

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

Case No. 2026-026936

In the matter between:

JACOB GEDLEYIHLEKISA ZUMA

First Applicant

and

**THE CHAIRPERSON OF THE COMMISSION:
COMMISSIONER SISI KHAMPEPE**

First Respondent

SECRETARY OF THE COMMISSION

Second Respondent

ADVOCATE ISHMAEL SEMENYA SC

Third Respondent

COMMISSIONER FRANS KGOMO

Fourth Respondent

ADVOCATE ANDREA GABRIEL SC

Fifth Respondent

CALATA GROUP

Sixth Respondent

THABO MVUYELWA MBEKI

Seventh Respondent

NATIONAL PROSECUTING AUTHORITY

Eighth Respondent

**MINISTER OF JUSTICE AND CONSTITUTIONAL
AFFAIRS**

Ninth Respondent

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

Tenth Respondent

**FIRST APPLICANT'S HEADS OF ARGUMENT: MAIN APPLICATION
(FORMER PRESIDENT ZUMA)**

PREAMBLE

“The important point is that less evidence will suffice to establish a prima facie case where the matter is peculiarly within the knowledge of the opposite party than would under other circumstances be required.”¹

A: INTRODUCTION

1. In this matter and regarding the merits it is imperative to recognise that there are three distinct topics or “*separate*” applications all of which arise from the conduct and/or decision of the Chairperson of the Commission in dismissing the application for her recusal from being a member and/or Chairperson of the said Commission. The three topics are:-
 - 1.1. Declaratory relief in terms of section 172 and/or 38 of the Constitution;
 - 1.2. Review relief in terms of PAJA and/or the principle of legality;
 - 1.3. Just and equitable remedies in terms of either 172(1)(b) of the Constitution.
2. Simply put, the gravamen of this application is that in making the impugned conduct or decision, the Chairperson
 - 2.1. breached certain fundamental rights and other provisions of the Constitution;
 - 2.2. breached section 33 of the Constitution, read with PAJA; and/or

¹ Per Innes CJ in *Union Government (Minister Railways) v Sykes* 1913 AD 156 at 173-4.

- 2.3. breached the principle of legality or the rationality test.
3. Assuming that the court will uphold any one or more of the above grounds and depending on which leg is upheld then two additional issues will or may arise at the end namely:-
 - 3.1. substitutionary relief (if we reach the review relief); and/or
 - 3.2. punitive and/or personal costs.
4. However and before dealing with those topics a plethora of preliminary issues have been raised by the parties, which will require prior adjudication. These topics entail a number of different legal points raised by the applicants but mainly by the first to fifth respondents, including:-
 - 4.1. an application to compel further and better discovery;
 - 4.2. an application for security for costs;
 - 4.3. the redesignation of President Mbeki from being a respondent to a co-applicant;
 - 4.4. the question of which person or body made the impugned ruling; and
 - 4.5. a number of other legal defences dealt with in section E below.
5. Before we tackle the issues listed above, it will be appropriate to outline some of the salient facts which underlie the application, most of which are common cause or not seriously disputed. Thereafter we will outline some of the relevant legal prescripts and then we will apply the law to the facts to justify the legal conclusions required to be reached by this Honourable Court.

6. It would seem that the urgency of the application and the redesignation of President Mbeki have been conceded by all the parties. So is the public importance of the matter and the need for the hearing to take place before the Full Court as a court of first instance. We proceed on that basis.
7. The interlocutory application to compel further and better discovery is dealt with in separate heads of argument for the reasons explained therein. The conduct of the main application dealt with herein is largely contingent upon the outcome of the interlocutory application, which is not seriously opposed save for a bare denial expressed in two sentences at paragraphs 200 and 201 of the main answering affidavit.
8. It is trite that a respondent cannot content himself in his answering affidavit with bare and unsubstantiated denials. This forms part of the well-known ***Plascon Evans*** Rule.

B: SALIENT FACTS

9. Save where it is otherwise indicated, the background facts are largely common cause in this matter.
10. The facts have been repeatedly set out in the pleadings, the record and in the heads of argument already before this Honourable Court. Where we refer to the parties by their proper names without using their titles, it is not out of disrespect.
11. In order to avoid unnecessary prolixity and mindful of the urgent nature of these proceedings and the volume of the papers, we refrain from yet another long exposition of the undisputed facts.

12. In doing so and with the leave of the Court, we refer to the exposition of the background as set out at paragraphs 16 to 58 of the Heads of Argument of President Mbeki, the seventh respondent (now effectively second applicant). It has been admitted that the two applications of the Former Presidents are mutually reinforcing. We make only the necessary additions outlined below. These facts too have been admitted or cannot be seriously disputed.
13. Sometime in October 2026 President Zuma was made aware by his office about the relevant Rule 3.3 Notice sent out by the Commission to him. He gave instructions for the documents to be urgently sent to his attorneys as he was about to leave the country.
14. On or about 2 October 2025 President Zuma's attorneys of record sent a letter to the Secretary of the Commission², Advocate Thokoa raising, *inter alia*, that:-
 - 14.1. he would only respond upon receiving the necessary legal advice;
 - 14.2. due to his then prevailing health condition and imminent overseas trip he could not meet the deadline set for him by the Commission;
 - 14.3. he was only returning to the country on or about 19 October 2025;
 - 14.4. *"Needless to say, he has not been in a position to have any meaningful consultations with his legal representatives. This is also partly due to the fact that he has not been furnished with the annexures to the affidavit in which he is allegedly implicated. We also hold instructions*

² CaseLines 077-662.

to make the necessary enquiry as to whether the state will provide any legal support to our client in view of the fact that you have approached him in his official capacity as a former head of state.”

15. A request was therefore made for the extension of the deadline and the furnishment of the missing annexures.
16. Effectively similarly worded letters were coincidentally set out by the legal representatives acting on behalf of President Mbeki and the other former members of the Cabinet who had received similar Notices. This was hardly surprising.
17. The Commission granted the indulgences sought.
18. After the requisite consultations had been conducted, President Zuma’s attorneys wrote another letter to the Secretary of the Commission³, dated 3 December 2025 in which it was indicated, *inter alia*, that:-
 - 18.1. *“We have now finally had the opportunity to consult with our client adequately in respect of this matter.”*
 - 18.2. President Zuma had been following the (then) recent developments regarding the objections against the Chief Evidence Leader, Adv I Semanya SC with keen interest.

³ CaseLines 077-34 (Bundle B).

- 18.3. Among the reasons he had not entered the fray was that he had objections of his own directed at the Chairperson of the Commission which he articulated.
- 18.4. He demanded the immediate recusal of the Chairperson.
- 18.5. He as willing to be guided by the Commission on how to take the matter forward.
19. On 3 October 2025 the Commission issued directions⁴ setting out timelines for the exchange of papers in the anticipated recusal application which indicated that the Chairperson was refusing voluntarily to recuse herself.
20. In the directions the Chairperson also indicated that “*the Commission will decide my recusal application on the papers filed with the Commission*”.
21. On 11 December 2025 President Zuma’s attorneys proposed an alternative filing schedule⁵ and made a specific that the recusal application be presented orally and in public in line with previous practice, the Rules and the principles of openness and transparency.
22. Following engagements between counsel, the hearing date of 16 January 2026 was agreed by both sides.
23. It is against this background that the recusal application was heard on 16 January 2026 and the impugned decision or ruling was delivered on 30 January 2026.

