



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 90/26

In the matter between:

JACOB GEDLEYIHLEKISA ZUMA

First Applicant

THABO MVUYELWA MBEKI

Second Applicant

and

**CHAIRPERSON OF THE JUDICIAL COMMISSION
OF INQUIRY INTO ALLEGATIONS REGARDING
EFFORTS OR ATTEMPTS HAVING BEEN
MADE TO STOP THE INVESTIGATION
OR PROSECUTION OF TRUTH AND
RECONCILIATION COMMISSION
CASES**

First Respondent

**SECRETARY OF THE JUDICIAL COMMISSION OF
INQUIRY INTO ALLEGATIONS REGARDING
EFFORTS OR ATTEMPTS HAVING BEEN
MADE TO STOP THE INVESTIGATION
OR PROSECUTION OF TRUTH AND
RECONCILIATION COMMISSION
CASES**

Second Respondent

ISHMAEL SEMENYA N.O.

Third Respondent

FRANS KGOMO N.O.

Fourth Respondent

ANDREA GABRIEL N.O.

Fifth Respondent

CALATA GROUP

Sixth Respondent

NATIONAL PROSECUTING AUTHORITY

Seventh Respondent

**MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT**

Eighth Respondent

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

Ninth Respondent

Neutral citation: *Zuma and Another v Chairperson of the Judicial Commission of Inquiry into Allegations Regarding Efforts or Attempts Having Been Made to Stop the Investigation or Prosecution of Truth and Reconciliation Commission Cases and Others* [2026] ZACC 34

Coram: Mlambo DCJ, Dambuza J, Kollapen J, Majiedt J, Mathopo J, Mhlantla J, Nuku AJ, Rogers J and Theron J

Judgments: Theron J (first judgment): [1] to [153]
Nuku AJ (second judgment): [154] to [190]
Rogers J (third judgment): [191] to [202]

Heard on: 29 June 2026

Decided on: 31 August 2026

Summary: Superior Courts Act 10 of 2013 — section 47(1) — judge of a Superior Court — judicial independence — consent to sue

Review application — Promotion of Administrative Justice Act 3 of 2000 — principle of legality — grounds of review — rationality — bias

Recusal application — reasonable apprehension of bias

ORDER

On application for leave to appeal directly from the High Court of South Africa, Gauteng Division, Johannesburg (High Court):

1. Leave to appeal directly is granted.

2. The appeal is partially upheld. The order of the High Court is set aside and replaced with the following:
 - “(a) The point *in limine* raised by the first to fifth respondents in respect of section 47(1) of the Superior Courts Act 10 of 2013 is dismissed.
 - (b) The application to review the ruling, delivered on 30 January 2026 by the Chairperson of the Judicial Commission of Inquiry into Allegations Regarding Efforts or Attempts Having Been Made to Stop the Investigation or Prosecution of Truth and Reconciliation Commission Cases dismissing the recusal applications, is dismissed.”
3. The seventh respondent’s application for condonation for the late filing of the explanatory affidavit is refused with costs.
4. Except for the order in paragraph 3, each party is to pay their own costs in the High Court and in this Court.

JUDGMENT

THERON J (Mlambo DCJ, Mathopo J and Mhlantla J concurring):

“The Commission operates at the intersection of profoundly significant and competing interests: the Calata Group and other victims seeking long-delayed truth and accountability; former Presidents whose personal and reputational interests are engaged; and the foundational constitutional values of national unity, reconciliation, and the rule of law that underpinned the [Truth and Reconciliation Commission]’s restorative justice framework. Maintaining public confidence in such a process requires scrupulous institutional impartiality. Any reasonable perception that the Chairperson’s continued involvement may compromise that impartiality risks

undermining the Commission's credibility and rendering its work vulnerable to lasting doubt."¹

Introduction

[1] This matter consists of two urgent applications. The first is an application for leave to appeal directly against the order and judgment of the High Court of South Africa, Gauteng Division, Johannesburg (High Court). The second is an application for direct access. These applications involve the same parties, concern similar factual matrices and overlap in the relief sought. The central questions to be determined address the interpretation of section 47(1) of the Superior Courts Act² (Act) and the review of a recusal decision. The applicants are two former Presidents, Mr Jacob Gedleyihlekisa Zuma and Mr Thabo Mvuyelwa Mbeki.³

[2] The first respondent is Commissioner Sisi Khampepe, who was a Justice of this Court from 2009 until her retirement in 2021. In May 2025, she was appointed by the ninth respondent, President Matamela Cyril Ramaphosa, to serve as the Chairperson of the Judicial Commission of Inquiry into Allegations Regarding Efforts or Attempts Having Been Made to Stop the Investigation or Prosecution of Truth and Reconciliation Commission Cases (Commission). The Commission has two other commissioners, Commissioner Frans Kgomo, who retired as the Judge President of the High Court of South Africa, Northern Cape Division in September 2017, and Commissioner Andrea Gabriel SC, an advocate. They are cited as the fourth and fifth respondents, respectively. The second respondent is the Secretary of the Commission. The third respondent is Advocate Ishmael Semenya SC, the Commission's Chief Evidence Leader. The first, third, fourth and fifth respondents are all cited *nomine officio* (in their official capacities). The first to fifth respondents are referred to as the Commission Respondents.

¹ *Zuma v Chairperson of the Commission Commissioner Sisi Khampepe (minority)* [2026] 2 All SA 684 (GJ) (High Court minority) at para 184.

² 10 of 2013.

³ Given the significant overlap in the applicants' pleadings and submissions, I refer to them collectively, save for where it is necessary to differentiate.

[3] The sixth respondent is the Calata Group, a collective term referring to twenty-five families who have been seeking the prosecution of apartheid-era crimes that involved the torture and killing of their family members. The seventh and eighth respondents are the National Prosecuting Authority (NPA) and the Minister of Justice and Constitutional Development (Minister), respectively. The two applications are opposed by the Commission Respondents and the Calata Group.⁴

Background

Establishment of the Commission

[4] The present applications stem from earlier applications for Commissioner Khampepe to recuse herself from the Commission. The broader context of the Commission and its significance to South Africa's democratic and constitutional transformation, however, form the critical backdrop against which this case must be viewed. In our still-maturing constitutional democracy, we continue to grapple with the legacies of our troubled past and the compromises of the negotiated transition. The navigation of these intricacies requires utmost care and integrity, constant attentiveness to their impact on both an individual and a societal level and an unwavering commitment to the judicious exercise of public power.

[5] The Commission is one example of this navigation. Its origin traces back to the Truth and Reconciliation Commission (TRC), an institution integral to South Africa's democratic transition. The TRC was designed to, among other things, establish as complete a picture as possible of the gross human rights violations that took place during apartheid; facilitate the granting of amnesty in appropriate cases; restore the dignity of victims and survivors; and promote national unity and reconciliation through truth and justice. Plainly, its significance cannot be overstated.

⁴ The NPA has filed an explanatory affidavit and an application for the condonation for the late filing thereof. I will discuss these filings later in this judgment.

[6] As part of its process, the TRC, and its Amnesty Committee in particular, reviewed and decided applications for amnesty. The handling of these applications was governed by the Promotion of National Unity and Reconciliation Act⁵ and premised on a negotiated compromise: perpetrators who made full disclosure could obtain amnesty, while those who did not would face legal consequences. Indeed, while the TRC granted amnesty to many who applied, in a considerable number of cases, amnesty was refused. Beginning in 1998, the TRC referred cases to the NPA for further investigation and possible prosecution. I refer to these cases as the TRC cases. The continued investigation and possible prosecution of the TRC cases fell primarily on the shoulders of two state functionaries: the NPA and the South African Police Service (SAPS).

[7] In the ensuing years, however, there was little progress in the prosecution of the TRC cases. This silence and inaction have led to public dissatisfaction. In particular, victims and survivors of apartheid-era crimes, as well as their families, have long sought justice and accountability. Worsening their frustration were concerns that the State's failure to prosecute the TRC cases may be the result of political interference. In *Rodrigues*, the High Court found:

“What occurred in the period from about 2003 until 2017 was that all investigations into TRC cases and other crimes of the past were stopped as a result of an executive decision taken at a high level that purported to interfere with the [NPA]’s prosecutorial decision making.

The [National Director of Public Prosecutions] describes this interference as follows:

‘The only conclusion to arrive at is that the delay in prosecuting . . . was as a result of the political interference and the “severe political constraints” to which the [National Director of Public Prosecutions] was subjected.’

There was thus what can only be described as high-level executive interference on investigating and prosecuting TRC crimes and other crimes of the past in the period from 2003 until about 2017.”⁶

⁵ 34 of 1995.

⁶ *Rodrigues v National Director of Public Prosecutions* 2019 (2) SACR 251 (GJ) at paras 21-3.

[8] There can be no question about the seriousness of these alleged influences. On 17 January 2025, the Calata Group launched an application in the High Court of South Africa, Gauteng Division, Pretoria (Calata Application). They primarily alleged that the Executive, the NPA, the SAPS and other state organs colluded or acquiesced in the suppression of the TRC cases. Settlement discussions ensued. On 29 May 2025, President Ramaphosa, in a proclamation, established the Commission “to investigate allegations of whether efforts or attempts were made to stop the investigation or prosecution of [the TRC] cases”.⁷ According to its Terms of Reference, the Commission—

“must, in relation to the period since 2003, inquire into, make findings, report on and make recommendations concerning the following, guided by the Constitution, relevant legislation, policies and guidelines—

- 1.1 whether, why, and to what extent and by whom, efforts or attempts were made to influence or pressure members of the [SAPS] or the [NPA] to stop investigating or prosecuting TRC cases;
- 1.2 whether any members of the [SAPS] or the [NPA] improperly colluded with such attempts to influence or pressure them; and
- 1.3 whether any action should be taken by any Organ of State, including possible further investigations to be conducted or prosecutions to be instituted, where appropriate, of persons who may have acted unlawfully by—
 - 1.3.1 attempting to influence or pressure members of the [SAPS] or the [NPA] to stop investigating or prosecuting TRC cases; or
 - 1.3.2 members of the [SAPS] or the [NPA] colluded with or succumbed to attempts to influence or pressure such members to stop investigating or prosecuting TRC cases; and
- 1.4 whether, in terms of the law and fairness, the payment of any amount in constitutional damages to any person is appropriate.”⁸

⁷ Terms of Reference of the Judicial Commission of Inquiry to Inquire into Allegations Regarding Efforts or Attempts Having Been Made to Stop the Investigation or Prosecution of Truth and Reconciliation Commission Cases; Proc R264 GG 52749 of 29 May 2025 (Terms of Reference).

⁸ Id at para 1.

[9] As the history of the Commission and its Terms of Reference elucidate, its establishment represents the culmination of demands over decades for justice in the TRC cases. The Commission serves to unearth the truth behind the alleged suppression of the TRC cases and bring our society one step further along in its transformation from a past marked by systematic oppression and impunity to a future premised on democracy, accountability and human rights.

[10] When the Commission was established, its term was to end on 29 May 2026. This term has since been extended to 18 December 2026. The Commission's Regulations afford it the power to "determine its own procedures".⁹ The Regulations also confer on Commissioner Khampepe the authority to "appoint . . . persons and officers as may be required to assist the Commission in carrying out its functions".¹⁰ Pursuant to these regulations, Commissioner Khampepe promulgated the Commission's Rules on 29 August 2025.¹¹

[11] In September 2025, the Commission, pursuant to rule 3.3 of its Rules,¹² served notices informing the applicants that they may be implicated persons and invited them to participate in the Commission's proceedings (Rule 3.3 Notices). After a series of exchanges, on 3 December 2025, President Zuma's attorneys sent a letter to the Commission demanding "the immediate recusal of [Commissioner Khampepe]". In response, Commissioner Khampepe directed President Zuma to file an application for

⁹ Judicial Commission of Inquiry to Inquire into Allegations Regarding Efforts or Attempts Having Been Made to Stop the Investigation or Prosecution of Truth and Reconciliation Commission Cases: Regulations; Proc R 278 GG 53183 of 19 August 2025.

¹⁰ *Id* at para 4.

¹¹ Rules of the Judicial Commission of Inquiry to Inquire into Allegations Regarding Efforts or Attempts Having Been Made to Stop the Investigation or Prosecution of Truth and Reconciliation Commission Cases; Proc R 285 GG 53251 of 29 August 2025.

¹² Rule 3.3 states:

"If the Commission's Evidence Leader intends to present to the Commission a witness, whose evidence implicates or may implicate another person, it must, through the Secretary of the Commission, notify that person ('implicated person') in writing within a reasonable time before the witness gives evidence."

her recusal, which he did on 15 December 2025. Four days later, President Mbeki brought a similar application, also seeking Commissioner Khampepe's recusal. These applications are referred to collectively as the recusal applications.

[12] In the recusal applications, the applicants called for Commissioner Khampepe's recusal on various grounds. While some grounds have since been abandoned, the grounds that remain relevant are largely grouped under two categories: Commissioner Khampepe's occupational history and her handling of allegations related to Advocate Semenya.

[13] On occupational history, the applicants raised concerns surrounding Commissioner Khampepe's two prior roles. First, she served as a Commissioner for the TRC between 1995 and 2001 and specifically as a member of the TRC's Amnesty Committee between 1996 and 2001. The applicants alleged that, at the TRC, Commissioner Khampepe—

- (a) assessed and determined applications for amnesty;
- (b) participated in the refusal of amnesty to the alleged killers of Richard and Irene Motasi¹³ and in the consideration of amnesty applications relating to the kidnapping of the "Pebco Three",¹⁴ all of whose family members were parties to the Calata Application and are interested parties before the Commission;
- (c) was part of the panel that refused amnesty applications brought by 37 members of the African National Congress ("ANC 37"),¹⁵ including the applicants and others who are, or may become, implicated persons before the Commission; and

¹³ Richard Motasi was a policeman who was killed alongside his wife, Irene Motasi, by members of the security police.

¹⁴ Sipho Samuel Hashe, Qaqawuli Godolozi and Twasile Champion Galela, collectively known as the "Pebco Three", were kidnapped by the Apartheid Security Branch.

¹⁵ The "ANC 37" includes the applicants and other prominent members of the African National Congress, who previously served or currently serve in the Executive.

- (d) was involved in the writing of the TRC's findings and recommendations and that, beginning in 1998, the TRC recommended that the NPA investigate and possibly prosecute cases where the TRC denied amnesty – these cases form part of the TRC cases.

[14] The second role of concern to the applicants was that, between September 1998 and December 1999, Commissioner Khampepe served as a Deputy National Director of Public Prosecutions (Deputy NDPP), the second highest prosecutorial position within the NPA. The applicants alleged that:

- (a) Her tenure at the NPA overlapped with the establishment and operationalisation of the Human Rights Investigation Unit (HRIU).
- (b) The HRIU's mandate was, among other things, to review records of amnesty applications before the TRC, investigate apartheid-era human rights violations and make recommendations on the possible prosecution of the TRC cases.
- (c) Commissioner Khampepe played a role in the HRIU, including by advising the then-National Director of Public Prosecutions (NDPP), Mr Bulelani Ngcuka, on the approach in the TRC cases, and by working with Judge Vincent Saldanha,¹⁶ who was the head of the HRIU in 1999. Both Mr Ngcuka and Judge Saldanha are witnesses before the Commission.
- (d) Had she not been a member of the Commission, Commissioner Khampepe would herself be a competent witness before the Commission.

[15] The applicants argued that, collectively, these roles placed Commissioner Khampepe in close institutional and decisional proximity to the very historical record, evaluative judgements and prosecutorial consequences that form the essential backdrop to the Commission's present mandate. They asserted that these roles

¹⁶ Judge Saldanha is a judge of the High Court of South Africa, Western Cape Division, Cape Town.

are “an obvious disqualifier” and that a reasonable observer would apprehend that Commissioner Khampepe might have an institutional interest in validating the propriety of decisions made during her tenure in either role. For these reasons, her previous roles give rise to a reasonable apprehension of bias.

[16] Additionally, the applicants alleged that Commissioner Khampepe endorsed an irregular private agreement between Advocate Semenya and Advocate Howard Varney, lead counsel for the Calata Group at the Commission. This agreement was said to have contravened rule 3.1 of the Commission’s Rules by allowing Advocate Varney to lead evidence of the Calata Group’s witnesses.¹⁷

[17] It was also alleged that Commissioner Khampepe condoned a breach of her directive by Advocate Semenya. In September 2025, the Calata Group informed Commissioner Khampepe of concerns regarding a possible conflict of interest involving Advocate Semenya, which stemmed from his prior involvement in the *Nkadimeng* case,¹⁸ a lawsuit surrounding an NDPP prosecuting policy titled “Prosecuting Policy and Directives Relating to the Prosecution of Offences Emanating from Conflicts of the Past and Which Were Committed on or Before 11 May 1994” (Prosecution Policy). Advocate Semenya appeared for the NDPP and the Minister in that case. On 19 September 2025, Commissioner Khampepe responded that while she “make[s] no decision” on these concerns, she was “minded going with” a solution that would preclude Advocate Semenya from questioning any NPA officials on the Prosecution Policy. On 13 November 2025, however, Advocate Semenya interviewed Dr Silas Ramaite SC, a former Acting NDPP. The interview traversed the Prosecution Policy, among other topics. The allegation was that Commissioner Khampepe overlooked this breach of her directive, thereby giving rise to a reasonable apprehension of bias on her part.

