IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No: 2026-026936

In the matter between:

JACOB GEDLEYIHLEKISA ZUMA	Applicant
and	
THE CHAIRPERSON OF THE COMMISSION	First Respondent
SECRETARY OF THE COMMISSION	Second Respondent
ADVOCATE ISHMAEL SEMENYA SC	Third Respondent
COMMISSIONER FRANS KGOMO	Fourth Respondent
COMMISSIONER ANDREA GABRIEL SC	Fifth Respondent
THE CALATA GROUP	Sixth Respondent
THABO MVUYELWA MBEKI	Seventh Respondent
NATIONAL PROSECUTING AUTHORITY	Eighth Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL AFFAIRS	Ninth Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Tenth Respondent

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INTRODUCTION

1 This is an urgent application in which former President Jacob Gedleyihlekisa Zuma ("**Mr Zuma**" or "**Zuma**") seeks an order of this Court reviewing and setting aside the ruling of Justice Sisi Khampepe ("**the Chairperson**") dismissing the application for her recusal as Chairperson of the Judicial Commission of Inquiry into the Stopped TRC Cases Investigations and/ or Prosecutions ("**the Commission**") ("**the ruling**").

2 Former President Thabo Mvuyelwa Mbeki's ("**Mr Mbeki**" or "**Mbeki**") applications were grafted onto the back of Mr Zuma's applications both before the Commission and this Court. He seeks to be joined as the second applicant. Where appropriate, Mr Zuma and Mr Mbeki are collectively referred to as the "**former presidents**".

3 President Cyril Ramaphosa ("**the President**" or "**Ramaphosa**") had taken the remarkable step of abandoning the very Chairperson he appointed by aligning himself with his predecessors. He does so under the guise of abiding by the decision of this Court. In reality, the President is not abiding. He has intervened on the side of Zuma and Mbeki and is actively encouraging the Court to make the orders sought by the former presidents.

4 The 25 families (cited as the "**Calata Group**") oppose these applications. They contend that the Chairperson's decision not to recuse herself was lawful and constitutionally compliant, that the Commission remains properly constituted, and that it is in the interests of justice that its work proceeds without further delay and interruption.

5 The families also oppose this application because they recognise that it is not simply about the recusal of the Chairperson; it forms part of a wider strategy to derail efforts to uncover the suppression of the Truth and Reconciliation Commission ("**TRC**") cases.

6 In this regard, the families assert that there is a closing of the ranks amongst the current and former heads of state.

7 In these heads of argument, we assert that:

7.1 Former Presidents Zuma and Mbeki are barred from proceeding as they failed to comply with the peremptory statutory requirement in s 47(1) of the Superior Courts Act.

7.2 Both applications for recusal were brought inordinately and inexcusably late.

7.3 Mr Zuma failed to put up any evidence to support his claim of alleged improper communications between the Chairperson and the Chief Evidence Leader.

7.4 The balance of the grounds pursued, namely the Chairperson's vocational history and her handling of various interlocutory applications amount to embellishment and do not give rise to a reasonable apprehension of bias.

7.5 Mr Mbeki's applications before the Commission and this Court were opportunistically brought on the back of Mr Zuma's initiatives and cannot

be taken seriously.

Condonation

8 These heads of arguments should have been filed on Friday, 13 March 2026. We were not able to meet this deadline due to the extreme pressure on the families' legal team. To the extent necessary we seek this Court's condonation for the late filing.

9 We were busy with consultations and the leading and cross examination of witnesses at the Commission during the week. We only concluded the leading of the evidence of former NDPP Adv Vusi Pikoli just before 6 pm on Friday evening.

10 Our work at the Commission is immensely time consuming and labour intensive, which severely reduced the time available to deal simultaneously with this litigation.

11 Since the families do not a enjoy state budget for this litigation, they are largely reliant on *pro bono* legal support, which means the families only have two counsel, one of whom is a baby junior, who was admitted 2 weeks back.

12 Notwithstanding near round the clock work it was simply not possible to meet the filing deadline. We regret this lapse and seek the Court's condonation.

13 In these submissions we address the following:

13.1 Background to the Commission;

13.2 The former Presidents' non-compliance with section 47 of the Superior Courts Act;

13.3 The law on recusal;

13.4 Unreasonable delay of the former Presidents in taking action;

13.5 The grounds of review, including:

13.5.1 the prior institutional roles of the Chairperson;

13.5.2 the Chairperson's handling of the Semenya recusal application and the request of the Calata Group to lead their witnesses;

13.6 Incompetent relief seeking to terminate the President's appointment of the Chairperson;

13.7 The relief sought by President Mbeki nullifying the Commission's proceedings;

13.8 The Chairperson's signing of the ruling without the other commissioners;

13.9 President Ramaphosa's intervention into these proceedings; and

13.10 Conclusion and costs

BACKGROUND TO THE COMMISSION

14 The TRC in its final report called for "*a bold prosecution policy*" in those cases not amnestied to avoid any suggestion of impunity.[1] Some 23 years after the final volume of the TRC report was published, very few of the cases that the TRC referred to the National Prosecuting Authority ("**NPA**") have been taken forward ("**the TRC cases**").

15 The families of loved ones who were murdered or disappeared contend that the gross neglect visited on their cases was a grave injustice, violated their constitutional rights and amounted to a breach of the constitutional and statutory duties of the relevant organs of state. They contend that the failure stains the very democracy that many of their loved ones fought for.

16 On 20 January 2025, the Calata Group, together with the Foundation for Human Rights launched an application in the High Court. They asserted that interference stopped or undermined the TRC cases from being pursued. In addition to other relief, the applicants sought an award of constitutional damages from the government as well as an order compelling the President to establish a commission of inquiry.[2]

17 Some 4 weeks later on 17 February 2025, the President and other government respondents filed notices to oppose, then withdrew their notices the next day, amidst much publicity. The President publicly stated that he "*has taken the position not to oppose the matter and to rather refer it to mediation, as well as*

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1 *Truth and Reconciliation Commission of South Africa Report* (2003) Vol 6 ch. 1 para 24 at 96.

2 *Calata and Others v Government of RSA and Others*, Case No 2025-005245 (GP).

being in support of instituting a commission … because families deserve closure, and they deserve justice".[3]

18 However, just weeks later the President and government respondents took the remarkable step of reversing course. They declared that there would be no mediation and insisted that the families abandon their litigation in favour of a commission of inquiry that would deal with all their claimed relief, including their claim for constitutional damages. When the families refused to abandon or suspend their litigation, the President brought an application to reinstate his opposition and to stay the proceedings pending the outcome of the commission.

19 In October 2025, the President's application for a stay of proceedings was dismissed out of hand by the High Court, which noted that

> "…The applicants are entitled and have a right to have their dispute finally determined. The applicants have been denied this right for more than twenty years. It is understandable that the applicants, some of whom are elderly, are eager to find closure and to put the matter to rest. It is rather ironic that the Government, who is the sole cause for the delay, wants this court to sanction yet a further indefinite delay without being able to point to any tangible benefit that will be achieved by the delay." [4]

20 On 29 May 2025 President Ramaphosa issued a Proclamation under Government Notice 264 of 2025 ("**the Proclamation**") establishing this Commission. Justice Khampepe was appointed as Chairperson and Justice Kgomo and Adv Gabriel SC as members of the Commission.

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[3] Calata Group affidavit in response to President Ramaphosa's explanatory affidavit, Caselines 016-60, Karyn Maughn, "*These families deserve closure': Ramaphosa withdraws opposition to apartheid victims' court bid*", 26 February 2025, News24.

[4] *Calata and Others v Government of the RSA and Others* [2025] ZAGPPHC 1078 at para 32.

