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Advocate Busisiwe Mkhwebane
The Public Protector of the
Republic of South Africa

[REDACTED]
[REDACTED]

Dear Advocate Mkhwebane

PROPOSED RESUMPTION OF THE SECTION 194 ENQUIRY / YOUR LEGAL REPRESENTATION

1. Your letter dated 10 May 2023, has reference.
2. While I am mindful of the fact that you indicated in your letter dated 5 May 2023 that several issues relating to your legal representation before the Committee for the section 194 Enquiry are the subject of litigation, I would be failing in my duties as the Acting Head of the Public Protector South Africa (PPSA) if I do not respond to some of the aspects of your letter where our records do not seem to correspond with your account of the events involving the PPSA.
3. **Procurement of your legal representation in respect of the section 194 Committee.**
 - 3.1 It is noted that you advised the Committee for the Section 194 Enquiry in April 2022 of your choice of “legal expert” and preference of Messrs Seanego Inc. as your Attorneys.

- 3.2 You further stated that the communication in April 2022 with the Committee on your legal representatives of choice, was *“rightly, the end and total extent of my involvement in the issue of the procurement of legal representation in respect of the section 194 Committee”*. According to you *“the issues of the nature, duration and estimated quantification of the legal representation was duly left in the hands of PPSA and the legal practitioners... I had no involvement whatsoever in those issues which is in line with the governance requirements of the PFMA and other relevant prescripts”*.
- 3.3 I am not aware when the procurement of the services of Messrs Seanego Inc. and a “legal expert”, for the purposes of providing legal representation to you on the section 194 proceedings, would have taken place. It is also worth noting that the procurement of the services of the nominated “legal expert” would in any event not have been catered for by the conditions for the sourcing of external legal services by the PPSA, as it only provides for the appointment of Counsel.
- 3.3.1 According to the records of the proceedings of the Committee for the Section 194 Enquiry, a letter was received from Messrs Seanego Inc dated 22 May 2002, (prior to your suspension and long before the engagement in July 2022 with the current Chief Executive Officer, Ms Sibanyoni on the issue of your legal representation before the Committee) *“indicating that they act for the PP together with Adv Dali Mpofo, SC”*.
- 3.3.2 You also advised me on 15 June 2022 that your legal representatives were acting on your behalf *“in line with the recent Constitutional Court judgment, which granted (you) the right to full legal representation”*, in communicating with the Chairperson regarding the practical arrangements for the hearing, which was due to commence on 11 July 2022.
- 3.3.3 In addition, after the engagements between your legal team and the PPSA on 4 July 2022 regarding funding of the reasonable costs of your defence in the section 194 proceedings, subject to the provision of an estimate of the legal costs, your legal representatives were already present and proceeded to represent you at the commencement of the proceedings on 11 July 2022, before the PPSA had been provided with any cost estimate or the issue of the funding was concluded (on 19 July 2022).

3.3.4 I am advised however, that there is no record of a procurement process relating to the sourcing of legal services by the PPSA from Messrs Seanego Inc. for the purpose of your legal representation during the section 194 proceedings, during the period from when you first communicated your choice of legal representatives to the Committee in April 2022 and confirmation by both Messrs Seanego Inc. and yourself that they had been appointed to act as your legal representatives at the section 194 proceedings, in May and June 2002 respectively.

3.5 You will recall that I wrote to you on 10 June 2022 regarding any support that you might require in your preparations for the section 194 process in the National Assembly, and I invited you to engage my office directly on any requests in relation to any of the services that might have been affected by your suspension. At the time of suspension you were involved in litigation against the Speaker and other parties on issues related to the so-called impeachment process with the assistance of legal representatives who might have been engaged prior to your suspension to render legal services to or on behalf of the PPSA. It was anticipated that you would have wanted to clarify the continuation of the provisioning of legal services in these matters, as well as access to the financial and/or legal resources of the PPSA during the period of your suspension.