¹⁷ Rule 3.1 states:

“Subject to anything to the contrary contained in these Rules or to the Chairperson’s directions in regard to any specific witness, the Commission’s Evidence Leader bears the overall responsibility to present the evidence of witnesses to the Commission.”

¹⁸ *Nkadimeng v National Director of Public Prosecutions* [2008] ZAGPHC 422.

[18] The final allegation in respect of Advocate Semenya related to how Commissioner Khampepe handled the application for his recusal as the Commission's Chief Evidence Leader (Semenya recusal application). After the NPA and the Department of Justice and Constitutional Development filed the Semenya recusal application, Commissioner Khampepe allegedly acted improperly by giving Advocate Semenya legal advice in the form of coaching him by pointing out potential pitfalls in the application and proposing instructions for him to give to his legal representative. President Zuma said that he had obtained evidence of secret communications between Commissioner Khampepe and Advocate Semenya from a whistleblower and contended that these communications constituted actual bias. The Commission received both oral and written submissions on the Semenya recusal application, which was dismissed on 4 December 2025.

[19] On 16 January 2026, all three commissioners heard argument on the recusal applications in respect of Commissioner Khampepe. Two weeks later, Commissioner Khampepe delivered a ruling on these applications (recusal ruling).

[20] In her ruling, Commissioner Khampepe set out the applicable legal framework, stating that recusal is warranted where there is either actual bias or a reasonable apprehension of bias. Relying on this Court's judgments in *SARFU*,¹⁹ *Masuku*²⁰ and *Bernert*,²¹ Commissioner Khampepe reiterated that the test for a reasonable apprehension of bias is objective and entails a double requirement of reasonableness: both the notional person apprehending the alleged bias and the apprehension itself must be reasonable. Given the strong presumption of judicial impartiality, the duty on judicial officers to sit in matters when not recused and their training and experience, she further emphasised that a party seeking the recusal of a judicial officer must do so with

¹⁹ *President of the Republic of South Africa v South African Rugby Football Union* [1999] ZACC 9; 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC).

²⁰ *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku* [2022] ZACC 5; 2022 (4) SA 1 (CC); 2022 (7) BCLR 850 (CC).

²¹ *Bernert v Absa Bank Ltd* [2010] ZACC 28; 2011 (3) SA 92 (CC); 2011 (4) BCLR 329 (CC).

“cogent or convincing evidence”²² and articulate “a logical connection between the matter and the feared deviation”.²³

[21] Commissioner Khampepe found that her prior institutional roles did not give rise to a reasonable apprehension of bias on the basis that the applicants had failed to articulate a logical connection between these roles and the Commission’s present investigation. She held that the allegations by the applicants were “based simply on generalised suspicions and claims, with no attempt to state what [she] did or when during those times, that is relevant to the work of [the] Commission”.²⁴ She reasoned that the subject matter of the Commission’s work, being “efforts or attempts having been made to stop the investigation or prosecution of TRC cases” were not “pertinent before the TRC’s Amnesty Committee or indeed at the [NPA] during [her] tenure there”.²⁵ Finally, she relied on the Commission’s Terms of Reference, which specify that the Commission must conduct its inquiry “in relation to the period since 2003”.²⁶ She found that, as her roles in the NPA and the TRC ended in 1999 and 2001, respectively, an apprehension of bias based on these roles would not be reasonable.²⁷

[22] Commissioner Khampepe also found that President Zuma provided “no evidence whatsoever of [the alleged improper] communications” between her and Advocate Semenya.²⁸ She reasoned that given the nature of the Commission, frequent communications between her and the evidence leaders were necessary. Commissioner Khampepe found that she was empowered to endorse the evidence-leading arrangement pursuant to rule 3.1 of the Commission’s Rules. She further held that the applicants had failed to establish any relevant connection between

²² *South African Commercial Catering and Allied Workers Union v Irvin & Johnson Limited Seafoods Division Fish Processing* [2000] ZACC 10; 2000 (3) SA 705 (CC); 2000 (8) BCLR 886 (CC) (SACCAWU) at para 12.

²³ *Ex Parte Goosen* 2020 (1) SA 569 (GJ) (*Goosen*) at para 29, endorsed in *Masuku* above n 20 at para 69.

²⁴ Recusal ruling at para 52.

²⁵ *Id* at para 45.

²⁶ *Id* at para 56.

²⁷ *Id* at paras 56-8.

²⁸ *Id* at para 70.

Advocate Semanya's participation in proceedings related to the Prosecution Policy and her ability to apply her mind impartially to the Commission's work.²⁹

[23] Commissioner Khampepe additionally found that the applicants unreasonably delayed in filing the recusal applications. She reasoned that the Commission's Terms of Reference, her position as a Commissioner and her employment history were public knowledge on or before 29 May 2025.³⁰ The applicants, however, made no effort to seek her recusal until December 2025. As the applicants did not proffer satisfactory explanations for this delay, she held that the recusal applications fell to be "non-suited on this ground alone".³¹

Litigation history

High Court proceedings

[24] The applicants approached the High Court on an urgent basis to review the recusal ruling (review application). They asked the High Court to declare the recusal ruling unconstitutional and invalid, set aside that ruling and order the removal of Commissioner Khampepe from the Commission. In addition, President Zuma sought to compel the discovery of records, including, among other things, certain correspondence between Commissioner Khampepe and Advocate Semanya related to the Semanya recusal application.

[25] President Ramaphosa filed an explanatory affidavit in the High Court. In it, he stated that when he appointed Commissioner Khampepe to the Commission, he was unaware of her prior involvements with the TRC and the NPA. He went on to state that he "would not have appointed her" had he been aware of these institutional involvements when he established the Commission.³²

²⁹ Id at paras 103-6.

³⁰ Id at paras 112-13.

³¹ Id at paras 134 and 140.

³² *Zuma v Chairperson of Commission Commissioner Sisi Khampepe (majority)* [2026] 2 All SA 668 (GJ) (High Court majority) at para 11.

[26] In their answering affidavit at the High Court, the Commission Respondents denied Commissioner Khampepe's involvement in the HRIU. Further, the Commission Respondents and the Calata Group raised a preliminary objection that the High Court lacked jurisdiction over the review application. This was so, they contended, because the applicants did not comply with the peremptory provisions of section 47 of the Act. That section reads:

“47 Issuing of summons or subpoena in civil proceedings against judge

- (1) Except for an application made in terms of the Domestic Violence Act, 1998 (Act 116 of 1998), no civil proceedings by way of summons or notice of motion may be instituted against any judge of a Superior Court, and no subpoena in respect of civil proceedings may be served on any judge of a Superior Court, except with the consent of the head of that court or, in the case of a head of court or the Chief Justice, with the consent of the Chief Justice or the President of the Supreme Court of Appeal, as the case may be.
- (2) Where the issuing of a summons or subpoena against a judge to appear in a civil action has been consented to, the date upon which such judge must attend court must be determined in consultation with the relevant head of court.”

It is common cause that the applicants neither sought nor obtained the consent of the Chief Justice or any Judge President prior to instituting the review application.

High Court majority

[27] The Full Court produced two judgments in a bifurcated approach, with the majority judgment delivered on 30 March 2026 and the minority on 21 April 2026 – some three weeks apart. In ordinary practice, even when a matter is before the High Court on an urgent basis, all judgments are delivered together. This practice should not be encouraged.

[28] Two of the three members of the Full Court dismissed the review application on the point *in limine* (at the threshold) based on non-compliance with section 47(1) and

did not reach the merits of the review application or the recusal applications.³³ The majority held that the purpose of section 47 is to provide “a procedural filter that protects judges from unwarranted litigation that could compromise their independence or distract them from their duties”.³⁴

[29] The majority held that section 47 applies to civil proceedings, including review applications. It reasoned that the section’s language is intended to cover all civil proceedings instituted by way of summons or notice of motion, with the only exception being an “application made in terms of the Domestic Violence Act”.³⁵ The review application, having been instituted by a notice of motion and listing Commissioner Khampepe as a respondent, thus fell within the ambit of section 47(1). The majority relied on *FUL*, which held that “[r]eview proceedings are civil proceedings”.³⁶

[30] The majority embraced an expansive definition of section 47 that applies to judges in both their judicial and personal capacities, including actions arising from their personal interactions. It also adopted the reasoning in *FUL* that section 47 does not distinguish between active and retired judges and applies equally to retired judges who continue to perform judicial services.³⁷ The High Court in *NP* also held that section 47 applies to retired judges if proceedings against them arise from their judicial functions.³⁸

[31] The majority approved of the approach adopted in *FUL* in its inquiry on whether chairing a commission of inquiry falls under judicial service. In *FUL*, the High Court relied on the definition of “service” in the Judges’ Remuneration and Conditions of

³³ Id at paras 54-5.

³⁴ Id at para 44.

³⁵ Id at para 21, referring to the Domestic Violence Act 116 of 1998 (Domestic Violence Act).

³⁶ *Freedom Under Law v Motata* [2021] ZAGPPHC 14 at para 32. See High Court majority above n 32 at para 25.

³⁷ High Court majority id.

³⁸ *NP v LP* 2021 (4) SA 559 (ECG) at para 49.

Employment Act³⁹ (Remuneration Act), which includes “service as a chairperson or a member of a commission as contemplated in the Commissions Act [8 of 1947]”,⁴⁰ to support its conclusion that section 47(1) extends to retired judges.⁴¹ On this point, the majority noted that the High Court in *Memela*⁴² found that the chairperson of the State Capture Commission⁴³ was not contemplated in section 47(1). However, it declined to follow *Memela*, finding that *Memela* failed to engage with binding precedent. Instead, the majority supported the rationale emerging from *Mantashe*⁴⁴ that *Memela* was “clearly wrong” for failing to take into account the definition of service in the Remuneration Act.⁴⁵ The majority further noted that in her role at the Commission, Commissioner Khampepe remains bound by her judicial oath and the ethical standards that attach to her judicial office. For these reasons, the majority held that section 47(1) applies to Commissioner Khampepe and that the applicants were required to seek the consent of the Chief Justice.

[32] The majority went on to find that the consent requirement in section 47(1) is a jurisdictional prerequisite, and that non-compliance therewith renders subsequent proceedings void *ab initio* (from the outset). According to the majority, a litigant’s failure to comply with this requirement cannot be condoned. Therefore, the majority held that the applicants’ non-compliance with section 47(1) was fatal and dismissed the review application. The majority deemed it unnecessary to decide the merits of President Zuma’s interlocutory application, as the dismissal of the review application rendered it moot.

³⁹ 47 of 2001.

⁴⁰ Section 1 of the Remuneration Act.

⁴¹ *FUL* above n 36 at para 25. See also High Court majority above n 32 at paras 25 and 27.

⁴² *Memela v Chairperson of the State Capture Commission of Inquiry* [2025] ZAGPPHC 816.

⁴³ Judicial Commission of Inquiry to Inquire into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State.

⁴⁴ *Mantashe v Zondo N.O.*, unreported judgment of the High Court of South Africa, Gauteng Division, Johannesburg, Case No. 007263/2022 (12 October 2025).

⁴⁵ High Court majority above n 32 at paras 34-6.

High Court minority

[33] The minority judgment parted ways with the majority on its conclusions on section 47(1). Additionally, it found that the recusal ruling was unlawful. On remedy, the minority would have set aside that ruling and ordered the recusal of Commissioner Khampepe.

[34] The minority found that the majority “adopt[ed] an unduly formalistic reading of section 47” by “overemphasis[ing] the protective purpose of section 47(1) while marginalising its textual limits and ignoring the unintended consequences that flow from extending the consent requirement to recusal reviews”.⁴⁶ According to the minority, the purpose of section 47 is twofold:

“First, it is to protect judges against frivolous and vexatious litigation in which they are targeted due to their work on the bench. Second, to ensure that appearance by a judge in court does not disrupt court proceedings.”⁴⁷

[35] The minority found that the nature of the proceedings in this case was dispositive of the applicability of section 47(1). Recusal proceedings, so reasoned the minority, are “never brought as new proceedings” but “always [arise] from proceedings that are underway”.⁴⁸ Ordinarily, the recusal of a judge is sought in proceedings where the judge is not cited as a party. Where the recusal order is not granted, the aggrieved party is entitled to appeal the decision and the judge is not cited in the appeal proceedings. The minority reasoned that recusal applications are aimed at ensuring the fairness of the proceedings – not at lodging claims against judges.

[36] By analogy, the minority viewed the recusal applications as objections to the Commission’s jurisdiction, which was asserted by the Rule 3.3 Notices. When the applicants brought these applications before the Commission, they were not launching

⁴⁶ High Court minority above n 1 at paras 23-4.

⁴⁷ Id at para 33.

⁴⁸ Id at para 40.

new proceedings as contemplated in section 47(1). The minority reasoned further that the subsequent review application in the High Court did “not morph into new proceedings as foreshadowed in section 47(1)”.⁴⁹ It was rather “akin to an appeal against a decision by a judge refusing to recuse herself”.⁵⁰ To distinguish the review application from an appeal would be to “permit an objection during secondary proceedings and place a hurdle that potentially insulates recusal decisions from judicial scrutiny”.⁵¹ The minority saw this distinction as “manifestly at odds with the purpose, context and language of the provision”.⁵² Accordingly, the minority concluded that section 47(1) does not apply to an application to review a recusal ruling.

[37] After dispensing with the preliminary section 47(1) objection, the minority evaluated the merits of the review application. One of the grounds on which the applicants challenged the recusal ruling was that it was decided by Commissioner Khampepe alone, although all three commissioners heard oral argument on it. Relying on *SARFU*, the applicants argued that the disqualification of a judicial officer on the basis of a reasonable apprehension of bias requires collective decision-making where possible. The minority agreed and reasoned that the Commission’s Rules can neither contravene settled law nor clothe Commissioner Khampepe with authority not sourced in law. Thus, the minority found that Commissioner Khampepe lacked the power to decide the recusal applications unilaterally, and the recusal decision was *ultra vires* (beyond authority).

[38] Relying on *Trencon*,⁵³ the minority deemed substitution to be a just and equitable remedy. On the substantive grounds of the recusal applications and in respect of Commissioner Khampepe’s past institutional roles, the minority found that past associations could create a reasonable apprehension of bias in the following recognised

⁴⁹ Id at para 48.

⁵⁰ Id.

⁵¹ Id.

⁵² Id.

⁵³ *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC).

situations: “where the subject matter of the litigation arises from the past role, or where the judge previously advised a party in relation to the matter”.⁵⁴ Under this test, the minority concluded that these roles were sufficient to raise a reasonable apprehension of bias.

[39] The minority was unpersuaded by the temporal boundary argument because the Rule 3.3 Notices traced suspected interferences back to the period of Commissioner Khampepe’s involvement in the NPA. Given the Commission’s focus on the prosecutorial treatment of the TRC cases, the minority found that the subject matter of the Commission’s work “traverses the same prosecutorial history and the same body of TRC-related cases that formed the context of [Commissioner Khampepe’s] past roles”.⁵⁵ It thus found the distinction between the Commission’s mandate and the prosecution of the TRC cases to elevate form over substance. The minority also accorded considerable weight to the fact that Mr Ngcuka and Judge Saldanha, both former colleagues of Commissioner Khampepe during her time at the NPA, are witnesses before the Commission. It opined that these facts rendered Commissioner Khampepe a competent witness in the same Commission that she is chairing. It concluded that the subject matter of the Commission does arise from Commissioner Khampepe’s prior roles.

[40] The minority found that President Zuma had “failed to establish any factual substratum capable of sustaining a finding of actual bias” based on the allegation that Commissioner Khampepe improperly coached or assisted Advocate Semenya.⁵⁶ It further found that Commissioner Khampepe’s approval of the witness leading arrangement could not, viewed in isolation, justify a finding of a reasonable apprehension of bias. Additionally, the minority found that Commissioner Khampepe’s response to the Calata Group on 19 September 2025 about Advocate Semenya’s involvement in proceedings related to the Prosecution Policy did not amount to a

⁵⁴ High Court minority above n 1 at para 130.

⁵⁵ Id at paras 131-2.

⁵⁶ Id at para 149.

binding directive. Consequently, she did not sanction any breach of her own directive.⁵⁷ In totality, the minority found that although Commissioner Khampepe's acts pertaining to these allegations "were capable of criticism", they did not in and of themselves "justify a finding of bias".⁵⁸ Finally, the minority found that the delay in bringing the recusal applications could be overlooked, because "the seriousness of the issues raised – particularly [Commissioner Khampepe's] prior institutional roles – carries decisive weight".⁵⁹

Issues for determination

[41] The following issues arise for determination:

- (a) whether this matter engages this Court's jurisdiction and, if so, whether leave to appeal directly to this Court should be granted;
- (b) whether the applicants, pursuant to section 47(1) of the Act, had to seek the consent of the Chief Justice before filing the review application in the High Court;
- (c) if the answer to (b) is no, whether this Court should entertain the merits of the review application;
- (d) if the answer to (c) is yes, whether the review application should succeed; and
- (e) whether this Court should grant condonation for the NPA's late filing of its explanatory affidavit.

Jurisdiction and direct appeal

[42] The question whether the applicants had to seek the consent of the Chief Justice prior to instituting the review application turns on the interpretation of section 47(1) of the Act. While not all questions of statutory interpretation engage this Court's

⁵⁷ Id at para 159.

⁵⁸ Id at para 162.

