

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case No: 2026-026936

In the matter between:

JACOB GEDLEYIHLEKISA ZUMA

1st Applicant

and

THE CHAIRPERSON OF THE COMMISSION

1st Respondent

SECRETARY OF THE COMMISSION

2nd Respondent

ADVOCATE ISHMAEL SEMENYA SC

3rd Respondent

COMMISSIONER FRANS KGOMO

4th Respondent

COMMISSIONER ANDREA GABRIEL SC

5th Respondent

THE CALATA GROUP

6th Respondent

THABO MVUYELWA MBEKI

7th Respondent

NATIONAL PROSECUTING AUTHORITY

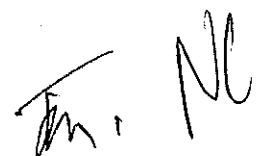
8th Respondent

**MINISTER OF JUSTICE AND CONSTITUTIONAL
AFFAIRS**

9th Respondent.

**PRESIDENT OF THE REPUBLIC OF SOUTH
AFRICA**

10th Respondent

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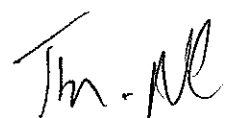
**ANSWERING AFFIDAVIT AND FOUNDING AFFIDAVIT IN APPLICATION TO BE
PERMITTED TO ACT AND JOINED AS A CO-APPLICANT**

I, the undersigned,

THABO MVUYELWA MBEKI

do hereby make oath and state that:

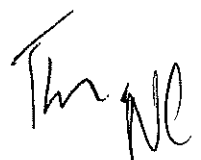
- 1 I am an adult, and the former Deputy President (1994 until 13 June 1999) and President (14 June 1999 to 24 September 2008) of the Republic of South Africa.
- 2 Unless otherwise stated or so indicated by the context, the facts contained in this affidavit are within my personal knowledge and are, to the best of my knowledge and belief, both true and correct. Where I make submissions of a legal nature, I do so on the advice of my legal representatives. I accept such advice as correct.
- 3 I depose to this answering and founding affidavit on my own behalf (I am cited as the seventh respondent in this application), and on behalf of former Ministers Brigitte Mabandla (former Minister of Justice), Charles Nqakula (former Minister of Defence), Ronnie Kasrils (former Minister of State Security), and the current speaker of the National Assembly, Thoko Didiza (former Minister of Agriculture and acted as Minister of Justice on a few occasions) collectively, **"the former members of the executive"**. As the former members of the executive we support the relief sought in the urgent review application by the applicant (**"Mr**



Zuma"). Because of this support, I apply to this Court to be permitted to act as a second applicant and to be joined as such in the urgent review application. As a result, this affidavit serves dual roles. It is both an answering affidavit to the relief that the applicant seeks and a founding affidavit in support of my application to be permitted to act and be joined as a second applicant. I am advised and respectfully submit that this procedural device is permissible and has been adopted by Courts to obviate the need for a separate application that may require a separate adjudication by the Court.¹

- 4 This affidavit will be filed before the other respondents file their answering affidavits on 20 February 2026 as per the applicant's notice of motion. This will allow this affidavit to be considered by them and responded to, and for the time periods stated in the applicant's notice of motion not to be affected.
- 5 The other former members of the executive are not cited in Mr Zuma's application. I do not seek their joinder in this affidavit. I file their respective confirmatory affidavits together with this affidavit to confirm that they support what I say about them in this affidavit and the relief that is sought in Mr Zuma's application and in this affidavit.
- 6 I refer in this affidavit to documents that will form part of the Rule 53 record. For that reason, and in order to avoid a voluminous founding affidavit, I do not attach all the documents as annexures. Should it become necessary to supplement

¹ See, for example, *South African Reserve Bank v Public Protector and Others* (43769/17) [2017] ZAGPPHC 443; [2017] 4 All SA 269 (GP); 2017 (6) SA 198 (GP) (15 August 2017) paras 8 and 60.1.

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this affidavit upon receipt of the Rule 53 record, I shall do so urgently and with the leave of this Court.

PURPOSE OF THE AFFIDAVIT

7 Mr Zuma launched urgent judicial review proceedings before this Honourable Court, in which he seeks to review and set aside the ruling by the Honourable Madam Justice Sisi Khampepe ("**Justice Khampepe**"), who is 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 ("**Commission**"). In her ruling under review, Justice Khampepe refused two applications for her recusal. One such an application was brought by Mr Zuma, and the other by me, together with the former members of the executive. I refer to Justice Khampepe's ruling interchangeably as "**the ruling**" or "**decision**" in this affidavit. Justice Khampepe's ruling was delivered on 30 January 2026. I attach the ruling as "**TMM1**".

8 In the application for Justice Khampepe's recusal, we relied on two distinct but mutually reinforcing grounds for Justice Khampepe's recusal which independently give rise to a reasonable apprehension of bias on her part:

8.1 The first concerns Justice Khampepe's past institutional roles as a Commissioner and a member of the Amnesty Committee in the Truth and Reconciliation Commission ("**TRC**") from 1998 to 2001, and as the



Deputy National Director of Public Prosecutions ("DNDPP") in the National Prosecuting Authority ("NPA") from 1998 to 1999.

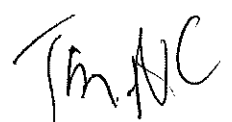
8.2 The second ground, which compounds the first, comprises two aspects:

8.2.1 Justice Khampepe's handling of conflict-of-interest objections pertaining to the Commission's Chief Evidence Leader, Advocate Semenya SC ("**Mr Semenya SC**"); and

8.2.2 her endorsement of a procedurally irregular arrangement between Adv Semenya SC and Adv Howard Varney ("**Mr Varney**"), who is counsel for the Calata Group. This arrangement – which came about as a result of opaque and bilateral interactions between the two advocates – permits Adv Varney (and not the Evidence leaders) to lead all eight of the Calata Group's witnesses.

9 The Calata Group of families represents 25 survivors and families of victims who forcibly disappeared or were murdered during South Africa's struggle against apartheid.

10 In light of the fact that I was a co-applicant in the recusal proceedings before Justice Khampepe, and because I also seek the review and setting aside of the decision refusing the recusal application, I request that I be permitted to act and joined as a second applicant instead of a respondent. I attach, as annexure



"TMM2" a notice of motion in which I seek additional relief. The basis for the additional relief is set out in this affidavit.

- 11 Since I support the relief that Mr Zuma seeks, this affidavit does not answer paragraph-by-paragraph to Mr Zuma's founding affidavit. Instead, it sets out the basis for my support for the relief that Mr Zuma seeks, as well as the additional relief that I seek. I set out the grounds of review that I rely upon, which overlap to some extent with the grounds of review that Mr Zuma raises.

A SUMMARY OF THE GROUNDS OF REVIEW

- 12 I am advised and submit that the law on recusal of judicial officers is trite and can be summarised thus: in the case of perceived bias, a judicial officer must apply the reasonable apprehension of bias test. The test is objective and excludes any subjective flavour to a judicial officer's consideration of a recusal application that is based on a perception of bias. A judicial officer is required to objectively consider whether the grounds advanced by the applicant lay a basis for the judicial officer's recusal. The apprehension of the reasonable person must be assessed in the light of the true facts as set out in the application.² Ultimately, the fate or otherwise of a recusal application depends on the totality of the relevant facts in the given case.

- 13 Against that backdrop, the first reason for reviewing and setting aside the ruling is that Justice Khampepe applied a subjective standard when an objective one

² A corollary of this is that incorrect facts which were taken into account by an applicant must be ignored in applying the test.

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was required. In addressing the ground based on her prior institutional roles, she held that we had to demonstrate a "logical connection" between those roles and the work of the Commission. Because she considered that no such connection had been shown, she characterised the facts in the founding affidavit as insufficient and the concerns raised as "generalised suspicions". In effect, her approach required us to prove that efforts to suppress TRC cases formed part of her work at either the TRC or the NPA, or both. This improperly elevates the test to one akin to a real likelihood of bias, which veers towards the standard of actual bias, rather than the correct objective test.

- 14 Our pleaded case before her was not that her prior work, both at the TRC and the NPA, concerned alleged political influence and interference in the prosecution of TRC cases. The case was that a reasonable observer would apprehend that a person who had institutional responsibility to shape NPA policy on TRC cases and who was responsible for TRC amnesty decisions may find it difficult to approach with neutrality a Commission now tasked to determine whether the NPA failed or neglected to pursue those cases because of political influence. Justice Khampepe may have an institutional interest, conscious or unconscious, in validating the propriety of decisions (whatever their inclination) made during her tenure in either role. This is so especially as the TRC amnesty decisions may be related to or affect parties that may appear before the Commission.

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- 15 Justice Khampepe's general approach to the facts alleged in support of the ground of recusal that pertained to her role in the NPA and the TRC leads to a conclusion that a subjective test was applied.
- 16 The second reason why Justice Khampepe's ruling ought to be reviewed and set aside is this: in paragraph 56 of the ruling, Justice Khampepe found that an apprehension based on her prior institutional roles is unfounded for the additional reason that the Terms of Reference set a temporal boundary over the work of the Commission, namely 2003. That is, the Terms of Reference require the Commission to investigate efforts to stop the prosecution and investigation of TRC cases from 2003, which is well after her roles ended in the Amnesty Committee (2001) and the NPA (December 1999).
- 17 This finding overlooks the common-cause facts concerning the temporal scope of the allegations. Notwithstanding the formal temporal boundary in the Terms of Reference, the Calata Group's position is that the political influence which ultimately frustrated the investigation and prosecution of the TRC cases originated in discussions between former defence force and police force generals, on the one hand, and ANC officials, on the other. Those discussions are alleged to have commenced in 1998. It follows that the Commission will necessarily be required to investigate the origins and motives of the alleged interference, which are said to pre-date 2003 and to arise during the period when Justice Khampepe held positions at both the NPA and the TRC.

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18 This position is countenanced by the fact that such other persons like the Former National Director of Public Prosecutions, Mr Bulelani Ngcuka is required to testify at the Commission despite having not been in such position during the period from 2003. This delineation of time is therefore superficial and offers not protection to Justice Khampepe as she claims.