⁴ CaseLines 077-662 (Bundle B).

⁵ CaseLines 077-76 (Bundle B).

24. The importance of the above information, which forms part of the record, relates to the impugned finding of the Chairperson that President Zuma somehow unduly delayed in bringing his recusal application. It is demonstrably unsustainable, irrational and/or unreasonable.
25. For the convenience of the court it needs to be stated upfront that the principal issue of disqualifying bias has been deliberately reduced and further streamlined into two broad categories namely:-
- 25.1. actual bias based on disputed allegations of misconduct and/or potential criminality associated with the alleged giving of advice, tips or coaching by the Chairperson to Adv Semanya SC (the misconduct ground”); and
- 25.2. reasonably apprehended biased based on the admitted past employment of the Chairperson by two particular institutions namely the Truth and Reconciliation Commission (“the TRC”), particularly its Amnesty Committee and also the National Prosecuting Authority (“the NPA”), particularly as the Deputy National Director of Public Prosecutions (“the DNDPP”), in short referred to as “*the vocational history ground*”.
26. Regarding the distinctions between the two and the applicable tests reference will be made, *inter alia*, to the judgment of Koen J in **S v Zuma**⁶.

⁶ S v Zuma and Another 2023 (1) SACR 621 (KZP).

27. The misconduct ground is asserted only by the First Applicant while the vocational history ground is asserted by both the First and Second Applicants, albeit on some overlapping as well as divergent factual bases.

C: REASONABLY APPREHENDED BIAS

28. On the safe assumption that the Second Applicant will place particular focus on the vocational history ground, which for the record the First Applicant is in total agreement with, these submissions will, in turn lean heavily in favour of addressing the misconduct ground. This must not be read as any abandonment or half-heartedness towards the vocational history ground. It continues to be equally asserted by the first applicant. On the contrary, the first applicant persists with this ground but will only deal with it briefly herein for the sake of practicality, convenience and judicial time economics on the common understanding that another party will deal with it in the required detail.
29. We therefore highlight a few issues not covered in the Mbeki papers.
30. First, the respondents have remarkably failed to deny or deal with the additional or aggravating factors pleaded by the first applicant in support of a reasonable apprehension of bias on his part.
31. These factors include the contents of the News24 article⁷, and Newszroom Afrika⁸ interview the extracts of which will be read to the court and in which the Chairperson, in flagrant breach of Rules 11 and 13 of the Judicial Code

⁷ CaseLines 007-61.

⁸ CaseLines 004-48.

conducted media interviews in which she commented extensively in a case “*determined by (her)*” and clearly “*entered into a public debate about a case (in response to) criticism levelled against the judge, the judgment or any other aspect of the case*”. Such conduct clearly supports the conclusion of *prima facie* violation of the Judicial code, let alone the rights of President Zuma.

32. In the article the Chairperson makes it clear that she intended to teach Zuma a lesson because he allegedly “*believe that he could test the limits of the judiciary*” and “*Mr Zuma had chosen to make a public spectacle of his disrespect for the courts, our judiciary and the rule of law*”. She also said that Mr Zuma preferred to abuse the court process, a finding which was not made by the Court.
33. Similarly the Chairperson has not denied or disputed the view held by President Zuma that she is *prima facie* guilty of the criminal offence of the violation of section 8 of PRECCA which deals with corruption in respect of judicial officers.
34. This is of course not to say the Chairperson is actually guilty of these charges. That much remains yet to be determined by the JSC and the police or the criminal courts. What is significant here is that it cannot be reasonably expected of President Zuma or any other reasonable person to believe that a Chairperson who has behaved as stated above can conceivably deliver a fair hearing in his direction, at the time when he will be a complainant against her in the JSC and in a criminal investigation, on apparently very good grounds.

35. Secondly, we wish to highlight that the concession made by the respondents that the Chairperson is a competent witness in the Commission⁹, albeit she will not actually be called, is fatal in respect of the case of a reasonable apprehension of bias. She has practically admitted to being an “*eye-witness*” to the events being debated in front of her and in respect of which she may condemn people to jail or ruin their reputations, in the famous words of Lord Denning in the case of *In Re Pergamon Press*¹⁰.
36. This must be read with the admission that the Chairperson’s former boss and colleagues have testified in the Commission.
37. Thirdly, the finding of unreasonable delay on the part of President Zuma when the Commission itself granted him extensions until he could consult his lawyers is another exhibition of bias or at least a reasonable apprehension that he can do nothing right in her eyes, i.e that she is inherently biased against him.
38. Lastly, we point out that the respondents failed to respond to the specific allegation that “*it would be untenable for the first respondent and/or the President to deny the inherent and multiple grounds for the requisite reasonable apprehension of this and/or conflicts of interests on the part of the first respondent as a result of her vocational history which has been invoked by the applicants.*”
39. The recent belated attacks and multiple insults hurled at the President by the respondents, especially the Calata Group, for merely acknowledging the

⁹ Commissions AA para 163 – 177, CaseLines.

¹⁰ Pergamon Press, Re [1990] 3 ALL ER 535 (CA).

above, are in the circumstances, totally gratuitous and unwarranted. In their affidavit the respondents have practically labelled the President as a liar, a chameleon and a political opportunist who is guilty of the crime of perjury. All because he has stated the obvious reality that he no longer believes that he will receive sound advice from this Chairperson, particularly because of the submission of the applicants on the issue of reasonably perceived bias. This conduct will be referred to also in the context of the appropriate order of costs below.

40. It is legally and constitutionally untenable for the Chairperson to force herself upon the President as his advisor, even against his will. The Constitution gives him the prerogative to select his preferred advisers.
41. Regarding the 2003 alleged temporal barrier, I also defer to what has been said by the first applicant save for highlighting the inexplicable volte face of the Calata Group, which once believed that the restrictive interpretation of that date was irrational. It has not been explained why that is suddenly not the case. Nor is it explained how a biased Chairperson can produce a fair and legitimate outcome for their regrettable and genuine plights.
42. In all the circumstances, the case for reasonably apprehended bias is well made.
43. With that said, we move to deal with the misconduct ground for actual bias, alternatively reasonably apprehended bias.