⁵⁹ Id at para 170.

jurisdiction,⁶⁰ those that turn on the interpretation of a statute through the prism of constitutional rights, values and principles are constitutional questions.⁶¹ Here, the interpretation of section 47(1) is interwoven with the right of access to courts.⁶² The question also requires this Court to consider the fundamental tenet of judicial independence.⁶³ Therefore, this Court's constitutional jurisdiction is engaged. This question of interpretation also engages our general jurisdiction, as it is an arguable point of law of general public importance, and it is one which this Court ought to consider, having regard to differing views expressed on this question by various divisions of the High Court.

[43] This Court grants leave to appeal directly to it where it is in the interests of justice to do so.⁶⁴ Whether leave should be granted depends on the facts of each case.⁶⁵ Although there is no exhaustive list, factors to be considered include the importance of the legal question, the possibility that a dispute of fact may arise, the extent to which lower courts have considered the question, the necessity to bring finality and certainty to the question, urgency and whether time and costs would be saved.⁶⁶

[44] The interpretation of section 47(1) is a purely legal inquiry. This inquiry transcends the narrow interests of the parties. In addition to its intersection with the right of access to courts and judicial independence, this inquiry has broader public implications. It is not uncommon that retired judges serve as commissioners. Various decisions of the High Court have expressed divergent views on the interpretation of

⁶⁰ *Sunwest International (Pty) Ltd v Western Cape Gambling and Racing Board* [2025] ZACC 18; 2025 (11) BCLR 1322 (CC); 2026 (2) SA 9 (CC) at para 25.

⁶¹ Section 39(2) of the Constitution. See also *id* at paras 32-3 and *Fraser v Absa Bank Ltd (National Director of Public Prosecutions as Amicus Curiae)* [2006] ZACC 24; 2007 (3) BCLR 219 (CC); 2007 (3) SA 484 (CC) at para 47.

⁶² Section 34 of the Constitution.

⁶³ Section 165(2) of the Constitution.

⁶⁴ Section 167(6)(b) of the Constitution.

⁶⁵ *Freedom of Religion South Africa v Minister of Justice* [2019] ZACC 34; 2019 (11) BCLR 1321 (CC), 2020 (1) SA 1 (CC) at para 27.

⁶⁶ *Id* and *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* [2006] ZACC 23; 2007 (4) BCLR 339 (CC); 2007 (4) SA 395 (CC) at para 21.

section 47(1).⁶⁷ It is therefore desirable to bring finality and legal certainty to this inquiry. It also bears repeating that the subject matter of the Commission is of great public significance and touches on the foundation of our constitutional democracy. While this Court is slow to condone bypassing the Supreme Court of Appeal,⁶⁸ it has, in the present matter, the benefit of the two judgments in the High Court and the views expressed by other courts. These considerations all favour granting leave to appeal directly to this Court.

[45] Another consideration is urgency. Urgency may afford grounds for engaging this Court directly where a delay in securing a definitive ruling would “prejudice the public interest or prejudice the ends of justice”.⁶⁹ This matter was patently urgent when it was launched, as the Commission’s term was due to expire on 29 May 2026. The extension of the Commission’s term to 31 December 2026 has alleviated but not eradicated this urgency. Additionally, the enforcement of summons for the applicants to give evidence before the Commission has only been stayed until 1 September 2026. The relief that the applicants seek include an order directing the removal of Commissioner Khampepe from the Commission. Such relief could call into question the preceding and ongoing work of the Commission, which is operating at significant cost to public resources.

[46] The respondents contend that the urgency is self-created, as the applicants only requested Commissioner Khampepe’s recusal about three months after receiving the Rule 3.3 Notices. This delay is neither ideal nor immaterial, and this Court has previously held that recusal applications should “be raised at the earliest possible stage”.⁷⁰ The applicants’ main explanation – that they needed time to strategise and

⁶⁷ For example, *NP* above n 38; *FUL* above n 36; *Mthenjwa v Steyn* [2017] ZAWCHC 161 (*Mthenjwa*); *Engelbrecht v Khumalo* 2016 (4) SA 564 (GP) (*Engelbrecht*); and *Soller v President of the Republic of South Africa* 2005 (3) SA 567 (T) (*Soller*).

⁶⁸ *Bruce v Fleecytex Johannesburg CC* [1998] ZACC 3; 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) (*Fleecytex*) at para 8.

⁶⁹ *Id* and *Transvaal Agricultural Union v Minister of Land Affairs* [1996] ZACC 22; 1996 (12) BCLR 1573 (CC); 1997 (2) SA 621 (CC) at paras 18-19.

⁷⁰ *Bernert* above n 21 at para 71.

weigh various considerations – does not constitute a wholly satisfactory explanation. Notwithstanding the delay, this matter remains urgent and it is in the interests of justice for this Court to entertain this matter.⁷¹ On a holistic evaluation of the foregoing factors, leave to appeal directly to this Court on an urgent basis is granted.

Interpretation of section 47(1)

[47] In general terms, section 47(1) prevents a litigant from instituting civil proceedings against a judge of a Superior Court without the consent of the head of that Court.⁷² The applicants argue that this section does not apply to the review application, and that the High Court erred by wrongly extending the section's scope to include retired judges who are cited *nomine officio* as chairpersons of commissions of inquiry, mischaracterising the review application as a civil proceeding against a judge and finding that section 47(1) is a jurisdictional prerequisite.

[48] The respondents submit that on a textual reading, section 47(1) excludes only domestic violence proceedings. It draws no distinction between retired judges and those in active service. They further submit that Commissioner Khampepe falls within the ambit of section 47(1) and that the applicants were required to seek the Chief Justice's consent before instituting the review application.

[49] It is trite that statutory interpretation is a unitary exercise, requiring courts to consider text, context and purpose collectively and construe statutes consistently with the Constitution.⁷³ I begin with a discussion of the context and purpose of section 47(1).

⁷¹ See *Economic Freedom Fighters v Speaker of the National Assembly* [2026] ZACC 17; 2026 (8) BCLR 761 (CC) at paras 93-5.

⁷² Except for actions that arise from the Domestic Violence Act.

⁷³ *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 28 and *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) at para 18.

Context and purpose of section 47

[50] Section 47(1) is the successor of section 25(1) of the previous Supreme Court Act⁷⁴ (repealed Act). The main difference from its predecessor is that it extends its protection to Justices of this Court.⁷⁵ The High Court in *Soller* held that section 25(1) of the repealed Act operated as a restriction against vexatious litigation and stated:

“Judges should not, in the execution of their judicial functions, be inhibited by fear of being dragged to court unnecessarily over their judgments. Such a threat could have a chilling effect on the execution of their duties. Furthermore, judges should rather spend time hearing matters than defending themselves against endless unfounded civil claims.”⁷⁶

[51] *Engelbrecht* concerned civil proceedings instituted against a sitting judge in her personal capacity. Expounding on the purpose and context of section 47(1), that Court stated:

“Section 47(1) is the mechanism through which the institution of legal proceedings against judges is regulated and plays what I regard as a gate keeping role. In essence the section seeks to insulate judges from unwarranted and ill-conceived legal proceedings aimed at them. The need to protect judges from unwanted litigation is not difficult to fathom. The core function of judges is the adjudication of disputes involving competing interests daily. The judgments they hand down as well as the statements they make in court and in their judgments invariably displease some litigants and sometimes their legal representatives.”⁷⁷

⁷⁴ 59 of 1959. Section 25(1) read:

“Notwithstanding anything to the contrary in any law contained, no summons or subpoena against the Chief Justice, a judge of appeal or any other judge of the Supreme Court shall in any civil action be issued out of any court except with the consent of that court: Provided that no such summons or subpoena shall be issued out of an inferior court unless the provincial division which has jurisdiction to hear and determine an appeal in a civil action from such inferior court, has consented to the issuing thereof.”

⁷⁵ Before the Act came into effect, the question of suing Justices of this Court used to be governed by section 5 of the Constitutional Court Complementary Act 13 of 1995.

⁷⁶ *Soller* above n 67 at para 14.

⁷⁷ *Engelbrecht* above n 67 at para 3.

[52] The long title of the Act indicates that its object is, among other things, to “make provision for the administration of judicial functions of all courts”.⁷⁸ This is reaffirmed in section 2(1)(c)⁷⁹ of the Act under the title “[o]bjects and interpretation of [the] Act”. The preamble of the Act further discusses the goal of providing for “a uniform framework for judicial management, by the judiciary, of the judicial functions of all courts” and unifying a “fragmented court structure and infrastructure”.⁸⁰ Overall, the Act is primarily concerned with the governance and functioning of the courts. Tied to this objective, the Act also deals with the function of the heads of each Superior Court. The head of each Superior Court is responsible for ensuring that sufficient judges are available to conduct the business of that court and issuing directions to the judges of their court with respect to their attendance at court.⁸¹

[53] Another important contextual consideration is section 47(2). As section 47(1)’s twin provision, it addresses civil proceedings against judges of Superior Courts after the consent stipulated in section 47(1) has been obtained. Section 47(2) requires consultation with the relevant head of court for the determination of the date that a judge may appear in a civil action.⁸² These provisions do not operate in isolation but form part of a unitary legislative scheme. Read together, they are concerned with the management of judicial capacity and the proper functioning of the courts. Section 47(1)

⁷⁸ The long title reads:

“To rationalise, consolidate and amend the laws relating to the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa; to make provision for the administration of the judicial functions of all courts; to make provision for administrative and budgetary matters relating to the Superior Courts; and to provide for matters incidental thereto.”

⁷⁹ The section reads:

“To make provision for the administration of the judicial functions of all courts, including governance issues, over which the Chief Justice exercises responsibility.”

⁸⁰ The Preamble of the Act.

⁸¹ Section 9(4)(a) and (b) of the Act.

⁸² Section 47(2) reads:

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

plays a gatekeeping role against unmeritorious and vexatious claims, and section 47(2) ensures that meritorious claims do not unduly inconvenience our courts.

[54] A holistic evaluation of the foregoing reveals that section 47(1) serves three related purposes. First, it shields judges from vexatious, frivolous or otherwise unmeritorious litigation. Second, it protects the proper administration of courts and ensures that court functions are not unduly disrupted by civil proceedings against judges. Third, it enables judges to apply the law without fear, favour or prejudice,⁸³ thereby enhancing the independence and integrity of the Judiciary as a whole. The jurisprudential crux of section 47(1) is the nature of the judicial office and its essential requirement of judicial impartiality. It safeguards judicial decision-making from the spectre of frivolous litigation and guards against the wheels of justice being slowed by unmeritorious stratagems aimed at the Judiciary.

[55] Our courts have recognised that section 47 does not confer an absolute immunity on judges against civil proceedings.⁸⁴ A fundamental tenet of the rule of law is that nobody is above the law. Section 47(1) operates in tandem with our common law judicial immunity to strike the appropriate balance between judicial independence and judicial accountability, as well as the proper administration of justice.

Is Commissioner Khampepe a “judge of a Superior Court”?

[56] Section 47(1) applies to civil proceedings instituted against a “judge of a Superior Court”. On a textual reading, section 47(1) states that no civil proceedings, except for proceedings in terms of the Domestic Violence Act, may be instituted against any judge of a Superior Court without the consent of the head of that court. It has been held that the language of section 47 is expansive and covers both matters related to judges’ official duties and personal matters.⁸⁵

⁸³ Section 165(2) of the Constitution.

⁸⁴ *Soller* above n 67 at para 16 and *Mthenjwa* above n 67 at paras 11 and 13.

⁸⁵ High Court majority above n 32 at para 27. See also *Engelbrecht* above n 67 at para 5 and *Soller* id at para 17.

[57] While section 1 of the Act defines “Superior Court” as “the Constitutional Court, the Supreme Court of Appeal, the High Court and any court of a status similar to the High Court”, the Act does not define a “judge”. The Commission Respondents rely heavily on this lack of a definition to argue that section 47(1) does not distinguish between active and retired judges. For section 47(1) to apply, however, the operative inquiry is whether Commissioner Khampepe is a “judge of a Superior Court”.

[58] After twelve years of distinguished service, Commissioner Khampepe retired from the Constitutional Court in 2021. It is common cause that, presently, she does not participate in proceedings of this Court. Under these circumstances, she is not a Justice of this Court. The Constitution and the Act both stipulate that the composition of this Court consists of the Chief Justice, the Deputy Chief Justice and nine other Justices.⁸⁶ The Constitution also stipulates that a maximum of eleven judges can serve at a given time.⁸⁷ Former Justices who no longer make up this composition, such as Commissioner Khampepe, are not Justices of this Court under section 167(1) of the Constitution or section 4(1)(a) of the Act.

[59] Similarly, the Supreme Court of Appeal consists of a President, a Deputy President and “so many other judges as may be determined in accordance with the prescribed criteria, and approved by the President”.⁸⁸ Each division of the High Court also consists of a Judge President, a Deputy Judge President and “so many other judges as may be determined in accordance with the prescribed criteria, and approved by the President”.⁸⁹ For a judge to be considered a “judge of a Superior Court” for the purpose of section 47(1), they must form part of the composition of one of the Superior Courts as defined in the Act. The Act frequently makes reference to the judge or judges “of” a particular court, and it is clear that in all cases the reference is to

⁸⁶ Section 167(1) of the Constitution and section 4(1)(a) of the Act.

⁸⁷ Section 167(1) of the Constitution.

⁸⁸ Section 5(1)(a) of the Act.

⁸⁹ Section 6(2) of the Act.

those persons currently serving as judges of the court, not retired or former judges of the court.⁹⁰ Commissioner Khampepe is not a member of the Supreme Court of Appeal or of the High Court. It follows that she is not a “judge of a Superior Court”.

[60] This interpretation also accords with the context and purpose of section 47(1). As mentioned, an important objective underpinning the section is to ensure the proper functioning of courts. The Chief Justice, as the head of this Court, assumes the responsibility of managing it, including the determination of the court roll, the allocation of responsibilities to the other Justices and the approval of their extraordinary absences from this Court. The Chief Justice has no oversight role in respect of retired Justices of this Court. More broadly, retired judges do not form part of the composition of their former courts: they do not contribute to the functioning of those courts, nor do their former heads of court exercise oversight over them. To include them under the definition of a “judge of a Superior Court” under section 47(1) would contradict the legislative scheme and provide little benefit to the functioning of the courts or the Judiciary.

[61] Additionally, this interpretative extension risks creating a perception that judges are above the law. While section 47(1) only plays a gatekeeping role and does not offer an absolute bar against civil lawsuits, to extend its reach to all judges, active and retired, would mean that once a person is appointed as a “judge of a Superior Court”, they would enjoy the protection of section 47(1) for the remainder of their life. Including former judges who no longer render active service under the section’s scope would help neither the management of the courts nor the functioning of the Judiciary. To the contrary, it would add to the administrative burden on the heads of court. Moreover, this interpretive extension would impose a procedural hurdle on litigants who wish to institute proceedings against former judges merely because they used to form part of the Judiciary. This may foster the impression that the law treats judges differently from others. In *Prinsloo*, this Court held that the right to equality before the law, now

⁹⁰ See, for example, para (iv) of the definition of “head of court” in section 1; section 4(1)(a) (dealing with the composition of this Court); and sections 6(4)(c), 7(2), 9(4)(a)-(b), 17(2)(a) and (c), 35(3), 36(5) and 40(2).

enshrined in section 9(1) of the Constitution, means that “no one is above or beneath the law and that all persons are subject to law impartially applied and administered”.⁹¹

[62] The need to shield judges from vexatious or frivolous litigation so that they can apply the law without fear, favour or prejudice also diminishes when section 47(1) is applied to retired judges. I am aware that the threat of retaliatory litigation, and the corresponding chilling effect, may endure after a judge’s retirement. In this regard, however, the long-established common law principle of judicial immunity affords sufficient protection.⁹² Under the Aquilian action, pure economic loss arising from negligent judgments is not actionable.⁹³ Similarly, under the *actio iniuriarum*, otherwise defamatory utterances made by judicial officers in the exercise of their judicial authority are presumed to be made lawfully within their authority and without *animus iniuriandi* (intention to injure).⁹⁴ This presumption is only rebutted where the judicial officer is actuated by malice.⁹⁵

[63] The common law protections differ from section 47(1) to the extent that they only apply to damages arising from the discharge of judicial duties. Section 47(1), on the other hand, applies to all civil proceedings, regardless of whether the cause of action relates to the judicial office or not.⁹⁶ This stems from section 47(1)’s purpose of protecting the proper administration of courts. Crucially, however, the common law immunity from civil liability for damages that arose from the discharge of judicial duties endures beyond a judicial officer’s retirement. Thus, even beyond the shield of section 47(1), these well-established protections safeguard judicial independence by allowing judicial officers to exercise their functions without fear, favour or

⁹¹ *Prinsloo v Van der Linde* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 22.

⁹² *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* [2005] ZASCA 73; 2006 (1) SA 461 (SCA) (*Telematrix*) at para 19; *Claasen v Minister of Safety and Security* 2010 (2) SACR 451 (WCC) (*Claasen*) at para 31; and *Minister of Safety and Security v Van der Walt* [2014] ZASCA 174; 2015 (2) SACR 1 (SCA) (*Van der Walt*) at para 20.

⁹³ *Van der Walt* id at paras 18-20; *Telematrix* id at para 14; and *Claasen* id at para 17.

⁹⁴ *May v Udwin* 1981 (1) SA 1 (A) at 16A-D.

⁹⁵ Id at 18A-B. See also *Moeketsi v Minister van Justisie* 1988 (4) SA 707 (T) at 714B-D.

