



PUBLIC PROTECTOR
SOUTH AFRICA

Accountability • Integrity • Responsiveness

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Adv. Busisiwe Mkhwebane
The Public Protector South Africa

Dear Adv. Mkhwebane

LEGAL SERVICES TO ADV B MKHWEBANE DURING THE PROCEEDINGS BEFORE THE SECTION 194 COMMITTEE

1. The above matter refers.
2. My previous communication to yourself as well as the Chief Executive Officer's (CEO) communication with your legal representatives and Attorney of record, Messrs Seanego Inc, dated 4 July 2022, 18 July 2022 and 13 September 2022, amongst others, have reference.
3. You would recall that the previous communications related to, *inter alia*, your request for continued access to the financial and legal resources of the PPSA during the period of your suspension, for the purposes of legal representation and/or legal assistance in relation to the section 194 proceedings as well as your suspension by the President.
4. In determining the PPSA's commitment and liability for the funding of your defence during the section 194 proceedings, consideration was given to, *inter alia*, the following:
 - 4.1 The Presidential Minute recording the decision by the President, as required by section 101(1) of the Constitution, which stated that you will continue to receive a salary, allowances and other benefits that are attached to the position of the Public Protector during the period of your suspension;
 - 4.2 The Constitutional Court finding in the matter of *Speaker of the National Assembly v Public Protector and Others; Democratic Alliance v Public Protector and Others* [2022] ZACC 1, that an

office-bearer is entitled to full legal representation at the stage of the section 194 enquiry, that is, during the enquiry before the committee established in terms of rule 129AA;

4.3 The judgement in the matter of the *Public Protector of SA v The Speaker of the National Assembly and Others 8500 / 2022* [2022] ZAWCHC 117 (10 June 2022), where the Western Cape Division of the High Court reiterated your legal rights, access to legal representation, as well as legal remedies as critical safeguards and guarantees in relation to both your suspension as well as the section 194 proceedings; and

4.4 That the commitment excludes any litigation in any other forum, such as a court of law, emanating from, or in relation to the proceedings, or any legal services in preparation for any legal action contemplated in respect of the proceedings.

5. It was noted that your conditions of service, as preserved in terms of the Presidential Minute containing the conditions of your suspension, do not contain any “benefits” that could be construed as a right or entitlement to legal representation and assistance by the PPSA from the public purse, particularly in pursuit of what is effectively, your personal interest in the post of Public Protector. Similarly, there is no judicial authority/precedent imposing an obligation on the PPSA to fund your right and access to legal representation in the section 194 proceedings, as envisaged in the above-mentioned judgements of the Constitutional Court and High Court.

6. PPSA nevertheless resolved, in order to support a fair and valid process before the section 194 Committee as far as its resources would allow, to commit to funding the reasonable costs of your defence in the impeachment proceedings, subject to confirmation by the accounting officer in terms of the PFMA and the Treasury Regulations that:-

- a) there is sufficient funding to cover the costs of legal services that you may require in relation to the section 194 process;
- b) any estimated legal costs are reasonable and budgeted for; and
- c) the commitment excludes any litigation in any other forum, such as a court of law, emanating from, or in relation to the proceedings, or any legal services in preparation of any legal action contemplated in respect of the proceedings.

7. It was therefore, imperative that the PPSA ascertain the likely financial implications of your legal representation at the section 194 proceedings as accurately and speedily as possible, to determine the extent of the PPSA’s reasonable financial commitment on the matter. To this end, the PPSA requested, and was provided with the estimated costs for the provisioning of legal services to you during the section 194 proceedings, which included fees, charges, disbursements and other costs to the amount of R4 550 000.00 (four million and five hundred and fifty thousand Rand). Your legal team noted that the estimated costs were calculated for an expected period of 35 days, and that the

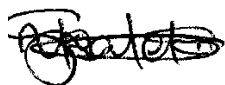
“fees will be revised should the total number of days exceed the scheduled days due to any extensions by the National Assembly.”

8. As you are aware, the section 194 proceedings have indeed exceeded the initial scheduled period and are still ongoing. The PPSA has already been billed and paid an amount in excess of R10 million (Ten million Rand), which is more than double the amount that it had originally committed, without the fee agreement being revised as per the undertaking between the parties. This amount excludes the costs for the period of October 2022 to date, for which the PPSA has not yet been billed.
9. Your legal team had, at some point, also approached the PPSA for additional mandates and instructions to provide you with legal services in other matters, which had to be declined. They were duly advised that the PPSA did not budget for the financial implications of the (extended) section 194 proceedings, and therefore cannot afford same.
10. I wish to reiterate that the budget of the PPSA is currently under severe pressure because of the escalating costs of the section 194 proceedings, as well as general litigation fees and costs, including expected bills of costs in matters where costs orders were issued against the PPSA. The current state of affairs has had a knock-on effect on other litigation matters, which had to be abandoned or where the PPSA is unable to consider the procurement of the services of external legal practitioners to assist with the defence and opposition of litigation against it, due to lack of funding.
11. The Public Finance Management Act, 1999 (PFMA) and the Treasury Regulations require the Accounting Officer (CEO) to ensure that there is sufficient funding for any expenditure that will be required to incur irrespective of the service to be rendered. I have already approached both the Department of Justice and Constitutional Development (DOJ) as well as the National Treasury for additional funding to cover the costs as outlined above. The commitment for financial assistance from the DOJ is not sufficient to avoid overspending on the budget, which may be classified as irregular and/or unauthorised expenditure.
12. In the circumstances, I wish to advise you that the PPSA will not be able to extend its funding commitment for the provisioning of legal services for the purpose of the Section 194 proceedings, beyond the current financial year ending on 31 March 2023.
13. Similarly, the PPSA is not in a position to continue to fund the legal costs for your legal representation in the criminal proceedings in the matter of *S v Adv Busisiwe Mkhwebane – Hillbrow Cas436/08/2019*, beyond the date of your last appearance in the Pretoria Regional Court on 31 August 2022. Your legal team will be advised that any mandate and instructions from the PPSA for the provisioning of legal services to you in respect of the said criminal matter at the expense of the PPSA, is henceforth terminated. The CEO has previously declined a request from your legal team to

fund the civil proceedings in the Gauteng Local Division of the High Court, Pretoria under case number 2022/19628 to review the decision of the National Director of Public Prosecutions on the criminal matter against you.

14. Furthermore, since the costs have not been revisited as agreed, and the available budget has effectively been depleted, the PPSA implores on you and your legal team to ensure that the invoices for the period October 2022 to date, as well as for the remainder of the financial year, are limited to the essential services rendered strictly in accordance with the agreements and the tariff of fees of the PPSA, to avoid any dispute that may impact on the sec 194 proceedings.

Sincerely,



ADV. KHOLEKA GCALEKA
ACTING PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 1 MARCH 2023

COPY:

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Chairperson: Committee for Section 194 Enquiry

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Mr Gratitude Magwanishe, MP

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Chief Executive Officer

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