19 The further reasons why the ruling ought to be reviewed and set aside are these:

19.1 Justice Khampepe did not herself answer the recusal application. Instead, Adv Semenya SC deposed to an affidavit purportedly on her behalf, without any form of confirmation by Justice Khampepe, whether by affidavit or otherwise. This course was adopted notwithstanding that we squarely raised a question concerning her role in the NPA's Human Rights Investigations Unit ("HRIU") and expressly sought clarity as to the nature and scope of that role. In circumstances where she was required to place her version before the Commission, Justice Khampepe did not do so, and responded only, and then only partially, in the ruling itself.

19.2 Her subjective approach to the procedural complaints, especially in relation to the improper and opaque interaction between Mr Semenya SC and Mr Varney, demonstrates an unwillingness to assess significant procedural irregularities in the conduct of the Commission's proceedings which compromises entrenched procedural rights and safeguards.

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19.3 It is not clear from the recusal ruling whether Commissioners Kgomo and Gabriel SC concurred in the ruling or that the ruling is a ruling of "the Commission" written for it by the Chairperson. In an application of this nature, where the Commission is constituted by three members and the allegation is directed at one of them, Justice Khampepe was required to consider her own position individually and then collectively together with the two Commissioners. The participation of the remaining Commissioners would require the Chairperson to place on record the facts as are known to her that are relevant to the grounds of recusal. Otherwise, the other Commissioners would not know what the Chairperson knew regarding her prior roles and the other factual allegations on why she ought to recuse herself. But the Chairperson placed no relevant facts known to her on record.

19.4 In the ruling, Justice Khampepe found that our application for her recusal stood to be dismissed for the sole reason that it was brought late. In so doing, she misapplied the law on delays in bringing recusal applications, and also incorrectly assessed the extent of the delay which by all accounts was not unreasonable.

20 For these reasons, the ruling falls to be reviewed and set aside on:

20.1 various grounds set out in the Promotion of Administrative Justice Act 3 of 2000 ("PAJA");

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20.2 the basis that it is inconsistent with section 1(c) of the Constitution; and

20.3 the basis that it violates the provisions of section 33(1) of the Constitution which guarantees the right to administrative action that is lawful, reasonable and procedurally fair.

21 Alternatively, and to the extent that PAJA does not apply, Justice Khampepe's ruling breaches the principle of legality.

22 I set out in more detail below the bases for the summarised grounds of review. The summary must be read with what I set out below.

23 Before I address these grounds of review in turn, I set out the relevant factual background in detail. Lastly, I explain why this application is brought urgently.

FACTUAL BACKGROUND

24 The facts relevant to this application are largely common cause.

Justice Khampepe's previous role as TRC Commissioner and on the Amnesty Committee

25 The TRC was established at the end of the apartheid regime, and its mandate was to investigate human rights abuses, promote healing, and offer amnesty to those who fully disclosed their participation in these apartheid era human rights abuses.

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- 26 The TRC was chaired by the (now) late Archbishop Desmond Tutu. The TRC implemented its mandate through three committees: (a) the Amnesty Committee, (b) Reparation and Rehabilitation Committee and (c) Human Rights Violations Committee.
- 27 The primary function of the Amnesty Committee was to receive, consider, and determine applications for amnesty. Applicants were entitled to seek amnesty for any act, omission, or offence associated with a political objective, committed during the period from 1 March 1960 to 11 May 1994. The granting of amnesty rendered the perpetrator immune from criminal prosecution in respect of the particular act concerned. Conversely, where amnesty was refused, the individual remained liable to criminal prosecution by the state. The mechanisms and procedures governing the amnesty process were set out in the Promotion of National Unity and Reconciliation Act 34 of 1995.
- 28 Justice Khampepe was appointed as a TRC Commissioner in December 1995, and her tenure expired in 2001. She served as a member of the Amnesty Committee from 1996 until 2001, when it was dissolved³.
- 29 Some of the parties/participants before the Commission (chaired now by Justice Khampepe) were involved in the TRC process in which Justice Khampepe participated as a Commissioner. This includes some "members" of the Calata

³ On 31 May 2001.

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Group and senior leaders of the African National Congress ("**ANC**"), including myself.

- 30 As a Commissioner of the TRC, Justice Khampepe served on the panel that concluded that ANC members, (together with those of other political parties), had committed gross human rights violations in the course of their political activities during the armed struggle.
- 31 According to former TRC Commissioners, Mr Dumisa Ntsebenza SC and Ms Yasmin Sooka, the TRC prepared a letter in October 1998 addressed to the then National Director of Public Prosecutions, Mr Bulelani Ngcuka. That letter was accompanied by a list of cases in respect of which the TRC requested the NPA to conduct further investigations with a view to possible prosecution.
- 32 In March 1999, the TRC Amnesty Committee, of which Justice Khampepe was part, denied the amnesty applications of 37 ANC leaders, including me. The application was denied because it did not disclose any individual offences.
- 33 The Amnesty Committee granted approximately 849 applications for amnesty, and declined some 358. Justice Khampepe was directly involved in making the findings and recommendations regarding the prosecutions of some of those who were declined amnesty. This includes amnesty applications of some participants currently before the Commission. I provide this detail below.

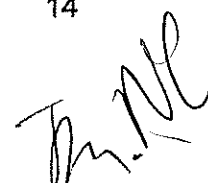


34 On 12 March 2003, the TRC Report's final volume (vol 6) was released by the TRC Commission. I was the President of the Republic at the time. On 15 April 2003, I tabled the report and delivered a statement on the report in Parliament. I annex a copy of the statement as "TMM3".

Justice Khampepe's prior role as the Deputy National Director of Public Prosecutions

35 I stated above that the Amnesty Committee referred several cases to the NPA for prosecution. Justice Khampepe served as the DNDPP under then National Director of Public Prosecutions ("NDPP"), Mr Bulelani Ngcuka ("Mr Ngcuka"), for just over a year, from September 1998 to December 1999. This period coincides with the establishment and operationalisation of the Human Rights Investigations Unit ("HRIU") within the NPA. The HRIU's mandate was to:

- 35.1 review non-amnesty cases and amnesty refusals;
- 35.2 investigate apartheid-era human rights violation;
- 35.3 make recommendations on the prosecution of TRC matters;
- 35.4 address the backlog of TRC-related prosecutions; and
- 35.5 oversee the transfer of dockets to Special Operations structures (later the Directorate of Special Operations).



36 Mr Justice Vincent Saldanha (“**Justice Saldanha**”) (then a Practising Attorney at the Legal Resources Centre) was the part time head of the HRIU. Justice Saldanha is a witness before the present Commission, and so too Mr Ngcuka.

37 According to the Calata Group, Justice Khampepe “*played a role in the HRIU*”, including providing advice to the NDPP, Mr Ngcuka – on the approach to TRC matters.⁴ In a letter to the Commission and to the parties dated 11 November 2025, the Calata Group set out the roles that members of the Commission have had in the past that “might be connected to the Commission’s mandate. In regards to Justice Khampepe, they explained that:

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

38 I attach the letter as “**TMM4**”.

The court proceedings that led to the establishment of the Commission

39 On 20 January 2025, the Calata Group launched an application before the High Court of South Africa Gauteng Division, Pretoria under case number 5245/25 against the Government (the President of the Republic, the Minister of Justice

⁴ This is contained in a letter that the Calata Group submitted to the Commission on 11 November 2025. The letter is part of the Rule 53 record.

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and Constitutional Development, the National Director of Public Prosecutions, the Minister of Police and the National Commissioner of the South African Police Service).

40 In the founding papers, the Calata Group alleges that over the years, and especially during my tenure as President of the Republic, the Executive ("*at its highest level*"), the NPA, the South Africa Police Service ("**SAPS**") and other state organs colluded or acquiesced in the suppression of the TRC cases (being the cases that were referred by the TRC to the NPA for investigation and prosecution).

41 Despite repeated requests, so it is alleged, the SAPS and the NPA failed to investigate and prosecute the TRC cases. In doing so, they are said at times to have acted on instructions emanating from the highest level of the Executive, namely the President. The Calata Group allege that this conduct was undertaken in bad faith and for unlawful political purposes. Their central contention is that a deliberate political decision was taken, particularly during my tenure as President of the Republic, not to prosecute individuals responsible for apartheid-era crimes who had been denied amnesty by the TRC. According to the Calata Group, this decision unlawfully deprived them of substantive rights and entitlements guaranteed by the Constitution.

42 The relief sought by the Calata Group in the High Court includes a declarator that the government respondents' conduct, in unlawfully refraining from, and/or

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obstructing, the investigation and/or prosecution of apartheid-era cases referred to the NPA by the TRC, or otherwise unlawfully abandoning or undermining such cases, violated the applicants' rights, breached the Constitution, constituted a failure to comply with constitutional and statutory duties and amounted to the commission of criminal offences. Consequent upon such declaratory relief, they seek an order directing the South African government to pay constitutional damages.

- 43 In addition to the declarator and constitutional damages, the Calata Group also sought a declarator that the failure and/or refusal by the current President to establish a commission of inquiry into the suppression of the investigations/prosecution of the TRC cases was inconsistent with his responsibilities under the Constitution.
- 44 The government respondents initially filed notices of opposition to the application. However, between 17 and 19 February 2025, all of them, with the exception of the NPA, withdrew their opposition. According to the government respondents, the withdrawal was motivated by the intention of Government and the President to establish a commission of inquiry, which they considered to be the primary objective of the application. Following the withdrawal of opposition, the Calata Group and the government respondents entered into settlement discussions concerning the establishment of a commission of inquiry. In March 2025, former Minister Mabandla and I sought and were declined leave to

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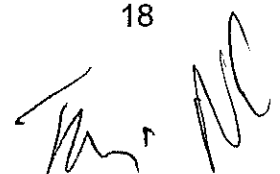
intervene in the main application.⁵ It is interesting to note that the essence of the Judges denial of our intervention is that there are no specific allegation of evidential value made against us as the allegations are largely drawn from newspaper reports and books written by people with no direct role in the TRC matters or anywhere close to our Justice system.

45 It appears that around April 2025, agreement was reached on the establishment of a commission of inquiry. However, its terms of reference were not agreed between the parties.

45.1 On 30 April 2025, President Ramaphosa issued a statement announcing that he was in the process of setting up a judicial commission of inquiry to establish whether attempts were made to prevent the investigation or prosecution of apartheid-era crimes referred by the TRC to the NPA.