⁹⁶ Except for the actions that arise from the Domestic Violence Act.

prejudice – particularly the fear that actions taken in the exercise of their judicial duties could be liable for future litigation.⁹⁷ It is also relevant to observe that, except for South Africa and two of its southern African neighbours, other countries have not deemed it necessary to enact a provision similar to section 47(1) in order to protect judges against vexatious or frivolous litigation.⁹⁸

[64] Retired judges may, in certain circumstances, fall within the prescripts of section 47(1). In *FUL*, it was held that the immunity provided by the section “also extends to those retired Judges who *remain in service*”.⁹⁹ For example, a retired judge may be recalled to perform judicial duties as an acting judge in a Superior Court. During that acting period, the retired judge forms part of the panel of that court and is a “judge of a Superior Court”. It is not necessary, in this matter, to list all circumstances where a retired judge may be considered a judge of a Superior Court for the purpose of section 47(1).

[65] Commissioner Khampepe’s role as the Chairperson of the Commission does not bring her within the ambit of a “judge of a Superior Court” for the purpose of section 47(1). As she acknowledged in her recusal ruling, “Commissions of Inquiry are not courts of law. This Commission is an investigatory body tasked with investigating the matters set out in its Terms of Reference.” Commissions of inquiry are creatures of the Commissions Act¹⁰⁰ and obtain powers from statutory sources. Commissioners are appointed solely by the President. There is no requirement that a commissioner must be a judge. In this very case, one of the commissioners is an advocate.

⁹⁷ *Telematrix* above n 92 at para 19; *Claasen* above n 92 at para 31; and *Van der Walt* above n 92 at para 20.

⁹⁸ Von Huelsen “The Liability of the Judiciary: The South African Doctrine of Leave to Sue” (2000) 117 *SALJ* 713 at 714 states:

“The South African concept of leave to sue is almost unique. Except for Botswana and Namibia, no other country provides for a similar preliminary procedural requirement at present. It is evident that leave to sue was received by these neighbouring countries as part of the general assimilation of South African Roman-Dutch law.”

⁹⁹ *FUL* above n 36 at para 25 (emphasis added).

¹⁰⁰ 8 of 1947.

[66] The appointment of a judge of a Superior Court, however, necessitates the involvement of the Judicial Services Commission.¹⁰¹ This is a constitutional prescript. Judges derive their powers directly from the Constitution. It is “coincidental” that a judge may be appointed as a commissioner.¹⁰² In this regard, the following passage from *Erasmus* is instructive:

“It is frequently said in the public media that commissions which are headed by a judge or a magistrate are ‘judicial commissions of inquiry’. There is no warrant in South African law for this expression, which is a misnomer and is only calculated to confuse. A commission exists, whether it is appointed by the State President or any other body or person, by virtue of the fact that the person who accepts such mandate was entrusted with some specific charge. The mere fact that in certain cases where the State President appoints a commission the powers contained in the Commissions Act are conferred on [them] does not turn such a person into anything else but an ordinary citizen who is charged with a commission. . . . The commissioner acts as such and [their] function is wholly unconnected with the position which he otherwise occupies. It is purely coincidental that commissioners are magistrates or judges. *In no respect whatsoever can their commissions of inquiry be equated with courts of law as they, qua commissioners, derive no power whatsoever from the judicial offices which they hold.*”¹⁰³ (Emphasis added.)

[67] In view of the facts that Commissioner Khampepe is not presently a Justice of this Court or a judge of any other Superior Court, and that the Commission is not a court of law, she falls beyond the ambit of section 47(1).

[68] Additionally, the High Court majority’s reliance on the definition of “service” in the Remuneration Act merits discussion. The High Court majority employed the definition in the Remuneration Act to find that serving on a commission of inquiry constitutes judicial service for the purpose of section 47(1) of the Act. This was impermissible.

¹⁰¹ Section 174(3) and (6) of the Constitution.

¹⁰² *Erasmus N.O. v SA Associated Newspapers Ltd* 1979 (3) SA 447 (W) at 456E.

¹⁰³ *Id* at 456C-F.

[69] It is settled law that one statute can be used to interpret another statute only when the two are *in pari materia* (concerning the same subject matter).¹⁰⁴ In *Independent Institute of Education*, this Court explained the proper approach thus:

“First, a special meaning ascribed to a word or phrase in a statute ordinarily applies to that statute alone. Second, even in instances where that statute applies, the context might dictate that the special meaning be departed from. Third, where the application of the definition, even where the same statute in which it is located applies, would give rise to an injustice or incongruity or absurdity that is at odds with the purpose of the statute, then the defined meaning would be inappropriate for use and should therefore be ignored. Fourth, a definition of a word in the one statute does not automatically or compulsorily apply to the same word in another statute. Fifth, a word or phrase is to be given its ordinary meaning unless it is defined in the statute where it is located. Sixth, where one of the meanings that could be given to a word or expression in a statute, without straining the language, ‘promotes the spirit, purport and objects of the Bill of Rights’, then that is the meaning to be adopted even if it is at odds with any other meaning in other statutes.”¹⁰⁵

[70] The High Court majority’s interpretive borrowing cannot be sustained, as the two Acts concern different subject matters. The Superior Courts Act addresses the governance, functioning and administration of the courts. The Remuneration Act, on the other hand, provides a framework for the remuneration and conditions of employment of judges. While both Acts concern judges, their subject matters are dissimilar and insufficiently related to justify interpretative borrowing.

[71] As a retired Justice of this Court, Commissioner Khampepe, like other retired Justices of this Court, receives remuneration with reference to the salary of a Justice of this Court. This does not make her, or any other retired Justice of this Court, a “judge

¹⁰⁴ *Commissioner, South African Revenue Service v Medtronic International Trading SARL* [2024] ZACC 26; 2025 (2) SA 337 (CC); 2025 (4) BCLR 383 (CC) at para 37 and *Independent Institute of Education (Pty) Ltd v KwaZulu-Natal Law Society* [2019] ZACC 47; 2020 (2) SA 325 (CC); 2020 (4) BCLR 495 (CC) (*Independent Institute of Education*) at paras 38-42 (judgment of Theron J).

¹⁰⁵ *Independent Institute of Education* id at para 18.

of a Superior Court” for the purpose of section 47(1). As mentioned, section 47(1) affords judges qualified protection against civil proceedings being brought against them so that they can apply the law independently and impartially, in order to ensure that the functioning of the Judiciary is unhampered by improper interruptions. These purposes are unrelated to the purposes of the Remuneration Act. The two Acts are, thus, not *in pari materia*.

[72] Commissioner Khampepe has not been recalled to perform judicial functions at a Superior Court. Her position as a commissioner is unconnected to the position she previously occupied as a Justice of this Court. It follows that Commissioner Khampepe is not a “judge of a Superior Court” as envisaged in section 47(1).

Remedy

[73] The next issue to consider is remedy. The applicants ask this Court not to remit but to determine the merits of the review application. To achieve this, they also seek direct access to this Court.

[74] At the hearing, counsel for President Mbeki conceded that the application for direct access was filed out of an abundance of caution. Indeed, its subject matter – a review of the recusal ruling – is identical to the applicants’ review application in the High Court. Definitionally, where litigants have sought recourse in another court, their subsequent application to this Court on the same subject matter is not an application for direct access: section 167(6)(a) of the Constitution stipulates direct access as a mechanism for litigants “to bring a matter *directly* to the Constitutional Court” when it is in the interests of justice to do so and with leave of this Court.¹⁰⁶ In the circumstances, the applicants’ application for direct access is misconceived.

¹⁰⁶ Emphasis added.

[75] Having found that section 47(1) is inapplicable to the review application and that the High Court was mistaken in dismissing it on that point *in limine*, what remains before this Court is whether to decide the review application.

[76] In my view, the answer is yes. The respondents contend that since the review application is sought *in medias res* (in the middle of proceedings), with the Commission's inquiry still ongoing, the applicants should wait for the Commission to conclude its work. I am not persuaded by this argument. While midstream reviews are generally disfavoured, immediate judicial intervention might be warranted where the impugned decision touches on jurisdiction. A complaint of actual or reasonably apprehended bias differs from those relating to other irregularities. It "goes to the core of the proceedings".¹⁰⁷ It is akin to saying that the Commission, by virtue of its tainted composition, lacks jurisdiction.¹⁰⁸ A decision as to the competency of a forum must be regarded as "radical or definitive and not merely interlocutory".¹⁰⁹

[77] Despite this Court's caution in *Spilhaus*,¹¹⁰ lower courts sometimes do "not express [their] view on the merits to cover the eventuality of a further appeal".¹¹¹ In these scenarios, while this Court is wary of acting as a court of first and last instance,¹¹² it recognises that it may, at times, be preferable to decide the unresolved questions rather than to remit them to lower courts.

[78] On the appropriateness of remittal as a remedy, this Court laid down several factors in *Airports Company*, including parties' capacity to litigate, whether this Court has the necessary information to answer the remaining legal questions, practical

¹⁰⁷ *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* [1996] ZASCA 2; 1996 (3) SA 1 (A) at 10D.

¹⁰⁸ *Basson v Hugo* [2018] ZASCA 1; 2018 (3) SA 46 (SCA) at para 18 and *id* at 10G.

¹⁰⁹ *Steytler N.O. v Fitzgerald* 1911 AD 295 at 327 (judgment of Laurence J).

¹¹⁰ *Spilhaus Property Holdings (Pty) Ltd v Mobile Telephone Networks (Pty) Ltd* [2019] ZACC 16; 2019 (4) SA 406 (CC); 2019 (6) BCLR 772 (CC) at paras 44-5.

¹¹¹ *United Manganese of Kalahari v Commissioner, South African Revenue Service and Four Similar Cases* [2025] ZACC 2; 2025 (5) BCLR 530 (CC); 2026 (2) SA 227 (CC) at para 378.

¹¹² *Fleecytex* above n 68 at para 8.

sensibilities and additional costs associated with prolonged litigation.¹¹³ In that case, while the “lack of a reasoned definitive determination on the merits” gave the Court some pause, it ultimately decided that remittal was not appropriate after weighing it against several practical considerations, such as the passage of time and cost implications.¹¹⁴ The present matter tells a similar tale.

[79] The High Court majority only considered the section 47(1) point *in limine*, leaving out the remainder of the review application. As the next section shows, the applicants also do not equip this Court with all the information to comprehensively decide the review application. Two significant countervailing factors are urgency and finality. If this Court were to remit the review application to the High Court, even if that Court decides the application on an urgent basis, it is possible that its decision would be further appealed. In that scenario, the review application might not be finally decided for another several months. Such a delay is highly undesirable in light of the profound national importance and urgency of this matter.¹¹⁵ It would not be in the interests of justice to allow the Commission to continue to run, and possibly complete its work, at great public cost, where the competence of its composition has been called into question.

[80] Moreover, the failure by the High Court majority to reach the applicants’ review grounds is no fault of the litigants; and while this Court does not have the benefit of the reasoning of either the High Court majority or the Supreme Court of Appeal, it is aided by the minority judgment in the High Court. Therefore, given the context of the present matter, I conclude that remittal is not the appropriate course.

¹¹³ *Airports Company South Africa v Big Five Duty Free (Pty) Ltd* [2018] ZACC 33; 2019 (2) BCLR 165 (CC); 2019 (5) SA 1 (CC) at para 25.

¹¹⁴ *Id* at para 26.

¹¹⁵ See [45].

Was the recusal application an administrative action?

[81] In any review application, there is the threshold question of the basis on which a court is empowered to exercise its review jurisdiction. The applicants raise a slew of review grounds under the Promotion of Administrative Justice Act ¹¹⁶ (PAJA). Alternatively, they seek review under the principle of legality.

[82] PAJA and the principle of legality are two distinct avenues for the judicial review of public power. The former applies specifically to administrative actions,¹¹⁷ while the latter is an incident of the rule of law and applies to the exercise of all public power.¹¹⁸ These avenues should not be conflated, because they afford a reviewing court distinct grounds under which to exercise scrutiny. In *Motau*, this Court distilled the elements contained in the “rather unwieldy” definition of administrative action found in section 1 of PAJA:

“The concept of ‘administrative action’, as defined in section 1(i) of PAJA, is the threshold for engaging in administrative-law review. The rather unwieldy definition can be distilled into seven elements: there must be (a) a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions.”¹¹⁹

[83] President Zuma, without more, simply urges this Court to exercise its PAJA review jurisdiction. President Mbeki goes slightly further in his pleadings:

¹¹⁶ 3 of 2000.

¹¹⁷ *Minister of Health v New Clicks South Africa (Pty) Ltd* [2005] ZACC 14; 2006 (1) BCLR 1 (CC); 2006 (2) SA 311 (CC) at paras 94-5 (judgment of Chaskalson CJ) and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 22.

¹¹⁸ *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) (*Pharmaceutical Manufacturers*) at paras 17 and 33 and *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17; 1998 (12) BCLR 1458 (CC); 1999 (1) SA 374 (CC) (*Fedsure*) at paras 57-9.

¹¹⁹ *Minister of Defence and Military Veterans v Motau* [2014] ZACC 18; 2014 (5) SA 69 (CC); 2014 (8) BCLR 930 (CC) at para 33.

“The definition of ‘administrative action’ in section 1 of PAJA would include a ruling by the Chairperson of the Commission when she exercises a public power or performs a public function in terms of the Commissions Act, and the Regulations and Rules promulgated in accordance with that Act. The recusal decision (a) adversely affects my rights and the rights of the former members of the executive to appear before an impartial chairperson, (b) the decision has direct, external legal effect in that it is final – the decision may not be reversed unless this Court reverses it. Unlike the findings of the Commission at the end of the day, the recusal ruling is and remains binding on me, (c) the recusal decision is not the exercise of executive powers.”¹²⁰

[84] President Mbeki goes no further than what is stated above. In particular, no argument is made as to why the recusal ruling is “administrative in nature”. This Court has time and again held that this is a determination to be made on a case-by-case basis,¹²¹ and there is no presumption that every exercise of public power is administrative in nature.¹²² In *Sokhela*, the High Court held:

“The court is required to make a positive decision in each case, whether a particular exercise of public power or performance of a public function is of an administrative character. . . . The inclusion, of the requirement that the decision be of an administrative nature, demands that a detailed analysis be undertaken of the nature of the public power or public function in question, to determine its true character. . . . There is accordingly no mechanical process by which to determine whether a particular exercise of public power or performance of a public function will constitute administrative action. That will have to be determined in each instance by a close analysis of the nature of the power or function and its source or purpose.”¹²³

¹²⁰ Second Applicant’s Founding Affidavit at para 213.

¹²¹ *Motau* above n 119 at para 36; *Association of Regional Magistrates of Southern Africa v President of the Republic of South Africa* [2013] ZACC 13; 2013 (7) BCLR 762 (CC) (*Association of Regional Magistrates*) at para 41; and *President of the Republic of South Africa v South African Rugby Football Union* [1999] ZACC 11; 1999 (10) BCLR 1059 (CC); 2000 (1) SA 1 (CC) (*SARFU III*) at para 143. See also *Minister of Home Affairs v Scalabrini Centre* [2017] ZASCA 126; 2013 (6) SA 421 (SCA) (*Scalabrini*) at paras 51 and 54.

¹²² *Motau* id at para 34.

¹²³ *Sokhela v MEC for Agriculture and Environmental Affairs (KwaZulu-Natal)* 2010 (5) SA 574 (KZP) at para 61.

[85] This Court has accepted that the characterisation of a decision as being of an administrative nature can be “something of a puzzle”.¹²⁴ In this case, whether the recusal ruling is administrative in nature was not canvassed in either judgment in the High Court and has not been fully ventilated in this Court. Case law provides some guidance on the relevant factors to consider but these cases were not properly raised or considered by the parties.¹²⁵

[86] Therefore, this Court is not in a position to determine whether the recusal ruling constitutes an administrative action. By extension, it can neither decide if PAJA is the appropriate avenue of review nor apply PAJA to the review application.

The principle of legality

[87] As mentioned, the principle of legality, as an incident of the rule of law and implicit in the architecture of our Constitution, constrains the exercise of all public power.¹²⁶ There is no serious dispute that the Commission exercises public power, given its authority to, among other things, summon and examine witnesses and call for the production of books, documents and objects.¹²⁷ These powers are rooted in legislation and executive proclamation. Indeed, in *Corruption Watch*, the High Court held that commissions of inquiry “must operate within the framework of the principles of legality”.¹²⁸

¹²⁴ *Association of Regional Magistrates* above n 121 at para 41.

¹²⁵ These factors include: the nature of the power being exercised; its source; its subject matter; whether it is more closely related to policy formulation or implementation; whether it involves the exercise of a public duty; how broad a discretion the decision-maker is afforded and the extent of the constraints imposed thereon; and how appropriate it is to subject the exercise of public power to a higher level of judicial scrutiny. See *Motau* above n 119 at paras 34 and 37-43; *SARFU III* above n 121 at paras 142-3; *Permanent Secretary of the Department of Education of the Government of the Eastern Cape v Ed-U-College (PE) (Section 21) Inc* [2000] ZACC 23; 2001 (2) SA 1 (CC); 2001 (2) BCLR 118 (CC) at para 21; and *Masetlha v President of the Republic of South Africa* [2007] ZACC 20; 2008 (1) BCLR 1 (CC); 2008 (1) SA 566 (CC) (*Masetlha*) at para 77.

