

**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 IN THE INTERLOCUTORY
APPLICATION TO COMPEL IN TERMS OF RULE 53(1)(b)**

A: INTRODUCTION

1. On 18 February 2026 the first applicant, President Zuma, delivered an interlocutory application to compel further and better discovery of documents forming part of the record of the first and/or further respondents. The application was brought in terms of Rule 53(1)(b) read with Rule 6(11).
2. In the context of the present application it is respectfully submitted that the interlocutory application must be decided upfront since the further conduct of the main application is largely dependent on its outcome.
3. In only two paragraphs (190 and 209) of its answering affidavit the first to fifth respondents mount a most half-hearted opposition to the application. Otherwise the detailed interlocutory application is met with a bare denial. The two paragraphs read as follows:-

“190. To the extent necessary I ... reiterate that President Zuma should not be permitted to rely on the existence of an anonymous whistleblower for his alleged possession of materials and communications that would, on his own version, have been illegally obtained and suggest criminality, if true (which is denied)”; and

“209 President Zuma is not at liberty simply to make unfounded allegations on the basis that a reverse onus will then be imposed upon the respondents to divulge private communications notwithstanding the absence of any truth or substance to such allegations.”

4. The most generous interpretation of these statements is that they seek to raise the following defences:-
 - 4.1. hearsay;
 - 4.2. illegally obtained evidence;
 - 4.3. the onus is on the applicant;
 - 4.4. privacy.
5. We will demonstrate below and during legal argument that none of these purported defences hold any water in the circumstances of this case. Notably the respondents have failed to raise any of the recognised defences in discovery causes, such as confidentiality, privilege or relevance.
6. In particular and in view of the fact that the application to compel is effectively unopposed and/or not seriously disputed, if it is granted it is most likely to trigger at least two important consequential process namely, the exercise by the first applicant of its right to file a further supplementary affidavit and the active participation of the NPA in the main application, an option which has been specifically and conditionally reserved by it. In any event the two applications are symbiotically linked.

B: THE TEST AND PROPOSED APPROACH

7. In short the principles to be applied in the present interlocutory application will be based on the provisions of Rule 53(1)(b), read with Rule 35 of the Uniform Rules of Court, with particular reference to sub-rules 35(3), 35(7) and/or 35(13).

8. That approach is adopted mindful of the legal position that although it is permissible to borrow from the principles applicable to Rule 35, the ambit of Rule 53(1)(b) is much wider in its reach. This was well articulated by Madlanga J in the leading case of **Helen Suzman**¹, as follows:

“The rule 53 process differs from normal discovery under rule 35 of the Uniform Rules of Court. Under rule 35 documents are discoverable if relevant, and relevance is determined with reference to the pleadings. So, under the rule 35 discovery process, asking for information not relevant to the pleaded case would be a fishing expedition. Rule 53 reviews are different. The rule envisages the grounds of review changing later. So, relevance is assessed as it relates to the decision sought to be reviewed, not the case pleaded in the founding affidavit.”

9. It is also trite that in motion proceedings, as in trial action proceedings, a compelling order will generally only be made after the legal issues have been established and crystallised ie. once all the affidavits have been filed. We have now reached that stage, albeit in the exceptional circumstances where the motion procedure is notably prescribed by law in terms of Rule 53.
10. The approach adopted below is in line with the two steps articulated by Joffe J in the leading case of **Swissborough**², namely to first deal with the existence of the required documents followed, where necessary by the question of relevance. Joffe J said that if a litigant requiring information which is in the possession of the State who *“is not satisfied with the discovery that*

¹ *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8; 2018 (4) SA 1 (CC).

² *Swissborough Diamond Mines (Pty) Ltd v Government of the RSA* 1999 (2) SA 279 (T).

is made he must discharge the onus of proving on the probabilities that the documents exist and/or are relevant, ... The fact that such onus lies on the party seeking the additional discovery should not act as a bar to him obtaining the relief which he seeks in an appropriate case”.

11. In making its determination, the court will be guided by various factors including:-

- 11.1. the pleadings;

- 11.2. any admissions made by the party making discovery; and

- 11.3. the nature of the case or the documents in issue.