45.2 The President explained that while agreement had been reached on the establishment of a commission of inquiry, the parties were not able to agree on the order to declare the conduct of various government entities unlawful and the payment of constitutional damages by the state. A copy of this statement is attached as "**TMM5**".

⁵ Mbeki and Another v Calata and Others (005245/2025) [2025] ZAGPPHC 753 (1 August 2025).

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46 On 29 May 2025, the President published a proclamation establishing the Commission, pursuant to section 84(2)(f) of the Constitution. In terms of its Terms of Reference, the Commission is mandated to investigate

"matters of public and national interest concerning allegations regarding efforts or attempts having been made to stop the investigation or prosecution of Truth and Reconciliation Commission ("TRC") cases."

47 The Terms of Reference say that the primary issue that the Commission must investigate is:

"whether, why, and to what extent and by whom, efforts or attempts were made to influence or pressure members of the SAPS or the NPA to stop investigating or prosecuting TRC cases" and "whether any members of the NPA or SAPS colluded with attempts to influence or pressure them".

48 In terms of the Terms of Reference, the Commission is mandated to investigate political interference that allegedly started in 2003. However, in their founding affidavit before the High Court, the Calata Group allege that the political influence which frustrated the investigation and prosecution of the TRC cases emanated from discussions between former high ranking defence force and police force generals on one hand and ANC officials on the other hand, and that those discussions commenced in 1998. These allegations are also repeated in the Rule

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3.3 notice that the Commission issued to me in September 2025. The relevant extracts of the notice are quoted below:

"378. Bubenzer in his book in a chapter titled "Bargaining Over the TRC's Legacy" detailed secret consultations between the ANC government and representatives of the SADF and the security police from 1998 until early 2004. The main aim appeared to be to reach agreement on a legislative solution on how to avoid prosecutions in the wake of the TRC.

379. According to an interview conducted by Bubenzer with former police commissioner and head of the Foundation for Equality Before the Law (FEL), Johann van der Merwe, in Pretoria on 5 May 2006, former President F.W. de Klerk assumed a central role in the consultations. According to Bubenzer:

379.1. De Klerk often consulted with President Mbeki directly or with other high-ranking members of the government.

379.2. The FEL's aim was to find a solution to avoid the prosecution of former members of the SAP who had not received amnesty.

379.3. Since a general amnesty was not politically or constitutionally feasible, the FEL proposed an indemnity procedure based on admission of the crime committed, but without the need to make full disclosure.

379.4. The talks continued until 2004, without an agreement being reached.

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380. However, the approach proposed by FEL in relation to the 'admission of crimes but no full disclosure' was adopted by the Pardons Reference Group established by President Mbeki under the Special Dispensation for Political Pardons in 2007.

381. According to an interview conducted by Bubenzer with former SADF General Jan Geldenhuys (Geldenhuys) in Pretoria on 10 May 2006, consultations between government and a group of high-ranking former generals of the SADF commenced during 1998.

381.1. Former Chief of the SADF, General Constand Viljoen was approached by Jacob Zuma, then Deputy President of the ANC with the aim of discussing questions of criminal accountability arising from the past.

Viljoen referred Zuma to Geldenhuys and the Contact Bureau (known in Afrikaans as the Kontak Buro).

381.2. As with the police negotiations, these talks were aimed at finding a mutual arrangement to avoid post TRC trials through a new indemnity mechanism. The government was represented by Jacob Zuma, who became Deputy President of South Africa in June 1999 (Zuma).

381.3. The talks were mediated and facilitated by Johannesburg businessman Jürgen Kögl, who was closely connected to leading ANC members. Apart from Zuma, other high-ranking members of the ANC, such as Penuell Maduna (then Justice Minister), Mathews Phosa, Sidney Mufamadi and Charles Nqakula also

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participated from time to time. On various occasions Thabo Mbeki was also present, initially in his capacity as Deputy President, and later as President.

381.4. The SADF was represented by Geldenhuys and other generals. Both sides had legal advisers present. The talks continued until early 2003, with a few follow-up meetings held in 2004.

381.5. Bubenzer explored the motivation of the government in reaching out to the SADF generals in two interviews conducted with Jürgen Kögl on 12 May 2006 and 14 June 2006. Apparently, the government was, for amongst other reasons, interested in persuading the generals to come clean on its past third force operations in KwaZulu Natal and in particular to disclose the sites of arms caches, which could be used in future political violence.

382. On 21 December 2019, investigative journalist and author, Michael Schmidt, conducted an interview in Hartbeespoort with Major-General Dirk Marais (Marais), former Deputy Chief of the Army and the Convenor of the SADF Contact Bureau. Schmidt's confirmatory affidavit is annexed hereto marked FA59. Schmidt writes in his book 'Death Flight' that, according to Marais, the government was seeking a quid pro quo. Copies of the relevant extracts from 'Death Flight' are annexed hereto marked FA60. Marais claimed that Mbeki indicated in their discussions that: "They don't want us to be charged – and they don't want them to be charged."

383: Marais said in the interview that on his side at the talks were former Defence Minister General Magnus Malan, former Chiefs of the Defence Force

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Generals Constand Viljoen and Jannie Geldenhuys, and former Chief of the Army General Kat Liebenberg – although sometimes they brought in other generals such as former Surgeon-General Niël Knobel, or one of the former Chiefs of the Air Force, as required.

384. Marais told Schmidt that on the ANC/Government side, Mbeki's team usually consisted of the "security cluster", which initially included Minister of Defence Joe Modise, Minister of Safety and Security Sydney Mufamadi and Minister of Justice Dullah Omar. According to Schmidt, when Mbeki became President, Zuma's "security cluster" team would most likely have included Minister of Defence Mosiuoa Lekota, Minister of Justice Penuell Maduna (replaced by Brigitte Mabandla in Mbeki's second Cabinet), Minister of Intelligence Joe Nhlanhla (replaced by Ronnie Kasrils), and Minister of Safety and Security Steve Tshwete (replaced by Charles Nqakula).

385. On 5 May 2020, former Minister of Intelligence Kasrils emailed Schmidt regarding the ANC-SADF talks advising that he had 'no knowledge of virtually all the meetings and developments arising from such talks.' Schmidt no longer has a copy of this email.

386. Schmidt notes in his book, that during the interview, Marais showed him an unsigned handwritten letter he prepared for the signature of the former Chiefs of the SADF in early 2004. Marais permitted Schmidt to take photographs of the letter. The letter was addressed to Deputy President Zuma, and it recalled the initiation of the series of secret, high-level talks between the

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government and former SADF Generals, a copy of which is annexed hereto marked FA61. The letter stated inter alia;

"A process of communicating between the ANC initially and the government lately with the former chiefs of the SA Defence Force was initiated by the Deputy President of South Africa Mr T. Mbeki when he approached General C.L. Viljoen in 1997 (sic). General Viljoen after consultation with the former Chiefs of the Defence Force within the structure of the SADF Contact Bureau conveyed our preparedness to communicate with Mr Mbeki in his capacity as Deputy President and President of the NEC of the ANC.

A convenor, Mr J. Kögl, apparently empowered by Mr Mbeki, arranged for a meeting at his house in Johannesburg. That meeting was in the form of discussions followed by a dinner hosted by Mr Kögl. It was attended by Mr Mbeki and various of his ministers as well as the Premier of Mpumalanga Mr M. Phosa, [leader of an ANC lobby arguing that its members be protected from prosecution], and by us the former Chiefs of the SADF.

There was enthusiastic agreement that the commenced communication should be continued and that more meetings should follow. We, the former Chiefs of the SADF, being aware of the Deputy President's tight work schedule, suggested that he appoint one of his ministers to represent the ANC in future deliberations. Mr Mbeki, however expressed the opinion that the process of communication, which was mutually agreed to, was so important to him that he preferred to remain the prime representative of the ANC in future deliberations.

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Many deliberations followed and mutual agreements were reached. When Mr Mbeki could not attend, he authorised somebody, usually a minister, and later on when he became president in 1999, you [Deputy President Jacob Zuma] represented him.

In execution of mutual decisions, much effort was put in by the Contact Bureau and some of your ministers to prepare papers and submissions for acceptance by the Deputy President and later on the President.

In similar fashion, we the former Chiefs of the SADF as members of the forum were flown to Cape Town for discussions with Ministers Maduna and Nqakula and thereafter with you on 17 February 2003."

387. Former Premier of Mpumalanga, Mr Mathews Phosa, in a telephonic call to Schmidt on 2 June 2020, denied the claim of Marais that he had been involved in an ANC lobby pursuing protection from prosecution.

388. Bubenzer writes that Geldenhuys and Kögl advised him that by the end of 2002, the consulting parties had agreed on a detailed proposal for the enactment of a legal mechanism which amounted to a new amnesty. It envisaged an amendment to the Criminal Procedure Act to allow for a new kind of special plea based on the TRC's amnesty criteria, followed by an inquiry by the presiding judge.

389. By late 2002 the proposal and draft legislation had been finalised by the Justice Department and was ready to be presented to Parliament for

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enactment. However, it first had be approved by President Mbeki, who ultimately rejected it in early 2003. Nonetheless, as has been set out above, the essential ideas remerged in the subsequent amendments to the Prosecution Policy.

390. At the ANC's 51st national conference in December 2002 in Stellenbosch, a discussion of guidelines for a broad national amnesty, possibly in the form of presidential pardons, was scheduled. According to the head of the ANC presidency, Smuts Ngonyama, the ANC supported the idea of introducing a new amnesty law. He added that his party was generally against running trials in the style of the Nuremberg trials, since this would occur at the cost of nation building. I attach hereto a copy of a news article marked FA62.

391. Prior to Mbeki's rejection of the amnesty legislation in early 2003, the SADF generals appeared to be on the brink of a breakthrough. Marais advised Schmidt in the aforesaid interview that after 7 years of negotiations, the generals and the Cabinet's security cluster had agreed on a legal framework for a post-TRC amnesty process. According to Marais the government arranged for "a law writer in Cape Town" to come up with the new legislation.