¹²⁶ *Pharmaceutical Manufacturers* above n 118 at para 17 and *Fedsure* above n 118 at para 59.

¹²⁷ Sections 1(1)(b) and 3 of the Commissions Act. See the factors in *Chirwa v Transnet Ltd* [2007] ZACC 23; 2008 (3) BCLR 251 (CC); 2008 (4) SA 367 (CC) at para 186.

¹²⁸ *Corruption Watch v Arms Procurement Commission* 2020 (2) SA 165 (GP) at paras 15 and 51.

Lawfulness

[88] The rule of law requires that no public power may be exercised except for that conferred by law.¹²⁹ The applicants submit that the recusal ruling was made by an improperly constituted decision-making body and therefore unlawful. Specifically, they point out that the recusal ruling was authored by Commissioner Khampepe alone, rather than by the Commission as a collective. While all three members of the Commission heard oral argument on the recusal applications, only Commissioner Khampepe signed the recusal ruling, with no explicit indication of the involvement of the other two commissioners. This, the applicants submit, renders the recusal ruling *ultra vires*, as rule 11 of the Commission's Rules provides that any application not otherwise provided for in the rules must be made "in writing to the Commission".¹³⁰ The applicants also rely on *SARFU*, where this Court, confronted with recusal applications for a number of its members, considered these applications individually and collectively. The applicants contend that where a recusal application is directed at one member of a multi-member forum, the determination must be made by the forum as a whole, not only by the member whose impartiality is impugned.

[89] This argument cannot be sustained. Rule 11 governs "any application to the Commission which is not otherwise provided for". While the recusal applications would fall under it, nothing in rule 11 provides that the Commission ought to decide them as a collective. Rule 11 generally discusses the procedures applicable to applications "not otherwise provided for" but does not deal with the locus of the power to decide these applications. It is silent on this question and of no assistance in this matter.

¹²⁹ *Fedsure* above n 118 at para 58.

¹³⁰ Rule 11.1 reads:

"Any party wishing to make any application to the Commission which is not otherwise provided for in these Rules must do so on . . . at least seven calendar days' notice in writing to the Commission but the Chairperson may condone non-compliance with this notice period on good cause shown."

[90] The applicants' reliance on *SARFU* for their proposition that the Commission, as a collective, should have decided the recusal applications is also misplaced. In that case, this Court remarked:

“Counsel for the appellants submitted that if a particular judge were to place on record that [they were] in fact biased in favour of one of the litigants, there would be an obligation on such judge to withdraw from the case. If, however, the case was concerned only with a reasonable apprehension of bias, the decision should be the decision of the court and not the individual judge.

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 [their] 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.”¹³¹

[91] This passage makes it clear that, while members of the Court in *SARFU* considered the recusal applications both individually and collectively, the Court imposed no “collective decision-making” obligation. To the contrary, the Court stated, in unequivocal terms, that “[j]udges have jurisdiction to determine applications for their own recusal” and that “the decision on the applications against each of the judges should in each instance be theirs alone”.¹³² *SARFU* is not authority for the proposition that collective decision-making is mandatory in recusal applications filed before multi-member panels.

¹³¹ *SARFU* above n 19 at paras 33-4.

¹³² *Id* at paras 27 and 31.

Bias and procedural rationality

[92] The applicants also ask this Court to review the recusal ruling on the ground of bias. This line of argument must start with a threshold question: is bias a standalone ground of review under the principle of legality? This is yet another complex and novel question of law that was not argued before this Court, nor discussed in either judgment in the High Court and for which there is scarcely any guidance from lower courts.

[93] In the pre-constitutional era, the judicial review of procedural fairness was based on the rules of natural justice, which included the twin pillars of *audi alteram partem* (hear the other side) and *nemo iudex in sua causa* (no one may be a judge in their own case).¹³³ After the enactment of PAJA, this Court concluded in *Masetlha* that procedural fairness is not a requirement under the principle of legality.¹³⁴ That case specifically concerned the right to be heard. Nothing was said as to the rule against bias. In *Public Protector*, this Court also left open the question whether bias is a ground of review under the principle of legality.¹³⁵ Given the consequences that deciding this issue would have on exercises of public power, in my view the interests of justice militate against doing so now.¹³⁶

[94] This conclusion, however, is not the end of the matter. While the applicants' pleadings are far from exemplary, it is clear from these pleadings that the applicants are of the view that it would offend the principle of legality for Commissioner Khampepe

¹³³ See, for example, *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) at 646E-H; *Marlin v Durban Turf Club* 1942 AD 112 at 126; *Van Huyssteen N.O. v Minister of Environmental Affairs and Tourism* 1996 (1) SA 283 (C) at 304A-I; and *Dhlamini v Minister of Education and Training* 1984 (3) SA 255 (N) at 257F-G.

¹³⁴ *Masetlha* above n 125 at para 78.

¹³⁵ *Democratic Alliance v Public Protector of South Africa* [2023] ZACC 25; 2023 (11) BCLR 1281 (CC); 2024 (3) SA 1 (CC) at paras 54, 60 and 140.

¹³⁶ In some foreign jurisdictions, the rule against bias is reviewed under the duty to act fairly or the rules of natural justice. There, the standards for disqualifying bias differ depending on the public power being exercised. See *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 at para 47; *Beno v Canada (Commissioner and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces to Somalia)* [1997] 2 FC 527 (CA) at paras 24-7; *Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)* [1992] 1 SCR 623 at 638-9; and *Ridge v Baldwin* [1963] 2 WLR 935 at 998. For the present matter, I express no view on whether bias is a standalone ground under the principle of legality or whether it is variable in its content.

to exercise her public powers if a reasonable apprehension of bias against her exists. Their pleadings related to this purported apprehension are detailed. Thus, I am of the view that this Court has the necessary information to analyse this issue.

[95] The principle of legality demands that every exercise of public power be rational in both substance and procedure.¹³⁷ While PAJA applies to decisions (or the failure to take them),¹³⁸ the principle of legality is “applicable to the exercise of all public power”.¹³⁹ As noted, when acting in terms of the Commission’s empowering provisions, the commissioners exercise public power. The question before us is whether that exercise of public power is rationally connected to the purpose for which it was granted. Procedural rationality is concerned with the evaluation of the relationship between means and ends.¹⁴⁰ There must be a *nexus* (link) between the means employed to achieve a particular purpose and the purpose itself. *Affordable Medicines* held that a court, when engaging in a rationality review, must exercise restraint.¹⁴¹ It is not for the court to intervene merely because it takes the view that a different or more appropriate means could have been used.¹⁴² However, where an exercise of public power bears no rational relationship to its purpose, it is the Constitution itself that enjoins the court to take action.

[96] In *Simelane*, this Court reviewed the President’s decision to appoint Mr Menzi Simelane as the NDPP under the principle of legality.¹⁴³ It found that in making that decision, the President’s failure to consider the findings of the Ginwala Commission,

¹³⁷ *Democratic Alliance v President of the Republic of South Africa* [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) (*Simelane*) at para 34.

¹³⁸ Section 1 of PAJA.

¹³⁹ *Khumalo v MEC for Education, KwaZulu-Natal* [2013] ZACC 49; 2014 (3) BCLR 333 (CC); 2014 (5) SA 579 (CC) at para 28. See also *Pharmaceutical Manufacturers* above n 118 at para 90.

¹⁴⁰ *Minister of Water and Sanitation v Sembcorp Siza Water (Pty) Ltd* [2021] ZACC 21; 2021 (10) BCLR 1152 (CC); 2023 (1) SA 1 (CC) at para 60 and *Simelane* above n 137 at paras 32 and 36.

¹⁴¹ *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2005 (6) BCLR 529 (CC); 2006 (3) SA 247 (CC) at para 86.

¹⁴² *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (2) SACR 101 (CC); 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) (*Albutt*) at para 51.

¹⁴³ *Simelane* above n 137.

which seriously impugned the candidate's credibility, integrity and conscientiousness, could not be rationally reconciled with his duty to appoint a "fit and proper person".¹⁴⁴ This Court found that there was no rational connection between the process by which the decision was taken and its purpose.

[97] In *Albutt*, this Court found that the President's decision to deal with the unfinished business of the TRC by creating a "special dispensation" to pardon persons convicted of politically motivated offences, which excluded the participation of the victims and their families, was irrational.¹⁴⁵ This Court reasoned that the "twin objectives of rebuilding a nation torn apart by an evil system and promoting reconciliation between the people of South Africa" could not possibly be achieved without the participation of both the victims and the perpetrators.¹⁴⁶

[98] Similarly, in *Scalabrini*, the Supreme Court of Appeal held that although there is no general duty to consult individuals or organisations affected by a decision, "there are indeed circumstances in which rational decision-making calls for interested persons to be heard".¹⁴⁷ There, the Director-General decided to close a Refugee Reception Office in Cape Town. The Supreme Court of Appeal endorsed the view that the Refugees Act¹⁴⁸ empowered the Director-General to establish and close Refugee Reception Offices for the purpose of ensuring that there is a sufficient number of offices in the country to meet the needs of the Refugees Act.¹⁴⁹ It concluded that this purpose could not be achieved without consulting organisations which he knew had "long experience and special expertise" in dealing with asylum seekers in Cape Town.¹⁵⁰

¹⁴⁴ Id at paras 86-9.

¹⁴⁵ *Albutt* above n 142 at paras 68-9.

¹⁴⁶ Id at para 56.

¹⁴⁷ *Scalabrini* above n 121 at paras 68 and 72.

¹⁴⁸ 130 of 1998.

¹⁴⁹ *Scalabrini* above n 121 at para 71.

¹⁵⁰ Id at paras 70-2.

[99] These cases demonstrate that the demands of procedural rationality depend on the facts of each case and the purpose served by the exercise of power. For example, while the right to be heard is not required under the principle of legality, when the purpose for which the power is exercised cannot be achieved without consultation, the failure to consult will render the exercise of public power irrational.

[100] I express no view on bias as a standalone review ground. However, where the presence of a reasonable apprehension of bias precludes a process from being capable of achieving its objectives, it renders the corresponding exercise of public power irrational. Although rationality is not “a uniquely designed master key that opens any and every door, any time, anyhow”,¹⁵¹ it is axiomatically concerned with the relationship between means and ends. That is the issue before us. What must be examined is whether the Commission can serve its purpose if it is chaired by a person in respect of whom a reasonable apprehension of bias exists.

[101] In *Corruption Watch*, the High Court held that “the purpose of a commission [is] to restore public confidence in the situation which is investigated”.¹⁵² The Commission is charged with investigating whether efforts or attempts were made to stop the investigation or prosecution of the TRC cases. In *Mail & Guardian*, the Supreme Court of Appeal held:

“[O]ne feature of an investigation that must always exist – because it is one that is universal and indispensable to an investigation of any kind . . . is that the investigation must have been conducted with an open and enquiring mind.”¹⁵³

[102] Public confidence is pivotal to the Commission. Its subject matter focuses on whether improper influence occurred through clandestine machinations. The Commission also exercises its statutory powers, in part, for the purpose of restoring

¹⁵¹ *Electronic Media Network Ltd v e.tv (Pty) Ltd* [2017] ZACC 17; 2017 (9) BCLR 1108 (CC) at para 6.

¹⁵² *Corruption Watch* above n 128 at para 15.

¹⁵³ *Public Protector v Mail & Guardian Ltd* [2011] ZASCA 108; 2011 (4) SA 420 (SCA) at para 21.

public confidence in relation to the TRC cases. Public frustrations over the lack of prosecutorial progress in respect of the TRC cases and the Calata Group's persistent pursuit of long-delayed justice and accountability are both integral to the Commission's establishment. It is crucial that the public has confidence in the Commission.

[103] Can the purposes of shedding light on alleged subterfuge and restoring public confidence objectively be served by a commissioner in respect of whom a reasonable apprehension of bias exists? In my view, it cannot. It was nearly two decades ago that *Albutt* sought to deal with the "unfinished business" of the TRC.¹⁵⁴ The Commission's animating purpose is bringing long-awaited closure and finality to the TRC cases. Should the shroud of reasonably apprehended bias cloak the Commission, the legitimacy of its findings will always be called into question. As this Court held in *Simelane*, the irrationality "colours the process as a whole" and threatens to taint the entirety of the Commission's work.¹⁵⁵ For these reasons, I am of the view that, in the specific context of this matter, the presence of a reasonable apprehension of bias, if it exists, is not rationally related to the achievement of the Commission's purposes.

Was there a reasonable apprehension of bias?

[104] The next question is whether there was a reasonable apprehension of bias against Commissioner Khampepe. The trite legal standard governing the recusal for judges in respect of an apprehension of bias – the so-called "double reasonableness" standard – was applied in both the recusal ruling and the High Court minority judgment. A commission of inquiry, however, is not a court of law. I have detailed differences between the two,¹⁵⁶ and they raise yet another threshold question: does the reasonable apprehension of bias standard governing the recusal of judges apply to Commissioner Khampepe?

¹⁵⁴ *Albutt* above n 142 at para 4.

¹⁵⁵ *Simelane* above n 137 at para 37.

¹⁵⁶ See [65] to [67].

[105] The Calata Group argues that the “double reasonableness” standard should not be applied rigidly. Instead, it submits, the test varies depending on the nature of the decision-maker and the function being performed. It submits that the requisite apprehension of bias applicable to commissioners in commissions of inquiry should be higher than that applied to judges. This is so, according to the Calata Group, because the Commission performs truth-seeking functions, for which a close working relationship with the evidence leaders and a degree of institutional knowledge may be beneficial. The Calata Group also submits that unlike a court of law, the Commission does not make binding legal or factual findings.

[106] The Commission arose from the Calata Application, and it forms part of the broader process of seeking justice in the TRC cases. Justice must not only be done, but must also be seen to be done. The standard of judicial recusal in our law is already formidable, requiring evidence to displace a high presumption of impartiality.¹⁵⁷ Adopting the standard put forth by the Calata Group would mean that even an apprehension of bias that could justify the recusal of a judge may not be sufficient for Commissioner Khampepe. This would risk undermining public trust in the Commission and jeopardising the broader project of pursuing justice in the TRC cases.

[107] Some arguments may even point in the opposite direction. In *SARFU*, this Court articulated three rationales underlying the robustness of the double reasonableness standard, namely, “the oath of office taken by the judges to administer justice without fear or favour”; judges’ “ability to carry out that oath by reason of their training and experience”; and judges’ “duty to sit in any case in which they are not obliged to recuse themselves”.¹⁵⁸

[108] These rationales do not strictly apply to commissioners of inquiry. Non-judges, who are not bound by the judicial oath of office, can serve as commissioners. There is

¹⁵⁷ *SACCAWU* above n 22 at para 13.

¹⁵⁸ *SARFU* above n 19 at para 48.

no guarantee that they will have the training and experience necessary to disabuse their minds of irrelevant personal belief or predispositions. As was said in *South African Reserve Bank*, the “presumption of impartiality in [favour of judges] has more to do with the weight of the constitutional obligation imposed on them to act without fear, favour or prejudice”.¹⁵⁹

[109] This judgment cannot, and need not, settle this issue at this juncture. The legal standard applicable to recusal applications for commissioners is a novel and complex question. This question, too, has not been properly argued in this matter, and this judgment refrains from resolving it. As to the standard applicable to Commissioner Khampepe, the applicants’ burden cannot be higher than the burden facing litigants seeking the recusal of judges. The applicants have not argued for a lower burden. The following analysis will, therefore, apply the same standard for the recusal of judges to Commissioner Khampepe. If a reasonable apprehension of bias is established under this standard, then the application of a lower standard would not change the outcome.

[110] The content of the double reasonableness test has been discussed extensively in the recusal ruling and the High Court minority judgment. While I need not provide a comprehensive overview here, the following aspects are of particular relevance.

[111] First, the question is not whether there is actual bias or whether the decision-maker is actually unable to deal with a matter even-handedly. The question is what reasonable, fair-minded, informed and objective observers would apprehend.¹⁶⁰ In *Lannon*, the following was said:

“[I]n considering whether there was a real likelihood of bias, the Court does not look at the mind of the Justice [themselves] or at the mind of the Chairman of the Tribunal, or whoever it may be. . . . It does not look to see if there was a real likelihood that [they]

¹⁵⁹ *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (6) SA 253 (CC); 2019 (9) BCLR 1113 (CC) at para 87 (judgment of Mogoeng CJ).

¹⁶⁰ *SARFU* above n 19 at para 48.

would, or did, in fact favour one side at the expense of the other. *The Court looks at the impression which would be given to other people. . . . The Court will not inquire whether [they] did, in fact, favour one side unfairly. Suffice it that reasonable people might think [they] did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: 'The judge was biased.'*"¹⁶¹ (Emphasis added.)

[112] Second, the test is objective and must be applied to the facts on which the recusal is based.¹⁶² A plethora of cases have reiterated that both the person apprehending the bias and the apprehension itself must be reasonable.¹⁶³ As to the apprehension, this Court has further clarified that it concerns whether a reasonable, objective and informed person *would* (not *might*) apprehend that the decision-maker *might* (not *would*) be unable to bring an impartial mind to bear on the matter.¹⁶⁴

[113] Third, the onus rests on the party alleging bias to establish a reasonable apprehension.¹⁶⁵ Where a "strongly and honestly felt anxiety" is insufficient,¹⁶⁶ courts have required the alleging party to articulate "a logical connection between the matter and the feared deviation".¹⁶⁷ I have listed reasons underlying the imposition of such a high burden.¹⁶⁸ Indeed, "[a]llegations of bias, the antithesis of fairness, are serious. If made with a sufficient degree of regularity, they have the potential to be deleterious to the confidence reposed by the public in administrators."¹⁶⁹ Though the burden may be "formidable",¹⁷⁰ it is not an escape rope for courts to dismiss meritorious applications.