21 Between 19 September and 8 October 2025, the Commission issued notices ("**the Rule 3.3 Notices**") to Mr Zuma and Mr Mbeki in terms of Rule 3.3 of the Commission's Rules notifying them of the establishment of the Commission and its composition, which included the appointment of Justice Khampepe as the Chairperson. It also provided details of how these former Presidents were potentially implicated in or connected to the subject matter of the Commission.[5]

22 Since 11 February 2026, the Commission has heard opening statements from interested parties and the evidence of 13 witnesses. One witness, former NDPP Adv Bulelani Ngcuka, has been cross examined and further cross examination of other witnesses commence in the next few days.

NON-COMPLIANCE WITH SECTION 47 OF THE SUPERIOR COURTS ACT

23 We support the contention of first to fifth respondents[6] that the former presidents did not comply with the provisions of section 47(1) of the Superior Courts Act ("**s 47**"), which provides as follows:

> "Notwithstanding any other law, 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."

24 In this regard we contend that there is no basis to disturb the judgment of this Division in *Gwede Samson Mantashe v Justice Raymond Zondo N.O and*

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5 Zuma Rule 3.3. Notice, CaseLines: 077-40; Mbeki Rule 3.3 Notice, CaseLines 077-492.

6 First to Fifth respondents' answering affidavit, Caselines 015-6.

Another (Case No 007263/2022) ("**Mantashe**") and the earlier line of judgments upon which it relies. Essentially this line of cases holds that the provisions of s 47 are peremptory and the wording of s 47(1) draws no distinction between judicial and non-judicial functions.[7] The Court in *Mantashe* held that:

> "… Even if a distinction were to be drawn in s 47(1) between judicial and non-judicial functions, which the provision does not do and which the authorities do not support, the chairing of a commission of enquiry falls squarely within what are ordinarily and legally considered to be judicial functions. Consent under s 47(1) of the Act was thus required.
>
> Proceedings cannot be saved absent consent prior to commencement of the proceedings. Several decisions of the courts have come to the conclusion that such proceedings are irregular, for example in *Amalgamated Lawyers Association*. There is no room for condonation and therefore no room for latitude. The proceedings are void *ab initio*." [8]

25 The former presidents do not deny that they failed to comply with section 47(1), however they argue that they were not required to comply with the section. They argue that:

25.1 Justice Khampepe and Judge Kgomo are retired, and as such section 47(1) does not apply; and

25.2 The section does not apply because they are not being sued in their juridical capacity, but rather in their capacity as Chairperson and Commissioner of the Commission.

26 The former presidents are mistaken. In *Freedom Under Law v Judge Motata*[9]

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[7] *Mantashe* at para 40; *Mthenjwa v Steyn and Another* (9028/17) [2017] ZAWCHC 161 at para 12.

[8] *Id,* paras 46 - 47.

[9] *Freedom Under Law v Judge Motata* 2021 JDR 0077 (GP)

("***FUL***"), Mlambo JP held:

26.1 in terms of section 47(1), leave to sue must be obtained regardless of whether the matter relates to a Judge's judicial functions, activities or private affairs.[10]

26.2 Section 47(1) does not draw a distinction between active and retired Judges.[11]

26.3 There are Judges who retire but who continue to feature in judicial functions and activities.[12]

26.4 Section 1 of the Judges Remuneration and Conditions of Employment Act states that: 'service means

> (b) service as a chairperson or a member of a commission as contemplated in the Commissions Act (Act no 8 of 1947); (c)- service as a chairperson or a **member of a body or institution established by or under any law**; or (d) any other service which the Minister may request him or her to perform.' [13] [emphasis added]

26.5 The import of this provision is to buttress the underling rationale that retirement cannot be construed, as contended by *FUL*, to lead to loss by retired judges of the protective mechanisms of section 47(1). [14]

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[10] *Id*, para 15

[11] *Id*, para 16

[12] *Id*, para 23

[13] *Id*, para 24

[14] *Id*, para 25

26.6 This points to the doctrine of leave to sue remaining as relevant to retired Judges as it does to Judges still in active service. Therefore, one cannot exclude retired Judges from the ambit of section 47(1).[15]

27 This was also the interpretation given to section 25(1) of the Supreme Court Act 59 of 1959 - the predecessor to section 47(1) of the Superior Courts Act. In this Court in the matter of *Soller*, Ngoepe JP held that *"the section also applies in instances where the Judge is to be sued in respect of personal matters, such as for a debt owing."*[16]

28 Similarly, in *Lukoto*, the High Court applied section 25(1) of the Supreme Court Act to an application against a judge of the High Court for maintenance of a child in respect of a dispute which arose prior to the judge's elevation to the Bench.[17]

29 Dippenaar J in *Mantashe,*[18] a judgment of this Division delivered on 12 October 2025, also confirmed that s 47 applies in respect of proceedings instituted against a chairperson in his capacity as a chair of a commission of inquiry. Dippenaar J held that:

> *"The provisions of s 47 are peremptory. The wording of s 47(1) draws no distinction between judicial and non-judicial functions…That militates against the applicant's contention that s 47 pertains only to judicial functions and not to judges' conduct of their private affairs or the chairing of an enquiry."*[19] (emphasis added)

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[15] *Id*, para 27

[16] *Soller v President of the Republic of South Africa* 2005 (3) SA 567 (T) ("*Soller*") at para 17.

[17] *N v Lukoto* 2007 (3) SA 569 (T) at para 1.

[18] *Gwede Samson Mantashe v Justice Raymond Zondo N.O and Another* case number 007263/2022 ("***Mantashe***").

[19] Id, para 40.

30 The Court in *Mantashe* concluded that "*if consent is not sought and granted before the institution of the proceedings, they are fatally defective and stand to be dismissed on that ground alone*".[20] Accordingly, Minister Mantashe's review application was dismissed for failure to obtain the s 47 consent.[21]

31 The application of the former presidents is on all fours with *Mantashe.* Nonetheless they claim that *Mantashe* is wrong and that this Court should prefer an earlier decision of this Court in *Memela* where Moshoana J held that the s 47 consent was not required before instituting proceedings against the Zondo Commission.[22]

Mantashe is the correct authority

32 The judgment in *Memela* was handed down on 5 August 2025, just two months before the *Mantashe* judgment. Moshoana J concluded that while the Chairperson is a judge, *"the present review application is not launched against him in his capacity as a judicial officer"*[23], and that accordingly the s 47 consent was not required before review proceedings may be instituted.[24]

33 This finding flew in the face of considerable judicial precedent. One can only

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[20] Id at para 45.

[21] Id at para 51.

[22] *Memela v Chairperson of the State Capture Commission of Inquiry and Others* (34177/22) [2025] ZAGPPHC 816 (14 August 2025) ("*Memela"*) at para 29.

[23] Id at para 23.

[24] *Memela* at para 29.

conclude that the findings in *Memela* were made per *incuriam.* It is a trite principle of the common law that a judgment cannot be regarded as precedent on a point where a court acts per *incuriam*.[25]

34 Indeed, that is the conclusion reached by Dippenaar J in *Mantashe* where she said the following:

> "[34] In the light of binding precedent in this Court, I respectfully cannot agree with the conclusion that consent in terms of s 47(1) was not required as the section is not applicable to Justice Zondo when he was cited in his capacity as chairperson of the Commission of Inquiry rather than in his capacity as a judge.
>
> [35] The nub of the judgment in Memela concerns the finding that the immunity protection afforded by s 47(1) is limited to judges performing the functions of a judge and that the chairing of a commission of enquiry is not a judicial function but a public or statutory function. That does not accord with the authorities referred to in this judgment, which give s 47(1) an expansive definition which includes affording protection to Judges in both their judicial and private capacities. With respect, the judgment fails to take these considerations and precedent into account.
>
> [36] I agree with the respondents' submission that the Learned Judge was bound by the previous decisions in this Division, unless he found them to be clearly wrong. He did not. I am further not persuaded that the interpretation afforded to s 47(1) accords with the grammatical text, context and purpose thereof. Moreover, the FUL judgment, although considered in Memela, was not considered as a whole or in context. By way of example, the contents of paragraphs 26, 34 and 35 do not provide support for the conclusion reached. These paragraphs explain the motives for the consent requirements and have nothing to do with the functions being performed by the judge in respect of which his or her conduct is being impugned. In FUL it was clarified that the reach of the s 47(1) covers judges' conduct in office and in private. With reference to Soller, it was pointed out that the court held that for the purposes of s 25(1) of the Superior Courts Act, 1959, the predecessor to s 47(1), there was no substantive difference between a claim based on a decision made by a judge in court and one based upon the extra-curial transactions of a judge. The judge needs protection from both if they are without merit.
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> …
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> [39] For these reasons, I am respectfully unable to agree with the reasoning and conclusion in Memela. After anxious consideration, I must conclude

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25 *Blaauwbosch Diamonds Ltd v Union Government (Minister of Finance)* [1915] AD 599.

