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Your Ref: Mr. Dyantyi 17 May 2023

Mr QR Dyantyi MP
Chairperson: Committee of the Section 194 Enquiry
Parliament Building
Parliament Street
Cape Town

Per Email: [redacted]

CC: [redacted]

Dear Chairperson,

RE: SECTION 194 PROCEEDINGS BEFORE THE COMMITTEE

1. We refer to your letter dated 15 May 2023 and received by our office on 16 May 2023 and other email exchanges between your office and our office.

2. We thank you for your indulgence in extending the deadline for submitting our response.

3. In making our response, we deem it prudent to inform you of the following:

3.1. First: we have taken the liberty of sharing your letter under reply with the Public Protector, Adv Busisiwe Mkhwebane. We trust you understand this need albeit, we shall nonetheless set out reasons, below, why we disclosed this letter to her.

3.2. Second: we indicated in immediate exchanges that we were considering your letter and intended responding to it comprehensively. .

3.3. Third: at the outset, we must impress our disalignment with views expressed in your letter, under reply, particularly as it relates to the powers enjoyed by your good self and/or the Committee to subpoena alternatively summon Mr Seanego of Seanego Attorneys Inc. in terms of section 56 of the Constitution of the Republic of South Africa, 1996 ("**Constitution"**) as read with sections 15, 16 and 17 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, 2004 as amended ("**Powers Act"**). On the contrary, we are Regulated and subject to the Legal Practice Act, 2014 as amended, read with related Rules and Regulations.

3.4. Fourth: with the above understanding, we thus disagree that we may be subpoenaed alternatively summoned in the manner and for the reasons stated and suggested in your letter.

4. While we intend addressing your letter, should we omit addressing any aspect thereof, we impress that such an omission ought not be construed as an admission of any fact not specifically address (deliberately or inadvertently). We accordingly reserve our right to respond to such allegations at the appropriate time and forum should the need arise.

5. You invited Mr. Seanego, of our firm, to voluntarily submit, himself before the Committee in order to:

> *"explain the "professional reasons" which have motivated your decision and answer any questions I may have in this regard. For purposes of providing this explanation you shall be sworn in and examined by me, in terms of section 15 of the Powers, Privileges and Immunities of Parliament and Provincial*

Legislatures Act 4 of 2003 (sic). Your attention is also drawn to sections 16 and 17 of that Act."

6. Failing such voluntary surrender, you threaten that "*I shall ask the Committee to summon you to appear before it*", for the self-same reason.

7. We disagree that Mr. Seanego may be summoned before the Committee for the reasons stated in your letter and because of the relationship between ourselves and Adv Mkhwebane.

8. It is our respectful view that the relationship between Seanego Attorneys Inc. and Adv Mkhwebane is that of attorney and client. For that reason, it is laced with the necessary cloth of professional privilege. Therefore, all communications and discussions emanating from the said professional relationship cannot be divulged unless expressly or impliedly or imputedly waived by Adv Mkhwebane. Accordingly, we would not be able to explain the "professional reasons" as referenced in our letter to you and dated 15 May 2023. Adv Mkhwebane has asserted her privilege and thus has not given us consent to divulge matters incidental to instructions given to us during the period we represented her as her attorneys of record.

9. In support of our conclusion, you will be aware that it is a trite principle of our law that communication made between attorney and client may not be disclosed without the client's consent. The principle has been expressed in these terms:

> *"The privilege is usually said to exist for the following reasons. Human affairs and the legal rules governing them are complex. Men are unequal in wealth, power, intelligence and capacity to handle their problems. To remove this inequality and to permit disputes to be resolved in accordance with the strength of the parties' cases, lawyers are necessary, and privilege is required to encourage resort to them, and to ensure that all the relevant facts will be put before them, not merely those the client thinks favour him. If lawyers are only told some of the facts, clients will be advised that their cases are better than they actually are, and will litigate instead of compromising and settling. Lawyer-client relations would be full of 'reverse and dissimulation, uneasiness,*

and suspicion and fear without the privilege the confidant might at any time have to betray confidences."

10. Our courts have remarked as follows:

> *"The conflict between the principle that all relevant evidence should be disclosed and the principle that communications between lawyer and clients should be confidential has been resolved in favour of the confidentiality of those communications. It has been determined that in this way the public interest is better served because the operation of the adversary system, upon which we depend for the attainment of justice in our society, would otherwise be impaired… The privilege extends beyond communications made for the purpose of litigation to all communications made for the purposes of giving and receiving advice and this extension of the principle makes it inappropriate to regard the doctrine as a mere rule of evidence. It is a doctrine which is based upon the view that confidentiality is necessary for the proper functioning of the legal system and not merely the proper conduct of particular litigation."*

11. Further, our profession and the applicable regulatory framework, including the Code of Conduct, compels us to maintain client confidentiality unless waived by the client.

12. We indicated above that we shared your letter under reply with Adv Mkhwebane. We invited her consideration and instructions, limited to the question of privilege as you are aware we hold no mandate, and she has indicated to us that she asserts her privilege and thus we are compelled to retain information she shared with us in the course of us executing her mandate.

13. Another reason is that the Committee is convened in terms of section 194 of the Constitution. Section 194, saliently, reads:

> *"The Public Protector … may be removed from office only on…a finding to that effect by a committee of the National Assembly*

and the adoption by the Assembly of a resolution calling for that person's removal from office."