392. On 17 February 2003, a delegation of SADF generals led by Geldenhuys met with Justice Minister Penuell Maduna and Police Minister Charles Nqakula in Cape Town. The law drafter (a state official in the Department of Justice) was called in to read out the proposed legislation. Marais indicated to Schmidt:

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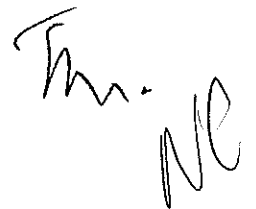
"... and when he finished, we said 'But that's got nothing to do with us'... because they [said] they will grant amnesty to everyone who will make a full statement of his [crimes committed] so General Geldenhuys said 'No, we don't need that. All our people who wanted to make statements and ask for forgiveness already went to the TRC. Our other people ... don't have to do that, so this means nothing to us The whole thing collapsed there This whole conversation collapsed..." (At page 146 of Death Flight).

393. According to Schmidt, the differences between the sides were now irreconcilable: the generals wanted a post TRC law granting a new blanket amnesty with no disclosure required – but the government appeared only willing to offer an amnesty based on full disclosure to be decided on a case by-case basis.

394. The talks between the SADF Generals and the government came to a close during 2004, without resolution, as was evident from Marais' 2004 letter to Deputy President Zuma referred to above:

"In spite of such submissions and apparent acceptances, little notable implementation was effected by the ANC or government. ...

Agreement on outstanding matters was again confirmed, yet more than a year later, no sign of implementation has become apparent, neither was there any effort on your behalf to inform us of any progress which could lead to eventual implementation.



In view of the above, you are requested to inform us of the desirability from your point of view to keep the door open for further co-operation."

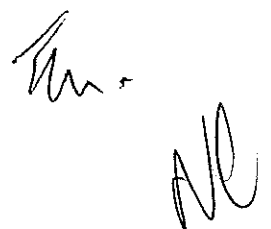
395. Deputy President Zuma did not respond to the letter.

49 I attach the notice in terms of Rule 3.3 as "TMM6".

50 It is clear, therefore, that the Commission will investigate the motive for the alleged interference which started before 2003, and specifically, from 1998. Therefore, drawing a line in the sand that starts in 2003 is artificial. The Calata Group says it is irrational to do so, and the Commission seems to accept 1998 as a relevant date, when regard is had to the Rule 3.3. notice that was issued to me, and that I am required to respond to. I attach the relevant covering page and the extract of the relevant paragraphs from the Calata Group's answering affidavit in the recusal application before the Commission as "TMM6".

The Rules and Regulations of the Commission

51 In establishing the Commission, the President directed that the provisions of the Commissions Act 8 of 1947 ("**Commissions Act**") apply to it. This much is recorded in item 4 of the Terms of Reference. Section 1(1)(b) of the Commissions Act authorises the promulgation of regulations which may, *inter alia*, provide for the manner in which investigations are to be conducted and the procedures to be followed. Consistently with this framework, item 5 of the

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Commission's Terms of Reference authorises the making of regulations to enable the Commission to conduct its work meaningfully and efficiently.

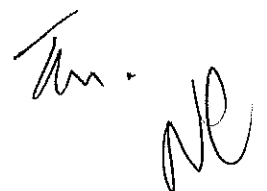
52 The Commission's Regulations were promulgated on 19 August 2025. In terms of the Regulations, the Chairperson may appoint Evidence Leaders to assist the Commission in the performance of its functions. The Chairperson has appointed Evidence Leaders. The Chief Evidence Leader is Mr Semanya SC.

53 The Commission also published Rules for the conduct of its proceedings on 29 August 2025.⁶ The rules address certain procedural aspects of the Commission, including the manner in which implicated persons are to be notified that they are implicated. The rules also address the presentation of evidence before the Commission, and provide (Rule 3.1) that the Evidence Leaders bear the overall responsibility to present the evidence of witnesses to the Commission. I attach the Rules of the Commission as "TMM7".

54 At paragraph 2, the Terms of Reference describe "interested parties". Thus the parties before the Commission include the NPA, the SAPS, the Department of Justice and Constitutional Development, the Calata Group and other families and victims in the TRC cases. I attach the Terms of Reference as "TMM8".

55 The Calata Group is represented by Mr Varney, on the instruction of Webber Wentzel Attorneys.

⁶ Rules of the Commission published under Government Gazette No. 53251 of 29 August 2025.

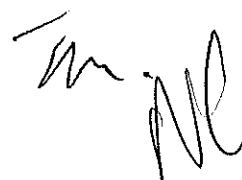
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The Commission begins its work

56 The Commission was established on 29 May 2025. It was envisaged, in the Terms of Reference, that it would finalise its work within 180 days from this date, i.e. by 25 November 2025. However, the Commission did not start its work immediately after the proclamation date. It appears that it started with its background work sometime in late August or early September 2025.

57 I became aware that the Commission was operational when I was served with a notice in terms of Rule 3.3, on 25 September 2025. Other former members of the executive were served with Rule 3.3 notices on 21 October 2025. The Rule 3.3 notices informed us that the Commission intended to lead witnesses whose evidence implicated us, and invited us to *inter alia*, submit written statements responding to allegations that implicate us. Those so-called allegations were uplifted, wholesale and including paragraph numbers, from the Calata Group's papers in the High Court. In effect therefore, we were required to respond to the Calata Group's pleaded case in the High Court. But I leave that aside for now.

58 We sought legal advice, following which our attorneys commenced corresponding with, and receiving communications from, the Commission on our behalf. On 27 October 2025, the Commission convened a pre-hearing meeting for the purpose of assessing its readiness to commence proceedings. Two matters emerged during that meeting: first, a significant procedural issue

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concerning the conduct of the Commission's proceedings; and second, an issue relating to Mr Semenya SC. I will address each of these matters in turn below.

Procedural issues in the conduct of the Commission that came to light

59 The first procedural issue that emerged relates to the manner in which the evidence in the Commission would be led. It will be recalled that Rule 3.1 of the Commission's Rules stipulates that the evidence leaders bear the overall responsibility of presenting evidence before the Commission.

60 During the pre-hearing meeting, it emerged for the first time that a private arrangement had been concluded on 29 September 2025 between Mr Semenya SC, acting on behalf of the Commission, and Mr Varney. In terms of that arrangement, Mr Varney would lead the evidence of all the Calata Group's witnesses, in place of the Commission's evidence leaders. This arrangement was not disclosed to the other parties when it was concluded. It came to light only on 27 October 2025, during the pre-hearing meeting, and then only after it was raised by other parties. With the exception of the Calata Group, the majority of the interested parties objected to the propriety of this arrangement.

60.1 The letter from Webber Wentzel dated 29 September recording the private arrangement on the leading of witnesses and the Transcript of the pre-hearing meeting are part of the Rule 53 record.

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61 A second procedural issue that emerged in the wake of the pre-hearing related to a potential conflict of interest concerning Mr Semenya SC, who was previously involved in advising the NPA on issues directly linked to the matters before the Commission. On 18 September 2025, Webber Wentzel addressed a letter to the Commission proposing that Mr Semenya SC not be involved in any deliberations or leading of evidence or cross examinations relating to the amendments to the NPA's prosecution policy.

62 The letter reads as follows, in part:

*"2. It has come to our attention that the chief evidence leader, Ishmael Semenya SC ("**Mr Semenya**"), represented the National Director of Public Prosecutions ("**the NDPP**") and the Minister of Justice ("**the Minister**") in **Nkadimeng and Others v National Director of Public Prosecutions and Others** [2008] ZAGPHC 422.*

*3. In the foregoing matter, Thembi Nkadimeng (now Simelane) and the wives of the Cradock Four ("**the applicants**") challenged the amendments in Appendix A to the Prosecution Policy titled: "PROSECUTING POLICY AND DIRECTIVES RELATING TO THE PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST AND WHICH WERE COMMITTED ON OR BEFORE 11 MAY 1994" ("**the amendments**").*

4. The applicants contended that the amendments amounted to "a backdoor amnesty" and an unlawful attempt to shield apartheid-era perpetrators from justice. Judge M F Legodi declared the amendments to be unconstitutional and set them aside.

5. Our clients (who include the Simelane and Cradock Four families) intend to put up the amendments to the Prosecution Policy as a key example of how the South African government sought to intervene and block the bulk of the TRC cases from proceeding.

6. In order to avoid any public perception of partiality or conflict we respectfully request that Mr Semenya not be involved in any of the deliberations or leading or cross examination of witnesses in relation to the amendments of the Prosecution Policy. As there is in any event likely to be a division of labour amongst the evidence leaders, we believe this to be a practical and sensible suggestion.

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7. Since the Commission must be seen by the community of victims and families and the wider public to be scrupulously independent, we trust that you will give our proposal serious consideration."

63 Justice Khampepe responded to the Calata Group's letter by correspondence dated 19 September 2025 (annexure "TMM7"), as follows:

"2. I have sent the letter to Adv Semanya SC for his response.

3. He advises me that Judge Legodi, in that matter, was not called to decide whether there was any interference with the investigation or prosecution of the TRC cases which is the mandate of this Commission.

*4. **Having considered the concerns of your client and having heard Adv Semanya SC's response, I am minded going with a solution you propose.** The concerns expressed by your client are noted. I make no decision on them. I will have another member of the Evidence Leader deal with this aspect."* (own emphasis.)

64 The coming to light of these procedural arrangements led to two formal interlocutory proceedings:

64.1 A formal application for the recusal of Mr Semanya SC, which was filed by the Department of Justice and the NPA. It was opposed by Mr Semanya SC (and/or the evidence leaders). The Calata Group abided the decision; and

64.2 Formal objections to the evidence leading arrangement with Mr Varney, opposed by the Calata Group and the evidence leaders.

64.3 The parties filed detailed submissions in respect of both proceedings.

- 64.4 My legal team submitted written objections and arguments in relation to the leading of evidence arrangement. The primary contention was that the primary responsibility to lead evidence lay with the evidence leaders, which is an important procedural safeguard to ensure that the Commission properly conducts its fact-finding role. This is particularly important in that this matter, same facts and same parties, is in front of the Courts. This therefore is beyond fact finding but a litigious matter and therefore the Commission should be wary of turning this into another litigious platform. These submissions form part of the Rule 53 record, but I reserve the right to provide them, should they be excluded from the record.
- 65 On 10 November 2025, the Commission directed that the founding papers in the recusal application be filed by 12 November, and that the answering papers be filed by 18 November 2025. The recusal application was set to be argued before the Commission on 26 November 2025.
- 66 On 13 November 2025, while recusal papers were being filed concerning his suitability to act as evidence leader in light of his prior involvement in the *Nkadimeng* matter, Mr Semenya SC conducted an interview with the former Acting National Director of Public Prosecutions, Dr Silas Ramaite. In the course of that interview, he traversed aspects of the Prosecution Policy and related matters that lay at the heart of the conflict raised in the recusal application. He did so notwithstanding Justice Khampepe's directive of 19 September 2025,

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which was intended to create a buffer between Mr Semenya SC and issues relating to Prosecution Policy. This conduct was subsequently raised by the NPA in a supplementary affidavit filed in support of its recusal application of Mr Semenya.

