accordingly received with due respect for the office he holds and the executive power he exercises. However, they cannot be elevated beyond their proper constitutional place. They do not amount to a concession binding on this Court, nor do they supply an independent legal basis upon which the impugned recusal ruling must stand or fall. The question before the Court remains whether, viewed objectively and on the facts known or reasonably discoverable at the relevant time, a reasonable apprehension of bias arose, assessed in accordance with established legal principles.

[176] Ultimately, the legality of the Chairperson's continued participation in the Commission is a matter for judicial determination. To ground that determination in retrospective executive disavowal would undermine the separation of powers, weaken adjudicative independence, and erode the constitutional boundary between appointment and adjudication.

NPA Explanatory Affidavit

[177] In its explanatory affidavit, the NPA records that it abides the proceedings but qualifies that position on the basis that the record is incomplete and material questions concerning the alleged misconduct by the Chairperson remain unanswered, which it contends impairs its section 34 rights. Those contentions are expressly dependent on the existence of a viable misconduct challenge. Once President Zuma's misconduct allegations are found to be unsustainable,

the premise of the NPA's affidavit falls away and no independent issue remains for determination.

On reviewability

[178] The grounds advanced by the applicants are reviewable under both the principle of legality and, to the extent applicable, PAJA, as they strike at the lawfulness of the decision-making process itself. The validity of the ruling ground – premised on a decision taken by a body lacking the authority or not composed as required by its empowering framework – constitutes an exercise of public power not authorised by law. Such a defect is essentially one of legality, rendering the decision *ultra vires* and invalid.

[179] It follows that a ruling issued by a body that was not lawfully constituted is reviewable irrespective of whether the decision constitutes administrative action under PAJA. Even if PAJA does not find direct application, the exercise of public power remains subject to constitutional control under the principle of legality, which requires that all public power be exercised lawfully, rationally, and in accordance with the applicable legal framework.

[180] The past institutional roles ground relates to the reasonable apprehension of bias, said to arise from the application of the wrong legal test in determining the recusal application. The misapplication of the governing test for recusal constitutes a material error of law. Where PAJA applies, it renders the decision reviewable on the grounds that it was materially influenced by an error of law and was taken in a manner that is procedurally unfair. Independently of PAJA, the correct application of the objective test for reasonable apprehension of bias is a constitutional requirement flowing from the principle that decision-makers must be, and must be seen to be, impartial.

[181] Therefore, a failure to apply that test properly undermines the legality of the decision and impairs the constitutional guarantee of lawful and impartial decision-making. For that reason, a ruling that applies the incorrect standard is reviewable under the principle of legality even where PAJA's definitional thresholds are not met. Both grounds therefore engage foundational questions

of authority, legality, and institutional impartiality, and are properly amenable to judicial review.

In conclusion

[182] For all these reasons, the application for the Chairperson's recusal must succeed. First, the impugned decision was taken singularly by the Chairperson, outside the collective decision-making framework of the Commission and beyond the scope of authority conferred by the Commission's rules. Properly interpreted, those rules do not vest unilateral jurisdiction in the Chairperson to determine recusal in circumstances implicating the Commission's institutional legitimacy. The decision was thus rooted in a misinterpretation of the governing framework and constitutes an exercise of power not authorised by law.

[183] Second, the Chairperson materially misapplied the test for reasonable apprehension of bias. The enquiry is an objective one, centred on whether a reasonable, informed observer would apprehend that the decision-maker might not bring an impartial mind to bear. Instead, the analysis impermissibly collapsed into a subjective assessment, insufficiently attuned to context, cumulative effect, and the constitutional demand that justice must both be done and be seen to be done. In a commission of inquiry, where authority derives substantially from public confidence rather than coercive legal effect, the appearance of impartiality assumes heightened importance.

[184] Third, the grant of recusal relief is necessary to protect the integrity of the Commission's work itself. The Commission operates at the intersection of profoundly significant and competing interests: the Calata Group and other victims seeking long-delayed truth and accountability; former Presidents whose personal and reputational interests are engaged; and the foundational constitutional values of national unity, reconciliation, and the rule of law that underpinned the TRC's restorative justice framework. Maintaining public confidence in such a process requires scrupulous institutional impartiality. Any reasonable perception that the Chairperson's continued involvement may compromise that impartiality risks undermining the Commission's credibility and rendering its work vulnerable to lasting doubt.

[185] Finally, the Chairperson's subsequent reliance on section 47(1) of the Superior Courts Act in collateral proceedings, to shield the recusal decision from scrutiny, improperly elevates form over substance. In doing so, it erects an undue procedural hurdle to judicial review of a decision that strikes at the heart of constitutional accountability. Where the integrity of a public inquiry is at stake, the courts cannot be foreclosed from examining whether the decision-making process meets the constitutional standards of legality, rationality, and impartiality.

[186] Taken together, these considerations compel the conclusion that recusal is not only justified but necessary. Granting the relief sought affirms the constitutional commitment to impartial adjudicative processes, safeguards the legitimacy of the Commission, and ensures that its work is not clouded by reasonable doubts as to fairness. Precisely because the stakes are so high for victims, implicated public figures, and society at large, no compromise of impartiality can be permitted.

Costs

[187] The question of costs must be determined in accordance with the well-established principle that costs are a matter within the discretion of the court, to be exercised judicially upon a consideration of all the relevant facts and in a manner that is fair to both sides. The overriding consideration is what is just and equitable in the circumstances of the case.