D: THE MISCONDUCT GROUND

44. In dealing with the misconduct ground we shall link it to the pleaded grounds of starting with the declaratory relief, followed by the PAJA review relief and then the principle of legality.
45. At the risk of repetition, we recognise that the application to compel compliance in terms of Rule 53(1)(b), if granted will be decisive of the further conduct of the matter insofar as it deals with the actual bias ground based on alleged gross misconduct and/or bias on the part of the Chairperson.
46. For now we proceed from the basis that, irrespective of the outcome of the interlocutory application, on the papers as they stand (including the relevant contents of the record) and by the application of the relevant legal principles, there is sufficiently cogent evidence to establish the existence of the disputed documents. To avoid unnecessary prolixity, we do not repeat the legal grounds articulated in support of that conclusion which are stated in the interlocutory application. Suffice to remind the court that the list of applicable legal principles includes:-
- 46.1. the interpretation of the pleadings;
- 46.2. the status of evidence which is in the particular knowledge of one party in respect of which a *prima facie* case is usually premised;¹¹
- 46.3. the legal principles which govern confession and avoidance or admitted evidence;

¹¹ *Union Government (Minister Railways) v Sykes* (supra).

46.4. the legal principles which govern the drawing of inferences from circumstantial evidence;

46.5. common sense; and

46.6. the incidence of the onus or burden of proof in respect of the above principles.

E: THE REMAINING LEGAL POINTS RAISED IN THE PLEADINGS

47. Putting aside the issue of discovery, we first deal with the various legal issues raised in the papers, starting with those with the most potential of being dispositive of the entire main application. This applies to the issues raised in E1 to E3 below.

E1: Unopposed relief against the President

48. At paragraphs 26 and 27 of the Supplementary Affidavit it was pertinently pleaded that the President was unaware of the grounds for disqualifying bias at the time of making the appointment and owing to his duty of justification and the principle of legality and the fact that he is cited, any failure to justify his appointment would put the President at the risk of attracting the relief sought against him by default.

49. This has now come to pass in that not only has the President failed to justify his impugned appointment but he has told the Court that in retrospect, it was done in error.

50. We therefore respectfully submit that nothing stands in the way of the relief sought against the President. On the contrary it is all but conceded and/or supported by him.

E2: The status of the answering affidavits

51. Briefly, it is common cause that both in the Khampepe recusal application and in the present application the two respective answering affidavits were deposed to by Adv Semanya SC in his capacity as the Chief Evidence Leader and purportedly also on behalf of the Commission as a whole and/or the Chairperson.
52. As a preliminary legal objection it is our respectful submission that, absent any indication whether in the form of a resolution or a suitably worded confirmatory affidavit, and in the face of specific objections, it was impermissible for Adv Semanya SC to depose to the said two affidavits because he is not authorised to do so.
53. To the extent that in the impugned ruling that the procedure followed was justified with reference to the **SARFU** case, that justification must fail because in **SARFU**, unlike here, the implicated judges made statements setting out the relevant facts which fell within their own personal knowledge.
54. In the result we submit that:-
- 54.1. in respect of the recusal application the ruling must be reviewed and set aside on this basis alone, and in so far as it is based on evidence which was patently inadmissible; and

54.2. in respect of the present application, the affidavit of Adv Semenya SC must be regarded as *pro non scripto*, insofar as it purports to be authorised by any other respondent other than himself, alternatively any information not falling within his own personal knowledge must be struck out as irrelevant.

55. It therefore follows that there is no meaningful opposition to the main application either by the Commission, its Chairperson, its Secretary and/or any of the Commissioners. The application also stands to be dismissed on that basis alone.

E3: There is no decision of the Commission regarding the Khampepe recusal application

56. In his original founding affidavit the first applicant has raised the issue that, on the face of it, the impugned ruling indicates that it was taken only by the first respondent to the exclusion of the fourth and fifth respondents and that the Commission, as such, was not properly constituted. This is admitted in the answering affidavit¹² or dealt with by another ill-conceived confession and avoidance where the avoidance is unsustainable.

57. It is specifically not disputed by the first to fifth respondents that the decision on the recusal application was taken by the Chairperson alone. In an attempt to avoid the obvious consequences of that admission, the first to fifth respondents feebly and incorrectly submit that not all such decisions of a commission of inquiry are required to be made by the panel of

¹² CaseLines 001-21 and CaseLines 0015-49.

Commissioners who participate in hearing the relevant application. They go on to say that recusal is a case in point.¹³ The first to fifth respondents are hugely mistaken. The ruling should have been delivered by “*the Commission*” comprising the Chairperson, Commissioner Kgomo, Commissioner Gabriel SC.

58. In paragraph 1 of the Terms of Reference¹⁴ “the Chairperson” “*the Commission*” carry two different definitions because legally they are two separate persons, one human and the other juristic. This should end any debate.

59. In **SARFU**¹⁵, the Constitutional Court held that:

[30] A judge who sits in a case in which she or he is disqualified from sitting because, seen objectively, there exists a reasonable apprehension that such judge might be biased, acts in a manner that is inconsistent with section 34 of the Constitution, and in breach of the requirements of section 165(2) and the prescribed oath of office. We have no doubt, therefore, that the application for recusal raised a “constitutional matter” within the meaning of section 167(3), and that it was the duty of this Court to give collective consideration to the question whether the judges concerned should recuse themselves.

[31] If one or more of its members is disqualified from sitting in a particular case, this Court is under a duty to say so, and to take such

¹³ Commission’s AA paras 75-76, CaseLines p 015-19.

¹⁴ CaseLines 001-79.

¹⁵ *President of the Republic of South Africa v South African Rugby Football Union* [1999] ZACC 9; 1999 (4) SA 147 (CC) (SARFU).

steps as may be necessary to ensure that the disqualified member does not participate in the adjudication of the case.

[32] If one judge, in the opinion of the other members of the Court, incorrectly refuses to recuse herself or himself, that decision could fatally contaminate the ultimate decision of the Court, and the other members may well have a duty to refuse to sit with that judge.”

60. The Constitutional Court further held that:-

“[34] It is not necessary to decide what the position would have been in the present case if one or more of the judges whose recusal was sought took the view that no grounds existed for his recusal, but the majority of the Court took a different view. Counsel were in agreement that the whole Court should participate in the hearing and that the judges should consider the application individually and collectively. This is how the matter was dealt with and in the result the judges whose recusal was sought, and the remainder who were asked to look to their conscience, considered their own positions individually, and also considered the application as a whole, collectively, and concluded unanimously that none should be recused.” (Emphasis added)

61. In ***Ex Parte: Goosen and Others* [2019] ZAGPJHC 154; 2020 (1) SA 569 (GJ)**, the General Council of the Bar of South Africa (**GCB**), supported by the Pretoria Society of Advocates sought the recusal of Millar AJ. The Full Court hearing the recusal application composed of Sutherland J, Modiba J and

Millar AJ.¹⁶ The judgment dismissing the recusal application was delivered by the Full Court. Similarly, in ***Ntuli and Another v S* [2017] ZAGPJHC 294; [2018] 1 All SA 780 (GJ)**, the judgment dismissing the recusal application of Monama J was dismissed by the Full Court composed of Splig J, Monama J and Matshitse AJ.