67 While the Calata Group initially abided the Chairperson's decision in the recusal application of Mr Semenya, they later attested under oath that (a) Mr Semenya SC did question Dr Ramaite, despite his denial under oath; (b) the questioning contravened Justice Khampepe's directive; and (c) Mr Semenya SC ought not to have been involved in the questioning of the witness. In their written submissions, the Calata Group agreed that Mr Semenya SC should stand down as evidence leader because he placed himself in breach of the Chairperson's directive. These submissions should be part of the Rule 53 record. If not, we shall furnish them to the Court in a supplementary affidavit if necessary.

68 The recusal application was argued on 26 November 2025.

69 The objection to the leading of witnesses was set down for oral argument on 28 November 2025. On the day of the hearing, however, the parties agreed to an order in terms of which the Chairperson would consider the Calata Group's request to lead their witnesses, together with the parties' written objections and submissions, on the papers, and would thereafter issue a ruling.

The rulings on the recusal of Mr Semenya SC and the leading of witnesses

- 70 On 2 December 2025, Justice Khampepe issued a ruling in which she granted the Calata Group permission to lead their eight (8) witnesses, without providing any reasons. My attorneys of record wrote to the Commission requesting reasons for the ruling, but their request was summarily refused.
- 71 On 4 December 2025, Justice Khampepe issued a ruling refusing the application for Mr Semenya SC's recusal. In her reasons dismissing the recusal application, Justice Khampepe concluded that Mr Semenya SC's prior involvement in the *Nkadimeng* matter did not disqualify him from acting as Chief Evidence Leader, with the result that the directive of 19 September 2025 was said to have fallen away. To clarify, that directive remained effective until 13 November 2025, and it was not withdrawn until 4 December 2025.

The recusal application in respect of the Chairperson

- 72 On 3 December 2025, the Commission circulated correspondence from the legal representatives of former Mr Zuma, in which he sought the recusal of Justice Khampepe on the grounds set out therein. Mr Zuma instituted a formal application for her recusal after Justice Khampepe declined to recuse herself.
- 73 In due course, and within the timelines communicated by the Commission for participation in a recusal process involving Justice Khampepe, I caused a supporting application to be prepared and delivered, seeking Justice Khampepe's recusal from the activities of the Commission. The application was



based on two distinct but mutually reinforcing grounds for her recusal. These grounds independently give rise to a reasonable apprehension of bias on her part. I have discussed these two grounds above – they are: (a) her involvement in the TRC and the NPA, and (ii) her handling of complaints about Mr Semenya SC.

74 The recusal application was opposed by the Evidence Leaders (on their own behalf and on behalf of the Commission), as well as by the Calata Group.

75 Argument on the recusal application was heard by all three members of the Commission (Justice Khampepe as the Commission Chairperson, Justice Kgomo and Ms Gabriel SC) on 16 January 2026, and dismissed on 30 January 2026. A copy of the ruling is attached as “TMM1”.

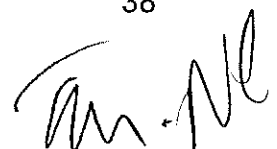
GROUNDS OF REVIEW

76 I am advised that the ruling constitutes administrative action as contemplated in section 1 of PAJA, and is accordingly reviewable under PAJA. In the event that this Honourable Court finds that the ruling does not constitute administrative action for purposes of PAJA, I am further advised that the ruling remains reviewable under the principle of legality.

77 The ruling is reviewable in terms of section 6 of PAJA on, *inter alia*, the following grounds:

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- 77.1 it was materially influenced by an error of law, as contemplated in section 6(2)(d);
- 77.2 the Chairperson was biased or reasonably suspected of bias, alternatively failed to approach the matter with the required impartial and open mind, as contemplated in section 6(2)(a)(iii);
- 77.3 the ruling was procedurally unfair, including by sanctioning processes inconsistent with *audi alteram partem* and the Commission's own Rules, as contemplated in section 6(2)(c);
- 77.4 a mandatory and material procedure or condition prescribed by the empowering provisions, Regulations and/or the Commission's Rules was not complied with, as contemplated in section 6(2)(b);
- 77.5 the Chairperson took irrelevant considerations into account and/or failed to take relevant considerations into account, as contemplated in section 6(2)(e)(iii);
- 77.6 the ruling was not rationally connected to the information before the decision-maker, the reasons given, or the purpose for which the power was conferred, as contemplated in section 6(2)(f)(ii)(aa)–(dd);
- 77.7 the ruling was so unreasonable that no reasonable decision-maker could have so exercised the power, as contemplated in section 6(2)(h); and
- 77.8 the ruling was otherwise unconstitutional or unlawful, as contemplated in section 6(2)(i).

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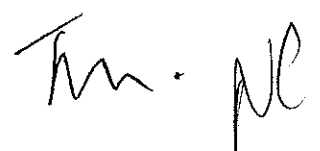
78 In the alternative, the ruling is reviewable under the principle of legality, as it constitutes an exercise of public power. On this basis, it is liable to be set aside on the grounds that it was taken unlawfully and/or for an improper purpose, and that it was not rationally connected to the purpose for which the power was conferred, the information before the decision-maker, or the reasons advanced, or that it was otherwise unconstitutional or unlawful.

79 In addition, the ruling is reviewable in that the Chairperson misdirected herself on the applicable legal standard, failed to take account of material considerations, and acted inconsistently with the constitutional requirements of accountability, openness, and fairness. Alternatively, the Chairperson misapplied the applicable legal standard in a material respect and ultimately denied the parties seeking her recusal a fair hearing.

First preliminary ground: Commission did not oppose the recusal application

80 I raise a preliminary ground of review which arises from the Chairperson's finding that the recusal application was opposed, notwithstanding that she did not file an answering affidavit/statement, nor any confirmation of the allegations pertaining to her, in the affidavit that was filed by Mr Semenya SC.

81 In my application for her recusal, the allegations were directed at the Chairperson personally. They related to her prior institutional roles within the TRC and the NPA, as well as to her own conduct and decisions, as Chairperson of the

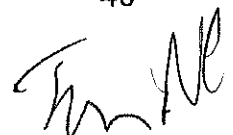
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Commission, concerning the handling of objections to Mr Semenya SC and the arrangements for the leading of evidence. Those were not allegations concerning the conduct of the Evidence Leaders, nor the Calata Group, but concerned Justice Khampepe's own historical involvement in relevant institutions and her exercise of authority as Chairperson. The answers to these allegations lay exclusively within her personal knowledge.

82 It is curious that Justice Khampepe elected not to file an answer, nor to place before the Commission any statement responding to the factual allegations made against her. She also did not confirm the allegations in Mr Semenya SC's affidavit that pertained to her.

83 Mr Semenya SC's answering affidavit could not constitute a proper factual response to allegations directed at Justice Khampepe, because he lacked both the authority and the personal knowledge necessary to address matters concerning her prior institutional roles and her decision-making as Chairperson. A person such as Mr Semenya cannot testify on behalf of another person, i.e., the Chairperson.

84 In my replying affidavit before the Commission, I expressly raised the point that, in the absence of a response by Justice Khampepe herself, the allegations directed at her were not been properly disputed and fell to be treated as common cause.

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- 85 In her ruling, Justice Khampepe held that the recusal application had been properly opposed, on the basis that judges do not file answering affidavits in recusal applications and that opposition by the Calata Group and the Evidence Leaders was sufficient. In reaching this conclusion, she misdirected herself in law. It is impermissible for a deponent to give evidence on behalf of another person in the absence of a confirmatory affidavit by that person. An affidavit cannot lawfully be made on behalf of another who does not confirm its contents.
- 86 The principle that judicial officers ordinarily respond to recusal applications through reasoned rulings does not dispense with the need for a factual response where the facts needed to answer the allegations fell exclusively within her personal knowledge.
- 87 Justice Khampepe further committed an error of law in treating opposition by the Calata Group, an interested party, as a substitute for a factual response by the decision-maker herself. Opposition by an interested party cannot cure the absence of a response on oath to allegations peculiarly within the decision-maker's knowledge. It follows then, that her finding was not rationally connected to the material before the Commission, given the absence of any statement on oath by the first respondent to the allegations directed at her.
- 88 This preliminary misdirection materially tainted Justice Khampepe's approach to the recusal application as a whole and constitutes a reviewable error under PAJA, and, in the alternative, under the principle of legality.

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Misapplication of the correct test for reasonable apprehension of bias

89 In analysing the factual basis of the recusal application, Justice Khampepe misdirected herself as to the applicable legal test. The enquiry was not whether there was proof of actual bias, nor whether I could demonstrate specific conduct on her part that directly implicated the present work of the Commission. The applicable test was whether a reasonable, objective and informed person, apprised of the relevant facts, would reasonably apprehend that the first respondent might not bring an impartial and open mind to bear on the proceedings.

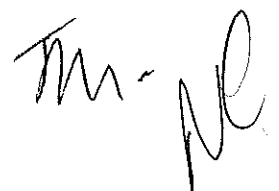
90 By characterising the grounds advanced as “generalised suspicions”⁷ and faulting the applicants for failing to identify what she “did or when”⁸ in her prior institutional roles, Justice Khampepe effectively imposed a standard akin to proof of actual bias.

91 In requiring a “logical connection”⁹ in the form of direct relevance or evidentiary proof, Justice Khampepe conflated the test for reasonable apprehension of bias with an enquiry into factual causation or culpability. This was not the enquiry she was required to undertake. The correct enquiry was whether a reasonable, objective and informed person in my position, having regard to her prior

⁷ Recusal Ruling, para 52.

⁸ Recusal Ruling, para 52.

⁹ Recusal Ruling, para 55.

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institutional involvement viewed cumulatively, would reasonably apprehend that she might not bring an impartial and open mind to bear on the proceedings of the Commission.