12. In the assessment of the pleadings heavy reliance will be placed on the principles set out in the leading case of **Plascon Evans**³ and similar decisions.

13. Armed with the principles, we now proceed to deal with the present interlocutory application.

C: PRESIDENT ZUMA’S APPLICATION TO COMPEL

14. President Zuma filed a judicial review application in terms of PAJA and/or legality, read with of Rule 53 of the Uniform Rules of Court (**Uniform Rules**). President Zuma seeks, *inter alia*, to review and set aside the decision of the Chairperson of the Commission, Commissioner Sisi Khampepe (**first**

³ *Plascon-Evans Paint Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) 623 at pages 634 to 635.

respondent / Chairperson) delivered on 30 January 2026 (**the impugned decision**).

15. President Zuma called upon the first respondent in particular and/or any other respondents who played any role in the impugned decision to produce the record of the decision in terms of Rule 53(1)(b) of the Uniform Rules.
16. On 23 February 2026, the first respondent produced an incomplete record of the decision in clear breach of Rule 53(1)(b) of the Uniform Rules. In light of conduct of the first respondent to file an incomplete record, President Zuma filed an application to compel the first respondent and/or second to fifth respondents to comply with Rule 53(1)(b).
17. The documents that the first respondent and/or the second to fifth respondents deliberately refused and/or omitted to produce are clearly and indisputably highly relevant in the assessment of the lawfulness of the impugned decision. The respondents do not dispute their relevance. Without the relevant documents that the respondent(s) are deliberately refusing and/or omitting to produce, this Court is impeded from fully interrogating the impugned decision. This breaches President Zuma's right of access to court and just administrative action. The first and/or second to fifth respondents should be compelled to produce the documents that they have deliberately elected not to file with this Court.
18. These documents are not only called for by President Zuma. The National Prosecuting Authority (**NPA**), in its explanatory affidavit deals pertinently with the relevance of undisclosed documents. It was incumbent upon the first and third respondents to produce these documents, without being compelled by

President Zuma. The NPA in its explanatory affidavit correctly submits that this Court would benefit from clear and candid answers from the first respondent regarding the alleged communications in the Semenza recusal application.⁴ The fundamental problem is that there are no clear and candid answers regarding the alleged coaching of the third respondent by the first respondent. The first and third respondents have avoided dealing with the issue. It is unhelpful to suggest that President Zuma may have obtained the information in an unlawful manner. The key question is whether these relevant documents exist. The first and third respondents have unfortunately not provided clear and candid answers in respect of these documents.

19. The Court must take a dim view of the first and third respondent's conduct. The first respondent is a member of the judiciary. The third respondent is still bound by her oath of judicial office even when not acting in a judicial capacity. The Code of Judicial Conduct requires judges:
 - 19.1. to always act honourably and in a manner befitting judicial office.
 - 19.2. to ensure that all their activities are compatible with the status of judicial office.
 - 19.3. to comply with the law in relation to extra-judicial conduct.
 - 19.4. to make known to litigant facts which result in an application for recusal.

⁴ NPA's explanatory affidavit paras 17-23.

20. The first and third respondents have failed to produce a full and complete record. This conduct is not compatible with the status of the chairperson as a retired justice of the Constitutional Court. The chairperson ought to have led by example. She dismally failed to ensure that this Court properly review the lawfulness of her decision fully armed with the truth, however ugly and bitter that truth may be.

C1: The relevant documents that the respondents intentionally elected not to file with this Court.

21. The first respondent and/or the third respondent filed an incomplete record. They deliberately excluded the following relevant documents:

21.1. email exchanges between the evidence leader referred to in paragraph 38 to 40 of the founding affidavit in the Khampepe recusal application.

21.2. the email allegedly sent by the first respondent to the Advocate Semenya SC (**third respondent / Semenya SC**) on 5 November 2025 or any other date in November dealing with the issues raised in the Semenya recusal application, referred to in paragraph 23.6 of the replying affidavit in the Khampepe recusal application and in section H of the impugned ruling or decision of the first respondent.

21.3. copies of any research conducted by the Commissioners and passed onto the Evidence Leaders before the arguing of the Semenya recusal application.

