



**PUBLIC PROTECTOR
SOUTH AFRICA**
Accountability • Integrity • Responsiveness

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Dear Mr Pandelani

REQUEST FOR LEGAL ASSISTANCE TO ADV B MKHWEBANE: PUBLIC PROTECTOR OF SOUTH AFRICA (SUSPENDED)

1. The Public Protector South Africa (PPSA) was requested by the Chairperson of the Committee for the Section 194 Enquiry into the Removal of the Public Protector, (Adv B Mkhwebane) to engage your esteemed Office with the view to *“enquire if there is any reason why the State Attorney cannot be instructed to brief counsel on behalf of the PPSA, for the benefit of Adv Mkhwebane...”*
2. The PPSA agreed to submit the request to you for your urgent discretion, but for the reasons explained in the enclosed letter to the Chairperson as well as to Adv Mkhwebane, dated 9 May 2023 and 10 May 2023 respectively, is not in a position to instruct the State Attorney directly as the client Institution to brief counsel on behalf of the PPSA for Adv Mkhwebane's benefit. The nature of the brief is therefore unique to the extent that the PPSA as a Constitutional Institution finds itself in a position where the interests of Adv Mkhwebane as the suspended Public Protector of South Africa and Executive Authority of the Institution, dictate that she brief and instruct legal representatives of her choice independently from the PPSA, to avoid a conflict and to vest a legal professional privilege with her and not with the Institution.
3. As background, it should be noted that Adv Mkhwebane was appointed as Public Protector by the President, on the recommendation of the National Assembly, in terms of Section 193(4) of the Constitution. Adv Mkhwebane is accountable to the National Assembly and in terms of the Public Finance Management Act, No 1 of

1999, read with the Treasury Regulations, occupied the position of the Executive Authority of the Institution.

4. On 9 June 2022, the President of the Republic of South Africa resolved to suspend the Public Protector of South Africa, Advocate Busisiwe Mkhwebane from Office in terms of Section 194(3)(a) of the Constitution, until the finalisation of an Enquiry into the removal of the Public Protector in terms of Section 194 of the Constitution, in the National Assembly.

5. The President advised that the Deputy Public Protector, Adv Kholeka Gcaleka will, during this period, perform the functions of the office of the Public Protector as provided for in section 2A(7) of the Public Protector Act, 1994.

6. The Presidential Minute recording the decision by the President, as required by section 101(1) of the Constitution, reads as follows:

I hereby in terms of Section 194(3)(a) of the Constitution of the Republic of South Africa, 1996 ("the Constitution"), suspend Adv. Busisiwe Mkhwebane from the office of the Public Protector pending the finalisation of the proceedings/inquiry initiated by the Committee of the National Assembly established in terms of Section 194 of the Constitution.

Adv. Mkhwebane will continue to receive salary, allowances and other benefits that are attached to the position of the Public Protector during the period of her suspension.

7. Adv Mkhwebane has subsequently communicated with the Acting Public Protector, Adv Gcaleka with regard to *inter alia*, access to the financial and legal resources of the PPSA during the period of her suspension, for the purposes of legal representation and/ or legal assistance in relation section 194 proceedings as well as her suspension by the President.

8. The Accounting Officer, in consultation with the Acting Public Protector, and after obtaining independent legal advice, resolved to commit to funding the reasonable costs of the defence of Adv Mkhwebane in her impeachment proceedings before the Section 194 Committee. In this regard the Accounting Officer, *inter alia*, took the following into account:

8.1 The Presidential Minute recording the decision by the President, as required by section 101(1) of the Constitution, stated that Adv. Mkhwebane will continue to receive salary, allowances and other benefits that are attached to the position of the Public Protector during the period of her suspension.

8.2 The Constitutional Court found 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;

- 8.3 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), the Western Cape Division of the High Court reiterated Adv Mkhwebane's legal rights, access to legal representation, as well as legal remedies as critical safeguards and guarantees in relation to both her suspension as well as the section 194 proceedings.
- 8.4 Chapter W of the Treasury Regulations governs the situation where Political heads, Ministers (equivalent to the position to the Public Protector as the executive authority of the PPSA in terms of the PFAM and Treasury Regulations) or Members of the Executive Council of a Province are entitled to legal representation and assistance by the state in matters where they litigate in their official capacity relating to the exercise of their constitutional, statutory, regulatory or other defined powers, duties and responsibilities.
9. The Funding Commitment was subject to the provision of a cost estimate by Adv Mkhwebane's Attorney of Choice, Messrs Seanego Inc, and confirmation by accounting officer in terms of the PFMA and the Treasury Regulations that -
- a) there is sufficient funding for any expenditure that it will be required to cover in respect of legal services that Adv Mkhwebane may require in relation to her suspension and 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.
10. Subsequently, the PPSA requested Advocate Mkhwebane's legal team, Seanego Attorneys Inc, to provide an estimation of costs from 11 July 2022 to 30 September 2022 when the Committee was to conclude its work. The Quotation received amounted to R 4 550 000, based on the total estimated and discounted daily costs equivalent to the hourly rate multiplied by 10 (ten) hours per day for the estimated duration of the proceedings for a period of 35 days, and is calculated as follows for each professional (excluding VAT): -
- a) Adv. D Mpofu SC: R45 000.00;
 - b) Adv. B Shabalala: R27 000.00;
 - c) Adv. B H Matlhape: R18 000.00; and
 - d) Mr. Seanego (of Seanego Attorneys Inc.): R25 000.00; and

e) Ms. Patel (of Seanego Attorneys Inc.): R15 000.00 (in the alternative as the PPSA is not paying duplicate fees for work performed by the Attorneys).