92 Justice Khampepe's failure to apply the correct test resulted in a material error of law and a failure to take into account relevant considerations, and alternatively irrational.

93 On this score alone, I am advised and submit that Justice Khampepe's ruling falls to be reviewed and set aside under section 6(2)(d), section 6(2)(e)(iii), and section 6(2)(f)(ii) and section 8 of PAJA, alternatively under the principle of legality.

A higher threshold which reflects subjective considerations

94 In my founding affidavit before the Commission, I based my apprehension of bias on the following facts:

94.1 Justice Khampepe was a TRC Commissioner and a member of the TRC Amnesty Committee between 1995 and 2001.

94.2 Justice Khampepe would have presided over, or participated in the amnesty applications of the accused persons in respect of interested parties who are now before the Commission.

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- 94.3 These amnesty determinations lie at the heart of the TRC's recommendations on prosecutions, which this Commission has been established to reconsider and account for.
- 94.4 Some participants before this Commission, particularly the Calata family, were involved in TRC processes in which Justice Khampepe personally participated.
- 94.5 In these circumstances, the cumulative effect of Justice Khampepe's prior adjudicative role in TRC processes, her participation in amnesty determinations directly concerning interested parties now before the Commission, and her authorship of findings now under renewed scrutiny before the Commission.
- 94.6 Justice Khampepe served as the DNDPP under then NDPP, Advocate Ngcuka, from September 1998 to December 1999. This period coincides with the establishment and operationalisation of the HRIU within the NPA. The HRIU's mandate was to review TRC amnesty records, investigate apartheid-era human rights violations, and make recommendations on the prosecution of TRC matters.
- 94.7 As appears from the Webber Wentzel letter of 11 November 2025 (annexure "TMM5"), Justice Khampepe "*played a role in the HRIU*", including providing advice to Advocate Ngcuka on the approach to TRC matters.

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- 94.8 The precise nature of Justice Khampepe's involvement in the HRIU requires further factual clarification. The uncertainty is material.
- 94.9 Her overlapping institutional roles, supported by documentary evidence and confirmed in official reports and correspondence.
- 95 The crux of our submission was that a reasonable, objective and informed observer, aware of Justice Khampepe's extensive involvement in TRC findings, TRC amnesty determinations, and her involvement as a senior official in the NPA, would apprehend that she may not approach the present inquiry with the degree of institutional detachment required.
- 96 Despite setting out this cogent case, Justice Khampepe finds (in para 52 of the ruling) that these are generalised suspicions and claims – with no attempt to show a logical connection between her prior roles and the work of the Commission. Stated otherwise, she finds that mere allegations are not enough, proof is required.
- 97 By insisting on the demonstration of a "logical connection", Justice Khampepe disregarded the evidence placed before her which was directed at establishing such a connection on the facts as pleaded. Instead, she required an unduly stringent showing of an identity, or near-identity, between the subject matter before the Commission and the work she previously performed at the TRC and the NPA. This approach is incorrect. Without having placed any relevant facts on record before the Commission, the Chairperson relied on what appears to be

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her personal knowledge of the relevant facts in making her determination. This appears also from paragraph 50 of the ruling where the Chairperson states:

*"Former President Mbeki alleges that during my time at the NPA I had
"institutional responsibility for shaping NPA policy on the TRC cases". I
am not aware of any specific policy on TRC cases that I was involved in
emerging from the human rights unit during 1998 or 1999. ..."*

98 She then proceeds to accept the Calata group's allegation that the allegations regarding her role regarding NPA policy on TRC cases is mere speculation and conjecture.

99 But the Chairperson had singularly failed to place relevant facts before the other Commissioners and the parties regarding her role in shaping NPA policy on TRC cases. She neither denied on affidavit or any statement of facts that she played such a role or she played some role but not as alleged by the applicants for recusal. Instead, she plainly draws on her personal knowledge of the facts to say that she is not aware of any such role that she played in the NPA. This factual position she adopts in the ruling ought to have been placed in an affidavit so that the parties seeking her recusal could investigate matters further and placed before her any known role by her in that regard. She only descended into the arena in her ruling to say that she is – personally – not aware of such a role. This conflates the role of a decision maker and a witness. It shows precisely why she is disqualified from sitting. It shows the risk of her determining matters to be investigated on the basis of personal knowledge of relevant facts – but

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undisclosed to any of the interested parties, including the former members of the executive.

100 Her further dismissal of allegations made in the recusal application in paragraph 52 of the ruling must be seen in the same light. She dismisses allegations as generalised. But it will be seen from what I say further below that the Chairperson ought to have always known that some of the perpetrators whom she refused amnesty in her previous roles are allegedly responsible for the disappearances and murders of some of the members of the families represented before the Commission. This is not a generalised complaint. A person alleged to have interfered with the prosecution of such perpetrators is justified in having an apprehension that the Chairperson may be affected by her previous role in this regard in bringing an impartial mind to bear to the task of the Commission on some of these aspects.

101 On this score alone, Justice Khampepe's ruling falls to be reviewed and set aside under section 6(2)(d), section 6(2)(e)(iii), and section 6(2)(f)(ii) and section 8 of PAJA, alternatively under the principle of legality.

Erroneous reliance on the 2003 temporal boundary

102 In her ruling, the first respondent held that there is a "2003 temporal boundary" to the Commission's work and concluded, on that basis, that what she did in her prior institutional roles will not be the subject of the Commission's inquiry and is therefore irrelevant to the recusal enquiry.

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103 Justice Khampepe misdirected herself as to both the nature of the apprehension advanced and the enquiry she was required to undertake.

104 The Commission's mandate concerns alleged efforts or attempts to stop the investigation or prosecution of matters arising from the TRC. That mandate necessarily implicates the historical context flowing from the work of the TRC and the NPA. A reasonable observer would not artificially sever that context by reference to a rigid temporal cut-off.

105 It is important to note that the Calata Group agrees that the temporal curtailment of the period under investigation to 2003 is artificial and irrational. We have attached the relevant extract of their answering affidavit as **TMM6**. This is consistent with their case in the High Court, as I have stated above. It is thus a common cause fact that the Commission will investigate the motive for the alleged interference which started before 2003, and specifically, from 1998 when Justice Khampepe was at the NPA and the TRC.

106 Justice Khampepe committed a material error of law and fact by treating the "2003 boundary" as effectively dispositive of the relevance of her prior institutional roles, took irrelevant considerations into account and ignored relevant considerations, and reached a conclusion not rationally connected to the evidence and purpose of the recusal standard. I am advised further that a decision is irrational if it is not based on the correct facts and the law.

107 The ruling falls to be reviewed and set aside under section 6(2)(d), section 6(2)(e)(iii), and section 6(2)(f)(ii) of PAJA, alternatively under the principle of legality.

Endorsement of an undisclosed and procedurally irregular arrangement

108 A further ground of review arises from the manner in which Justice Khampepe dealt with the objections to Mr Varney leading the evidence of the Calata Group's witnesses. The complaint was not that she lacked the power, in principle, to permit a party to lead its own witnesses. Rather, the complaint is that she endorsed an arrangement privately concluded between a party before the Commission, acting through Mr Varney, and an evidence leader to the Commission, Mr Semenya SC, without prior disclosure to, or participation by, the other interested parties. Justice Khampepe did not, prior to or at the time the private arrangement was concluded, and at least to my knowledge, seek to ascertain or engage with the objections raised by the other interested parties concerning the conduct of Mr Semenya SC and Mr Varney. That such an agreement was concluded in these circumstances, and thereafter sanctioned by Justice Khampepe, is deeply concerning and irregular.

109 It was common cause that the arrangement permitting Mr Varney to lead the Calata witnesses was not the product of a formal application in terms of Rule 3.1, nor was it communicated to the other parties at the time it was concluded.

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110 In her ruling, Justice Khampepe did not engage with the undisputed fact that the arrangement arose through bilateral interactions between Mr Varney and Mr Semenya SC, conducted without transparency and without affording other interested parties an opportunity to be heard. Also that, by retrospectively endorsing a privately concluded and undisclosed arrangement, Justice Khampepe failed to apply the procedural safeguards contained in the Commission's own Rules, undermined the principle of *audi alteram partem*, and sanctioned a process that was procedurally unfair. Justice Khampepe ignored these complaints in her ruling, misunderstood the crux of the complaints or failed to deal with them properly. The decision was accordingly not rationally connected to the information before her and was taken in a manner inconsistent with lawful, reasonable and procedurally fair administrative action.

111 There is a second reason why the ruling is not rationally connected to the information before the Commission. In para 92 of the ruling, Justice Khampepe, after recounting the events that led to the consent order on 28 November 2025, finds that she made the decision in accordance with the process agreed by the parties. And therefore (para 94) after submitting her ruling on the question of the leading of evidence, there was no *lis* on this aspect. This finding is inaccurate and not borne out by the record.

111.1 It was common cause before the Commission that the consent order was agreed to so that the Chairperson would consider the request by the Calata Group, consider the objections by the parties and then issue a

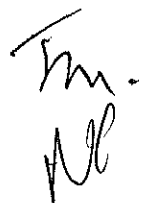
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ruling. It is thus incorrect and inconsistent with the common cause facts to hold that there was no longer a *lis* on this aspect. All the parties concerned expected that the Chairperson was going to apply her mind to the objections raised against the leading of own witnesses. Instead, she treated the matter as though it concerned a consensual procedural process agreed to by all parties, when that was factually not the case. Even after this was specifically clarified by my legal representatives during the hearing of the recusal application in reply, Justice Khampepe still found that the consent order eliminated the *lis* between the parties.

112 This is a complete failure to deal with the complaint actually raised in the recusal application.

113 Furthermore, Justice Khampepe's reliance on the fact that other commissions have, in general, permitted parties to lead their own witnesses constituted a misdirection. The existence of such practices elsewhere did not answer the specific complaint before her, which concerned the secretive manner in which the arrangement arose, and the failure to follow the prescribed process under the Commission's Rules and her subsequent endorsement of an irregular process without any correction or rebuke of Mr Semenya SC's conduct.