62. In this matter, the recusal decision was strangely and irregularly delivered by the Chairperson alone to the specific and admitted exclusion of the other members of the panel when the two recusal applications served before the Commission and not the Chairperson.¹⁷ In so doing the Chairperson acted *ultra vires* and/or unlawfully.
63. Ironically the Semenya recusal ruling was clearly delivered by the Chairperson on behalf of the Commission as a body and as the panel that sat in the hearing thereof.
64. We submit that the said conduct and/or ruling is irregular and invalid because it was not delivered by the correct body or person, alternatively the body was not properly constituted. Quite clearly, the recusal ruling amounts to an invalid order and must be reviewed and set aside. The Supreme Court of Appeal in ***Judicial Service Commission and Another v Cape Bar Council and Another* [2012] ZASCA 115; 2013 (1) SA 170 (SCA)**, relying on Innes CJ statement in ***Schierhout v Union Government* 1919 AD 30** at paragraph 44 held that:-

¹⁶ Goosen para 2.

¹⁷ Recusal ruling para 1 CaseLines p 001-39.

“... When several persons are appointed to exercise judicial powers, then in the absence of provision to the contrary, they must all act together; there can only be one adjudication, and that must be the adjudication of the entire body. ... And the same rule would apply whenever a number of individuals, were empowered by Statute to deal with any matter as one body; the action taken would have to be the joint action of all of them ... for otherwise they would not be acting in accordance with the provisions of the Statute. ...”

65. In this matter, President Ramaphosa appointed a Judicial Commission of Inquiry to investigate allegations of whether efforts or attempts were made to stop the investigation or prosecution of the Truth and Reconciliation Commission cases. The President using his constitutional powers under section 84(2)(f) of the Constitution appointed the first respondent as its chairperson, and Commissioners Kgomo and Gabriel SC as members of the Commission.¹⁸
66. The decision on the recusal application should have been the decision of the Commission composed of all three Commissioners.
67. We submit that the decision of the Chairperson is irregular, invalid and should be reviewed and set aside, because it was not taken by the authorised body.
68. If this ground is upheld, as it must, then that should spell the end of this particular application. There would be no need to go any further. For what it is still worth, we now deal with the legal points of the respondents.

¹⁸ Proclamation notice 264 of 2025.

E4: Alleged requirement for permission in terms of Section 47(1) of the Superior Courts Act

69. We dispute that there was any requirement to obtain permission to institute the proceedings against the first and/or fourth respondents who are both:-

69.1. retired judges; and

69.2. in any event, being sued not in their judicial capacities but in their official capacities (nominee officio) as members of an administrative organ or tribunal.

70. The defences are firstly based on a proper interpretation or construction of the section, which makes it clear that it applies to judges who are in active service and therefore answerable to a particular head of court. Any contrary interpretation would lead to absurdity and impossibility of compliance with the purpose of the section.

71. In any event in the present matter the relevant respondents have been cited and are acting in their capacities as members of the Commission not the judiciary. For the purposes of this matter they are in exactly the same position as Commissioner Gabriel SC who is the fifth respondent. They are also in the same position as the late Archbishop Tutu or Advocate Moerane SC who chaired the TRC and the so-called Moerane Commission, respectively.

72. Authority for the inapplicability of the section is also to be found in the case of **Memela**, where it was stated, with respect correctly that:-

*“What is perspicuous in the **FUL** matter is that consent is required in an instance where a judge had performed the functions of a judge. The corollary of that must be that, **where a judge functions in a different capacity, consent will not be required simply by virtue of their judicial status**. There is no doubt that the purpose of section 47(1) is to afford some limited immunity and protection to judges when they perform their official functions. This, to my mind, is underpinned by the express exclusion of the application of the section to an application brought in terms of the Domestic Violence Act. Nevertheless, the point made herein was somewhat confirmed by the United States Courts in *Mireles v Waco* (Waco). In the United States, unlike in South Africa, judges enjoy full immunity against lawsuits¹⁹.*

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

73. To the extent that the more recent decision in **Mantashe** may be invoked as relevant and/or in conflict with the **Memela** decision, it is respectfully submitted that it was wrongly decided and the approach taken in **Memela** is to be preferred.
74. That judgment is distinguishable and, with respect, incorrectly decided. In **Mantashe**, Dippenaar J held that section 47 consent was required, relying on

¹⁹ *Randall v Brigham* **74 U.S. 523**, 537 (1869) and *Bradley v Fisher* **[1871] USSC 92; 80 U.S. 335**, 347 (1872).

the definition of "service" in the Judges' Remuneration and Conditions of Employment Act, which includes service as a commission chairperson. In the context of that Act the reference is clearly to active service, especially when the specific wording of section 47(1) of the Superior Courts Act is taken into account.

75. However, with deference, this conflates remuneration classification with the substantive nature of the function performed. The fact that a judge is remunerated for commission work does not transform that work into judicial functions for purposes of section 47 immunity.
76. Critically, in *Mantashe* the learned judge erred in failing to read the two statutes together and harmoniously.
77. As Moshwana J correctly held in *Memela*, a commission chair performs functions governed by the Commissions Act, which are not judicial in nature. The situation may well be different in respect of a judge in active service. We express no opinion or submission on this. The *Memela* judgment has not been overturned and represents the correct interpretation.
78. The respondents' interpretation would produce absurd and unconstitutional results. If section 47 applied to commission chairs, every person aggrieved by a commission's findings would require the consent of the head of court before seeking judicial review. This would effectively immunise commissions of inquiry from judicial oversight, a result plainly inconsistent with the rule of law and the constitutional imperative that public power be subject to scrutiny.

79. Section 34 of the Constitution guarantees the right to have justiciable disputes resolved by a court of law. Section 47(1) constitutes a limitation on that right. Limitations must be interpreted restrictively and cannot be extended beyond their plain purpose, protecting judges from frivolous litigation arising from their judicial acts. This court is bound to adopt an interpretation that promotes the spirit, purport and objects of the Bill of Rights. An interpretation that would potentially shield administrative decisions from review simply because of the absence of consent of an unidentifiable head of court cannot be legally sustained.

E5: Alleged prohibition against midstream reviews

80. The Commission argues that the review is premature because the proceedings are ongoing (in media res)²⁰. They content that the entire application must therefore be dismissed on that basis. This defence should fail for several reasons. First, courts may intervene in ongoing proceedings where fairness is compromised. In the case of **Bhungwan v JSE Limited**²¹ in arriving at its conclusion about the timing of bringing a review application in media res, the Court also approved the view expressed by Baxter in the following passage:-

“It is submitted that the appropriate criterion by which the ripeness of the action in question is to be measured is whether prejudice has already resulted or is inevitable, irrespective of whether the action is complete or not. Once unlawfulness is manifest in a form which cannot

²⁰ Case lines, Master Bundle, Pocket 015, page 1, 1st to 5th Respondent’s Answering Affidavit, para 22 to 24.

²¹ 2010 (3) 335 (GST) at para 11.

be corrected no matter how the public authority continues to act, there is no point in insisting that the complainant should continue to go through the motions before bringing the matter to court.”