21.4. transcripts or copies of the WhatsApp messages between the first respondent and the third respondent, also referred to in paragraph 23.6 of the replying affidavit in the Khampepe recusal application and in section H of the impugned ruling or decision of the first respondent; and

21.5. all other outstanding documents and/or reasons which shed light on the alleged misconduct and/or impugned decision.⁵

22. The first and third respondents should be compelled to produce the above relevant documents.

C2: The relevant documents exist and are in possession of the first and/or second to fifth respondents

23. Since relevance is not disputed, the application turns squarely on the question of existence.

24. At paragraph 32 of the founding affidavit⁶ it is specifically alleged that President Zuma was informed by a whistleblower that he had committed actions which amount to bias, gross misconduct and/or corruption in that she had, *inter alia*, coached and/or colluded with one of the parties in the Semenya SC recusal application, in that, she advised him of weaknesses in his case and even went as far as sharing research in her possession regarding the dispute and telling him to convey certain tips to Adv Vas Soni SC who was representing Adv Semenya SC.

⁵ Bundle A, Notice of Motion (**NOM**) in the Application to Compel paras 1.1 to 1.6, CaseLines pp 005-3-005-4.

⁶ CaseLines 001-17.

25. Remarkably the response of Adv Semanya SC, purporting to act on behalf of the Chairperson to these allegations is: "*I admit these allegations*". It is found at paragraph 182 of the answering affidavit.⁷
26. The existence of the documents has not been disputed by the first and/or second to fifth respondents. The third respondent in his answering affidavit, purportedly on behalf of the Commission, raises the following explanations:
- 26.1. that by the very nature of his appointment as the Evidence Leader, he speaks to the first respondent and other Commissioners regarding matters of the Commission.⁸
- 26.2. that frequent interactions between the first and third respondents are necessary.⁹
- 26.3. that the Commissioners may play a role in advising the Evidence Leaders on whom to call as witnesses, and statements of persons whom the Evidence Leaders propose to call as witness would be made available to the Commissioners in advance so that the Chairperson can advise on the sequence in which she would prefer the evidence to be led, and whether cross-examination of a particular witness should be permitted.¹⁰
- 26.4. that there is a need for frequent interaction between the Commissioner, on the one hand, and Evidence Leaders on the other.

⁷ CaseLines 015-47

⁸ Bundle B, Answering Affidavit (**AA**) in the Khampepe recusal application para 5.11, CaseLines p 077-103.

⁹ Bundle B, AA in the Khampepe recusal application para 10, CaseLines p 077-106.

¹⁰ Bundle B, AA in the Khampepe recusal application para 19, CaseLines p 077-109.

That these interactions take place in the absence of other persons.
And they may be described as “private”.¹¹

26.5. that the interactions take place more frequently and regularly between the first and the third respondents.¹²

26.6. that where necessary, the third respondent would communicate to the first respondent the views of the Evidence Leaders and the first respondent’s views to the Evidence Leaders. And the first respondent would communicate to her the views of the Commissioners (including her own).¹³

27. Upon reading the papers for a while there can therefore be no serious dispute about their existence. The regular and frequent interactions should naturally include the relevant documents sought by President Zuma. The Chairperson in her ruling further confirmed that she uses her private email in carrying out the work of the Commission, as alleged by the first respondent with the information received from the whistleblower.

28. It is also trite that in motion proceedings if an allegation is not met with a denial or denied even a confession and avoidance then the court will regard it as true for the purposes of the application.

29. In this regard the following was said in *Ebrahim v Georgoulas*¹⁴:-

¹¹ Bundle B, AA in the in the Khampepe recusal application para 20, CaseLines p 077-109.

¹² Bundle B, AA in the Khampepe recusal application para 21, CaseLines p 077-110.

¹³ Bundle B, AA in the Khampepe recusal application para 21, CaseLines p 077-110.

¹⁴ 1992 (2) SA 151 (B) at 154 C

“... the respondent has chosen to say nothing about most of the allegations made against him, leaving unanswered the important question whether there was in fact a contract or not These allegations must therefore be accepted.”