11. For the period July 2022 to October 2022, the legal fees in respect of the Section 194 proceedings alone, which were paid by the PPSA, amounted to R10,202,786.30. The total costs of legal fees in respect of the litigation on the impeachment process, as well as the proceedings before the Section 194 Enquiry for the 2022/23 financial year, amounted to approximately R26, 2 Million. A further invoice was received for March 2023 to the amount of R3 942 366, 57, which brought the total expenditure incurred by the PPSA in this matter, to approximately R30 Million.
12. Efforts to engage National Treasury on a budget adjustment for the 2023/24 financial year have furthermore been unsuccessful. During the budget bilateral meetings hearings between PPSA and National Treasury it was highlighted that the baseline for 2023/24 financial year will remain the same as initially approved.
13. The reality is that the available funds in the Legal Services budget are not to cater for additional expenditure that the PPSA would be required to cover for the legal fees for the remainder of the Section 194 proceedings. The Legal Services budget of the PPSA is currently under severe pressure because of the expected 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 legal practitioners to assist with the defence and opposition of litigation against it, due to a lack of funding.
14. On 1 March 2023 the PPSA advised Adv Mkhwebane that it would not be able to extend its funding commitment for the reasonable and budgeted costs for the provisioning of legal services to her for the purpose of the Section 194 proceedings, beyond the financial year ending on 31 March 2023.
15. In order to try and address a situation where the proceedings could not continue as a result of a lack of legal representation on behalf of Adv Mkhwebane, the Section 194 Committee subsequently requested the PPSA to explore further options to assist Adv Mkhwebane in securing funding for the provisioning of legal services to her for the purpose of the Section 194 proceedings.
16. Subsequent to engagements between the Parliament, the National Treasury and the Department of Justice, the PPSA was given two options; namely, to either fund the legal fees from the baseline allocation or to utilise the balance of the approved 2021/ 2022 retained surplus to cover these costs. The Chief Executive Officer (CEO) confirmed that the PPSA was in no position to cover the sec 194 legal fees from its baseline allocation, which is earmarked to provide for expenditure on court orders already issued against the PPSA relating to various matters, including

those relating to the impeachment process as well as other legal services operational cost.

17. It was subsequently resolved that, with the concurrence of National Treasury, the only additional funds that the PPSA was able to commit to the Section 194 process is the balance of the 2021/ 2022 retained surplus, which amounted to four million rand (R4 000 000). It was further made clear that any further expenditure to be incurred in this matter be subject to strict conditions.
18. The decision was communicated to Adv Mkhwebane on 3 May 2023. On 5 May 2023, Adv Mkhwebane lodged an urgent Application with the Constitutional Court seeking, inter alia, a declaratory order that the State should be liable for the cost of her legal representation before the Section 194 Committee. Adv Mkhwebane also addressed correspondence to the Chairperson of the Committee for the section 194 Committee and the Acting Public Protector, Adv Kholeka Gcaleka on 5 May 2023, to raise a number of issues and objections with the conditions set for the funding commitment for the additional amount of R4 million.
19. When the Committee resumed its proceedings on 8 May 2023, Adv Mkhwebane advised that she was effectively without legal representation because the mandate and instructions to her attorneys of record were effectively terminated as a consequence of the decision by the PPSA to discontinue its funding commitment.
20. The PPSA advised the Committee that Messrs Seanego Inc. and Adv Mkhwebane's legal team were in fact briefed and appointed by her, and that the PPSA only committed to contribute towards her legal expenses. However, on 15 May 2023, Messrs Seanego Inc directed communications to the Chairperson of the Committee for the Section 194 enquiry to the effect that it is their understanding that their mandate was terminated effective 31 March 2023 and that they will not be involved going forward "*due to professional reasons*".
21. It is against this background that the Chairperson directed the enclosed letter to the PPSA, which, as stated above, we are redirected to your office for the necessary attention to advise if Adv Mkhwebane might in the circumstances, have access to the services of the State Attorney, with the view to instruct counsel to represent her at the proceedings of the Committee for the Section 194 proceedings.
22. As you might be aware, the current impasse has a serious effect on the continuation of the Section 194 proceedings, and time is of the essence as the proceedings are set to resume on 17 May 2023, and the Chairperson requested a response before the resumption of the proceedings.
23. Your assistance in this regard will be highly appreciated.

Regards,



MS. THANDI SIBANYONI
CHIEF EXECUTIVE OFFICER

DATE: 16 / 05 / 2023

Copy: Mr T Ngoma

Secretary: Committee for Section 194 Enquiry

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