> that Memela is clearly wrong and I respectfully decline to follow it. I consider myself bound by the judgments in Soller, Engelbrecht and FUL in accordance with the doctrine of precedent or, put differently, the principle of stare decisis. Given that Memela did not hold that any of these judgments are clearly wrong, I am not persuaded that it has any binding effect on this Court.
>
> [40] In summary: The provisions of s 47 are peremptory. The wording of s 47(1) draws no distinction between judicial and non-judicial functions." (Emphasis added).

35 In light of the above, s 47 of the Superior Courts Act is plainly applicable to the present proceedings. Compliance with s 47 was a jurisdictional pre-requisite for the institution of the present application.

36 Absent compliance with section 47, the proceedings are fatally defective and invalid.[26] The application of the former presidents falls to be dismissed on this basis alone.

THE LAW ON RECUSAL

37 In this section we set out the legal principles applicable to recusal. We do so for the purposes of illustrating that the Chairperson adopted the correct legal approach in her ruling.

The test for recusal

Actual bias

38 Actual bias occurs where the issues in question are approached "*with a mind*

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[26] *Amalgamated Lawyers Association and Another v Judicial Service Commission and Others* (2022-036684) ZAGPJHC 1312 (15 November 2023) para 4; *Mthenjwa v Steyn and Another* (9028/17) [2017] ZAWCHC 161 (30 November 2017) at para 15.

which was in fact prejudiced and not open to conviction".[27] The pre-judgment of issues by a tribunal or committee constitutes bias.[28]

39 Allegations of bias, especially on the part of a judge, must be substantiated by a proper factual basis and must be proved by the party alleging bias.[29]

Reasonable apprehension of bias

40 The test of reasonable apprehension of bias was authoritatively established by the Constitutional Court in *SARFU* as follows:

> "The question is whether a reasonable, objective and informed person would, on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience." It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite to a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of the litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial" [30]

41 The Court held that the test is objective. The onus of establishing an

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[27] *BTR Industries SA* (*Pty*) *Ltd v Metal & Allied Workers*' *Union* 1992 4 All SA 701 (A); 1992 3 SA 673 (A) ("*BTR Industries*") 690A–B.

[28] *De Lille v Speaker of the National Assembly* 1998 3 All SA 287 (C); 1998 7 BCLR 916 (C)1998 7 BCLR 916 (C); 1998 3 SA 430 (C) at paras 17-18. Cf *Chairman*: *Board on Tariffs & Trade v Brenco Incorporated* 2001 JOL 8274 (A); 2001 4 SA 511 (SCA) at para 64.

[29] *Sepheka v Du Point Pioneer (Pty) Ltd* (J267/18) [2018] ZALCJHB 336; (2019) 40 ILJ 613 (LC) ("Sepheka") at para 16.

[30] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC) ("*SARFU*") at para 48.

apprehension of bias rests on the party applying for recusal.[31]

Presumption of judicial impartiality

42 The Constitutional Court held, and has subsequently emphasised, that the apprehension of bias must be assessed in the light of the presumption of judicial impartiality.[32] In *SARFU* the Court explains that judges have taken an oath of office to administer justice without fear or favour and can ordinarily disabuse their minds of irrelevant personal beliefs or predispositions.

43 In *SACCAWU,* the Constitutional Court held that this principle entailed two consequences: that a person seeking recusal bears the onus of rebutting the presumption of judicial impartiality; and that the presumption is not easily dislodged but requires cogent or convincing evidence.[33]

Double reasonableness requirement

44 The burden that arises that from the "*presumption of impartiality and the double requirement of reasonableness*" is a "*formidable*" one.[34] A judge is presumed to be a person of conscience and intellectual discipline, capable of judging the particular controversy fairly on the basis of its own circumstances.[35]

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[31] *SARFU* at para 45.

[32] *SARFU* at paras 40-41; Emphasised in *South African Commercial Catering and Allied Workers Union v Irvin & Johnson Ltd* 2000 (3) SA 705 (CC) ("*SACCAWU*") at para 12; *Bernert v ABSA Bank Ltd* 2011 (3) SA 92 (CC) ("*Bernert*") at paras 31-34 and *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and another (South African Holocaust and Genocide Foundation and others as amici curiae)* 2022 (4) SA 1 (CC) ("*Masuku*") at paras 59-62.

[33] *SACCAWU* at para 13.

[34] *Bernert* at para 35.

[35] *SACCAWU* at para 12-13, *Bernert* at paras 31-34 and *Masuku* at para 59.

45 An applicant seeking recusal of a judge, can overcome that presumption only if they meet the double requirement of reasonableness—the apprehension of bias must be that of a reasonable person in the position of the litigant, and it must be based on reasonable grounds.[36]

46 The double reasonableness requirement emerged from the Canadian case of *R v S (RD)*[37] which held that *"the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case."*[38]

47 The double requirement not only ensures that the threshold for establishing apprehended bias is high, but also that '*mere apprehensiveness'* on the part of a litigant is not enough.[39]

48 A court must determine that objectively a reasonable litigant would entertain an apprehension that on the facts is reasonable. A subjective anxiety on the part of a litigant, even if genuine, will not suffice for recusal if it is not grounded on facts sufficient to give rise to a reasonable apprehension of bias in the mind of a reasonable litigant.[40]

Duty to hear a case

49 A judge has a duty to hear a case unless they are required to recuse themselves.

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[36] *Masuku* at para 64.

[37] (1997) 118 CCC (3d) 353

[38] Quoted at para 45 of *SARFU*.

[39] *SACCAWU* at paras 16-17.

[40] *SACCAWU* at para 17.

In *SARFU*, the court cited the following comments from the High Court of Australia with approval:

> *"Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."*[41]

UNREASONABLE DELAY

The law on recusal and delay

50 Legal applications must be brought as soon as an applicant becomes aware of the circumstances that warranted such an application.[42] This is particularly the case in respect of complaints of bias against judges.[43] Recusal applications should be made promptly and may be dismissed if there is inordinate and inexcusable delay in raising the point.[44] This is because such applications go to the heart of the administration of justice and must be raised as soon as reasonably practicable.[45]

51 The Constitutional Court held in *De Lacy* that:

> "It must be added that a litigant who raises a complaint of bias or its apprehension must do so at the earliest possible opportunity, setting out the details of the time and circumstances under which the apprehension of

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41 *SARFU* at para 46.

42 *Lion Match Company (Pty) Ltd v Commissioner, South African Revenue Service* [2025] ZASCA (Lion Match) at paras 21 – 25.

43 *Bernert* at para 71.

44 *BMF Assets No 1 Ltd v Sanne Group Plc*, 2022 WL 00228282 (2022) at p16.