114 In these circumstances, Justice Khampepe's endorsement of an undisclosed and procedurally irregular arrangement constituted the unlawful exercise of public power. It demonstrates a subjective approach to issues that ought properly

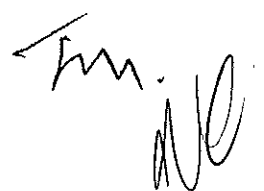
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to have been considered objectively. This is not an indirect review of her decision regarding Mr Semenya SC's private arrangement. It is a complaint that her conduct in dealing with the objections and Mr Semenya SC's conduct, as well as her directive to him and his failure to obey it, seen as a whole, creates a reasonable apprehension of bias. It shows that she is prepared to turn a blind eye and not rebuke such private arrangements between the Chief Evidence leader and a legal representative of parties that effectively complainants or accusers in the Commission. We are the "accused", so to speak. An apprehension of bias in such circumstances is reasonable.

115 The recusal ruling accordingly falls to be reviewed and set aside in terms of section 6(2)(c), section 6(2)(d), section 6(2)(e)(iii), and section 6(2)(f)(ii) of PAJA, alternatively, under the principle of legality, as it was not taken lawfully, rationally, and in a manner consistent with the constitutional requirements of accountability, openness, and fairness.

Failure to meaningfully engage with the realities of institutional bias

116 I am advised and submit that institutional bias occurs when a tribunal's structure or decision-making process inherently creates a reasonable apprehension of bias rather than bias stemming from an individual adjudicator's personal predisposition.

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117 In her ruling, Justice Khampepe acknowledges that the evidence leaders operate subject to the control and direction of the Chairperson, and that the Chairperson bears responsibility for the processes and conduct of the Commission. These features heighten the need for objective institutional independence and the appearance of impartiality. Yet Justice Khampepe's reasoning largely reduces the inquiry to whether the applicants proved direct involvement or direct relevance in her past roles.

118 That is a misdirection. It is reviewable because Justice Khampepe failed to consider the nature of her present powers and the objective appearance inquiry, and instead demanded an unduly stringent showing approaching proof of actual bias.

Unlawful approach to reasons and procedural fairness

119 In her ruling, Justice Khampepe addressed my complaints concerning her ruling of 2 December 2025 by stating that the furnishing of reasons would have been superfluous, that procedural directions seldom require reasons, and that I ought to have challenged such directions by way of review. This finding is, with respect, a non-sequitur.

120 Importantly, this reasoning is unlawful for at least two reasons. First, procedural directions in a Commission of Inquiry can materially affect fairness, and public confidence. Second, the absence of reasons, where the decision materially

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affects parties' participation and fairness, may be inconsistent with constitutional rationality and administrative justice norms.

121 These misdirections feed into the objective apprehension enquiry and render the ruling reviewable and susceptible to being set aside.

The uncritical endorsement of irregular conduct

122 A reasonable observer, apprised of the facts and circumstances would be alarmed that Justice Khampepe:

122.1 In her ruling dated 2 December 2025, endorsed without interrogation, an irregular and undisclosed private arrangement made on 18 September regarding the leading of witness and only disclosed to the rest of the parties on 27 October 2025.

122.2 declined to interrogate a clear breach of her own directive in the recusal application; and

122.3 treated serious objections by multiple parties as though they are insignificant and not worthy of examination.

123 The recusal ruling falls to be reviewed and set aside under section 6(2)(h) of PAJA, alternatively under the principle of legality.

Delay treated as a substitute for the recusal standard

124 In her ruling, Justice Khampepe places substantial reliance on alleged delay in my bringing of the recusal application and links this to the Commission's timetable and perceived urgency of its work. In doing so, she treats delay as a decisive or overriding consideration, rather than as a contextual factor to be weighed, if at all, after the proper application of the recusal test.

125 As I have explained above, the legal standard for recusal is whether a reasonable, objective and informed person would reasonably apprehend that the decision-maker may not bring an impartial mind to bear on the matter. That standard is not displaced by considerations of expedition or institutional convenience.

126 While delay may sometimes be relevant contextually, it cannot displace the recusal standard. To the extent that the ruling uses delay to defeat an otherwise reasonable apprehension enquiry, it is legally wrong and irrational.

127 By elevating delay into a substitute for the substantive recusal enquiry, and by engaging in an improper balancing between impartiality and perceived practical inconvenience, Justice Khampepe committed an error of law and failed to apply the correct legal test.

128 She committed a further error of law by failing to apply the applicable principles relevant to the assessment of delay. It is a balancing act, in which in addition to the extent of the delay, other factors like the prospects of success in the recusal

application and the importance of the issues raised are considered and weighed.

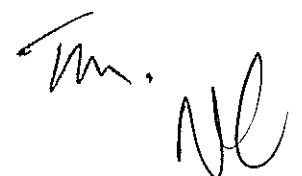
Delay alone is not decisive.

129 In her approach, a balancing of factors is not properly done. Importantly, Justice Khampepe did not even consider that if she was obliged to recuse herself and failed to do so, the Commission's proceedings would be nullified. This is a fundamental issue to consider and bears directly on the administration of justice.

130 Moreover, Justice Khampepe's findings of fact on the extent of the delay are not borne out by the information before her. It is common cause that while the Commission was established in May 2025, it only started its work in August/September 2025. The Rule 3.3 notices were issued to us later, in September and October 2025. On the facts, any period before 29 May 2025, immediately after 29 May 2025, and until the Commission issued the applicants with Rule 3.3 notices is irrelevant to the computation of any period of lateness.

131 Lastly, Justice Khampepe was influenced by an error of law when she found that we participated in the Commission and thus waived the right to raise recusal. The appropriate consideration where delay is alleged in a recusal application is interests of justice, not acquiescence or waiver.

132 Accordingly, the ruling falls to be reviewed and set aside in terms of section 6(2)(c), section 6(2)(d), section 6(2)(e)(iii), and section 6(2)(f)(ii) of PAJA, alternatively, under the principle of legality, as it was not taken lawfully, rationally,

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and in a manner consistent with the constitutional requirements of accountability, openness, and fairness.

Prior adjudication of amnesty applications involving parties appearing before the Commission and the interests of justice

133 I am advised and submit that a fundamental requirement of the exercise of public power, particularly in proceedings that implicate constitutional accountability and historical justice, is that the process must not only be fair but must also be perceived to be fair by those affected and by the public at large.

134 I have been advised that courts have repeatedly emphasised that justice must not only be done, but must be seen to be done, as public confidence in adjudicative and quasi-judicial processes depends as much on the appearance of impartiality as on impartiality itself. This principle applies with particular force to commissions of inquiry, which exercise significant investigative public power and whose legitimacy rests on public trust in their independence, openness and fairness.

135 Where circumstances arise that may reasonably give rise to an apprehension that a decision-maker's prior involvement with the same parties or subject matter could compromise that appearance, the interests of justice require that such concerns be properly considered and addressed. In fact, the decision maker

must be transparent and accountable by disclosing such prior involvement upfront, allowing the parties to consider whether she is disqualified to sit.

136 A further preliminary ground of review arose from Justice Khampepe's failure to consider the implications of her prior adjudication of amnesty applications involving family members and individuals who were participants before the Commission.

137 As appears from the records of the TRC, Justice Khampepe, while serving as a member of the TRC Amnesty Committee, participated in the determination of amnesty applications relating to several families and individuals who are likely to be witnesses before her in the Commission.

138 In our founding affidavit before the Commission, we incorrectly stated that Justice Khampepe presided over the amnesty proceedings in the Cradock Four matter, which matter concerns Mr Calata's father. When the Calata Group pointed out that this was factually incorrect, we accepted this, but we reiterated in our replying affidavit that the substance of the complaint was not confined to a single amnesty decision but to the Chairperson's institutional and adjudicative involvement in the TRC process as a whole. We annex the relevant extract from our replying affidavit as "**TMM10**". In her ruling, Justice Khampepe disregarded the explanation, and focused on the factual inaccuracy (para 47).

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139 Having considered Justice Khampepe's approach and finding in relation to the complaint about the presiding over amnesty proceedings, my legal representatives took it upon themselves to review the TRC Amnesty archival records to verify whether Justice Khampepe presided over amnesty proceedings relating to parties before the Commission. The records reveal that Justice Khampepe participated in, and was party to, the refusal of amnesty in respect of the killers of Richard and Irene Motasi, as reflected in Schedule 17 of the TRC Amnesty Committee's decision AC 99/0035 (attached as annexure "**TMM11**"). Members of the Motasi family are applicants before the Commission and were cited as the eighteenth applicant in the related High Court proceedings in case number 2025-005245, Gauteng Division, Pretoria.

140 Justice Khampepe also participated in the consideration of an amnesty applications relating to the kidnapping of the "Pebco Three" near Cradock (AC/2001/064 and AC/2001/107 attached as annexure "**TMM12a and b**"). Members of the Pebco Three families were cited as the sixteenth, twentieth and twenty-first applicants in the High Court proceedings.

141 Further, in AC/99/0046 (attached as annexure "**TMM13**"), Justice Khampepe formed part of the panel that refused amnesty applications brought by several members of the ANC. Among those implicated in those proceedings were individuals who are interested persons before the Commission, or who received Rule 3.3 notices from the Commission. I am one of them, and so are the former members of the executive, on behalf of whom I also file this application.

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142 In dismissing this aspect of my case, Justice Khampepe misdirected herself by treating my concern as turning on whether the ANC was the sole perpetrator of gross human rights abuses, rather than on the undisputed fact of her personal prior adjudicative involvement in amnesty proceedings implicating ANC leaders who are now participants before the Commission.

143 Whether other political formations or the apartheid regime were also found to have committed gross human rights violations was not the issue raised and was, with respect, irrelevant to the enquiry that Justice Khampepe was required to undertake.

144 The material consideration was that Justice Khampepe had previously participated in adjudicative determinations refusing amnesty to members of the ANC, including individuals who are now cited as interested persons before her, and that correspondence in those proceedings was directed to her personally.

145 It is not possible that Justice Khampepe was not aware of these facts when she was appointed to the Commission or when the recusal application was brought and determined. But she did not disclose them before and during recusal application. She also resisted recusal despite being aware of the facts.

146 I point out that Justice Khampepe did not dispute that she participated in conclusions reached by the TRC to the effect that the ANC had committed gross human rights abuses. By responding instead with a generalised summary of the

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TRC's overall findings, Justice Khampepe failed to engage with the substance of the apprehension of bias advanced, substituted the correct enquiry with an extraneous consideration, and thereby reached a conclusion that was not rationally connected to the issue she was required to decide.

