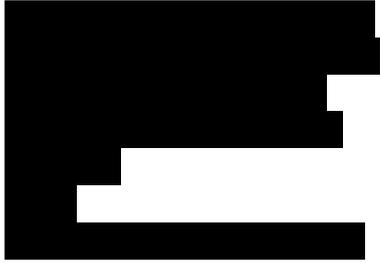


# TN MADONSELA

CENTRE FOR SOCIAL JUSTICE; FACULTY OF LAW; UNIVERSITY OF STELLENBOSCH CNR  
RYNEVELD AND VICTORIA STREET; MATIELAND 7600 [REDACTED]



Dear Colleagues

**RE: SECTION 194(1) ENQUIRY IN RESPECT OF THE PUBLIC PROTECTOR OF SOUTH AFRICA, ADV BUSI MKHWEBANE: REQUEST TO TESTIFY**

Thank you for your letter sent to me via e-mail in November 2023 and which came to my attention recently.

1) I note your assertion that you:

“1. ... act for the Public Protector, Advocate Busisiwe Mkhwebane, who was suspended by President Ramaphosa on 9 June 2022 and who is currently undergoing a parliamentary enquiry into the veracity of the charges against her. Depending on the findings and/or recommendations of the Section 194(1) Committee, she may undergo removal proceedings conducted by or under the auspices of the National Assembly.

2. Adv Mkhwebane took over the reigns at PPSA on 16 October 2016, immediately after you left the institution. We are therefore, of the view that your evidence would assist the Section 194 Committee to reach a just decision. To this end, we have identified various key areas pertinent to the motion of Honourable Mazzone MP and in respect of which your testimony is likely to be relevant, including:- 2.1. The backlog within the PPSA from the time you took over the reigns as the incumbent Public Protector and when you left the institution;

The relationship between the institution and the State Security Agency, more especially on issues relating to classified documents and classification of such;

- 2.3. Vetting of staff members of the PPSA;
- 2.4. Donor funding to augment the budgetary constraints at PPSA;
- 2.5. Outsourcing of investigations to the various law firms;
- 2.6. Consequence management at PPSA during your tenure;
- 2.7. The impact that the Nkandla judgment had on litigation costs at PPSA;
- 2.8. The reasons for not completing some of the key investigations, especially the key CIEX and Vrede matters, after considerably long period of investigation;
- 2.9. Human Resource Management issues to do with the management of poor performance;
- 2.10. The impact of inadequate resource allocation on what may seem to be incompetence in the office;
- 2.11. Your public utterances regarding, *inter alia*, the allegations that Adv Mkhwebane had revealed confidential information in respect of the section 7(9) Notice issued to Minister Gordhan; and
- 2.12. The role of the executive authority, in the institution.

The above is not exhaustive and should not limit the scope of your testimony into assisting the Committee to understand the functioning of the office of the Public Protector. The list does however cover the key areas of relevance. It is not reasonably practicable to predict all the areas which may arise or cleared up during the anticipated consultations with the legal team representing the Public Protector.

## **REQUEST**

4. The purpose of this letter is to request you, in view of all or some of the foregoing, to agree voluntarily to avail yourself to give evidence at the Section 194(1) Enquiry and in connection with the abovementioned issues. The existence of the alleged incompetence and/or misconduct now falls to be verified or refuted by the Section 194(1) Committee.

5. Should you be willing to avail yourself voluntarily as per this request, please indicate so by communicating your decision to do so preferably on or before Friday 18 November 2022. The

necessary arrangements will then be made to consult with you in order to compile a statement of fact that will be utilised as a basis for your evidence. It is reasonably expected that, as a public figure, you will only be willing to assist in this important process.