[188] As a general rule, costs follow the result. This principle serves not as an inflexible rule, but as a useful starting point in the exercise of the court's discretion. Departure from it must be justified by considerations which render such departure equitable, including the nature of the issues raised, the conduct of the parties, and the broader interests of justice.

[189] In matters raising constitutional or public-interest questions, courts are often cautious in applying the conventional costs rule, lest litigants be discouraged from approaching the courts to vindicate constitutional rights or to seek clarity on matters of public importance. However, that caution does not entail a general immunity from adverse costs orders. Where a party has achieved substantial success, an award of costs may be both appropriate and fair, notwithstanding the public character of the litigation.

[190] In the present matter, the applicants sought judicial intervention on issues going to the lawfulness of the decision-making process of a commission of inquiry, the proper interpretation of its rules, and the constitutional requirement of institutional impartiality. These were not peripheral or technical complaints. They raised serious questions of legality and fairness, central to the integrity of the Commission's work and to public confidence in its processes.

[191] On the approach I have adopted, the applicants were substantially successful. The impugned ruling was found to be unlawful and was set aside. The failure of the Commission to determine the recusal application in a manner consistent with its rules and the principle of institutional impartiality necessitated the intervention of this Court. In those circumstances, the applicants cannot be said to have acted unreasonably or opportunistically in approaching the Court, nor can their application be characterised as an abuse of process.

[192] The opposition to the relief sought was robust and comprehensive. While that opposition was pursued by the Commission in the discharge of its public duties, it does not alter the fact that, on this view of the matter, it was unsuccessful. Under these circumstances, depriving the applicants of their costs is not justified.

Refusal of personal and punitive costs

[193] President Zuma sought a punitive costs order *de bonis propriis* against the Chairperson. That relief cannot be granted. The request was founded on allegations of misconduct on the part of the Chairperson which, on the approach I have adopted, were neither established on the papers nor borne out by the findings made by this Court. A personal costs order is an exceptional remedy, reserved for circumstances where a judicial or quasi-judicial office-bearer has acted *mala fide*, dishonestly, or with gross negligence. The Court's findings do not support such a conclusion.

[194] To the contrary, while the impugned ruling was unlawful and fell to be set aside, it does not follow that the Chairperson's conduct warrants personal censure through a punitive costs order. In the absence of proof of egregious or improper conduct, it would be neither just nor equitable to mulct the Chairperson in costs in a personal capacity.

Costs in relation to the Calata Group

[195] It is also necessary to address the position of the Calata Group. No costs order is warranted against them. The Calata Group did not make the ruling that was impugned in these proceedings and cannot be said to have acted unlawfully. Their participation in the proceedings was directed at protecting their legitimate interest in the expeditious finalisation of the Commission's work, an interest that is neither improper nor unreasonable. They were not the authors of the decision that necessitated the review, nor were they responsible for the procedural defects identified by this Court. In those circumstances, it would be unfair to burden them with an adverse costs order. The interests of justice are adequately served by confining the costs liability to the Commission alone.

[196] In all the circumstances, and exercising the court's discretion judicially, the interests of justice would be best served by an order that the Commission bear the applicants' costs of the review application. Such an order properly reflects the outcome, vindicates the applicants' entitlement to effective judicial relief, and affirms the principle that public bodies, no less than private litigants, must bear the costs consequences of unlawful decision-making when it is successfully challenged.

On the timing of the delivery of this judgment

[197] This judgment is being delivered three weeks after the majority judgement because for several reasons: this is a dissenting judgment, which by its nature demands independent and exacting engagement with the reasoning of the majority; a novel and complex issue of law that has not previously been authoritatively settled, which is intertwined with the merits was raised; the issues were vigorously contested, with the application attracting robust opposition and extensive argument.

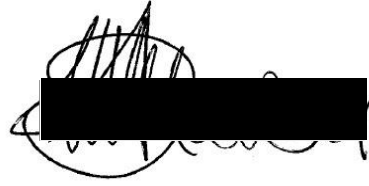
[198] The stakes were particularly high, given the sensitive interests implicated and the significant public importance of the dispute. This was further underscored by the public stature of the parties involved, including a former Justice of the Constitutional Court and two former Presidents of the Republic. The Court was also required to consider voluminous papers and copious legal authorities to

which repeated reference was made. In these circumstances, the time taken was necessary to ensure that the issues were accorded the depth of reflection and judicial care that they properly deserved.

Order

[199] Had my view commanded the support of the majority, I would have granted the following order giving effect to my conclusions on review, substitution and recusal:

1. The application to compel is dismissed with costs on scale C.
2. The ruling delivered by the Chairperson of the Judicial Commission of Inquiry into Allegations Regarding Efforts or Attempts Having Been Made to Stop the Investigation or Prosecution of Truth and Reconciliation Commission Cases, Justice Sisi Khampepe (the Chairperson, the Commission) on 30 January 2026 dismissing the recusal application is reviewed and set aside.
3. It is declared that the recusal application was not lawfully determined by the Commission, as required by its rules and the principle of institutional impartiality.
4. There is no order remitting the recusal application to the Commission.
5. The ruling delivered by the Chairperson on 30 January 2026 dismissing the recusal application is substituted with the following order:
 - a. The applications filed by President Jacob Gedleyihlekisa Zuma and President Thabo Mvuyelwa Mbeki for the recusal of the Chairperson succeed.
 - b. Chairperson is recused from the Commission.
6. The first to fifth respondents shall pay the applicants' costs of the review application on scale C.



LT MODIBA

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

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For the Second Applicant:

Adv N Maenetje SC

Adv N Muvangua

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 Dissenting Judgment:	21 April 2026