81. President Zuma states that as soon as the information from the whistle-blower came to his attention, he immediately launched the recusal application²². He further contends that the proceedings in question will be irretrievably tainted by bias because of the conduct of the Chairperson who took it upon herself to give advice to one party in the proceedings to the detriment of the other party, in this case, by coaching the evidence leader on how to resist his own recusal application.
82. Second, intervention before finalisation is justified where grave injustice would otherwise occur. In **Wahlhaus v Additional Magistrate, Johannesburg**²³ the court held that that such judicial intervention in medias res has been said to be warranted only where there is a gross irregularity in the proceedings and in a rare case. Therefore allowing the inquiry to continue under a Chairperson whose impartiality is reasonably questioned causes irreparable procedural prejudice as well as loss of legitimacy of the process.
83. This is most certainly and hopefully one of those rare cases. The Chairperson is a former Justice of the Constitutional Court and, in addition, has been entrusted with the responsibility of chairing a Commission tasked with addressing the atrocities of our past, during which many people were

²² Master Bundle, case lines pocket 001-17, para 32.

²³ *Wahlhaus v Additional Magistrate Johannesburg* 1959(3) SA 113 (A) at 120B.

subjected to the most egregious violations of their human rights. Consequently, the submission that President Zuma should wait for the Commission to complete its work before taking action is untenable, particularly in circumstances where it is apparent that such delay would prejudice both President Zuma and the citizens of South Africa at large.

84. Furthermore, the respondents cannot blow hot and cold. On the one hand in order to support the theory of unreasonable delay the respondents claim that the applicants brought the review proceedings too late. They should have brought them earlier. In the same breath and when it comes to the *in media res* defence, the very same respondents now claim that the applicants acted too early in bringing the review proceedings. It is this type of
85. In ***Bernert v ABSA Bank*** the court had the following to say about the timing of a judicial review²⁴:-

“It is not in the interests of justice to permit a litigant, where the litigant has knowledge of all the facts upon which recusal is sought to wait until an adverse judgment before raising the issue of recusal. Litigation must be brought to finality as speedily as possible. It is undesirable to counsel parties in litigation to live with the uncertainty that, after the outcome of the case is known, there is a possibility that litigation may be commenced afresh because a late application for recusal which should have been brought earlier. To do otherwise would undermine the administration of justice.”

²⁴ *Bernert v ABSA Bank* 2011 (3) SA 92 at para 75.

86. To further underscore the exceptional nature of this matter, one must pose the following question: what could be more extraordinary than a situation in which the Chairperson of a Commission refuses to recuse herself even after the President of the Republic, acting through the Minister of Justice, has formally requested that she step down? The Chairperson's refusal to do so demonstrates that she has effectively embarked upon a frolic of her own, revealing a personal and one-sided vested interest in the matter. This conduct renders the present case not merely exceptional, but singularly so.
87. Third, this defence must be rejected simply on the basis that, in its own terms, it is not dispositive of the application. Even if the review relief were to be cast aside, there is no defence of *in media res* against the declaratory relief sought in prayers 1 and 5 of the Amended Notice of Motion.
88. Consequently, the *in media res* defence is misplaced, because courts may intervene where bias and procedural unfairness threaten the integrity of the proceedings. There is no fixed prohibition on reviews or appeals *in media res*. The test is one of balance of convenience.²⁵ Here the balance of convenience clearly favours an untainted process.

E6: Separation of powers

89. It is respectfully submitted that there is no separation of powers issue in this matter. The court will be referred specifically to the careful manner in which the relief against the President was pleaded to specifically refer to the rationality of any refusal on his part to terminate the appointment of the

²⁵ *Take and Save Trading CC v Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA) at paragraph [4].

Chairperson's appointment with immediate effect, at paragraph 26.3 of the Supplementary Affidavit.²⁶

90. To the extent that there is alternative relief sought to direct the President to terminate the appointment of the Chairperson, we agree with the Calata Group that the President is at large to do so.
91. In any event there can be no question of an unlawful encroachment when the President as the appointing authority, himself has expressed a desire not to be given advice by the Chairperson and has voluntarily taken the view that her non-recusal decision is untenable.

E7: Alleged abuse of process

92. Similarly there is no question of abuse of process by the applicants in resorting to the courts when aggrieved by an adverse decision of an organ of state on the pleaded grounds. It is the Chairperson who has abused the process of the court, knowingly.
93. The very purpose of section 6 of PAJA and/or the principle of legality read with Rule 53 is to provide protection by parties in the position of the applicants.

E8: Unreasonable delay and unconstitutional conduct

94. First it is specifically disputed that, on the objective facts the complaint of unreasonable delay against the first applicant can be sustained.

²⁶ CaseLines 004-39.

95. It is abundantly clear on the objective facts that such “*delay*” as there might have been on the part of the first applicant is from some time in mid-November to the first week of December, which is in the circumstances negligible as to be non-existent. The allegations and/or findings of the Chairperson to the contrary are demonstrably contrived when viewed against the admissions made in the present answering affidavit.
96. In terms of this-stage test articulated in the case of ***Khumalo***²⁷ once it is established that the alleged delay is not unreasonable or undue, that is the end of the matter. The second stage, discussed below, does not arise.
97. However and in the unlikely event that it is found that there was indeed any unreasonable and/or undue delay on the part of the first applicant, which is denied, then it is respectfully submitted that the ***Gijima***²⁸ principle should apply. According to that principle “*an unlawful act, being void ab initio, cannot be allowed by delay or any other consideration to be treated as valid*”.
98. The ***Gijima*** principle has accordingly replaced the second leg of the ***Khumalo*** test.
99. In our respectful submission the *Gijima* principle should not be confined to cases of self-review. There is no reason it principle for that to be so. That question was left open in the case of ***Notyawa***²⁹.

²⁷ *Khumalo v MEC for Education Kwa-Zulu Natal* 2014 (5) SA 579 (CC).

²⁸ *SITA v Gijima Holdings* 2018 (2) SA 23 (CC).

²⁹ *Notyawa v Makana Municipality* (2020) 41 ILJ 1069 (CC).

100. In this regard, the fatal mistake made by the Chairperson was to uphold the defence of unreasonable delay on the basis that “*even if I am wrong*” in the conclusions she had made regarding disqualifying bias.
101. It must be obvious that, once it is assumed that the impugned decision is otherwise unconstitutional and invalid on the basis of actual and/or reasonably perceived bias, it cannot somehow be rescued or resurrected by a defence of unreasonable delay from the legal consequences of such invalidity, whether in terms of section 172(1)(a) and/or 172(1)(b) according to which every competent court must declare as invalid law or conduct which is inconsistent with the Constitution. The only possible debate may arise in respect of the appropriate just and equitable remedies. The objective unconstitutionality is incurable.
102. The finding of the Chairperson that the recusal application could be dismissed on the basis of delay in circumstances where actual and/or reasonably apprehended delay of the magnitude referred to in the present circumstances is assumed, stands to be declared unconstitutional alternatively to be reviewed and set aside in terms of PAJA and/or 172(1)(b) of the Constitution.

E9: Conclusion on preliminary legal points

103. Regarding the points raised by the applicants and set out at Sections E1 to E3, above, the application ought to be granted without delving much into the rest of merits.