3.5.1 As noted earlier, you wrote to me on 15 June 2022 to “advise” me of the status and further steps that you intended to take in the pending litigation in the Western Cape High Court on “legal issues pertaining to the section 194 process generally and, more specifically, to the legality of the suspension process”. You stated, *inter alia*, that-

“The first part of the application, which dealt with an urgent application for an interim interdict pending the determination of the above-mentioned issues, was decided against me in the recent judgment of the High Court delivered on 10 June 2022, a day after my suspension. At that stage, I had already instructed the legal team to proceed with the main application as soon as possible so that the main questions can be answered, one way or the other.

*The purpose of this letter is therefore to **advise** you of the above and to **inform** you that the ongoing application has therefore now entered its second part, as the first part has been concluded.” (emphasis added)*

- 3.5.2 You also made it very clear in the letter dated 15 June 2022, that the conditions of your suspension by the President would have ensured your continued access to the financial and/or legal resources of the PPSA including the services of your legal representatives at the expense of the PPSA, during the period of your suspension.
- 3.5.2.1 You will further recall that at the time, however, the PPSA was querying the authority of Messrs Seneago Inc. to act and continue to act on behalf of the PPSA, because they continued to render services to you in litigation pertaining to the impeachment process subsequent to your suspension, without any engagement, consultation or obtaining instructions from the PPSA.
- 3.5.2.2 The PPSA had verified the official records at its disposal and noted that, an offer was extended to Messrs Seanego Inc. by the former CEO on 20 December 2019 to appoint them to act on behalf of the Public Protector in instituting an application against the Speaker of the National Assembly and Others, to challenge the validity of the Parliamentary Rules for the removal of office bearers of Institutions Supporting Constitutional Democracy.
- 3.5.2.3 The PPSA took the view that Messrs Seanego Inc. could not merely continue to act on behalf of Adv Mkhwebane (or the PPSA) in legal matters “*pertaining to the section 194 process generally*” in all ensuing matters that “generally” relate to the impeachment process” as that was not the mandate and instruction extended to them in the original 2019 brief.
- 3.5.2.4 In ensuing engagements and communications, the PPSA and yourself did not agree on the issue that the original instructions and mandate issued to Messrs Seanego in 2019 by the then Chief Executive Officer of the PPSA, could serve as authority for them to continue rendering legal services to you in respect of the litigation matters.
- 3.5.2.5 You were adamant that Messrs Seanego Inc. did not require a new mandate or instructions from the PPSA to continue to act as your legal representatives

pursuant to your suspension as Public Protector on 9 June 2022. In a letter dated 6 July 2022, you requested me to corroborate the fact that I would have been aware of Messrs Seanego Inc's "initial authorised appointment by me and/or the former Chief Executive Officer, Mr Mahlangu (I welcome and confirm these facts)." You further stated that-

*"I expressed my total disagreement with the above on the grounds that the two parts of the application were inseparable, and I **had given authority for the litigation, as you know, and in my capacity as the Public Protector.** Furthermore and in any event, I remain entitled to the benefits which go with Public Protector SA, according to my suspension letter."* (emphasis added).

3.5.2.6 On 7 July 2022 Messrs Seanego Inc. also addressed correspondence to me on this issue stating, that –

*"we have never requested a new mandate to act on behalf of PPSA simply because it is not true that we were affected as attorneys of record for the PPSA... The only arrangement we needed to conclude was whether and to what extent the institution would continue to fund the litigation instituted by the Public Protector to challenge her suspension.... That issue has now been finalised with the CEO on the basis that the institution will only fund such costs to the agreed extent. ... Our mandate to act in this matter has not yet been lawfully terminated by the CEO. **If and when it is, we will gladly continue to act only for the Public Protector, in her official and personal capacities,** with no exposure to PPSA for any of the costs, save as agreed with the CEO.... Neither can we terminate the brief of our counsel **because the Public Protector in her personal capacity has already instructed us to brief them.** The agreement with the CEO was reached on the basis that she (adv Mkhwebane) would select counsel of her choice. (emphasis added)*