¹⁶¹ *Metropolitan Properties Co (FGC) Ltd v Lannon* [1968] 3 WLR 694 at 707G-H.

¹⁶² *Masuku* above n 20 at para 64.

¹⁶³ For example, *SACCAWU* above n 22 at para 15 and *Bernert* above n 21 at para 34.

¹⁶⁴ *Turnbull-Jackson v Hibiscus Coast Municipality* [2014] ZACC 24; 2014 (6) SA 592 (CC); 2014 (11) BCLR 1310 (CC) (*Turnbull-Jackson*) at para 32; *SARFU* above n 19 at para 48; and *S v Roberts* [1999] ZASCA 53; 1999 (4) SA 915 (SCA) (*Roberts*) at paras 32 and 34.

¹⁶⁵ *SARFU* above n 19 at para 45.

¹⁶⁶ *Bernert* above n 21 at para 34.

¹⁶⁷ *Goosen* above n 23 at para 29, endorsed in *Masuku* above n 20 at para 69.

¹⁶⁸ See [107].

¹⁶⁹ *Turnbull-Jackson* above n 164 at para 35.

¹⁷⁰ *Bernert* above n 21 at para 35.

[114] This Court has stressed that, just as it is impermissible to yield to objections that are frivolous or tenuous, it is equally impermissible to simply ignore those that are of substance.¹⁷¹ Although judges have a duty to sit in all cases where they are not disqualified, where reasonable grounds for an apprehension of bias exist, they “should not hesitate” to recuse themselves.¹⁷² Any doubt about a recusal application “must be resolved in favour of recusal”.¹⁷³ Properly construed, applications for recusal assume a dual character. On one hand, allegations of bias must be based on concrete facts and reasonable grounds. On the other hand, cogent and substantiated calls for recusal must be treated seriously. Even though the burden to establish a reasonable apprehension of bias is high, judicial responsibility requires a court to analyse allegations of bias carefully and determine whether a case for recusal has been established.

[115] Similar considerations apply in the context of prior associations. Judges and commissioners are human beings who carry their prior experiences and beliefs with them, and absolute, colourless neutrality is “something of a chimera”.¹⁷⁴ What impartiality requires is not the absence of these experiences, predilections or preconceptions, but that the existence thereof does not create the impression in the mind of the reasonable observer that the decision-maker might be unable to bring an impartial mind to bear. While prior association with an institution alone does not form a reasonable apprehension of bias, this Court held in *SARFU* that prior activities or associations may create such an apprehension where “the subject-matter of the litigation in question arises from such associations or activities”.¹⁷⁵ Building on this proposition, this Court said in *Bernert* that where a judicial officer “in [their] former

¹⁷¹ *SACCAWU* above n 22 at para 17.

¹⁷² *Bernert* above n 21 at paras 35-6 and *SARFU* above n 19 at para 48.

¹⁷³ *S v Dube* [2009] ZASCA 28; 2009 (2) SACR 99 (SCA) at para 13.

¹⁷⁴ *SACCAWU* above n 22 at para 13 and *SARFU* above n 19 at para 42.

¹⁷⁵ *SARFU* id at para 76.

capacity . . . acquired personal knowledge relevant to a case before the court, it would not be proper for that judicial officer to sit in that case”.¹⁷⁶

[116] In considering the applicable legal standard, there is an added element in this case, which concerns information within the personal and exclusive knowledge of the decision-maker. Our courts have laid down an approach that promotes transparency through disclosure. In *SARFU*, this Court held that a judicial officer is obliged to disclose “such facts as might reasonably be relevant to a recusal application”.¹⁷⁷ *Bernert* held that disclosure should be made on any pertinent interest “no matter how small the interest may be”.¹⁷⁸ The High Court in *Hugo* also held that, where a legitimate concern is raised concerning matters in the exclusive knowledge of the decision-maker—

“[the] deliberate action of non-disclosure, revealing no disassociation from the petition, leads to a reasonable apprehension of bias, simply because it is not far-fetched or untenable to accept.”¹⁷⁹

[117] Therefore, where an applicant has established a *nexus* between a decision-maker and the subject matter before them and where the precise nature of this connection is in the peculiar knowledge of the decision-maker, there is an obligation on the decision-maker to disclose relevant information. In respect of the evidentiary burden, the Appellate Division in *Sykes* held that “less evidence will suffice to establish a *prima facie* (on the face of it) case where the matter is peculiarly within the knowledge of the opposite party than would under other circumstances be required”.¹⁸⁰ In *Gericke*, that Court held that although there is no principle that the mere possession of personal knowledge should shift the onus of proof, courts must “take cognisance of the handicap under which a litigant may labour where facts are within the exclusive knowledge of

¹⁷⁶ *Bernert* above n 21 at para 78.

¹⁷⁷ *SARFU* above n 19 at para 89.

¹⁷⁸ *Bernert* above n 21 at para 56.

¹⁷⁹ *Basson v Hugo* 2019 (5) SA 142 (GP) at para 31.

¹⁸⁰ *Union Government (Minister of Railways) v Sykes* 1913 AD 156 at 173-4.

[their] opponent”.¹⁸¹ While the mere existence of a *nexus* may not itself establish a reasonable apprehension of bias, it creates a duty to disclose – especially on those matters exclusively known by the decision-maker.

Tenure at the NPA

[118] The applicants raise two of Commissioner Khampepe’s prior institutional positions as causes for concern. First, she served at the TRC between 1995 and 2001. Second, between 1998 and 1999, she served as a Deputy NDPP, one of the highest-ranking officials in the NPA – the same institution that was in charge of investigating and prosecuting the TRC cases and that is directly under the Commission’s inquiry.

[119] Three aspects of Commissioner Khampepe’s tenure at the NPA are relevant in the evaluation of whether a reasonable apprehension of bias exists: first, her position as a senior-ranking official in the organisation the Commission is tasked with investigating; second, the overlap between her tenure and both the establishment of the HRIU and the referral of the TRC cases to the NPA; and third, the fact that former colleagues from her time at the NPA have been called to testify before the Commission.

Position as Deputy NDPP

[120] To fully understand Commissioner Khampepe’s role at the NPA, regard must be had to the powers vested in her as a Deputy NDPP. While some of these powers could only be exercised subject to the control and authorisation of the then-NDPP, Mr Ngcuka, the National Prosecuting Authority Act¹⁸² (NPA Act) enabled her to, among other things, institute, conduct and discontinue criminal proceedings; determine prosecution policy and issue policy directives; intervene in prosecution process when

¹⁸¹ *Gericke v Sack* 1978 (1) SA 821 (A) at 827D-F.

¹⁸² 32 of 1998.

policy directives were not complied with; and review decisions to prosecute or not to prosecute, provided that certain procedures were complied with.¹⁸³

[121] It is common cause that the establishment and operationalisation of the HRIU, the unit mandated to deal with the TRC cases and similar matters, took place during Commissioner Khampepe's tenure at the NPA. The fact that the TRC started referring certain cases to the NPA from 1998 suggests that, with respect to at least some of the TRC cases, Commissioner Khampepe was on both the referring end (the TRC) and the receiving end (the NPA). In the eyes of a reasonable and objective observer, do these facts establish a *nexus* between Commissioner Khampepe's role at the NPA and the mandate of the Commission?

[122] There is no doubt that the NPA processed the TRC cases during Commissioner Khampepe's tenure there as a senior official. Her position specifically afforded her the power and discretion to decide whether to institute, conduct and discontinue prosecutions. She also had the power to determine prosecutorial policies and issue directives in the NPA, which guide how the organisation approaches cases. The establishment of the HRIU and the processing of the TRC cases were matters of profound national significance. It is thus not a stretch of the imagination to conceive that as a Deputy NDPP, Commissioner Khampepe probably had involvement in, or at least knowledge of, the handling of these matters, including high-level policy decisions related to whether or how to investigate and prosecute them. Therefore, her prominent position within the NPA, her wide powers as a Deputy NDPP and her background with the TRC all form part of the *nexus*. In my view, a reasonable person would draw a reasonable inference of bias in the absence of any explanation to the contrary by Commissioner Khampepe.

[123] In the recusal ruling, much was made of the "2003 temporal boundary". The Commission's Terms of Reference stipulate that the period relevant to its inquiry is "the

¹⁸³ Sections 21 to 23 of the NPA Act.

period since 2003”. Commissioner Khampepe’s former roles at the TRC and the NPA ended in 2001 and 1999, respectively. This temporal disjunct, so reasoned the recusal ruling, renders any suspicion of bias based on her prior roles untenable.

[124] This argument collapses under scrutiny. Witnesses and interested parties before the Commission have been called to account for allegations dating back to years before 2003. The Commission issued a Rule 3.3 Notice to President Mbeki and called on him to answer allegations that included:

- (a) “[S]ecret consultations between the ANC government and representatives of the [South African Defence Force (SADF)] and the security police *from 1998 until early 2004*. The main aim appeared to be to reach agreement on a legislative solution on how to avoid prosecutions in the wake of the TRC.”¹⁸⁴
- (b) “[C]onsultations between government and a group of high-ranking former generals of the SADF *commenced during 1998*.”¹⁸⁵

[125] Similarly, the Commission requested Judge Saldanha to furnish it with “information concerning decisions, discussions or policies affecting the investigation and prosecution of TRC-related cases”.¹⁸⁶ Judge Saldanha only served at the HRIU in 1999. Not only is this period before the so-called “temporal boundary”, it also overlapped with Commissioner Khampepe’s tenure as Deputy NDPP. The fact that one of her former colleagues has been summoned, specifically to adduce evidence related to events that occurred at the organisation at which they both worked and during the period they shared, suggests that had Commissioner Khampepe not been appointed to chair the Commission, she may herself have been a competent and compellable witness before it. The rule against bias, *nemo iudex in sua causa*, pared down to its most literal

¹⁸⁴ Notice in terms of Rule 3.3 of the Rules of the Judicial Commission of Inquiry into Allegations Regarding Efforts or Attempts Having Been Made to Stop the Investigation or Prosecution of Truth and Reconciliation Commission Cases (19 September 2025) at para 9 (emphasis added).

¹⁸⁵ Id (emphasis added).

¹⁸⁶ Request for Assistance with Information in Aid of the Judicial Commission of Inquiry to Inquire into Allegations Regarding Efforts or Attempts Having Been Made to Stop the Investigation or Prosecution of Truth and Reconciliation Commission Cases (14 November 2025) at para 3.

substance, propounds the principle that no one may be a judge in their own case. Although the Commission is not a court of law, this fact reinforces the *nexus* between Commissioner Khampepe's position at the NPA and the subject matter of the Commission.

[126] Although some alleged obstructions of the investigations into the TRC cases may have occurred in or after 2003, it seems self-evident – and readily accepted by the Commission – that such obstructions may well have been presaged by earlier negotiations or arrangements. This leaves no doubt that the Commission itself considers events pre-dating 2003, including events that took place when Commissioner Khampepe served at the TRC and the NPA, material to its inquiry. Otherwise, the Rule 3.3 Notices including pre-2003 allegations would, as the High Court minority observed, “defy common sense”.¹⁸⁷

[127] The Rule 3.3 Notices and the request to Judge Saldanha further dispel the notion that pre-2003 events are mere contexts or backdrops to the Commission's mandate. By seeking to investigate alleged improprieties going back to 1998, the Commission acknowledges that suspected efforts to stifle the investigation or prosecution of the TRC cases did not commence on or after 2003. 2003 is not a magical “cut-off” that severs prior events from consideration. The Commission's own conduct strengthens the view that pre-2003 events are relevant to the same subject matter that it investigates. As aptly put by the High Court minority:

“The Commission is not concerned solely with acts of interference in the abstract, but with whether, and how, prosecutorial decisions in TRC-related matters were shaped, deferred or abandoned over time. That enquiry necessarily traverses the earlier period in which those cases were under consideration, the prosecutorial framework within which they were handled, and the decisions taken or not taken at that stage.”¹⁸⁸

¹⁸⁷ High Court minority above n 1 at para 128.

¹⁸⁸ Id at para 136.

[128] I agree with this reasoning. The recusal ruling erects an artificial wall of division by using the 2003 temporal boundary.

Involvement with the HRIU

[129] The Calata Group raised concern about Commissioner Khampepe’s involvement in the HRIU because this unit was established to advise Mr Ngcuka “on how to handle” the TRC cases. This allegation originated in a letter dated 11 November 2025:

“Between September 1998 and December 1999, [Commissioner] Khampepe was a Deputy [NDPP]. During this period, she apparently played a role on the [HRIU], established by then NDPP Bulelani Ngcuka to advise him on how to handle the cases referred by the [TRC] to the [NPA].”¹⁸⁹

[130] At that point, Commissioner Khampepe did not respond to this allegation. The applicants restated it in their recusal applications. In her recusal ruling, Commissioner Khampepe said:

“I am not aware of any specific policy on TRC cases that I was involved in emerging from the [HRIU] during 1998 or 1999.”¹⁹⁰

[131] It is important to note that in the recusal ruling, Commissioner Khampepe did not deny any involvement in the HRIU but said she was not aware of “any specific policy on TRC cases” emerging from the unit. This statement could even suggest involvement in the HRIU. It is also significant that the first denial of Commissioner Khampepe’s role in the HRIU came in the High Court. A bare denial was tendered when Advocate Semenya, on behalf of the Commission Respondents, stated: “I . . . deny that [Commissioner Khampepe] had any role in the NPA’s [HRIU].”

¹⁸⁹ Annexure TMM20 of the Second Applicant’s Founding Affidavit.

¹⁹⁰ Recusal ruling at para 50.

[132] Commissioner Khampepe has not explained the nature and scope of her role in the NPA. This information is not in the public domain but peculiarly within her knowledge. While the applicants bear the onus to establish a reasonable apprehension of bias, there was an obligation on Commissioner Khampepe to disclose facts within her exclusive knowledge that “might reasonably be relevant to a recusal application”.¹⁹¹

[133] In *Bernert*, it was reiterated that “[l]itigants should not be left with the impression that the judicial officer is hiding [their] interest in the case from them”.¹⁹² This Court went on to hold that where there is a reasonable apprehension that the decision-maker has an attachment to the case or an interest in its outcome or the parties involved, they—

“must disclose [their] interest in the case, *no matter how small or trivial that interest may be*. And in the event of any doubt, *a judicial officer should err in favour of disclosure*.”¹⁹³ (Emphasis added.)

[134] This case is distinguishable from *Masuku* and *Goosen*, where all facts necessary for the assessment of bias were before the courts, either because they were public knowledge or full disclosure had been made. The absence of disclosure may not establish a reasonable apprehension of bias in and of itself, but where there is a *nexus* between a prior association and the subject matter before a decision-maker, it may call for an explanation. Full disclosure may “cast some evidentiary light on the ultimate question of reasonable apprehension of bias”.¹⁹⁴ Transparency through disclosure operates as an important safeguard in preserving the legitimacy of the decision-making process. Given the paramount importance of public confidence to the Commission, the caution that “in the event of any doubt, a judicial officer should err in favour of disclosure” should be heeded.¹⁹⁵

¹⁹¹ *SARFU* above n 19 at para 89.

¹⁹² *Bernert* above n 21 at para 56.

¹⁹³ *Id* at para 63.

¹⁹⁴ *Ebner v The Official Trustee in Bankruptcy* (2001) 205 CLR 337 at para 70.

¹⁹⁵ *Bernert* above n 21 at para 63.

Relationship within the NPA

[135] The Commission's Terms of Reference clarify that it is investigating both alleged external influences on the NPA as well as alleged improper conduct within the NPA.¹⁹⁶ These Terms further task the Commission with making findings, reports and recommendations on whether the government should take further actions, including possible investigations and prosecution, regarding the above.¹⁹⁷ Commissioner Khampepe's responsibilities now may call on her to make adverse findings, not only against her former organisation, but also against her former colleagues in respect of their conduct at the organisation which they served. Prior associations could form the basis of a reasonable apprehension of bias where "the subject-matter of the litigation in question arises from such associations or activities".¹⁹⁸ That is what has occurred in the present case.

Position at the TRC

[136] The applicants also rely on the fact that Commissioner Khampepe served on the TRC and specifically its Amnesty Committee. Commissioner Khampepe served both on the TRC, from which the TRC cases were referred, and at the NPA, to which the cases were referred. The recusal ruling finds that there is a conceptual distinction between the work of the TRC, which decided amnesty applications and referred certain cases to the NPA, and the NPA's subsequent handling of those cases.¹⁹⁹

[137] I accept that a distinction exists between the work of the Amnesty Committee and the subject matter before the Commission. However, the two are not unrelated, as it is common cause that many TRC cases are the same cases that were processed by the Amnesty Committee and subsequently referred to the NPA by the TRC. While the Amnesty Committee and the NPA focus on different aspects or stages of these cases,

¹⁹⁶ See Terms of Reference above n 7 at para 1.1-1.2.

¹⁹⁷ Id at para 1.3.

¹⁹⁸ *SARFU* above n 19 at para 76.