C3: The applicable legal framework

30. Rule 53(1) of the Uniform Rules provides that:

“Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any lower court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and served by the party seeking to review such decision or proceedings on the magistrate, presiding officer or chairperson of the court, tribunal or board or to the officer, as the case may be, and on all other parties affected –

(a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and

(b) calling upon the magistrate, presiding officer, chairperson or officer, as the case may be, to dispatch, within 15 days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as the magistrate, presiding officer, chairperson or officer, as the case may be is by law required or desires to give or make, and to notify the applicant that such magistrate, presiding officer, chairperson or officer, as the case may be has done so.

31. The first respondent and/or second to fifth respondents have failed to dispatch a full and complete record to the Registrar of this Court. The

Constitutional Court in ***Helen Suzman Foundation v Judicial Service Commission*** (“HSF”)¹⁵, held that:

[17] What forms part of the rule 53 record? The current position in our law is that – with the exception of privileged information – the record contains all information relevant to the impugned decision or proceedings. Information is relevant if it throws light on the decision-making process and the factors that were likely at play in the mind of the decision-maker. Zeffertt and Paizes make a comment on the exclusion of evidence on the grounds of privilege. That comment must surely be of relevance even to the exclusion of privileged information from a rule 53 record. After all, the content of a rule 53 record is but evidentiary in nature. The authors say that in the case of privileged information, the exclusion is based on the recognition that the general policy that justice is best served when all relevant evidence is ventilated may, in some cases, be outweighed by a particular policy that requires the suppression of that evidence. The fact that documents contain information of a confidential nature “does not per se in our law confer on them any privilege against disclosure.

[18] Specifically coming to a decision-maker’s deliberations, historically they have not formed part of the rule 53 record. This was based on this dictum in Johannesburg City Council:

“The words ‘record of proceedings’ cannot be otherwise construed, in my view, than as a loose description of the documents, evidence, arguments and other information before the tribunal relating to the matter under review, at the time of the making of the decision in question. It may be a formal record and dossier of what has happened before the tribunal, but it may also be a disjointed indication of the material that was at the tribunal’s disposal. In the latter case it would, I venture to think, include every scrap of paper throwing light, however indirectly, on what the proceedings were, both procedurally and evidentially. A record of proceedings is analogous to the record of proceedings in a court of law which quite clearly does not include a record of the deliberations subsequent to the receiving of the evidence and

¹⁵ *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8; 2018 (4) SA 1 (CC)

preceding the announcement of the court's decision. Thus the deliberations of the Executive Committee are as little part of the record of proceedings as the private deliberations of the jury or of the Court in a case before it. It does, however, include all the documents before the Executive Committee as well as all documents which are by reference incorporated in the file before it."

To state the obvious, "[t]he fact that the deliberations may in a given case occur privately does not detract from their relevance as evidence of the matters considered in arriving at the impugned decision."

[Emphasis Added]

32. The communications between the two persons may also be generously viewed as forming part of the deliberations leading up to the decision in the related Semenya SC recusal application. In that event the following *dictum* will apply:

"[23] Surely, deliberations are relevant to the decision they precede and to which they relate. Indeed, HC SANRAL correctly says so. They may well provide evidence of reviewable irregularities in the process, such as bias, ulterior purpose, bad faith, the consideration of irrelevant factors, a failure to consider relevant factors, and the like. Absent disclosure, these irregularities would remain hidden. Deliberations are the most immediate and accurate record of the process leading up to the decision.

33. The principles that emerges from the **HSF** case is that all relevant documents must be provided, unless there is some legal justification for not providing the record.¹⁶ The Court reasoned that *"the fact that a number of other relevant documents and reasons distilled from the deliberations have been provided does not detract from the unfairness of withholding other relevant information. The information that has been withheld may provide evidence of*

¹⁶ HSF para 27.