104. Regarding the legal defences raised by the respondents and dealt with at Sections E4 to E8 above, the court ought properly to dismiss them outrightly, for the reasons dealt with above.
105. The remaining issue of the alleged non-applicability of PAJA will be dealt with further below in Section G.
106. We now deal with the merits proper under the headings of :-
- 106.1. the declaratory relief;
- 106.2. the review relief under PAJA;
- 106.3. the review relief under the principle of legality; and
- 106.4. just and equitable remedies.

F: THE DECLARATORY RELIEF (Prayer 2)

107. As clearly stated in the founding affidavit,

“The urgent review application is coupled with stand-alone declaratory relief based on alleged breaches of fundamental and other constitutional provisions, in terms of section 172 and/or section 38 of the Constitution, together with a prayer for just and equitable remedies. This relief is independent and separate from the cause of action based on judicial review.”

108. The respondents have correctly admitted the position articulated above.
109. It is important to clearly articulate the legal and procedural implications of what is stated above namely that irrespective of the outcome and preferably

even before dealing with the review application, the separate application based on the declaratory relief ought properly to be decided.

110. The legal bases for prayer 2 are simply:-

110.1. the alleged breaches of section 9 and 34 of the Bill of Rights; and/or

110.2. the alleged breaches of sections 165 and/or 195 of the Constitution.

111. If any one of these grounds is clearly established then Prayer 2 must be granted and prayers 6 to 8 may be consequentially granted.

112. In order to avoid confusion regarding subsidiarity we refrain from any reliance on section 33 of the Constitution in this section for the purpose of the declaratory relief based on the Constitution. We refer to section 8 of the PAJA in that regard.

F1: The First Respondent's Conduct Violates the Rule of Law

113. The First Respondent's failure to file an answering affidavit in the recusal proceedings constitutes a fundamental breach of her duty to account. Her failure to provide any countervailing account under oath left "*serious, detailed, and unchallenged allegations of misconduct unanswered, in violation of her duty to act openly and accountably*".

F2: Section 9 of the Constitution

114. The alleged conduct of the Chairperson is in breach of section 9(1) of the Constitution more particularly in that the unequal treatment of the applicants and the respondents in the Semenya recusal application was clearly

calculated to treat the two parties differently and unfairly in breach of the injunction that:-

“Everyone is equal before the law and has the right to equal protection and benefit of the law.”

115. The principle that justice must be even-handed was unequivocally stated in **S v Roberts**³⁰, where the court held that a presiding officer should have no communication with either party except in the presence of the other. Its obvious intentions are to preserve the equality of arms and eliminate perceptions of bias.
116. The First Respondent's alleged secret communications with the Third Respondent, coaching him on his recusal application, constitutes a grave violation of this principle³¹. It irrationally differentiated between the parties, giving one a clandestine, unfair advantage in adversarial proceedings. The Respondents' failure to squarely deny the existence of these communications, resorting instead to “*confession and avoidance*”, is a telling admission.

F3: Section 34 of the Constitution

117. In **Magidiwana**³² it was correctly found that the provisions of section 34 may apply to Commissions of inquiry, depending on the specific facts of a particular case.

³⁰ 1999 (4) SA 915 (SCA) at para 23.

³¹ FA: 001-19.

³² *Legal Aid South Africa v Magidiwana and Others* 2015 (6) SA 494 (CC).

118. Section 34 guarantees everyone the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. This is clearly illustrated in the quotation from **SARFU** which appears earlier in these submissions in a different context.
119. In the present matter a distinction needs to be drawn between the ordinary work of the Commission as set out in the terms of reference and the special situation where the Commission is sitting to adjudicate an adversarially presented recusal application disputed between the Evidence Leaders on the one hand and the NPA and the Minister of Justice on the other.
120. Section 34 of the Constitution applies to the Commission itself but even more so to the recusal application proceedings.
121. The section has been breached in various respects including the failure of the Chairperson to consider, adequately or at all, some of the key issues in dispute between the parties or participants.
122. Breach of other constitutional provisions.
123. Irrespective of the resolution of the debate as to whether the Chairperson was acting in a judicial or administrative capacity, her conduct is in breach of section 165(2) of the Constitution and/or section 195(1) thereof.
124. In short and if her conduct must be evaluated in relation to her judicial office, which is denied, then she acted in breach of the duty to perform without fear, favour or prejudice and in *prima facie* breach of section 165 and/or section 8 of PRECCA. If on the other hand she acted as head of an organ of state,

then she nevertheless acted in breach of the anti-bias provisions of section 195(1) of the Constitution. It is a legal *cul-de-sac*.

125. In addition to the above the First Respondent's conduct, particularly in dismissing the recusal application and the events surrounding it, constitutes a direct and egregious violation of several fundamental rights enshrined in the Bill of Rights. This infringement is not merely technical; it goes to the heart of a constitutional democracy predicated on the rule of law, accountability, and procedural fairness.³³
126. The replying affidavit of 8 March 2026 reinforces and amplifies these violations, demonstrating that the Respondents' defences are unsustainable and that the constitutional breaches are even more profound than initially pleaded.³⁴

F4: Violation of Section 195 - Basic Values and Principles Governing Public Administration:

127. Section 195 sets out the basic values and principles governing public administration. These notably include a high standard of professional ethics, fairness, impartiality and the absence of bias.
128. The Commission is an organ of state, and the First Respondent is a public office-bearer. Her conduct must be measured against these principles.
129. The replying affidavit reinforces this:

³³ FA: 001-11 to 001-34.

³⁴ RA: 016-6 to 016-7 and RA: 016-19-016-25.

“The belated attempt at paragraph 209 of the answering affidavit to describe the required material as ‘private communication’ is demonstrably false and a desperate afterthought. It is belied by the repeated description of the said communications as being related to the work of the Commission which is a public and not private enterprise.”³⁵

F5: Violation of Section 165 and/or section 8 of PRECCA

130. Section 165(2) of the Constitution requires courts to apply the law impartially and without fear, favour or prejudice. Section 165(4) requires organs of state, through legislative and other measures, to assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness.
131. While the First Respondent is not a sitting judge, she correctly considers herself bound by her oath of judicial office. Her conduct must be judged against the highest standards of impartiality and professionalism.
132. Her conduct is clearly also in *prima facie* violation of PRECCA.
133. The President, being the appointing authority, states he does not oppose the relief and would not have appointed the First Respondent had he known of her history.³⁶
134. This admission by the Head of State that the appointment is now, in hindsight, problematic, provides an unassailable foundation for a declaratory order that her continued tenure is unconstitutional. It renders the procedural

³⁵ RA: 016-24: para 104.

³⁶ President's Affidavit: 009-310, para 14.

complexities of the review less critical, as the constitutional mandate for a lawful and rational appointment process has been breached. As the Applicant submits, the Court can and should grant the relief in Prayer 6 on an unopposed basis, disposing of the matter justly and equitably.³⁷

F6: Conclusion on the declaratory relief

135. On any one or more of the foregoing grounds, it is respectfully submitted that the relief sought in Prayer 2 ought properly to be granted, coupled with:-

135.1. the order to setting aside the invalid conduct; and

135.2. the order for removal alternatively termination of the appointment.