6. However and in the unlikely event that you are not willing to avail yourself voluntarily, then the necessary steps will be taken to bring you before the Committee by the invocation of the process envisaged in section 14 of the Powers, Privileges and Immunities of Parliaments and Provincial Legislatures Act 3 of 2004, read with clauses 5.3 and 5.4 of the Directives which were issued by the Chairperson of the Section 194(1) Committee on 14 July 2022. For your convenience, we annex hereto a copy of the official and signed Directives. In either eventuality, kindly and promptly respond by the aforementioned deadline of 18 November 2022.

7. We are available to assist you to compile a statement on the aforesaid testimony. Unfortunately, time is of the essence, and we are obliged to submit such a statement to the Committee as soon as possible...”

2) Kindly note that I am unable to assist you for the following reasons:

(a) I do not see the rational connection of the majority of the above questions and the Section 194(1) inquiry, which stems from judgements by court, up to the Constitutional Court regarding Adv Mkhwebane’s integrity flowing from court decisions about her honesty and professional competence flowing from court decisions regarding her comprehension of the Public Protector’s constitutional mandate;

(b) The information you seek is with the Public Protector as an institution. Having left the institution more than 6 years ago, it is the institution that is best suited to respond to questions regarding its relationship with organs of state in line with its constitutional position as an independent constitutional institution that is set up to hold other organs of state accountable, including the State Security Agency;

(c) I would have been in a position to help a week after leaving office if efforts to work with applicable Public Protector Team members to finalise a quality assured set of records in the week after leaving office on 14 October 2016, were not rebuffed by Advocate Mkhwebane who flatly forbade any contact between myself and the teams I had worked with when I requested her permission to do so; and

(d) With matters still fresh in my head, Advocate Mkhwebane would have had an opportunity to ask me institutional management questions not in mine or staff reports had she not suddenly

refused to meet me the week following my leaving office, despite the two of us having agreed during our handover meeting at my office on 14 October 2016, that we would continue our meeting and briefing the following week. The following week, she suddenly insisted that as I was no longer in office such was inappropriate to meet to augment my briefing with her and that I should have done this earlier. This was despite it being in the public domain that I had been ambushed by the then President with legal action on the state capture matter, which impacted my plans for a neat handover. E-mail correspondence to this effect should be available. In my case, I had been able to meet with both my immediate predecessors Advocate Mushwana and Baqwa soon after assuming office, to fill in gaps where there were some.

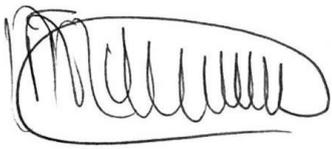
3) I recommend that you find the administrative information about staffing, vetting and institutional relations from the Public Protector records and staff members such as Neels Vander Merwe and Pona Mokgaladi who had been there since the establishment of the Public Protector as an independent constitutional institution under Advocate Baqwa, in 1995. Former CEOs may also be helpful.

4) Regarding investigations related information, I suggest you rely on observations and findings that have been made by courts in cases such as the *SARB* case. This has included determinations of the Constitutional Court, which is the apex court whose decision is final. In this regard, it must be borne in mind that nothing I or anyone can say can override court decisions. An attempt to do such would have the same results as when Parliament tried to review the findings of the Public Protector in the Nkandla matter reported under the title *Secure in Comfort*. You will recall that in *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* [2016 \(3\) SA 580](#) (CC) (*EFF 1*), the Constitutional Court found that the National Assembly's second-guessing of the findings of the Public Protector or "stepping into the shoes of the Public Protector" and replacing her findings with its own, was a violation of the rule of law (para 98).

5) Regarding preparing my statement in the event I am subpoenaed, I would require an independent legal service provider procured by the Public Protector as an institution and to work with that institution to find relevant records and prepared any statement that is rationally connected to and accordingly relevant to this matter. This will require that the Public Protector pays for my transport to Pretoria and that time is allowed to find relevant records.

6) I hope you find the above in order.

Best wishes

A handwritten signature in black ink, consisting of a series of loops and curves, enclosed within a roughly rectangular border.

**Prof Thulisile Madonsela**