4 Termination of mandate and related arrangements.

- 4.1 Pursuant to my letter to you dated 10 June 2022, and your response dated 15 June 2022, several engagements followed between us, as well as between the CEO and your legal representatives on the issue of your legal representation in the matters that you were involved in, and which expenses and costs the PPSA was prepared to cover and which not.
- 4.2 In the initial engagements between the CEO and your legal representatives on 4 July 2022 it was anticipated that the PPSA would be issuing instructions and a mandate directly to your legal team in line with the PPSA litigation Management Strategy on receipt of a cost estimate of the reasonable costs of your defence in the section 194 proceedings.
- 4.3 However, the PPSA noted that Messrs Seanego Inc. was already on record as having been instructed by you to represent you in the section 194 proceedings, without their services having been procured or a specific mandate or instructions having been issued in this regard by the PPSA. Furthermore your legal team was already present and proceeded to represent you at the commencement of the section 194 proceedings on 11 July 2022, before a cost estimate was received or the anticipated mandate could be extended.
- 4.4 In internal consultations with the PPSA legal services, Mr Sithole also advised me of certain risks that may arise if the PPSA should be responsible for the issuing of instructions and a mandate to your legal representatives, or be involved in the direction or consultations on your preferred legal strategy.
- 4.5 Based on the fact that your legal team had been providing you with legal services for the purpose and during the course of the section 194 proceedings, as well as being mindful that any risks of conflict of interests that the PPSA or you might be exposed to as a result of the fact that the PPSA was required and requested to assist the Committee for the Section 194 Enquiry, and that you required freedom and confidentiality of communications with and instructions to your legal team, the approach taken by the PPSA was that it would provide you with access to financial resources of the PPSA, but not directly engage the services of your legal representatives on behalf of the PPSA.

4.6 You were subsequently advised in correspondence dated 6 July 2022, stating inter alia, the following:

*“As indicated, your Attorneys may proceed to engage the CEO directly with the regard to the logistical arrangements for the purposes of **the agreement on the covering of the legal fees** as communicated to them by the CEO on 4 July 2022.”* (own emphasis).

4.7 The request for a cost estimate to Messrs Seanego Inc. was repeated in communications dated 12 July 2022 addressed to them by Adv Van der Merwe on behalf of the PPSA, reiterating , inter alia, the following:

*“It is confirmed that the CEO requested you to provide a cost estimate relating to the envisaged costs to provide legal assistance to Adv Mkhwebane to challenge her suspension and to assist and support her during the section 194 Proceedings. As the explained above this process is not intended to issue, confirm or condone any purported authorisation or instruction to act on behalf of the Public Protector SA, **as your client in these matters would be Adv Busisiwe Mkhwebane and not the office of the Public Protector.***

*As soon as the CEO is favoured with the remaining outstanding cost estimate notice, in writing, specifying all particulars relating to the envisaged costs **of the provisioning of legal services to Adv Mkhwebane** for the purpose of and during the proceedings before the Committee for the Section 194 Enquiry (only), the CEO will confirm the PPSA’s **agreement to incur the reasonable costs of the defence of Adv Mkhwebane in her impeachment proceedings**”* (emphasis added).

4.8 On 18 July 2022 the PPSA noted that the section 194 proceedings had already commenced on 11 July 2022 and your legal team continued with the provisioning of legal services to you and representing you in the proceedings without the PPSA having received the requested cost estimate, or confirming its funding commitment. Adv Van der Merwe subsequently addressed another letter to Messrs Seanego Inc. with the following contents:

*“As you are aware, and as advised by the Chief Executive Officer of the Public Protector SA (CEO), in her letter dated 4 July 2022, as well as in communications between the Acting Public Protector and Adv Mkhwebane, the **PPSA agreed in principle to incur the reasonable costs** of the defence of Adv Mkhwebane in her impeachment proceedings the Committee for the Section 194 Enquiry. The commitment is subject to the submission of the cost estimate notice, in writing, specifying all particulars relating to the envisaged costs of the provisioning of legal services to Adv Mkhwebane for the purpose of and during the proceedings before (only). This request was repeated in my letter dated 13 July 2022 and our conversation of 14 July 2022.*

The proceedings have in the meanwhile started on 11 July 2022, and we have noted that Adv Mkhwebane is assisted and represented by your Firm as well as Counsel (Adv D Mpofu, Sc), and I have observed the presence of at least one Junior Advocate.