*reviewable irregularities that are not revealed by the other documentation. That is why the rule requires that all relevant documentation must be provided, unless there is some legally cognizable basis for withholding it.*¹⁷

34. The Supreme Court of Appeal (**SCA**) has also dealt with the importance of full and complete record in a constitutional democracy. In ***Democratic Alliance v Acting National Director of Public Prosecution 2012 (3) SA 486 (SCA)***¹⁸, the SCA held that:

“[37] In the constitutional era courts are clearly empowered beyond the confines of PAJA to scrutinise the exercise of public power for compliance with constitutional prescripts. That much is clear from the Constitutional Court judgments set out above. It can hardly be argued that, in an era of greater transparency, accountability and access to information, a record of decision related to the exercise of public power that can be reviewed should not be made available, whether in terms of Rule 53 or by courts exercising their inherent power to regulate their own process. Without the record a court cannot perform its constitutionally entrenched review function, with the result that a litigant’s right in terms of s 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated, would be infringed. The DA, in its application to compel discovery, has merely asked for an order directing the office of the NDPP to despatch within such time as the court may prescribe the record of proceedings relating to the decision to discontinue the prosecution, excluding the written representations made on behalf of Mr Zuma to the office of the NDPP. Subject to the question of standing which is dealt with next I can see no bar to such an order being made.”

¹⁷ HSF para 77.

¹⁸ At paragraph [37]

35. The conduct of the first respondent and/or second to fifth respondents in refusing to file a full and complete record is an affront to the rule of law and breaches the binding authority of the Constitutional Court and the SCA in ***HSF DA v ANDPP*** and many other settled cases on the applicability of Rule 53¹⁹.
36. President Zuma has pertinently alleged in his review application that in November 2025, it was reported to him by a whistleblower that the first respondent had committed actions which amount to bias, gross misconduct and/or corruption in that she had , *inter alia*, coached and/or colluded with one of the parties in the Semenya recusal application, namely, the third respondent in that she advised the third respondent of weaknesses in his case and even went as far as sharing research in her possession regarding the dispute in the Semenya recusal application and telling him to convey certain tips to Advocate Vas Soni SC who was representing the third respondent.²⁰ This is admitted The defence of hearsay can therefore not be sustained.
37. In the circumstances and in view of the fact that these statements are made under oath, it is our respective submission that they contain sufficiently cogent evidence to provoke the provisions of Rule 53(1)(b). It seems completely lost to the respondents that statements made under oath constitute evidence which at a minimum attracts the duty of rebuttal. The weight and/or admissibility of such evidence may be debated but not its inherent nature.

¹⁹ See also *Public Protector v South Africa Reserve Bank* [2019] ZACC 29.

²⁰ Bundle A, Founding Affidavit (**FA**) para 32, CaseLines p 001-17

38. The above allegation against the first and third respondents triggered an obligation to produce the email exchanges and/or the so-called frequent and regular interactions. The SCA held that in terms of Rule 53, the obligation to produce the record automatically follows upon the launch of the application, however ill-founded that application may later turn out to be.²¹ The first respondent and/or second to fifth respondents have not asserted or pleaded that the documents are legally privileged.
39. In any event, to the extent that this Court finds that the existence of these relevant documents is disputed, we submit that the first respondent and/or second to fifth respondents' response amounts to a confession and avoidance. Since the first respondent and/or second to fifth respondents pleaded confession and avoidance, the onus of proving the avoidance or justification rests on them.²² This is known as the **Mabaso** principle. It is also related to the rule in **Galante v Dickson**²³, according to which the absence of an explanation leads to the adoption of the version of the plaintiff or applicant. It also calls on the courts to adopt the more plausible inference.
40. It is trite that the onus for a justification shift to the justification party. That onus has not been discharged or even attempted by the first respondent and/or second to fifth respondents. The first and third respondents have not provided their email exchanges for the month of November 2025 to prove their avoidance. In other words, the first and third respondents must show that their frequent interactions were exclusively limited to the discharge of the Commission's mandate and terms of reference. This can only be determined

²¹ *Competition Commission v Computicket (Pty) Ltd* [2014] ZASCA 185; [2015] 1 CPLR 15 (SCA) para 20

²² *Mabaso v Felix* 1981 (3) SA 865 (A) p 875.

²³ *Galante v Dickson* 1950 (2) SA 460 (A) at 465

after the disclosure of the email exchanges. Without the full record, President Zuma and this Court cannot fully and properly assess the lawfulness of the decision making process.²⁴ To be clear, the email exchanges are relevant to the undisclosed collusion and coaching of the Evidence Leader(s).