¹⁹⁹ Recusal ruling at paras 45 and 53.

the significant overlap, including the factual matrix and the persons involved, cannot be overlooked.

[138] A reasonable apprehension of bias may be founded on the fact that a decision-maker previously acquired personal knowledge of the present matter in a past role.²⁰⁰ It is common cause that Commissioner Khampepe was involved in deciding several amnesty applications that became the TRC cases and that she played a role in the referral of some TRC cases to the NPA. For example, she was part of the panels that refused amnesty for the “ANC 37”, which includes the applicants, and the alleged perpetrators responsible for the murder of Richard and Irene Motasi. Due to this personal involvement, Commissioner Khampepe has first-hand knowledge regarding the origin and progression of some of the very cases that are before the Commission.

Communication with Advocate Semenya

[139] Commissioner Khampepe also did not disclose material information on the coaching allegations related to Advocate Semenya. These include allegations that on or about 5 November 2025, Commissioner Khampepe used her private email address to communicate with Advocate Semenya, where she referred him to legal research or authorities that may assist him in the Semenya recusal application.

[140] I agree with the High Court minority that the applicants have not provided evidence of the existence of these alleged improper communications. In particular, President Zuma alleged to have obtained evidence through a whistleblower, yet did not produce this evidence. These unsubstantiated allegations do not establish a reasonable apprehension of bias.

[141] It must be noted that Commissioner Khampepe did not admit or deny the existence of private communications between her and Advocate Semenya. She did not disclose the content of communications between them during the relevant time. An

²⁰⁰ *Bernert* above n 21 at para 78.

essential requirement of justice being seen to be done is that “the presiding judicial officer should have no communication whatever with either party except in the presence of the other” to “avoid the appearance that justice is being administered in secret”.²⁰¹ I accept that the context of an investigative commission differs from that of adversarial litigation. This distinction, however, carries considerably less force in the Semenya recusal application, where Commissioner Khampepe performed an arbitral role. The applicants do not suggest that general communications between the commissioners and the evidence leaders are impermissible. Their concern instead centres on alleged communications between a decision-maker in a recusal application (Commissioner Khampepe) and the person whose recusal is sought (Advocate Semenya) about that recusal application.

[142] In these circumstances, the lack of disclosure may raise concerns. The applicants have specified the alleged period and the mode of communication between Commissioner Khampepe and Advocate Semenya. Rather than dispelling these allegations in a transparent manner, Commissioner Khampepe chose not to disclose the communications.

Appointment to the Commission

[143] President Ramaphosa, in his explanatory affidavit in the High Court, asserts that he was unaware of Commissioner Khampepe’s prior associations with the NPA and the TRC, and that he would not have appointed her had he been aware. The applicants have not sought to review President Ramaphosa’s decision to appoint Commissioner Khampepe.

[144] However, President Ramaphosa’s claim of unawareness demonstrates not only that there was a lack of disclosure but that such non-disclosure had a material impact on his decision to appoint Commissioner Khampepe. It may well be said that there was

²⁰¹ *Roberts* above n 164 at para 23.

a duty on Commissioner Khampepe to disclose her prior roles to President Ramaphosa so that he could have taken an informed decision.

Conclusion on bias

[145] It is irrelevant whether this Court believes that Commissioner Khampepe has the ability and integrity to bring a dispassionate mind to bear and discharge her mandate at the Commission with the requisite impartiality.²⁰² The apprehension of bias is one that a reasonable layperson who is concerned with the administration of justice would have, not that of a judicial officer or trained lawyer familiar with judicial process.²⁰³ This is all the more true in the context of this Commission, where the restoration of public confidence is central to its establishment and purpose. As the Appellate Division held in *BTR Industries*:

“Provided the suspicion of partiality is one which might reasonably be entertained by a lay litigant . . . [i]f suspicion is reasonably apprehended, then that is an end to the matter.”²⁰⁴

[146] I repeat the salient facts. Commissioner Khampepe was among the most senior officials at the NPA during the period when it was receiving and processing the TRC cases. The Commission has called witnesses to testify on the affairs that occurred at that organisation at that time. Despite her level of seniority, she claims to be unaware of any specific policy on the prosecution of the TRC cases during her tenure. There is the added fact that she was also a member of the TRC, the non-prosecution of whose referrals the Commission is tasked to investigate. She is in a position to make findings in respect of her former organisation and former colleagues in that organisation. Had she not been the Chairperson, she may well be a competent witness herself. It is indisputable that the multiplicity of ways in which the matter touches

²⁰² To this end, I agree with the sentiments of Mokgoro J and Sachs J in *SACCAWU* above n 22 at para 57.

²⁰³ *Roberts* above n 164 at para 36.

²⁰⁴ *BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers Union* [1992] ZASCA 85; 1992 (3) SA 673 (AD) at 694I-695A.

Commissioner Khampepe's professional experiences are, at the very least, quite remarkable. Can it be said that the bare denial of bias would satisfy a reasonable member of the public that the cumulative effect of all of these facts is of no moment?

[147] I am of the view that a fair-minded observer, familiar with the correct facts (to the extent that they were disclosed), would reasonably apprehend that Commissioner Khampepe's prior associations with the organisations whose work is under the Commission's inquiry, and her proximity to the Commission's investigative subject matter, might preclude her from bringing a sufficiently disinvested mind to bear. She is simply "too close to the fire". Adding to this apprehension of bias is her lack of disclosure in respect of the multiple connections that are relevant to the assessment of her alleged bias. Had Commissioner Khampepe cleared the mist, the applicants may not have had a strong case for her recusal. Under present circumstances, I am of the view that a reasonable apprehension of bias in respect of Commissioner Khampepe has been established, and the Commission, tainted by such apprehension, cannot serve its function.

Condonation application by the NPA

[148] The NPA seeks condonation for the late filing of an explanatory affidavit. The test is whether it is in the interests of justice to grant condonation. This Court must consider, among other things, the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised and the prospects of success.²⁰⁵

[149] A party seeking condonation before this Court must adequately address all the necessary factors to the satisfaction of this Court. The delay in this matter is approximately two months. Having regard to the nature and urgency of the matter, a

²⁰⁵ *Director of Public Prosecutions, Johannesburg v Schultz; Director of Public Prosecutions, Bloemfontein v Cholota* [2026] ZACC 3; 2026 (3) BCLR 175 (CC) at para 105.

two-month delay is substantial and unreasonable, particularly for an organ of state. The NPA has the resources to abide by this Court's timelines. The explanatory affidavit and written submissions were filed less than two weeks before the hearing.

[150] The NPA's explanation for the delay is that it had to reconsider its initial position to abide by the decision of this Court. It further experienced practical difficulties in obtaining the necessary internal approvals and instructions, and in finalising the papers. The granting of condonation is a judicial discretion. As a public litigant, the NPA cannot escape these timelines with reference to internal delays or practical difficulties.²⁰⁶ Additionally, the issues that the NPA's explanatory affidavit addresses – pertaining to President Zuma's interlocutory application to compel – are canvassed by records already before this Court in this matter. Therefore, condonation is refused. As the Calata Group opposed the NPA's condonation application, the NPA should bear the Calata Group's costs.

Costs

[151] It is trite that costs are awarded at the discretion of the court. In light of the second and third judgments, both the applicants and the respondents have had some measure of success. In the circumstances, each party should bear their own costs.

Second and third judgments

[152] I have read the judgments of my Colleagues Nuku AJ and Rogers J. For the reasons set out in this judgment, I disagree with their conclusion on the recusal applications.

[153] Had I commanded the majority, I would have made the following order:

1. Leave to appeal directly is granted.

²⁰⁶ Id at para 108.

2. The appeal is upheld and the order of the High Court of South Africa, Gauteng Division, Johannesburg, is set aside and replaced with the following:
 - “(a) The point *in limine* raised by the first to fifth respondents in respect of section 47(1) of the Superior Courts Act 10 of 2013 is dismissed.
 - (b) The application to review the ruling, delivered on 30 January 2026 by the Chairperson of the Judicial Commission of Inquiry into Allegations Regarding Efforts or Attempts Having Been Made to Stop the Investigation or Prosecution of Truth and Reconciliation Commission Cases dismissing the recusal applications, is upheld.”
3. The seventh respondent’s application for condonation for the late filing of the explanatory affidavit is refused with costs.
4. Except for the order in paragraph 3, each party is to pay their own costs in the High Court and in this Court.

NUKU AJ (Dambuza J, Kollapen J and Majiedt J concurring):

Introduction

[154] I have had the benefit of reading the judgment of my Colleague Theron J (first judgment). I adopt the facts as set out in that judgment. I agree that this matter engages this Court’s jurisdiction and that leave to appeal directly should be granted. I also agree with the first judgment’s reasoning and conclusion—

- (a) on the section 47(1) point *in limine*;
- (b) that we should entertain the merits of the review application; and
- (c) that condonation of the NPA’s late filing of its explanatory affidavit should be refused.

However, I diverge from the first judgment on whether the review application should succeed. This is for two reasons: (i) the applicants did not properly plead procedural

rationality as a ground of review; and (ii) the facts pleaded by the applicants fall short of establishing a reasonable basis to apprehend that Commissioner Khampepe is biased.

[155] Ordinarily, once it is concluded that a sustainable ground of review has not been pleaded, that should be the end of the matter. However, I address the merits of the recusal application in case I am wrong that no sustainable ground of review has been pleaded. In what follows, I explain the two reasons for my divergence from the first judgment.

Inadequate pleadings on procedural rationality

[156] The first judgment does not determine whether bias is a standalone ground of review under the principle of legality. It instead considers the issue of procedural rationality. It holds that “the presence of a reasonable apprehension of bias, if it exists, is not rationally related to the achievement of the Commission’s purposes”.²⁰⁷ The first judgment accepts that the applicants’ pleadings on procedural rationality are not exemplary.²⁰⁸ However, it asserts that “[the applicants] are of the view that it would offend the principle of legality for Commissioner Khampepe to exercise her public powers if a reasonable apprehension of bias against her exists” and that “their pleadings related to this purported apprehension are detailed”.²⁰⁹ On this basis the first judgment is of the view that this Court has the necessary information to analyse this submission.²¹⁰ Thereafter, it discusses the applicable principles with reference to various decisions of this Court, which explain that procedural rationality concerns the evaluation of the relationship between means and ends. This occurs in instances where a public functionary is vested with power to achieve a particular object, and the inquiry is whether the means employed by that public functionary are rationally related to the achievement of that particular objective. It is thus necessary to examine the case pleaded by the applicants to determine whether this distillate results from the pleadings.

²⁰⁷ See the first judgment at [103].

²⁰⁸ Id at [94].

²⁰⁹ Id.

²¹⁰ Id.

[157] Before this Court, President Zuma has asked for the following relief: upholding the appeal itself and granting the relief sought. Despite this ambiguity, I understood the relief sought by President Zuma to be that this Court should find that it was not necessary for him to have obtained the consent of the Chief Justice before instituting the review proceedings against Commissioner Khampepe, and that this Court should grant the review application which the majority in the High Court had not determined. In President Mbeki's notice of motion before this Court, he simply asks this Court to set aside the recusal decision based on PAJA or, in the alternative, the principle of legality. Thus far, it is clear that the attack targets the recusal decision.

[158] The first judgment observes that neither applicant has pleaded sufficient facts to enable this Court to determine whether the recusal decision constitutes administrative action under PAJA. For that reason, among others, it declines to determine that issue and, as a result, does not consider the applicants' PAJA grounds of review. This, in turn, leaves the applicants' arguments grounded in legality review.

[159] In the High Court, President Zuma pleaded that "under the principle of legality, the decision of Commissioner Khampepe is reviewable as it was not taken lawfully, rationally, and in a manner consistent with the constitutional requirements of accountability, openness and fairness". The first judgment correctly identifies the applicants' point that the recusal decision should have been made by all three members of the Commission as falling within the legality review, because it questions the decision-maker's power. Having considered that point on its merits, it concludes that the point is bad in law, a conclusion with which I align myself.

[160] On rationality, President Zuma's pleaded case is an attack on the recusal decision, which is said not to have been taken rationally. In my view, this is an attack based on substantive rationality which is quite distinct from procedural rationality. The pleaded case does not identify the power vested in Commissioner Khampepe, the

purpose for which that power is conferred and the relevant considerations she ignored in exercising that power to achieve that purpose.

[161] The grounds of review under the principle of legality, as articulated by President Mbeki, are—

- (a) misapplication of the correct test for a reasonable apprehension of bias arising from prior associations and roles;
- (b) that Commissioner Khampepe made her ruling based on subjective considerations;
- (c) erroneous reliance on the 2003 temporal boundary;
- (d) endorsement of an undisclosed and procedurally irregular arrangement regarding Commissioner Khampepe's relationships with Advocate Semenya and Advocate Varney;
- (e) failure to meaningfully engage with the realities of institutional bias;
- (f) adoption of an unlawful approach to reasons and procedural fairness;
- (g) uncritical endorsement of irregular conduct;
- (h) reliance on alleged delay in bringing the recusal application;
- (i) Commissioner Khampepe's failure to consider the implications of her prior adjudication of amnesty applications; and
- (j) improper emphasis on time pressure and speculative disruption.

[162] As with President Zuma, none of the grounds pleaded by President Mbeki identify the power vested in Commissioner Khampepe, the purpose for which that power is conferred and the relevant considerations she ignored when exercising that power to achieve that purpose. Instead, most of these grounds are directed at challenging the substantive correctness of the recusal decision and thus cannot ground a legality review based on procedural irrationality.

[163] Based on all of the above, I have difficulty with the first judgment's conclusion that the applicants have pleaded a case based on procedural rationality. In my view, the deficiencies in the applicants' pleadings should result in the dismissal of the review

application. This is consistent with the first judgment's holding regarding the review grounds based on PAJA, because the review would have been dismissed if it had relied solely on the PAJA grounds due to the deficiencies in the pleaded case. As stated above, I align myself with the first judgment in how it disposed of the other grounds of review under the principle of legality. I am of the view that it is unnecessary to consider them individually.

[164] The difficulty in this case is: what does a person do when summoned to appear before a commission of inquiry chaired by someone perceived as biased? The obvious answer is that such a person may seek to review the President's decision to appoint the Commissioner concerned on procedural legality grounds. In such a case, the court would be in a position to determine, on the pleaded facts, whether a reasonable apprehension of bias has been established in respect of the Commissioner concerned, and, if so, that the decision to appoint them would suffer from procedural irrationality. But this is not the pleaded case, and that puts this Court in an invidious position where it may be constrained to enter into the merits of the review on what may be considered a technical legal basis. This may well be what has compelled the first judgment to resort to procedural rationality as a basis upon which to entertain the merits of the review.

[165] The first judgment upholds the review on one ground based on the reasonable apprehension that Commissioner Khampepe might be biased because of the prior roles she occupied at the TRC and the NPA, as well as her failure to explain the roles she played at these institutions. Assuming I am wrong in finding that procedural irrationality has not been properly pleaded, I am, in any event, not persuaded that the facts pleaded by the applicants have established a reasonable basis to apprehend that Commissioner Khampepe is biased. In considering whether a reasonable apprehension of bias has been established, I assess the issue on the test for a reasonable apprehension of bias adopted in the first judgment.

Have the applicants made out a case for a reasonable apprehension of bias?

[166] The first judgment has set out the facts pleaded by the applicants to substantiate their allegations of reasonable apprehension of bias. I agree with that setting-out. However, I consider it necessary to outline the arguments advanced by both applicants to determine if they are supported by the evidence presented.

[167] President Zuma argues that there is no merit in the defence that the Commission's subject matter has no relationship to the tasks performed by Commissioner Khampepe while she was working for either the TRC or the NPA because there is clear evidence of this in the calling of her colleagues in the HRIU, Judge Saldanha and her former senior in the NPA, Mr Ngcuka, as witnesses to testify before her. He then says that it follows as a matter of simple logic that, first, their evidence is presumed to be relevant to the subject matter of the inquiry and, second, Commissioner Khampepe is as competent and compellable a witness as they are. He concludes that, based on both of these grounds, she is disqualified from sitting on the Commission on the principle of *nemo iudex in sua causa*.

[168] In support of his argument, President Zuma refers to a letter dated 14 November 2025 from the Chief Evidence Leader, Advocate Semanya, to Judge Saldanha, requesting his assistance in providing information to aid the Commission. The letter records that Judge Saldanha, as the head of his unit, "would have had access to information concerning decisions, discussions or policies affecting the investigation and prosecution of TRC-related cases".

[169] Judge Saldanha responded to the letter referenced above, noting that the Terms of Reference of the Commission cover the period from 2003, and advising that his service at the NPA was in 1999, which falls outside the Commission's Terms of Reference. He also stated that he recalled an interim report submitted to the NDPP in 1999, which addressed matters the HRIU was considering at the time. Finally, he stated that he did not possess any documents or records relating to the TRC cases referred by the Amnesty Committee for investigation and prosecution.

[170] Whilst President Zuma may be correct that it can be presumed from the letter dated 14 November 2025 that Judge Saldanha's evidence is relevant to the Commission's investigation, Judge Saldanha's response dispels that presumption. It is clear from Judge Saldanha's response that he cannot be of any assistance to the Commission, and it is difficult to see how the position of Commissioner Khampepe, whose tenure at the NPA coincided with that of Judge Saldanha, can be different. Indeed, it would have been different if there had been no response from Judge Saldanha, or if he had provided a response relevant to the Commission's investigation. When the letter of 14 November 2025 is considered together with Judge Saldanha's response, all that remains is that Judge Saldanha was at the HRIU in 1999, with no indication of his involvement in matters relevant to the Commission's subject matter, and that Commissioner Khampepe is in no different a position.