45 *Id.*

> bias would have arisen. These details would be singularly important in assessing whether the apprehension advanced is reasonable. Here the applicants have neither furnished an explanation for the delay nor any details of the circumstances under which their apprehension of bias has arisen."[46]

52 Recusal applications must be brought promptly and without delay. In *Bernert* the Constitutional Court noted that:[47]

> "In Locabail, the Court of Appeal held that if, after disclosure of interest in one of the parties to proceedings, a party does not raise any objection to the judge hearing the case or continuing to hear the case, that party cannot thereafter complain of the matter disclosed as giving rise to a real danger of bias.[48] To allow a party to complain of bias in these circumstances would be unjust to the other party and undermine both the reality and the appearance of justice".[49]

53 Pursuing a recusal at a later stage, despite a much earlier opportunity to do so, implicates the interests of justice.[50] In addition, the interests of justice demand that the interests of other parties and the wider public be considered. [51]

54 There is a duty on courts and commissions to the public and the parties to ensure that abuses of their processes are curtailed.[52]

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[46] *De Lacy and Another v South African Post Office* 2011 (9) BCLR 905 (CC) ("*De Lacy*") at para 61.

[47] *Bernert* at para 72.

[48] *Locabail* (*UK) Ltd v Bayfield Properties Ltd and another* [2000] 1 All ER 65 at para 21 at para 26.

[49] Id.

[50] *Bernert* at para 74 - 75.

[51] Id.

[52] *Lion Match* at para 22.

Mr Zuma's delay

55 Mr Zuma's delay in taking action is set out Lukhanyo Calata's answering affidavit at paragraphs 63 to 81 and will not be repeated in any detail here.[53]

56 Mr Zuma claims that the Chairperson's treatment of his delay is unlawful and renders the ruling subject to review. He states further that the Chairperson failed to consider the "*the Gijima principle according to which undue delay cannot trump objective illegality and/or unconstitutionality*."[54]

57 In *Gijima*, the Constitutional Court recognised that the Court has a discretion to overlook the delay, however it cautioned that there must be a basis for doing so.

> "From this, we see that no discretion can be exercised in the air. If we are to exercise a discretion to overlook the inordinate delay in this matter, there must be a basis for us to do so. That basis may be gleaned from facts placed before us by the parties or objectively available factors. We see no possible basis for the exercise of the discretion here…"[55]

58 The Constitutional Court held that SITA's delay of nearly 22 months before approaching the High Court for review was unreasonable, and there was no basis for it to exercise a discretion to overlook the delay.[56]

59 In those circumstances, despite the invalidity the agreement, the court held

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[53] Calata Group answering affidavit, Caselines 016-21 to 016-25.

[54] Zuma Founding Affidavit, Caselines 001-31 at para 89.5.6.

[55] *State Information Technology Agency SOC Limited v Gijima Holdings (Pty)* Limited [2017] ZACC 40 ("*Gijima*") at para 49.

[56] *Ibid.*

that, in the interests of justice and equity, SITA must not benefit from its own undue delay in instituting proceedings. It therefore declared the award of the contract to Gijima and the subsequent extension to be invalid but ordered that the declaration of invalidity must not divest Gijima of rights to which it would have been entitled, but for the declaration of invalidity.[57]

60 Unlike the situation in *Gijima*, no illegal conduct has been proven against Justice Khampepe that would warrant the overlooking of the delay in taking action on the part of Zuma and Mbeki.

61 Zuma's founding affidavit before the Commission offered no explanation as to why he first only raised his concerns in his attorney's letter of 3 December 2025.[58] This is notwithstanding the very public appointment of Judge Khampepe on 29 May 2025 and the receipt of his Rule 3.3 notice on 19 September 2025.

62 Zuma's replying affidavit before the Commission offered some explanation. In particular he alleged that:

> "…the fact that the most recent improper conduct in respect of the Semenya recusal application **constituted the last straw and trigger for the recusal application**."[59] (Bold added)

63 This explanation is most revealing. The alleged improper conduct of the Chairperson in the Semenya recusal was "*the last straw*" and "*the trigger*" for his application against her. Zuma is effectively saying that but for the claimed

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[57] *Ibid* at para 54

[58] Zuma application for recusal in the Commission, Rule 53 Record, Caselines 077-12.

[59] Zuma Replying Affidavit in the Commission, Rule 53 Record Caselines 077-86 at para 16.

improper conduct in the Semenya recusal, he would not have brought the recusal application.[60]

64 The grounds relating to the Chairperson's adverse judgments against Zuma and her previous roles in the TRC and NPA were insufficient to "*trigger*" a recusal application. Indeed Zuma, knowing that the original hearings were scheduled to start on 10 November 2025, was happy to proceed without seeking the Chairperson's recusal notwithstanding his knowledge of her involvement in the adverse judgments and the public positions she held previously. [61]

65 In the circumstances the finding of the Chairperson that Mr Zuma's delay was unreasonable and undermined the reasonableness of his apprehension of bias was eminently justified.

Mr Mbeki's delay

66 Mr Mbeki's 7 month delay in taking action was particularly egregious and is set out in Lukhanyo Calata's answering affidavit at paragraphs 105 to 124 but will not be repeated in any detail here.[62]

67 The only explanation offered by Mbeki in his founding affidavit before the Commission was that he had to wait for his lawyers to consider Zuma's recusal application filed on 15 December 2025 before he could act.[63]

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[60] Calata Group answering affidavit, Caselines 016-22 at para 71

[61] Calata Group answering affidavit, Caselines 016-23 at para 73

[62] Calata Group answering affidavit, Caselines 016-29 to 016-33.

[63] Mbeki founding affidavit before the Commission, Rule 53 Record, Caselines 077-162 at para 64.

68 It is clear then that but for the bringing of the Zuma recusal application, Mbeki would not have acted. An application brought in such circumstances cannot be taken seriously.

69 Mr Mbeki argues that the Chairperson misapplied the legal test on delay in recusal applications by not balancing factors such as the importance of the issues and the prospects of success. [64]

70 In Mr Mbeki's written submissions, it was asserted:

> "…That enquiry necessarily involves a consideration of multiple factors, including the length of the delay, the explanation for the delay, the stage of the proceedings, the nature and importance of the issue raised, the prospects of success on the merits, and the prejudice that may arise if the proceedings continue before a decision-maker who ought to have recused herself. The mere absence of an adequate explanation is not dispositive, depriving the Court of the ability to overlook the delay…"[65]

71 In her ruling the Chairperson canvassed the elements relevant in assessing Mr Mbeki's delay.[66] The contention that the determination on delay was made solely due to the failure of Mr Mbeki to provide an explanation is unfounded.

72 Given Mr Mbeki's inordinate delay in taking action, the Chairperson was correct to treat Mr Mbeki's delay as unreasonable. She was also correct to find that the circumstances underlying Mr Mbeki's delay undermined the reasonableness of his apprehension of bias.

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[64] Mbeki answering affidavit, Caselines: 009-55 – 009-56 at para 128.

[65] Mbeki's written submissions, Caselines 054-47 at para 111.2.

[66] Ruling, Caselines 077-1021 at paras 132 -138.

GROUND OF REVIEW - PRIOR INSTITUTIONAL ROLES

73 Both Zuma and Mbeki complain that the Chairperson's former roles render her unsuitable for the position of Chairperson of the Commission.

74 They point out that the Chairperson was a TRC Commissioner and a member of the Amnesty Committee and a Deputy NDPP, a post she held from September 1998 to December 1999.

75 The facts in connection with the roles of the Chairperson at the TRC and the NPA are set out in Lukhanyo's affidavit at paragraphs 125 to 139 and will not be repeated here in any detail.[67]

The law on previous positions and recusal

76 The mere holding of a position is not a ground for recusal. The mere association with a person or institution is also not a ground for recusal, nor is a general claim of "unsuitability".

77 In *SARFU*, the application for the recusal was based in part on the fact that four of the judges had been members of the African National Congress ("**ANC")** before appointment, although they had all resigned upon appointment.