41. The first respondent in her ruling or impugned decision found that:

“81. What is more sinister about these allegations is that former President Zuma does not explain the lawful bases upon which he has acquired such communications, on the assumption that these exist and are in his possession. It is an offence in terms of the Cybercrimes Act 19 of 2020 to gain access to another person’s computer system or data storage without permission. I have given no such permission to former President Zuma, or to anyone else for that matter, relating to the work of this Commission.

82. What is more, former President Zuma contends that I emailed Semanya SC from my private email address rather than my official address. The system that obtains is that all Commissioners use their private email addresses and have not been allocated official email addresses.”²⁵

42. It is clear from the first respondent’s ruling that the alleged communication with the third respondent using the first respondent’s private email is not actually denied or disputed. The application of some of the most trite and basic rules of the law of evidence overwhelmingly point to the existence of the documents.

²⁴ HSF para 13.

²⁵ Bundle A, Annexure JRZ1 paras 81-82 CaseLines pp 001-61-001-62.

43. We therefore submit that President Zuma has made out a proper case for this Court to compel the first respondent and/or second to fifth respondents to produce the documents sought in terms of the notice of motion.

C4: The defence of illegally obtained evidence

44. The Chairperson and Advocate Semanya SC have curiously advanced the defence of illegality obtained evidence. While the defence itself is still-born as demonstrated below, it is rather revealing as to the question of the existence or otherwise of the exchanges. The obvious rhetorical question is: If indeed the documents do not exist, how is it even conceivable that he assumed thereof might be guilty of the crime of obtaining them illegally?
45. The obvious answer is that the very possibility of such an offence is only consistent with the existence of the documents. The accusation is therefore a Freudian ship.
46. As if that were not enough, the Chairperson protests that the first applicant has accused her of writing the improper exchanges on her personal email and not the official computers supposedly issued to the Commissioners. In response the Commissioner reveals that all communications between her and the Evidence Leaders is indeed done on her personal computer because the Commissioners have not been issued with official devices. This too ought properly to serve as further, albeit unintended, corroboration of the version of the first applicant as revealed by the whistleblower.
47. To repeat, the first applicant has repeatedly indicated that the evidence of the alleged conduct of the Chairperson was not unlawfully obtained but

conveyed by a whistleblower. To the extent that it may therefore be regarded as hearsay, we respectfully submit that it ought to be admitted under the exceptions of the nature of the evidence or any other factor which in the opinion of the court should be taken into account. The key factor is the protection of whistleblowers along the lines set out in the applicable legislation and the general fight against corruption.

48. Even in the unlikely event that it were to be found that the evidence was illegally obtained as highly speculated by the respondents, it would be of no assistance to the Chairperson because in our law there is no total or automatic prohibition against the admissibility of illegally obtained evidence, especially in civil matters. As Brand J correctly put it in ***Fedics***²⁶:-

“(In criminal proceedings) the accused is under no duty to disclose his defence nor is he obliged to disclose any documents which might strengthen the State’s case. In civil proceedings the position is quite the opposite. A litigant is not only obliged to disclose his case, he is also obliged to discover all documents which may damage his own case or which may directly or indirectly enable his adversary to advance his case.”

49. After further discussing the legal principles Brand J concluded that

“It goes without saying that the Court will, in any event, have regard to all the other circumstances of a particular case.”

²⁶ *Fedics Group (Pty) Ltd v Matus* 1998 (2) SA 617 (C) at paragraph [90]

50. In the present matter the particular circumstances must include the devastating unsolicited evidence publicly given by the official spokesperson of the Commission to the effect that he had discussed the specific accusations with the Chairperson and that the advice was indeed given but there was nothing wrong with doing so, which is consistent with the confession and avoidance stance cagily adopted by both Adv Semanya SC and the Chairperson for whom he speaks under oath.
51. This defence therefore cannot avail the respondents.

C5: Ignoring the pertinent concerns and questions raised by the NPA

52. To make matters worse and relevant to the present application, the first to fifth respondents have elected to ignore and/or failed to comment on the explanatory affidavit of the NPA. Such failure is only consistent with the allegations of active concealment of relevant information and/or malicious compliance with Rule 53.
53. The contents of that affidavit ought properly, with the leave of the court, to be read as part of this application.
54. The stance adopted by the first applicant and the NPA must also be viewed against the clear provisions of section 165 of the Constitution which enjoins organs of state, such as the Commission, “*to assist and protect the courts to ensure the independence, impartiality, dignity and effectiveness of the courts*”.