136. In that case it may not be necessary to proceed to the review application. However and in the event that the required relief sought in terms of section 172 of the Constitution, alternatively section 38 thereof, we now turn to the review relief.

G: THE REVIEW RELIEF

137. The review relief is based on PAJA, alternatively, the principle of legality. We deal with these alternative grounds in turn.

G1: PAJA

138. Before delving into the various PAJA grounds it will be appropriate to address the legal objection raised by the first to fifth respondents regarding the alleged non-applicability of PAJA.

³⁷ RA: 016-9: para 20-21.

139. The specific defence raised in this regard is that the impugned non-recusal decision cannot be said to have a direct legal effect or constitute one of finality in the administration of rights.
140. With regard to finality we cross-refer to what is stated above in respect of the *in media res* or ripeness objection.
141. As to the direct effect requirement reliance will be placed on the dictum in the leading case of ***Grey's Marine***³⁸ that direct legal effect refers to action which impacts directly and immediately on individuals. That test is surely met in the present circumstances particularly if it is taken into account that:-
- 141.1. the constitutional rights of the applicants, listed above have already been impacted; and
- 141.2. the terms of reference of the Commission included the threat of criminal proceedings against implicated persons.
142. In this regard reliance will be placed on the *dictum* of Skweyiya J in ***Joseph***³⁹, that:-
- “A finding that the rights of the applicants were materially and adversely affected for the purposes of section 3 of PAJA would necessarily imply that the decision had a direct, external legal effect.”*
143. Section 3 of PAJA deals with procedural fairness which encapsulates the rule against bias.

³⁸ *Greys Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313.

³⁹ *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) at paragraph [27].

144. In the premises, the grounds relied upon to plead the alleged non-applicability of PAJA, must fail.

G2: The PAJA grounds

145. The impugned decision or ruling was in breach of the legal standards set at in PAJA, more particularly in that:-

145.1. Section 5 of PAJA in so far as the Chairperson in her ruling and elsewhere, has failed to provide adequate reasons to me as the aggrieved party. The reasons given in the impugned ruling are severely deficient and/or inadequate.

145.2. Section 6(2)(a)(iii), in that upon the admitted facts the relevant decision was tainted by actual bias with reference to the giving of advice to Advocate Semenya SC and/or reasonably apprehended bias, with reference to the institutional and/or subject matter bias arising from the previous vocational involvement with the very issues under investigation, as more elaborately put in the pleadings in both the Zuma and Mbeki recusal applications.

145.3. Section 6(2)(e)(ii) in that the impugned conduct was clearly rooted in bad faith as well as the improper and/or ulterior motive of assisting Advocate Semenya SC to emerge victorious from the application for his recusal and to eliminate the prospects of success on the part of the opposing parties.

145.4. Section 6(2)(e)(iii) in that upon a reading of the ruling it is clear that, firstly, the Chairperson took into account the irrelevant considerations, including:-

145.4.1. the alleged intemperate language which unfairly sought to regulate my true feelings regarding what I considered to be cruel and degrading punishment;

145.4.2. the separate and severable opposition mounted by the Calata group;

145.4.3. the double reasonableness test and/or presumption of impartiality;

145.4.4. the cut off date of 2003;

145.4.5. the inapplicable remarks made in the *Irvin and Johnson* and/or the *Masuku* cases;

145.4.6. the inquisitorial nature of the ordinary proceedings of the Commission;

145.4.7. the alleged 8-month delay which relates to a period where I was not even aware of the existence of the Commission.

145.5. Section 6(2)(e)(iii) in that, secondly, the Chairperson, in the same breath, failed to take into account the relevant considerations, including:-

145.5.1. the failure of the respondents to deny the allegations of misconduct;

- 145.5.2. the failure by the Chairperson to submit any statement, in contrast to the position in the **SARFU** case;
 - 145.5.3. the distinction between administrative and judicial roles;
 - 145.5.4. the binding and total prohibition on undisclosed communications with only one party in a dispute;
 - 145.5.5. the prohibitions contained in Rules 11 and 13 of the Judicial Code of Conduct;
 - 145.5.6. the **Gijima** principle according to which undue delay cannot trump objective illegality and/or unconstitutionality.
- 145.6. Section 6(2)(f) in that in taking the decision the Chairperson breached several constitutional provisions and exceeded her powers.
- 145.7. Section 6(2)(h) in that, the non-recusal decision was so unreasonable that no reasonable decision maker could have made it, in all the prevailing circumstances.
- 145.8. In addition the Chairperson was, in these particular circumstances, not authorised, qualified or competent to sit in the hearing of an application dealing with alleged gross misconduct and/or criminal conduct on her own part. This is a violation of the rule against bias.
146. We repeat these detailed allegations directly from the pleadings simply to illustrate the fact that they have not been dealt with in any meaningful way by the respondents. Only the very bare denials found at paragraphs 201 to 202

and constituting true sentences have been pleaded. This does not qualify as opposition. The ***Plascon Evans*** Rule, referred to above, must apply in favour of granting the unanswered PAJA grounds.

G3: The principle of legality (Prayer 4)

147. In view of the failure to deal with the PAJA grounds, which also apply with equal force to legality, this leg of the review must succeed, in the event that it is even necessary to reach it, which is denied.
148. In short reliance will be placed on the same grounds advanced in respect of PAJA. There is therefore no need to repeat what has already been said immediately above.
149. None of the alleged conduct meets the traditional rationality test by any stretch of the imagination.

H: PUNITIVE AND/OR PERSONAL COSTS

150. For all the above reasons we proceed on the assumption that President Zuma will have made out a case for the main relief sought in his amended notice of motion. In that case the prayer for a personal costs on attorney and client scale against the Chairperson will kick in. The Chairperson should also be ordered to pay personal costs on an attorney and client scale. There are sufficiently exceptional circumstances justifying a punitive costs, as discussed below.
151. The Chairperson is a former justice of the Constitutional Court. Although retired, she is still bound by the Code of Judicial Conduct. The conduct of the

chairperson in these proceedings calls for judicial opprobrium through an appropriate costs order. The Code of Conduct requires all activities of a judge no longer in active service to be compatible with his status as a retired judge. In the context of providing judicial services (which applies with equal force in these proceedings), if a judge is of the view that there are no grounds for recusal but believes that there are facts which, if known to a party, might result in an application for recusal, such facts must be made known timeously to the parties. The Chairperson failed to provide President Zuma and the parties involved in this matter about her actual activities at the Amnesty Commission and the NPA.