77.1 It was argued that their prior political affiliation gave rise to a reasonable apprehension that they would be biased in favour of the President of the country, the president of the ANC, against whom the applicant was

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[67] Calata Group answering affidavit, Caselines 016-33 to 016-35.

litigating.

77.2 This argument was rejected. The Constitutional Court reasoned that Judges are expected to put party political loyalties behind them upon appointment.

77.3 The Court concluded that prior political affiliation would not be a ground for recusal "*unless the subject matter of the litigation arises from such association or activities*".[68]

78 In addition, in *Goosen*, the full court of this Division noted that "[*i]t is unnecessary for a Judge to occupy a place of utter isolation from an issue or from even a party for that matter.*[69] The full court, quoting the Australian case of *Ebna,*[70] emphasised that more is needed before the test for recusal will be satisfied:

> "There must be an articulation of a logical connection between the matter and the feared deviation from the course of deciding the case on the merits. The bare assertion that a Judge has an 'interest' in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making is articulated." [71]

Mr Zuma – prior institutional roles

79 According to Mr Zuma:

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[68] *SARFU* at para 76.

[69] *Ex parte Goosen* 2020 (1) SA 569 (GJ) ("*Goosen"*) at para 25.

[70] *Ebner v Official Trustee* (2001) 205 CLR 337 (HCA) ([2000] HCA 63; 176 ALR 644; 75 ALJR 277)

[71] *Goosen* at para 29 quoting *Ebner* at para 8. The position in Goosen was confirmed by the Constitutional Court in *Masuku* at para 69.

79.1 the mere holding of these positions made her "*distinctively unsuitable and/ or automatically disqualified for her present position*"[72]

79.2 witnesses before the Commission could include her former colleagues and superiors,[73]

79.3 the issue of prosecution is directly linked to the granting or refusal of amnesty.[74]

80 Mr Zuma overlooks the fact the political interference was not a subject matter before the TRC and NPA during the Chairperson's tenure there, since such steps were only taken more than 3 years later.[75]

81 In short, Mr Zuma does not explain how the Chairperson's ruling was deficient in dealing with her prior institutional roles.

Mr Mbeki – prior institutional roles

82 Mr Mbeki claims that the Chairperson misdirected herself as to the applicable legal test for reasonable apprehension of bias. He claims that, in requiring a logical connection between her prior roles and the work of the Commission, the Chairperson imposes a standard that is akin to proof of actual bias.

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[72] Zuma affidavit before the Commission, Caselines, Rule 53 Record, 077-24 - 077-25 at para 48.

[73] Zuma affidavit before the Commission, Caselines Rule 53 Record, 077-25 at para 49.

[74] *Id*.

[75] Calata Group answering affidavit before the Commission, Caselines Rule 53 Record 077-137 – 077-138 at paras 56 -58

83 This is incorrect, in *Masuku* the Constitutional Court explained that:

> "What an applicant raising an apprehension of bias must prove is that there is some connection between the views, opinions or experiences of a judicial officer and the subject-matter they are to be seized with. So, proving that a judicial officer holds a particular view is not, without more, sufficient to establish a reasonable apprehension of bias." [76]

84 Mbeki notes that as a TRC Commissioner, Judge Khampepe, was party to a finding made in the TRC Report that the ANC had committed gross human rights violations.[77]

84.1 However, he did not refer to the TRC's primary finding (against the former apartheid regime) as well as other findings against other groups.[78]

84.2 He did so presumably to raise the insinuation that the Chairperson would be predisposed against the ANC. [79]

85 Mbeki also explained that:

> "*Given Justice Khampepe was directly involved in making the TRC findings and recommendations (regarding prosecutions of those who were declined amnesty), the reasonable observer would apprehend that she may be predisposed in favour of justifying or defending prior institutional conclusions in which she played a key decision-making role.*"[80]

86 Mbeki made the same claim in respect of the Chairperson's short stint at the NPA, namely that she may have an "*institutional interest*" in validating her

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[76] *Masuku* at para 68.

[77] Mbeki answering affidavit before the Commission, Caselines Rule 53 Record 077-148 at para 18.

[78] Thakor answering affidavit before the Commission, Caselines Rule 53 Record 077-725 -077-727 at paras 47–54.

[79] Calata Group answering affidavit, Caselines 016-34, at para 129.

[80] Mbeki answering affidavit before the Commission, Caselines Rule 53 Record 077-148 at para 20.

decisions while at the prosecuting authority.[81]

87 However, the question of whether apartheid-era crimes should be prosecuted is a function of the rule of law. This question is not before the Commission and accordingly the TRC recommendation that offenders who were not amnestied should be prosecuted does not have to be defended or justified.[82]

88 Mbeki alleges, without any evidence, that Judge Khampepe had the "*institutional responsibility for shaping NPA policy on the TRC cases*". This is speculation. We are not aware of any specific policy on the TRC cases emerging from the NPA or the Human Rights Investigation Unit ("**HRIU**") during 1998 or 1999, and in any event the Commission has denied that she played a role at that unit. [83]

89 Mbeki makes the further extraordinary claim that because of Judge Khampepe's prior role in the TRC an apprehension of bias arises from "*the unavoidable overlap*" between her "*past adjudicative role and her present fact-finding responsibilities*". It is settled law that mere overlap between cases or judgments is not a ground for recusal.[84]

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[81] Mbeki answering affidavit before the Commission, Caselines Rule 53 Record 077-151 at para 31.

[82] Calata Group answering affidavit, Caselines 016-34 at para 131.

[83] First to Fifth respondents' answering affidavit, Caselines 015-22 - 015-23 at para 86. Mbeki's description of the HRIU's mandate in paragraph 68.1 of his heads of argument before this Court is incorrect. There is no evidence before this Court, or the Commission, to suggest that the mandate of the HRIU is as described by Mbeki.

[84] *Electoral Commission of South Africa v Umkhonto Wesizwe Political Party and Others (CCT 97/24) [2024] ZACC 6; 2024 (7) BCLR 869 (CC); 2025 (5) SA 1 (CC) (20 May 2024)* ("*Electoral Commission*") at para 26.

The temporal bound

90 Mr Mbeki asserts that the Chairperson's ruling regarding her previous roles is in part premised on the temporal mandate beginning in 2003. He argues that this is irrational.

91 Mr Mbeki points to the meetings between former police and army generals and representatives of the ANC government in the late 1990s and early 2000s and alleges that this overlapped with the time that the Chairperson was at the TRC and the NPA.

92 Mbeki claims that "*this Commission is mandated to investigate whether, during that very period*" (1995 – 2001) steps were taken to block TRC-related prosecutions.[85] Yet there is no allegation or evidence suggesting that such steps were taken before mid-2003.[86]

93 However, as mentioned above, mere overlap does not give rise to bias or conflict. The NPA and the TRC were not involved in those deliberations. Unless the Chairperson can be connected to those discussions, the fact that they were taking place while she was with TRC and NPA is entirely irrelevant. [87] There is no allegation on the record that the Chairperson was involved in or connected in any way with these discussions.

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[85] Mbeki answering affidavit before the Commission, Caselines Rule 53 Record 077-150 at para 28.

[86] Thakor answering affidavit before the Commission, Caselines Rule 53 Record 077-729 – 077-731, at paras 66-71.

[87] Calata Group Answering Affidavit, Caselines 016-35 at paras 135-138.

94 Mr Mbeki takes issue with this; he claims that this is a new ground of defence raised by the Calata Group. We disagree. These facts were part of the record before the Commission. Moreover, the assertion is one of simple logical deduction from the known facts.

95 In short, the former presidents have failed to articulate a logical connection between the Chairperson's former positions in the TRC and NPA and the apprehension of bias. In particular they have failed to explain why her former roles prevent her from adjudicating impartially on the question of political interference.