14. The removal of the Public Protector is a Parliamentary mandate – she is subject and accounts to Parliament. The Committee in question, therefore, is a Parliamentary Committee – to state the obvious.

15. That said, it is no wonder that the applicable rules (or Directions, issued by the Chairperson in terms of the Assemble Rule 183, governing the appearance of persons in the oral hearings of the s194 Enquiry into the removal of the Public Protector, Adv B Mkhwebane) are invoked through the auspices of section 56 of the Constitution. Section 56 of the Constitution is located in Chapter 4 of the Constitution, which Chapter deals with Parliament and not legal practitioners such as Seanego Attorneys Inc.

16. Further, a summons (intimated in your letter under reply) would be issued pursuant to section 56 of the Constitution as read with section 14 of the Powers Act.

17. Accordingly, where it is suggested that we are subject to the reach of the said provisions, a proper interpretation of those provisions would be necessary. In this instant, it would be necessary to first establish whether Mr. Seanego may be summoned for the reasons of "*explain(ing) the "professional reasons" which have motivated your decision and answer any questions I may have in this regard. For purposes of providing this explanation you shall be sworn in and examined by me, in terms of section 15 of the Powers (Act).*"

18. We refer this Committee and your good self to ***Natal Joint Municipality Fund Endumeni Municipality*** ((920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012)) wherein the following was stated by the Supreme Court of Appeal:

> *"[18] Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the*

construction of documents in order to trace those developments. The relevant authorities are collected and summarised in Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School. The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. ***The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document****."*

19. The Constitutional Court in the matter of ***University of Johannesburg v Auckland Park Theological Seminary and Another*** (CCT 70/20) [2021] ZACC 13; 2021 (8) BCLR 807 (CC); 2021 (6) SA 1 (CC) (11 June 2021) confirmed the foregoing principle

and thus, we have to look at the context and purpose of the provisions being interpreted, in this case the Powers Act read with the Constitutional provision.

20. For our purposes, the Powers Act and section 56 of the Constitution find application within the relevance of the section 194 Inquiry and no other context nor purpose.

21. In the circumstances of the foregoing, it is difficult to understand the basis of the Chairperson of the Committee seeking to exercise the powers alleged. Furthermore, it is surprising why Mr. Seanego of Seanego Attorneys Inc. is being called to appear before the Committee as suggested, for at least two reasons.

21.1. First: the Committee is a creature of Statute and has no inherent powers. While it seeks allegiance and refuge in the Powers Act, we respectfully disagree that the Powers Act is invoked in relation to the matters before us.

21.2. Second: we were attorneys of record for Adv Mkhwebane. The invitation is directly related to that relationship and seeks to uncover confidential information shared within the context of that relationship.

22. The purpose of the section 194 Inquiry could never include and extend to calling an erstwhile legal representative before the Committee in order to divulge confidential information and thereby betraying legal professional privilege enjoyed by clients.

23. The provisions of the Powers Act, relied upon, correctly interpreted cannot be construed in the manner suggested in your letter, with respect.

24. To summarise this point:

24.1. Seanego Attorneys Inc. (or its employees) is not the subject of the section 194 proceedings.

24.2. Mr. Seanego is not a witness in the section 194 Inquiry – neither the evidence leaders nor the Public Protector, Adv Mkhwebane has suggested that Mr. Seanego would be called as a witness and importantly, we have not been advised what evidence would be required of him and in relation to which aspect of the section 194 Inquiry. That is to say, our invitation would not be connected

to the work of the Committee looking into the fitness of Adv Mkhwebane to hold the office of the Public Protector.

24.3. As a result, Mr. Seanego cannot be summoned to appear before the Committee for the reasons stated and suggested in your letter.

25. Further, there is an unfortunate undertone in your letter insinuating that we have withdrawn as attorneys of record purely to frustrate the Committee's work. This is unfortunate.

26. We must impress that the Public Protector has never instructed us to delay this matter, for whatever cause, and thus our involvement has been a genuine attempt at executing instructions given us. We have parted with Adv Busisiwe Mkhwebane and we no longer represent her as attorneys of record for legitimate reasons albeit we cannot divulge those reasons apart from saying what we have already said in our letter.

27. To illustrate this point, you wrote to Adv Mkhwebane on 12 May 2023 and copied us to that correspondence. We responded to your letter on 15 May 2023 and we referred your letter dated 03 May 2023 wherein you expressly mentioned that Adv Mkhwebane had communicated to the Committee secretary that "*I wonder why you copied the Attorneys since currently I have no attorneys of record".*

28. As stated, our mandate was terminated on 31 March 2023 and this much is echoed in our previous correspondence. Our letter merely sought to clarify the position and was not a recent development.

29. Our courts have recognised that both client and attorney have power to terminate their relationship at any stage during the course of their relationship. We refer you to the Pretoria Division of the High Court in the matter between ***Advocates S Sayed N.O v Road Accident Fund*** under case number 50887/18.

30. We have indicated that Adv Mkhwebane already communicated to the committee secretary that we were no longer her attorneys of record. We understood and continue to understand that our mandate was terminated on 31 March 2023.

31. Our non-involvement is thus not engineered at stalling proceedings, at all.

32. Lastly, we wish to correct this misstatement. Seanego Attorneys Inc. was instructed by Adv Mkhwebane. In the course of executing the said instruction, at least two directors of Seanego Attorneys Inc. were used; namely, Mr. Seanego and Ms. Malope, who you previously referred to as an associate.

Yours Faithfully

SEANEGO ATTORNEYS INC.