152. In this regard reliance will be placed on the exemplary conduct of some judges when faced with similar situations.
153. Instead of explaining her role in order to take the parties into her confidence, the Chairperson resorted to technical arguments – which are not benefiting for a person holding the status of the retired judge, particularly a retired judge of the highest court in the land. The Chairperson has not explained her role in these bodies in her recusal ruling and the Semenya SC's answering affidavit, including the chairperson's confirmatory affidavit.
154. The Chairperson has not explained nor denied that as a member of the Amnesty Committee, she denied the killers of Richard and Irene Motasi amnesty. The Chairperson knew that the family members of Richard and Irene Motasi are participants at the Commission. This was information with the Chairperson's knowledge and failed to disclose to President Zuma and

President Mbeki her role. Similarly, the Chairperson failed to disclose her role in the Amnesty Committee's decision to refuse RJ Venter amnesty.

155. If established by the evidence the Chairperson, who is a retired judge of the Constitutional Court would have misconducted herself by providing advice and/or coaching one of the litigant, Semenya SC, in matter that she was required to her and rule on. This was a fundamental breach of the principles of natural justice by one of the most senior member of the judiciary.
156. The first to fifth respondents are aware that at the heart of President Zuma's review is, *inter alia*, the alleged coaching of the third respondent by the first respondent. However, the first to fifth respondents deliberately elected to produce an incomplete record in clear breach of Rule 53(1)(b) and section 34 of the Constitution. This Court must demonstrate its displeasure against the conduct of the first to fifth respondents through an appropriate punitive costs order. These exceptional circumstances include, *inter alia*, the following:
 - 156.1. the chairperson as an administrative body and the Chief Evidence Leader were obliged to provide a full and frank account of their impugned conduct.⁴⁰ The respondents are performing public functions. The Constitution demands accountability, responsiveness and openness from the first to third respondent.
 - 156.2. this required the chairperson and the Chief Evidence Leader to explain whether the alleged email exchanges took place in the

⁴⁰ *Public Protector v the South African Reserve Bank* 2019 ZACC 29 para 176.

Semenya recusal application. It is simply not enough for the first and third respondent to confess and avoid. It is also not enough for the chairperson to suggest that the emails may have been obtained in an unlawful manner. In any event, courts have a discretion to admit evidence if it is in the interest of justice.⁴¹

156.3. the chairperson and the Chief Evidence Leader did not explain why advice was provided to the Chief Evidence Leader in a contested matter before the same chairperson.

156.4. The chairperson did not explain why she shared her research output with the Chief Evidence Leader, on clear instruction that it must be passed to Advocate Vas Soni SC, who was representing Semenya SC in the Semenya recusal application.⁴²

157. The frivolous and technical points taken by the Chairperson, together with second to fifth respondents and the nature of the opposition offered are, technical, unreasonable, reckless and ill-advised in the extreme. At any rate, they fall far short of the expectation of her as the retired judge of the Constitutional Court.

158. The Chairperson's blatant refusal to account for her alleged coaching of Advocate Semenya SC by providing the email exchanges and WhatsApp messages, is conduct incompatible with her status as a retired judge.

⁴¹ *Waste Products Utilisation (Pty) Ltd v Wilkes and Another* 2003 (2) SA 515 (W) pp 549-550.

⁴² *The Public Protector v SARB* para 176.

159. What makes matters worse for the Chairperson in this matter is that the alleged coaching / email exchanges or WhatsApp messages is not denied by Advocate Semenya SC and the Chairperson in their affidavits. Yet, they have failed to provide a complete and full record.
160. We submit that there are exceptional circumstances for the granting of personal costs order on attorney and client scale.
161. The Constitutional Court has set the standard for the award of punitive costs.⁴³ This is one such case for such personal cost order on an attorney and client scale to be granted against the first respondent. We ask this Court to show its displeasure at the flagrant abuse of its process in the face of clear binding authority, clear conflict of interest, and the flagrant frustration of the Rule 53 process that ensures this Court is placed in a good position to properly perform its constitutional review functions. Without a full and complete record, this Court is impeded from carrying out its constitutional functions. The complete disregard of the timelines imposed by the Applicant in an urgent matter and the Acting Deputy Judge President's directive calls for punitive costs order against the first to fifth respondents.
162. We submit that a punitive costs on attorney and client scale is appropriate. There are exceptional circumstances for the grant of a punitive costs order. The first to fifth respondents' disregard of the rules of this Court and its directives is nothing short of vexatious, abusive and bad faith.

⁴³ *Public Protector v the South African Reserve Bank* 2019 ZACC 29 para 223.

163. As per Khampepe J in the ***Public Protector v South African Reserve Bank***, the allegations by President Zuma required explanations which were called for by President Zuma, since the alleged email exchanges and advice provided to the third respondent gave rise to a serious concern about the impartiality of the first respondent. President Zuma also explained that the alleged email exchanges and advice given to one litigant by the presiding officer gave a distinct impression that the chairperson was not impartial.⁴⁴
164. Other than the tactical approach by the first and third respondents to confess and avoid, they have not explained on oath to dispel the alleged bias claim against the chairperson. They have also not produced a full and complete record. Khampepe J in the ***Public Protector v South African Reserve Bank*** at paragraph 185 justifying for punitive costs held that “*the Public Protector was, however required to produce a full and complete record of the proceedings under review in terms of rule 53 of the Uniform Rules of Court. This included “every scrap of paper throwing light, however indirectly, on what the proceedings were, both procedurally and evidentially.”*”
165. The first to third respondents are eminent senior judges and eminent senior lawyers, represented by an eminent senior counsel in this matter. The obligation under Rule 53(1)(b) is an obligation that they are well acquainted with. The record, together with the email exchanges as held by Khampepe J in ***Public Protector v South African Reserve Bank*** were “*essential*” to enable President Zuma to understand the nature of the advice provided to the third respondent. It is ironic that the chairperson makes a *volte face* in

⁴⁴ Para 177.

matters involving herself in breach of her own binding principle. This Court should not countenance the conduct of the first and/or second to fifth respondents.

166. The Rule 53 record produced by the first to fifth respondents excluded important documents, including email exchanges and WhatsApp messages between the chairperson and the Chief Evidence Leader.⁴⁵ This deliberate omission is in stark contrast to the chairperson's obligation as an administrative body to assist this Court the review of her decision.⁴⁶ Even if it is the Commission is not an administrative body, legality applies.

167. We submit that a punitive costs order is justified. The chairperson failed to fully understand her constitutional duty to be impartial.⁴⁷ We submit that this Court should mark its disapproval of the conduct of the first respondent by awarding a punitive costs against the first respondent.

168. Insults to the President who is obviously concerned about receiving a report from a discredited body which will lack the most important ingredient(s) of transparency, accountability, openness and above all legitimacy in the eyes of the public.

169. If the Chairperson of the Commission, in the course and scope of her appointment to such an important public office, said anything which she is not prepared with the public then that is a reason for more not less disclosure.

⁴⁵ Public Protector v SARB para 186.

⁴⁶ Public Protector v SARB para 187.

⁴⁷ Public Protector v SARB para 219.

She cannot expect the courts to assist in concealing the truth, however ugly or personally embarrassing the truth may be.

I: CONCLUSION

170. In the result and in view of all the foregoing we respectfully submit that it may please the above Honourable Court to grant the relief as prayed for in the Amended Notice of Motion.

171. At the appropriate stage a draft order will be handed up.

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13 March 2026**

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