GROUND OF REVIEW – THE SEMENYA RECUSAL APPLICATION

Mr Zuma

96 Mr Zuma's assertion of actual bias rests entirely on his claim of secret and private advice provided by the Chairperson to Semenya SC in respect of the application to recuse the latter.

97 This was an application which Mr Zuma specifically "elected not to join". [88]

98 Mr Zuma provides no facts or evidence to support his claim. He simply claims that at some future point the alleged evidence may emerge.[89]

99 It is trite law that the test for recusal is objective and assumes that a reasonable

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[88] Zuma affidavit before the Commission, Caselines, Rule 53 Record 077-22 at para 37.

[89] Zuma affidavit before the Commission, Caselines, Rule 53 Record 077-25 at para 51

litigant is in possession of all the relevant facts.

99.1 This test must, thus, be applied to the *true* facts on which the recusal application is based.[90]

99.2 In all circumstances, the test emphasises reasonableness in light of the true facts, not the technical legal nuances of the particular case.[91]

99.3 In other words, if the factual foundation is wanting then *a fortiori* the apprehension is misplaced and that will end the enquiry.[92]

100 Any allegation of bias, especially on the part of a judge must be substantiated by a proper factual basis and must be proved by the party alleging bias.[93]

101 In addition, actual bias must be clearly pleaded and particularised. The burden of proof on actual bias has been described in an academic article "*as heavy as the burden of proof of fraud, bad faith or misfeasance in public office*", meaning that that the party alleging it must support it with cogent evidence, not mere assertion.[94]

102 Zuma has failed to put up true facts or cogent evidence. This is a theme of the case put up by Zuma. Not only did he fail to put up the aforesaid communications, but he also declined to refer to the relevant extracts from the media articles he

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[90] *Masuku* at para 64.

[91] *SARFU* at para 45, *SACCAWU* at para 57.

[92] *Bennett and Another v The State: In re S v Porritt and Another* 2021 (1) SACR 195 (GJ) ("*Porritt")* at para 26.

[93] *Sepheka* at paras 15–16.

[94] C Okpaluba and L Juma, *The Problems of Proving Actual or Apparent Bias: An Analysis of Contemporary Developments in South Africa* [2011] PER 38**.**

relies on to claim actual or a reasonable apprehension of bias. [95]

103 The making of claims without putting up evidence brings an end to this ground of review.

Mr Mbeki

104 Mr Mbeki's reliance on the Chairperson's ruling to dismiss the application to recuse Adv Ishmael Semenya SC as chief evidence leader ("**Semenya**") has been dealt with in detail in the Calata's group's answering affidavit at paragraphs 148 – 154.[96]

105 Mr Mbeki raises a complaint in respect of the recusal of Semenya, a matter in which he chose not to participate. He also elected not to review the ruling when it was handed down.

106 The Semenya recusal ruling likewise involved weighing competing considerations. Whether one agrees with that weighing or not, it is clear that the Chairperson:

106.1 applied the correct legal test;

106.2 took account of the factual record; and

106.3 gave full, reasoned conclusions.

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[95] Calata Group answering affidavit before Commission, Caselines Rule 53 Record 077-139 at para 63.

[96] Calata Group answering affidavit, Caselines 016-38 – 016-38 at paras 148-154.

GROUND OF REVIEW – THE LEADING OF WITNESSES

107 Mr Mbeki persists in his complaint about the Chairperson's decision to approve the Calata Group's request to lead their witnesses, a decision which is a standard approach in several commissions of inquiry. This ground is contrived. It has been adequately covered in the Calata Group's Answering affidavit at paragraphs 140 – 147.2. [97]

108 This is a ground manufactured by Mr Mbeki to distinguish his application from that of Mr Zuma and to come up with a reason for his inordinate delay in taking action. [98]

109 It speaks volumes that Mr Mbeki chose not to review the Chairperson's decision in this regard. [99]

110 Mr Mbeki's criticisms amount to disagreement with the outcome of the Chairperson's rulings, not proof that the Chairperson was biased.[100]

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[97] Calata Group answering affidavit, Caselines 016-36 - 016-37.

[98] Calata Group answering affidavit, Caselines 016-32 at para 121.

[99] Calata Group answering affidavit, Caselines 016-36 at para 142.

[100] Calata Group answering affidavit, Caselines 016-38 at para 154

INCOMPETENT RELIEF SOUGHT

111 Mr Zuma and Mr Mbeki seek an order directing President Ramaphosa to immediately terminate the appointment of Justice Khampepe as a member and Chairperson of the Commission. [101]

112 The Commission was established in terms of section 84(2)(f) of the Constitution. The section confers the power to appoint commissions of inquiry upon the President alone. This is an executive power, vested solely with the President. As part of this power, the President appoints the Chairperson of a commission of inquiry.

113 In *SARFU III,*[102] the Constitutional Court held that the appointment of a commission of inquiry does not constitute administrative action within the meaning of section 33 of the Constitution.

114 The appointment of the Chairperson is therefore not subject to review in terms of PAJA. In the circumstances, this Court cannot accommodate Mr Mbeki's for an order instructing President Ramaphosa to terminate the appointment of Justice Khampepe as the Chairperson of the Commission. To do so would result in a violation of the doctrine of separation of powers. [103]

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[101] Zuma amended notice of motion, prayer 6, Caselines 003-3; Mbeki notice of motion, prayer 5, Caselines 011-4.

[102] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (CCT16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 (10 September 1999) "*SARFU III*" at para 34(b).

[103] *Masetlha* at para 77.

NULLITY RELIEF

115 In his notice of motion, Mr Mbeki seeks, at paragraph 5, an order:

> "Declaring that all acts, decisions, directives, and proceedings undertaken by the Commission with the involvement of Commissioner Khampepe, whether directly or indirectly, are unlawful and of no force or effect, and accordingly constitute a nullity;"

116 Nullity is not the invariable consequence of an order of recusal based on reasonable apprehension of bias. In *Take and Save*,[104] the SCA held that a failure to recuse need not result in the proceedings being a nullity:

> "A balancing act by the judicial officer is required because there is a thin dividing line between managing a trial and getting involved in the fray. Should the line on occasion be overstepped, it does not mean that a recusal has to follow or the proceedings have to be set aside. If it is, the evidence can usually be reassessed on appeal, taking into account the degree of the trial court's aberration."[105] (Emphasis added)

117 *In S v Basson*, the Constitutional Court held that:

> "There is a difference between grounding a complaint of bias on the conduct of the Judge in hearing the case and grounding such a complaint on the relationship between the Judge and one of the parties or witnesses. It is generally far harder to establish a reasonable apprehension of bias in the former case."[106]

118 The former presidents grounds of review include allegations that the Chairperson acted improperly in certain procedural rulings. In particular her handling of the application of Advocate Semenya's recusal and the leading of evidence by the

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[104] *Take and Save Trading CC & Others v Standard Bank of SA* 2004 (4) SA 1 (SCA) ("*Take and Save*").

[105] Ibid at para 4.

[106] *S v Basson* 2007 (3) SA 582 (CC) *("**Basson**")* at para 33.

Calata Group. In both of these scenarios, the conduct was committed during the proceedings of the commission, it therefore falls into the second category set out in *Take and Save*.

119 Accordingly, Mr Mbeki's claim that the proceedings of the Commission must be rendered a nullity does not necessarily follow.

120 This distinction and approach set out in *Take and Save* serves a vital constitutional imperative. It balances the section 34 rights of the party complaining of bias against those of the party who seeks to have its cause determined.

121 Mr Mbeki's appeal to a blanket-rule approach, overlooks the court's power and duty in terms of section 172(1)(b) of the Constitution to "*make any order that is just and equitable*."

122 In this regard it is noted that neither former presidents sought to interdict the proceedings of the Commission pending the outcome of their reviews.