[171] Mr Ngcuka also provided a statement to the Commission, stating that he was the NDPP between 1998 and 2004. He explains that the HRIU's mandate was to review and assess whether there was sufficient evidence for the NPA to prosecute anyone and to identify which cases required further investigation. He explains further that the HRIU provided its report on which cases could be prosecuted and which could not; thereafter, he decided to refer all the TRC-related cases to the Special National Projects Unit, a unit within the Directorate of Special Operations (Scorpions) that operated until approximately 2003. Mr Ngcuka goes to great lengths to explain what was happening within the NPA during his tenure, and there is no evidence from the time when Commissioner Khampepe was at the NPA suggesting that her role there would have exposed her to matters relevant to the Commission's investigation. It is no wonder that President Zuma's argument goes no further than relying on mere institutional association.

[172] The question is whether a reasonable person having access to the statements from both Judge Saldanha and Mr Ngcuka would reasonably apprehend that Commissioner Khampepe is biased. The existence of a reasonable apprehension of bias

must be assessed based on the content of the knowledge available to a reasonable observer. At first glance, it might have been concerning to see persons who worked with Commissioner Khampepe at the TRC being called to the Commission, but the statements they provided do not offer any evidence supporting a reasonable apprehension of bias on Commissioner Khampepe's part. In the final analysis, what remains is the fact that Commissioner Khampepe was once associated with the NPA, without any evidence of what her role entailed that would have brought her in close proximity to the subject matter of the Commission.

[173] President Zuma also argues that it is common cause that there are members of the Calata Group who are allegedly victims of persons who were denied amnesty by the Amnesty Committee. In this regard, he refers to the affidavit filed by President Ramaphosa, in which the latter states that he understands that Commissioner Khampepe was a member of the Amnesty Committee when the Chairperson of that Committee refused amnesty to the applicants. In this regard, there is some specificity to the role played by Commissioner Khampepe, but the question is whether that role relates to the Commission's subject matter.

[174] The Amnesty Committee considered applications for amnesty and referred those whose applications were denied to the NPA for investigation and possible prosecution. The first judgment acknowledges a distinction between the Amnesty Committee's work and the Commission's subject matter, and, in my view, this should be the end of the inquiry.²¹¹ However, the first judgment goes further and considers the progression of the matters from the Amnesty Committee to the NPA sufficient to establish the necessary link. That, in my view, does not accord with the test in *Bernert*, which the first judgment relies on for this conclusion, because that test requires the decision-maker to have acquired *personal knowledge relevant to the subject matter*. The progression of matters from the Amnesty Committee to the NPA, without evidence that the decision-maker acquired knowledge relevant to the Commission's subject matter, is

²¹¹ See the first judgment at [137].

insufficient. It is necessary for the applicants to present evidence that Commissioner Khampepe, during her time at the Amnesty Committee, acquired personal information relevant to the subject matter of the Commission, and the applicants have not done so.

[175] The next point President Zuma relies on is that Commissioner Khampepe failed to respond to the invitations to explain her role in the NPA, and relatedly failed to disclose these matters to the President, which would have prevented the President from appointing her because of the obvious conflict. He argues that these failures only serve to aggravate the case for a reasonable apprehension of bias.

[176] The argument that Commissioner Khampepe failed to disclose her prior roles at the TRC and the NPA, without evidence showing that those roles were relevant to the subject matter of the Commission, is not sustainable and risks shifting the burden of proof to her, when it is the applicants who have a duty to present evidence substantiating a claim that grounds their apprehension of bias. The President has filed an explanatory affidavit stating that he would not have appointed Commissioner Khampepe had he been aware of the roles she had previously held at the TRC and the NPA. That is no more than a mere personal opinion and is not the test for establishing a reasonable apprehension of bias.

[177] President Zuma's final argument is that there is equally no merit in the defence that the mere fact that the Terms of Reference mention 2003 as the date from which the decisions not to prosecute were made, somehow places a temporal limit on the necessary investigation. He argues that the Terms of Reference address only the date from which the prosecutions were allegedly stopped, not when they were initiated, because, on the evidence, the prosecutions would have been contemplated, considered and otherwise dealt with long before the impugned stoppage thereof. That prior period includes Commissioner Khampepe's stint at the NPA alongside Judge Saldanha.

[178] The issue of the 2003 temporal boundary must be considered in light of all the relevant evidence presented by the applicants. A logical connection must be established between Commissioner Khampepe's prior roles and the Commission's subject matter.²¹² Only thereafter does the issue of the temporal boundary become relevant to whether it can affect the reasonableness of the apprehension. Without establishing that connection, the issue of the 2003 temporal boundary plays an insignificant role.

[179] President Mbeki explains that his application for the recusal of Commissioner Khampepe was based on the following two grounds. First, Commissioner Khampepe's past institutional roles as a Commissioner and a member of the Amnesty Committee between 1998 and 2001, and as a Deputy NDPP in the NPA between 1998 and 1999. Second, Commissioner Khampepe's handling of conflict-of-interest objections pertaining to the Commission's Chief Evidence Leader, Advocate Semenya, as well as her endorsement of a procedurally irregular arrangement between Advocate Semenya and Advocate Varney, who is counsel for the Calata Group, an arrangement which he claims came about as a result of opaque and bilateral interactions between Advocate Semenya and Advocate Varney.

[180] I have addressed the complaint regarding Commissioner Khampepe's prior roles, and President Mbeki's submissions are largely aligned with President Zuma's. On the issue of the 2003 temporal boundary, President Mbeki argues that, while the Terms of Reference require the Commission to investigate alleged interference with the investigation and prosecution of the TRC cases since 2003 (and not before), the reliance on a "temporal boundary" beginning in 2003 is unsustainable and irrational. The context in which the inquiry occurs is relevant to the Commission. It is common cause that the TRC referred the TRC cases to the NPA in 1998. It is also common cause that, after the NPA took ownership of these cases, it established a specialised unit (the HRIU) to investigate and prosecute them – this also occurred in 1998. For the Commission to understand how the alleged influence occurred, it would need to understand the

²¹² *Bernert* above n 21 at para 57.

institutional history and prosecutorial treatment of those cases prior to 2003. The Commission must appreciate this much. As demonstrated by Modiba J (in an analysis of the facts), this assertion is inconsistent with the Commission's own objective conduct.²¹³

[181] President Mbeki's submissions are notably couched in general terms, without providing the specificity needed to connect Commissioner Khampepe's prior institutional roles to the Commission's subject matter. To be clear, there are three roles that are relevant to this application: the role played by Commissioner Khampepe at the TRC, particularly in the Amnesty Committee; the role she played at the NPA; and her role as the Chairperson of the Commission tasked with investigating allegations regarding efforts or attempts made to stop the investigation or prosecution of the TRC cases.

[182] As noted, the first judgment accepts the distinction between the work of the Amnesty Committee and that of the Commission.²¹⁴ While the NPA and the HRIU were involved in investigating the TRC cases, there is no evidence that, between 1998 and 1999, when Commissioner Khampepe was at the NPA, she acquired personal information relevant to efforts or attempts to stop the investigation or prosecution of the TRC cases, which is the subject matter of the Commission.

[183] President Mbeki's second complaint, concerning Commissioner Khampepe's handling of conflict-of-interest objections regarding Advocate Semanya and her endorsement of an arrangement between him and Advocate Varney, is even less convincing and appears to be nothing more than a makeweight argument. Commissioner Khampepe will be required to make rulings from time to time on issues raised by the parties appearing before the Commission, and a party's dissatisfaction

²¹³ See High Court minority above n 1 at para 127.

²¹⁴ See the first judgment at [137].

with any of those rulings cannot, without more, be sufficient to ground a reasonable apprehension of bias.

[184] In conclusion, the applicants failed to adduce evidence supporting their apprehension of bias. Therefore, there is no basis to conclude that Commissioner Khampepe will be unable to bring an impartial mind to the evaluation of the evidence before her, or that she would be beholden to institutional associations that are decades old. Accordingly, I hold that no reasonable apprehension of bias has been established in this case.

[185] The first judgment correctly sets out the legal position that, for the applicants to succeed, they must establish a *nexus* between the decision-maker and the subject matter.²¹⁵ In grappling with this question, it then asks: “[i]n the eyes of a reasonable and objective observer, do these facts establish a *nexus* between Commissioner Khampepe’s role at the NPA and the mandate of the Commission?”²¹⁶ Thereafter, it answers the question in the affirmative and explains why the answer must be so. This, in my view, is where the first judgment errs, as I explain below.

[186] There is a difference between the standard that requires an applicant to establish a *nexus* between the decision-maker’s role and the subject matter, on the one hand, and the question posed in the first judgment about whether a *nexus* has been established in the eyes of a reasonable, objective observer. The standard requires that the *nexus* be established by evidence, but on the first judgment’s premise, the establishment of the *nexus* is not a matter of evidence but an observation by a reasonable and objective observer – that is, an appearance. This point is made clear by this Court in *Bernert*, when it stated that “[t]hese facts are necessary in order to assess the reasonableness of the apprehension of bias and they may well demonstrate whether there is any logical

²¹⁵ Id at [117].

²¹⁶ Id at [121].

connection between the interest held and the feared deviation from impartial adjudication”.²¹⁷

[187] The first judgment’s incorrect premise is clear from its assessment, which focuses on the roles Commissioner Khampepe played while at the TRC and the NPA, without any attempt to assess, on the basis of evidence rather than appearance, whether the *nexus* has been established. Having assessed the roles, it concludes that “her prominent position within the NPA, her wide powers as a Deputy NDPP and her background with the TRC all form part of the *nexus*”.²¹⁸

[188] It is necessary to recall what this Court stated in *Masuku* regarding the reasonable apprehension of bias and prior associations. It stated:

“[T]he test for reasonable apprehension of bias requires more than mere association with a matter. The relevant connection must call into question the ability of the judge to apply their mind in an impartial manner to the case before them.”²¹⁹

On this basis, it would be insufficient to ground a reasonable apprehension of bias on mere institutional associations. More is required. The applicants made generalised averments that Commissioner Khampepe occupied positions in the Amnesty Committee and the NPA. Unfortunately, these generalised averments cannot constitute grounds for recusal on a reasonable apprehension of bias. They do not indicate that Commissioner Khampepe will be unable to bring an independent and impartial mind to bear on the evidence before her.

Costs

[189] I agree with the first judgment’s conclusion on costs.

²¹⁷ *Bernert* above n 21 at para 57.

²¹⁸ See the first judgment at [122].

²¹⁹ *Masuku* above n 20 at para 69.

Order

[190] In conclusion, I agree with the proposed order of my Colleague, Theron J, on jurisdiction, leave to appeal directly, the interpretation of section 47(1) of the Act, the NPA's condonation application and costs. Taking into account the third judgment by my Colleague, Rogers J, this Court reaches unanimity on these issues. A majority of this Court holds that the review application falls to be dismissed. Therefore, I make the following order:

1. Leave to appeal directly is granted.
2. The appeal is partially upheld. The order of the High Court of South Africa, Gauteng Division, Johannesburg is set aside and replaced with the following:
 - “(a) The point *in limine* raised by the first to fifth respondents in respect of section 47(1) of the Superior Courts Act 10 of 2013 is dismissed.
 - (b) The application to review the ruling, delivered on 30 January 2026, by the Chairperson of the Judicial Commission of Inquiry into Allegations Regarding Efforts or Attempts Having Been Made to Stop the Investigation or Prosecution of Truth and Reconciliation Commission Cases dismissing the recusal applications, is dismissed.”
3. The seventh respondent's application for condonation for the late filing of the explanatory affidavit is refused with costs.
4. Except for the order in paragraph 3, each party is to pay their own costs in the High Court and in this Court.

ROGERS J

[191] I have had the benefit of reading the judgments of my Colleagues Theron J (first judgment) and Nuku AJ (second judgment). I agree with the order, though not all

of the reasoning, in the second judgment. My views are summarised below. Time and other circumstances do not permit me to write a full judgment.

[192] The proceedings of the Commission are not subject to review in terms of PAJA as they do not meet the test in the definition of “administrative action” read with the definition of “decision” in PAJA. This is so at least for the reason that the acts of such a commission are not “of an administrative nature”. Since we have all the facts, and since the question is one of law, it is not a matter that we should leave open merely because it has perhaps been insufficiently argued. The approach to the review depends vitally on whether PAJA is applicable.

[193] Although, in my view, PAJA is inapplicable, the Commission’s proceedings are subject to review in terms of legality. This is so because, as the first judgment correctly notes,²²⁰ the Commission exercises public power and performs a public function. Among other things, the Commission may compel people to give evidence and provide documents, with criminal sanctions if they do not comply. It must furnish a report at the end of its proceedings. Although the report does not adjudicate rights, it may be very damaging to the reputations of implicated persons.

[194] Bias (in which I include a reasonable apprehension of bias) should be recognised as a self-standing ground of legality review in the case of commissions of inquiry. It is not necessary to decide to what extent bias is a ground of legality review in other contexts. If bias were not a self-standing ground of review in the case of commissions of inquiry, there would have been no point in asking Commissioner Khampepe to recuse herself, because it would not have been unlawful for her to remain as a commissioner even if she was biased. I cannot accept that this is the law.

[195] For the reasons just stated, I do not consider that bias needs to be shoehorned into procedural irrationality, as the first judgment does. As the second judgment notes,

²²⁰ See the first judgment at [87].

it might be procedurally irrational for a President to appoint a commissioner who is biased,²²¹ but that is not the case advanced by the applicants. Commissioner Khampepe herself does not seem to have proceeded in a procedurally irrational way. The applicants might say that her recusal ruling was substantively irrational, but for the reasons briefly stated below, the focus on the rationality of her ruling is misconceived.

[196] If, as I consider to be the case, bias is a self-standing ground of legality review in the case of commissions of inquiry, a court must test bias objectively. The question is not whether a commissioner who has declined to recuse herself acted rationally or reasonably in reaching that conclusion. There is no law that confers on a commission of inquiry or an individual commissioner the power, in place of the courts, to determine whether there is a reasonable apprehension of bias.

[197] It is undoubtedly sensible for a person who wants to have a commissioner removed on grounds of bias to lay the facts before the commissioner and request her to withdraw. If she does not do so, however, the court before which a challenge is brought must decide for itself whether, on the evidence, bias has been established.²²² That is what a review court would do in a variety of other circumstances, for example where there is a dispute as to the existence of a jurisdictional fact or about procedural fairness (if this ground of review is applicable).

[198] There might even be a legal challenge without a prior recusal ruling, since there is no absolute bar preventing a disgruntled litigant from approaching a court directly without first asking a commissioner to recuse herself. A direct challenge might be the only option where the facts supporting bias emerge late in the day. Whether or not there

²²¹ See the second judgment at [164].

²²² This is in line with Canadian authorities to the effect that the standard of review in such circumstances is correctness, not reasonableness: *Communication, Energy and Paperworkers Union of Canada Local 60N v Abitibi Consolidated Company of Canada* 2008 NLCA 4 (CanLII) at para 11; *Joyce v Newfoundland and Labrador Chiropractic Board* 2008 NLTD 144 (CanLII) at para 33; *Canadian Pacific Railway Company v Canada (Attorney General)* 2018 FCA 69 (CanLII); [2019] 1 FCR 121 at paras 34 and 55; *Transport Car-Fré Ltée v Lecours* 2018 FC 1133 (CanLII) at para 35; and *Adeniji v Canada (Citizenship and Immigration)* 2026 FC 799 (CanLII) at paras 11-12.

has been a prior request for recusal, the test in the review court is the same: objectively assessed, are the proceedings of the commission lawful, having regard to the alleged bias of one of the commissioners?

[199] In the present case, the applicants framed their case as a challenge to the reasonableness or rationality of Commissioner Khampepe's recusal ruling. In my view, that was incorrect, since its unstated premise is that Commissioner Khampepe had a statutory power to decide on her own recusal, the question being whether she exercised the power in a way that could be impugned in terms of PAJA or legality review. Despite this misconception in the framing of the case, bias was fully canvassed in the evidence and argument. The fact that the applicants placed bias in the wrong legal pigeonhole should not be a basis for this Court to decline to decide the real issue on the correct legal basis. The respondents cannot be prejudiced.s

[200] For the reasons just stated, I do not agree with the second judgment's conclusion that this case should fail at the level of pleading.²²³

[201] The fact that the proceedings of a commission are subject to review in terms of legality does not mean that, when bias is raised in court proceedings, one must first find some particular decision of the commission as a target of the review. The complaint in such a case is that the biased commissioner cannot lawfully be part of the proceedings of the commission, a commission that will inevitably exercise public powers and public functions during the course of its proceedings up to the time it issues its report. In the present case, recusal was sought at a time when the Commission had indeed already exercised some of its public powers, not least the summoning of former Presidents Zuma and Mbeki to give evidence. In his amended notice of motion in the High Court, former President Mbeki specifically asked that the Commission's proceedings to date be declared unlawful, of no force or effect and thus a nullity.

²²³ See the second judgment at [163].

[202] Finally, as to whether, objectively tested, bias was established on the pleadings in the High Court, I agree with the second judgment's conclusion that it was not.

For the First Applicant:

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B N Buthelezi, K Monareng and
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For the Seventh Respondent:

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