D: CONCLUSION AND THE NEED FOR PUNITIVE AND/OR PERSONAL COSTS IN THE INTERLOCUTORY APPLICATION

55. In a conspectus of all the circumstances, and absent any sustainable or legally cognisable defence, the application to compel the disclosure of the listed documents as part of the Rule 53 record ought properly to be granted.
56. The first applicant has exceedingly discharged the onus of establishing the existence of the documents. The second leg of the test, namely relevance, has not been disputed.
57. Furthermore and given the status, training and experience of the two persons involved in the alleged misconduct, it can only be assumed that they are fully aware of the legal obligation to be candid with the court and to assist it in the discharge of its judicial duties.
58. The first respondent presided over many cases in which she and others made pronouncements which are relevant to the present matter.
59. It is improper for the respondents to be cagey and play cat and mouse with the first applicant, the public and the court, all of whom remain in the dark as to the existence and/or contents of the alleged irregular communications.
60. The respondents ought to be judged according to the higher standard consistent with their oaths of office(s).
61. In the event that the order is granted the opposing respondents ought properly to be mulcted with punitive and/or personal costs on the basis of gross unreasonableness and recklessness.²⁷ The Court is also duty bound

²⁷ *President of the RSA v Public Protector* 2018 (2) SA 100 (GP) at paragraphs [187] to [190]

to seriously depreciate the proven conduct, most of which has not even been denied or is undeniable.

E: RELIEF SOUGHT

62. The applicant seek the following interlocutory relief:-

62.1. Ordering the first and/or fourth to fifth respondents to file, forthwith and within 2 days:-

62.1.1. all email correspondence exchanged between the Chief Evidence Leader and the Chairperson pertaining to the contents of paragraphs 38 to 40 of the founding affidavit in the Khampepe recusal application.

62.1.2. the correspondence from the National Prosecuting Authority and/or Department of Justice notifying the Commission of the intention to institute the Semenya recusal application.

62.1.3. the email allegedly sent by the first respondent to the Advocate Semenya SC (**third respondent / Semenya SC**) on 5 November 2025 or any other date in November dealing with the issues raised in the Semenya recusal application, referred to in paragraph 23.6 of the replying affidavit in the Khampepe recusal application and in section H of the impugned ruling or decision of the first respondent.

62.1.4. copies of any research conducted by the Commissioners and passed onto the Evidence Leaders before the arguing of the Semenya recusal application.

62.1.5. transcripts or copies of the WhatsApp messages between the first respondent and the third respondent, also referred to in paragraph 23.6 of the replying affidavit in the Khampepe recusal application and in section H of the impugned ruling or decision of the first respondent; and

62.1.6. all other outstanding documents and/or reasons which shed light on the alleged misconduct and/or impugned decision.²⁸

62.2. Ordering the first respondent to pay the costs of the interlocutory application personally and on the punitive attorney and client scale.

D.C. MPOFU SC

H.B. MATLHAPE

B.N. BUTHELEZI

K. MONARENG

K. PAMA-SIHUNU

**Counsel for the First Applicant
Chambers, Sandton**

13 March 2026

²⁸ Bundle A, Notice of Motion (**NOM**) in the Application to Compel paras 1.1 to 1.6, CaseLines pp 005-3-005-4.

LIST OF AUTHORITIES

1. Democratic Alliance v Acting National Director of Public Prosecution 2012 (3) SA 486 (SCA)
2. Ebrahim v Georgoulas 1992 (2) SA 151 (B)
3. Fedics Group (Pty) Ltd v Matus 1998 (2) SA 617 (C)
4. Galante v Dickson 1950 (2) SA 460 (A)
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6. Mabaso v Felix 1981 (3) SA 865 (A)
7. *Plascon-Evans Paint Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3)
8. President of the RSA v Public Protector 2018 (2) SA 100 (GP)
9. Public Protector v South Africa Reserve Bank [2019] ZACC
10. Swissborough Diamond Mines (Pty) Ltd v Government of the RSA 1999 (2) SA 279 (T)