123 We submit that a court should be slow to grant 'nullity' relief where no attempt was made to seek interdictory relief, and when by the time this litigation is concluded it is likely that more than a year's operations of the Commission will have elapsed, months of hearings will have been held, and expenditure of public funds may have breached the R100 million mark.

SIGNING OF THE RULING

124 The applicants argue that the ruling is not that of the Commission because the

ruling is not signed by Commissioners Kgomo and Gabriel SC.[107]

125 We note that it is also the practice of other commissions of inquiry for chairpersons to sign rulings. For instance, on 9 March 2026 a ruling was handed down in the Judicial Commission of Inquiry Into Criminality, Political Interference and Corruption in the Criminal Justice System ("**The Madlanga Commission**"). The ruling was issued by the Chairperson, Justice Madlanga, and signed by him alone.[108] The Madlanga Commission is also comprised of a panel of three.

126 It is noted that the recusal application was directed only against the Chairperson and not the other commissioners. In addition, the Rules of the Commission provide for the Chairperson to decide interlocutory applications.

PRESIDENT RAMAPHOSA'S INTERVENTION

127 On 6 March 2026, President Ramaphosa filed an explanatory affidavit, in which he claims to abide by the decision of this Court.[109] However, this is a transparent act of pretence. The President is not abiding by the decision of this Court, since he is actively encouraging it to make the orders sought by the former presidents.

128 The President's legal team has also filed written submissions before this Court.

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[107] Zuma Founding Affidavit, Caselines 001-21, para 52; Mbeki Answering Affidavit, Caselines 009-10 at para 19.3.

[108] Judicial Commission of Inquiry into Criminality, Political Interference and Corruption in the Criminal Justice System ("Madlanga Commission"), Ruling by the Chairperson, Justice Mbuyiseli Madlanga, 9 March 2026 (Pretoria).

[109] Ramaphosa explanatory affidavit, Caselines 006-22 at paras 2-2.2.

In those submissions the President sets out reasons why the Court should grant the orders sought by the former presidents.

129 The President's affidavit was filed well out of time and more than a week after when answering affidavits were due. He did not seek condonation for his late filing. Accordingly, his affidavit is not properly before this Court.

130 Given that the President has entered into the fray and taken sides with the former presidents, the families were forced to file an affidavit responding to his extraordinary conduct.[110] To the extent that they require condonation for their affidavit they have sought such leave. [111]

131 The President actively advances the demise of the very Commission he himself established when on his own admission he did not conduct the most basic background checks. When he apparently discovered the issues he claimed warranted the Chairperson's removal, he did not act in terms of his powers. His conduct is incompatible with the constitutional responsibilities of the office he holds.

Feigned ignorance

132 President Ramaphosa makes the remarkable claim that he was unaware of the Chairperson's previous roles even though her background was easily accessible on multiple websites and her previous positions were high profile on well-known

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[110] Calata Group affidavit: response to President Ramaphosa's explanatory affidavit, Caselines 016-51.

[111] Calata Group affidavit in response to President Ramaphosa's explanatory affidavit, Caselines 016-53 at paras 5 - 6.

bodies.[112] It is a contention that is difficult to take seriously.

133 The President also claims that there was no onus on him or his advisers to carry out basic checks on his shortlist of candidates, not least his actual selection, where the candidates are judges.[113] This is a disturbing admission on the part of the President.

134 He appears to be saying that if he selects a judge, he is entitled to assume he or she is fit and proper and is not burdened by any conflicts, unless the appointee volunteers such conflicts.[114] According to the President, this relieves him and his advisers from the bother of having to look at curriculum vitae or biographies.

135 Where an appointee is aware that there is material information, that is not in the public domain and not publicly accessible or well-known, then there is certainly an obligation to disclose this. That is not the case here.

136 The Chairperson was entitled to assume that the President's office had taken a minute to look at her publicly available biography, which a Google search would have delivered in a few seconds. She was entitled to assume that those involved in the selection process would have compiled basic profiles on the shortlisted candidates, before proceeding to a final decision.

137 The President then puts up various arguments that dovetail the submissions of

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[112] Calata Group affidavit in response to President Ramaphosa's explanatory affidavit, Caselines 016-55 at paras 17 – 18. This Court should take judicial notice of the fact that President Ramaphosa himself twice appointed Justice Khampepe as the Acting Deputy Chief Justice of the Republic on 1 November 2019 and 1 May 2021.

[113] Ramaphosa's heads of argument, Caselines 054-78 at para 9.2.

[114] Ramaphosa's heads of argument, Caselines 054-78 at paras 9.3 – 9.5.

the former presidents as to why the Chairperson should be removed from the Commission. He does so even though there it is trite law that the mere overlapping in matters does not in itself provide a ground for recusal.

138 He also appears to be unaware that while the Chairperson was at the TRC and the NPA in the 1990s, the interference in the TRC cases had not commenced.

The power of the President to remove or replace the Chairperson

139 President Ramaphosa argues that once he had appointed the Chairperson in terms of s 84(2)(f) of the Constitution, he was rendered powerless under law from addressing the issue. The President claims that this is because he exercised an executive power which was completed, and "it could be argued that he is *functus*." [115]

140 In making this claim he relies on *Mncwabe v President of the RSA* [2023] ZACC 29.[116] That matter dealt with whether President Zuma was *functus officio* in relation to certain appointments (since the persons in question had not been formally advised by the President) and whether he (or his successor) still had the right to change his mind regarding the selections. [117]

141 In this matter there is no debate over whether the appointment of the Chairperson had been finally made or not. Her appointment was complete once the Commission was proclaimed in the Government Gazette. The question here is

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[115] Ramaphosa's heads of argument, Caselines 054-75 at paras 5.1.

[116] At paras 42 - 60.

[117] At paras 125 – 128.

not whether President Ramaphosa can change his mind in relation to the appointment of the Chairperson. He clearly cannot since the appointment is complete. The question is whether, post appointment, he was empowered to make a new decision to remove and replace her on good cause.

142 This is a question that the President has avoided addressing as it would require him explaining his inaction notwithstanding his claimed concerns. If he was serious about taking action, he had ample opportunity to do so (some 8 months) before the hearings commenced.[118]

143 It is uncontroversial that the executive power to appoint includes the power to remove or replace an appointee, unless the Constitution or legislation limits that power, which it does not in this case.[119] The President is however required to act rationally and lawfully in taking such action. [120]

144 In *Masetlha*, the Constitutional Court considered the President's power to terminate the employment of the Director-General of the National Intelligence Agency. The Court held that the President had the power to terminate the employment of the applicant under section 209 of the Constitution read with section 3 of the Intelligence Services Act.

145 The Court explained that while section 209 of the Constitution is silent on the power of the President to suspend or dismiss a head of an intelligence service,

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[118] Between the appointment of the Chairperson on 29 May 2025 and the start of the hearings on 11 February 2026.

[119] *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC) ("*Masetlha*"), at paras 69, 73, 74, 77.

[120] *Masetlha*, at paras 78-81; and *Democratic Alliance v President of South Africa and Other*s 2013 (1) SA 248 (CC) at paras 41 and 44.

that power must be inferred, at para 68 the Court states:

> "*The power to dismiss is necessary in order to exercise the power to appoint. The High Court is right that the power to dismiss a head of the Agency is a necessary power without which the pursuit of national security through intelligence services would fail. Without the competence to dismiss, the President would not be able to remove the head of the Agency without his or her consent before the end of the term of office, whatever the circumstances might be. That would indeed lead to an absurdity and severely undermine the constitutional pursuit of the security of this country and its people. That is why the power to dismiss is an essential corollary of the power to appoint and the power to dismiss must be read into section 209(2) of the Constitution. There is no doubt that the power to appoint under section 209(2) of the Constitution and the power under ISA implies a power to dismiss.*"[121] (Own emphasis)

146 Accordingly, the power to dismiss or remove appointees that the President makes in terms of s 84(2)(e) – appointing persons where the Constitution or legislation requires him to do so; s 84(2)(f) – appointing persons to commissions of inquiry; and s 84(2)(i) – appointing ambassadors and diplomatic representatives, is a corollary of the power to appoint in term of those provisions.