147 The ruling falls to be reviewed and set aside on the basis of a material error of law and a failure to take into account relevant considerations, rendering the ruling reviewable in terms of section 6(2)(d), 6(2)(e)(iii), and 6(2)(f)(ii) of PAJA, alternatively under the principle of legality.

148 In total, the information at my disposal shows that Justice Khampepe had previously been involved in amnesty determinations relating to at least four individuals or families who are participants before the Commission. In each of those matters, Justice Khampepe formed part of a panel that refused amnesty.

149 These prior adjudications were not peripheral. They concerned the same historical events, and, in some instances as I pointed above, the same families, that forms the backdrop to the current Commission's mandate.

150 The Chairperson must now determine whether there was interference with the prosecution of those who she refused amnesty, some of whom are implicated in the complaints of those appearing before her in the Commission. I submit with respect that this is the height of disqualification to continue as Chairperson of the

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Commission. Justice Khampepe ought to do the honourable thing and recuse herself.

151 In the recusal ruling, however, Justice Khampepe did not engage with the cumulative effect of these prior adjudications on the appearance of impartiality in circumstances where affected families are required to appear before her again, this time in an investigative forum examining failures to investigate or prosecute arising from the TRC process.

152 The existence of repeated prior adjudicative encounters between the first respondent and the same families and individuals constituted a relevant and material consideration in assessing whether her continued participation would give rise to a reasonable apprehension of bias, or undermine public confidence in the fairness and integrity of the Commission's processes.

153 By failing to consider this factor, the first respondent misdirected herself as to the scope of the enquiry she was required to undertake. The omission resulted in a decision that failed to take into account a material consideration and was procedurally unfair.

154 In addition, the failure to engage with this issue rendered the decision incompatible with the constitutional requirement that decision-makers exercising public power must not only be impartial, but must also be seen to be impartial,

particularly in a commission of inquiry dealing with matters of significant historical sensitivity.

155 In these circumstances, the interests of justice required the first respondent to recuse herself in order to preserve public confidence in the Commission and to avoid placing affected families in the position of appearing before a decision-maker who had previously adjudicated their amnesty-related matters.

Improper emphasis on “time pressure” and speculative disruption

156 Justice Khampepe’s ruling emphasises that time is *“of the essence for the Commission to fulfil its mandate”*¹⁰ and that *“the effect of the recusal applications, if they are successful will be to bring the work of the Commission to a halt until a new Chairperson is appointed.”*¹¹

157 I am advised that these considerations are, at best, consequential issues. They are not the recusal test. The recusal test concerns the objective appearance of impartiality. In any event, the Commission had not started its work in any meaningful way, especially as regards public hearings, when the recusal application was brought. The Commission could easily have continued with the remaining commissioners or a replacement could be appointed expeditiously, perhaps with the advice of the Chief Justice in the selection of a suitable Judge

¹⁰ Recusal Ruling para 5.

¹¹ Recusal Ruling para 7.

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to replace Justice Khampepe. The work of the Commission could still be completed. It is not correct to adopt the view that Justice Khampepe may not be replaced without significantly undermining the work of the Commission.

158 I am advised that these considerations in any event are not part of the legal test for recusal. While administrative consequences may arise from a recusal decision, they cannot lawfully override the constitutional requirement of impartiality or be used to dilute the objective apprehension standard.

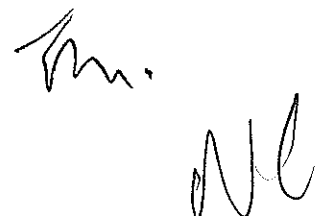
159 By permitting considerations of timetable pressure and anticipated institutional disruption to intrude into the recusal enquiry, Justice Khampepe applied an incorrect legal standard and thereby materially misdirected herself.

160 The decision is accordingly reviewable under section 6(2)(e)(iii) (irrelevant considerations), section 6(2)(f)(ii) (irrationality), and section 6(2)(d) (procedural unfairness) of PAJA, alternatively under the principle of legality.

The ruling is not concurred in by the Commissions

161 Judges have jurisdiction to determine applications for their own recusal.

162 It is generally required, in recusal proceedings before more than one judge, that the entire court assess and determine the recusal application. The judges hearing the application should consider the application both individually and

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collectively. That is why the facts relevant to the Judge whose recusal is sought ought to be properly disclosed to other Judges (in this case Commissioners) sitting together, so that the other Judges may properly assess the case for recusal on all relevant and material facts. There can be no proper and lawful determination of the recusal application when one Judge has personal knowledge of relevant and material facts and others do not but must together determine the outcome of the recusal application.

163 The recusal application was heard on 16 January 2026. All three Commission members attended the hearing and engaged counsel in the debate of the merits of the recusal application.

164 However, on 30 January 2026 when the ruling came out, Justice Khampepe was the sole arbiter and penned her ruling alone. There is no indication of concurrence or dissent by the other Commissioners. There is also no indication that Justice Khampepe penned the ruling for "the Commission", as would be the case with a unanimous judgment of "the Court".

165 Seen as a whole, the facts placed before the Commission in the recusal application, and further in this affidavit, justify the conclusion that Justice Khampepe should be recused from the Commission. Her ruling refusing recusal is tainted by irregularities as set out above and should be reviewed and set aside. She should be directed to recuse herself, alternatively the President should be directed to terminate her appointment to the Commission.

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URGENCY

166 Like Mr Zuma, I submit that the application is urgent. The applicants will not obtain substantial redress at a hearing in due course.

167 The Commission is ongoing and is due to complete its work by 29 July 2026. At the time of deposing to this affidavit, the Commission had started with opening statements. Soon, oral evidence will commence.

168 There is thus a grave risk that the Commission will have been finalised long before the review application could be heard in the ordinary course. Naturally, its findings would be one-sided, based on the evidence led by the Calata Group and other witnesses other than the former members of the executive.

169 Secondly, continuing to preside after recusal should have occurred renders the further proceedings a nullity. In practical terms, this means that if the Commission proceeds and finalises its work, and a court in due course overturns the recusal ruling, all intervening steps would be rendered legally ineffective. Such an outcome would occasion unnecessary prejudice to the public interest and the fiscus, procedural inefficiency, and institutional embarrassment.

170 In these circumstances, the interests of justice and the public interest militate against permitting the continuation of proceedings that may ultimately prove to

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be a nullity while the question of the Commission's proper constitution goes through the ordinary time frames.

171 In addition, it has been mentioned in the pre-hearing meeting of the Commission held after the recusal ruling and prior to the start of public hearings that the former members of the executive may be subpoenaed to appear before the Commission. They would do so as witnesses. If this happens, we may be compelled to appear before the Chairperson that we submit ought to be recused. We will also do so before an unlawfully constituted Commission if we are correct that the Chairperson should recuse herself. Furthermore, we will do so without having filed any witness statements. The Evidence Leaders have not consulted with us regarding any witness statements. This matter ought to be heard urgently so that we are not compelled to appear before the Commission in breach of our constitutional rights to insist that the Commission be properly constituted without the Chairperson who ought to recuse herself. I am advised and respectfully submit that appearing before an impartial Chairperson is a fundamental human right guaranteed under the Constitution and we do not waive it in any manner or form. We assert it.

172 We pursue this application to vindicate our constitutional rights. We ask this Court to review and set aside the recusal ruling, as does Mr Zuma, and for the Chairperson to be directed to recuse herself or to be removed.

173 If our contentions are upheld, the President may be directed to terminate Justice Khampepe's appointment. We ask for this relief as set out below and in the attached proposed amended notice of motion.

174 I am advised and respectfully submit that it follows as a matter of law that if Justice Khampepe ought to have recused herself, all proceedings in the Commission involving her will be a nullity upon this Court finding that she ought to have recused herself from all the proceedings of the Commission. The finding means that all those proceedings of the Commission are tainted by illegality and constitute a nullity. Out of an abundance of caution, I ask for such relief below.

ADDITIONAL RELIEF SOUGHT

175 In addition to the relief prayed for by Mr Zuma, I respectfully seek the following further relief:

175.1 An order recognising me as the second applicant in the application that was brought by Mr Zuma.

175.2 An order directing the President of the Republic to terminate the appointment of Justice Khampepe as Chairperson of the Commission.

175.3 A declarator that all acts, decisions, directives, and proceedings undertaken by the Commission with the involvement of Justice Khampepe, whether directly or indirectly, are unlawful and of no force or effect, and accordingly constitute a nullity.

175.4 Such further and/or alternative relief as this Honourable Court may deem just and equitable.

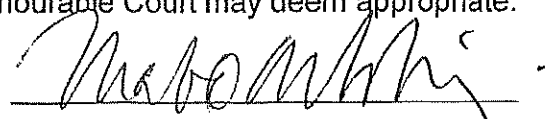
176 This relief is formally prayed for in the attached proposed amended Notice of Motion. This is a proposed amended notice of motion and leave shall be sought at the hearing of the application in terms of Rules 6(12) and 28(10) of the Uniform Rules of Court for the Court's leave to effect the amendments to Mr Zuma's notice of motion accordingly, subject of course to any further amendments by Mr Zuma himself.

CONCLUSION

177 In the premises, and for the reasons set out above, I respectfully submit that the ruling of the Chairperson dated 30 January 2026 is unlawful and falls to be reviewed and set aside in terms of the PAJA, alternatively under the principle of legality.

178 I further respectfully submit that I, together with the former members of the executive represented herein, have a direct and substantial interest in the relief sought, support the setting aside of the impugned ruling, and ought accordingly to be permitted to act and be joined as a second applicant in these proceedings.

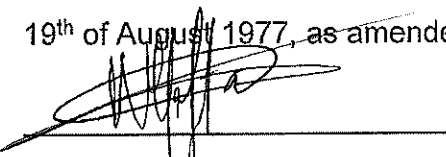
179 In the result, I pray for an order in terms of the proposed amended Notice of Motion, including an order granting my joinder as a second applicant and such further and/or alternative relief as this Honourable Court may deem appropriate.


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THABO MVUYELWA MBEKI

I certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and deposited before me at JOHANNESBURG on this the 13th day of February 2026, and that the provisions of the regulations contained in the Government Notice R1258 of the 21st of July 1972, as amended, and Government Gazette Notice R1648 of the 19th of August 1977, as amended, have been complied with.


COMMISSIONER OF OATHS

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