147 The claim that the President's hands were tied once he had appointed the Chairperson is not correct. He was empowered to act if he had the grounds or cause to act. It is our submission that he did not act, since there were no viable grounds or basis to remove the Chairperson.

148 For the same reason, the claim by Mr Zuma in his replying affidavit that President Ramaphosa's decision to abide is dispositive of this matter is mistaken.[122] If the President's position was seriously held, he would have acted in terms of his

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[121] *Masetlha* at para 6.

[122] Zuma Replying Affidavit, Caselines 017-7 – 017-8.

powers as mentioned above. He did not.

149 The families are perplexed and alarmed at the erratic conduct of the President. They do not understand why he is so willing to help engineer the demise of the Commission he appointed. If successful, this will result in the waste of tens of millions of rands and several months of work and hearings. They are of the view that his actions amount to a closing of the ranks and are politically motivated.[123]

150 The families, victims and survivors stand to suffer deep prejudice if the Commission is dismantled and/ or further delayed. [124]

CONCLUSION AND COSTS

151 Accordingly, the families have demonstrated that the former presidents have not established any entitlement to the relief they seek. Their case is fatally compromised by undue delay and the absence of the necessary authorisations to institute these proceedings. The non-compliance with a peremptory statutory requirement is a defect that no amount of subsequent legal ingenuity can cure.

152 Mr Zuma put up no evidence of his central claim - the alleged improper communications between the Chairperson and the chief evidence leader. No Court can entertain a claim without evidence. It is also apparent that but for this claim, Mr Zuma would not have sought the recusal of the Chairperson.

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[123] Calata Group affidavit in response to President Ramaphosa's explanatory affidavit, Caselines 016-60 at para 39.

[124] Calata Group affidavit in response to President Ramaphosa's explanatory affidavit, Caselines 016-61 at para 43.

153 Mr Mbeki's applications before both the Commission and this Court were opportunistically brought on the back of Mr Zuma's initiatives. But for the action taken by Mr Zuma he would not have acted.

154 It follows that the balance of the grounds of the former presidents, such as the Chairperson's vocational history, and the various procedural grounds dealing with the interlocutory applications before the Commission cannot be taken seriously. They must be seen for what they are: embellishment and embroidering.

155 In the light of this context, the families are entitled to legal costs, including the costs of two counsel.

156 In relation to the conduct of the President Ramaphosa, we urge this Court to consider a costs order against him. He opted not to simply abide by the decision of this Court. He decided to enter the fray and has become an active litigant, supporting the relief sought by the former presidents.

157 President Ramaphosa cannot be considered a neutral or passive party. We submit, that in the event that this Court awards costs against the former presidents, that order should also extend to President Ramaphosa based on his active role in these proceedings.

158 In *Lawyers for Human Rights v Rules Board for Courts of Law*[125] the High Court awarded costs against a party that purported to abide, but in fact participated in the proceedings. The Court stated:

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[125] 2012 JDR 0601 (GNP).

> "Although the First Respondent has indicated that it will abide by the Court's decision there was appearance on its behalf in circumstances where it clearly appears that the First Respondent joined forces with the Second Respondent in his opposition to the application.
>
> I accordingly see no reason why the First Respondent should not also be held liable for the Applicant's costs."[126]

159 That finding applies with equal force to the conduct of President Ramaphosa in these proceedings.

160 The applications of the applicant and seventh respondent fall to be dismissed with costs on Scale C.

Howard Varney

Dasantha Pillay

Counsel for the Calata Group

15 March 2026

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[126] Ibid at paras 101-102

LIST OF AUTHORITIES

NO	DESCRIPTION
	Domestic case law
1.	*Amalgamated Lawyers Association and Another v Judicial Service Commission and Others* (2022-036684) ZAGPJHC 1312 (15 November 2023)
2.	*Bennett and Another v the State: In re S v Porritt and Another* 2021 (1) SACR 195 (GJ)
3.	*Bernert v ABSA Bank Ltd,* 2011 (3) SA 92 (CC)
4.	*Blaauwbosch Diamonds Ltd v Union Government (Minister of Finance)* [1915] AD 599.
5.	*BTR Industries SA (Pty) Ltd v Metal & Allied Workers' Union,* 1992 4 All SA 701 (A); 1992 3 SA 673 (A)
6.	*Board on Tariffs & Trade v Brenco Incorporated*, 2001 JOL 8274 (A); 2001 4 SA 511 (SCA)
7.	*Chairman: Board on Tariffs & Trade v Brenco Incorporated* 2001 JOL 8274 (A); 2001 4 SA 511 (SCA)
8.	*De Lacy and Another v South African Post Office*, 2011 (9) BCLR 905 (CC)
9.	*De Lille v Speaker of the National Assembly*, 1998 3 All SA 287 (C); 1998 7 BCLR 916 (C); 1998 3 SA 430 (C)
10.	*Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC)
11.	*Ex parte Goosen*, 2020 (1) SA 569 (GJ)
12.	*Electoral Commission of South Africa v Umkhonto Wesizwe Political Party and Others (CCT 97/24) [2024] ZACC 6; 2024 (7) BCLR 869 (CC); 2025 (5) SA 1 (CC) (20 May 2024)*
13.	*Freedom Under Law v Judge Motata* 2021 JDR 0077 (GP)
14.	*Lawyers for Human Rights v Rules Board for Courts of Law 2012 JDR 0601 (GNP).*
15.	*Lion Match Company (Pty) Ltd v Commissioner, South African Revenue Service,* [2025] ZASCA

16.	*Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC)
17.	*Mthenjwa v Steyn and Another* (9028/17) [2017] ZAWCHC 161
18.	*Memela v Chairperson of the State Capture Commission of Inquiry and Others* (34177/22) [2025] ZAGPPHC 816 (14 August 2025)
19.	*N v Lukoto* 2007 (3) SA 569 (T)
20.	*President of the Republic of South Africa and Others v South African Rugby Football Union and Others*, 1999 (4) SA 147 (CC)
21.	*President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (CCT16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059
22.	*S v Basson* (CCT30/03A) [2005] ZACC 10; 2005 (12) BCLR 1192 (CC); 2007 (3) SA 582 (CC); 2007 (1) SACR 566 (CC) (9 September 2005)
23.	*Samson Mantashe v Justice Raymond Zondo N.O and Another* (Gauteng Local Division) Case No 007263/2022
24.	*Sepheka v Du Point Pioneer (Pty) Ltd*, (J267/18) [2018] ZALCJHB 336; (2019) 40 ILJ 613 (LC)
25.	*Soller v President of the Republic of South Africa* 2005 (3) SA 567 (T)
26.	*South African Commercial Catering and Allied Workers Union v Irvin & Johnson Ltd*, 2000 (3) SA 705 (CC)
27.	*South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another*, 2022 (4) SA 1 (CC)
28.	*State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* [2017] ZACC 40
29.	*Take and Save Trading CC & Others v Standard Bank of SA* 2004 (4) SA 1 (SCA)
Foreign case law	
30.	*BMF Assets No 1 Ltd v Sanne Group Plc*, 2022 WL 00228282 (2022)
31.	*Ebner v Official Trustee*, (2001) 205 CLR 337 (HCA); [2000] HCA 63; 176 ALR 644; 75 ALJR 277
32.	*R v S (RD)* (1997) 118 CCC (3d) 353

Academic article /text	
33.	C Okpaluba and L Juma, *The Problems of Proving Actual or Apparent Bias: An Analysis of Contemporary Developments in South Africa* [2011] PER 38.