The current state of affairs, where your Firm is effectively acting without a written agreement in respect of the nature and extent of the PPSA’s commitment and liability for the funding of Adv Mkhwebane’s defence during the section 194 proceedings, is putting the PPSA at serious risk for a finding of irregular and/ or unauthorised expenditure on the costs implications of the legal services provided during the proceedings thus far. Furthermore, as you are aware, 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 it will be required to fund in respect of the provision or procurement of legal and related services by the PPSA in relation to the section 194 process, (which is a particular concern in the light of statements made during the proceedings thus far on the possible duration thereof.)

The reality is that the PPSA did not budget for the financial implications of (extended) section 194 proceedings, and the Chief Financial Officer and the CEO will raise the issue with National Treasury during the Medium Term Expenditure Framework engagements scheduled for this week. It is therefore imperative that we ascertain the likely financial implications of Adv

Mkhwebane's 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.

By direction of the CEO and Accounting Officer of the PPSA I therefore implore on you to provide this office with a written notice confirming a (sic) legal instructions from Adv Mkhwebane as envisaged in section 37(7) of the Legal Practice Act 28 of 2014 (LPA), and giving a cost estimate for the rendering of such services. The written notice must include the following details:

- a) The likely financial implications, including fees, charges, disbursements and other costs;*
- b) The hourly rate of the attorney and Counsel/ advocate(s);*
- c) A broad outline of the work to be done in respect of each stage of the proceedings; and*
- d) The total daily (estimated) costs for the provisioning of legal services to Adv Mkhwebane for the purpose of the section 194 proceedings- if a cost estimation cannot be provided for the duration of the entire proceedings.*

*Should the Office not receive the required Notice by the close of business on 19 July 2022, the PPSA will be obliged to finalise its **offer on the reasonable expenditure for the provisioning of legal services** to Adv Mkhwebane during the section 194 proceedings without the benefit of a cost estimation by your good selves, and advise you of the funding that the PPSA will be able to make available within budget.” (emphasis added)*

4.9 Messrs Seanego Inc. responded on 19 July 2022 and stated amongst others that-

“We confirm that the Public Protector, Adv. Busisiwe Mkhwebane, is assisted and represented by ourselves, including counsel (one senior and two juniors) in the aforesaid proceedings.

As you may be aware, the hearing of the section 194 Committee commenced from 11 July 2022. It is not certain at this stage when the hearing will be

finalised. Therefore, it may be difficult to estimate the total costs that will be charged for the entire process. However, please be guided by the following financial implications inclusive of the fees and disbursements that shall be charged...

We estimate that the total fees for representing and assisting Adv. Mkhwebane in the section 194 proceedings (for a period of 35 days) shall be an amount of R4 550 000.00 (four million and five hundred and fifty thousand rand) “

- 4.10 As you are aware the PPSA continued to cover the legal expenditures involved in your legal representation by your legal team, well beyond the original funding commitment based on the estimated costs of R4, 5 Million.
- 4.11 On 1 March 2023 I wrote to you regarding the suspension of the PPSA's funding commitments for the reasonable and budgeted costs for the provisioning of legal services for the purpose of the Section 194 proceedings, on 31 March 2023. We did not address any communications to Messrs Seanego Inc. to terminate any purported instructions or mandate to act on behalf of the PPSA, as they were appointed by you prior to any engagement in this regard with the PPSA or any confirmation to fund, subject to reasonability and budget.
- 4.12 As mentioned earlier there was neither a procurement process that resulted in any written offer to appoint Messrs Seanego Inc. to act on behalf of the PPSA for the purposes of legal representation and/ or legal assistance to you in relation to the section 194 proceedings, nor is there any record of such an offer being accepted by Messrs Seanego Inc, or any formal written agreement concluded with them for the provisioning of such services.
- 4.13 The PPSA stated clearly that its funding commitment in respect of your legal costs was subject to the conditions that the fees be reasonable and that the budget was available. The setting of those conditions always meant that the funding was not open ended or limitless and therefore might not cover all your financial requirements in this regard but would serve as a contribution to cover your legal expenses as far as possible.
- 4.14 The funding commitment or even the eventual notice that it would be discontinued could not have had a direct impact on the relationship between you and your legal

representatives and the instructions and mandate under which they were representing you, unless the funding by PPSA was one of the conditions agreed upon for the rendering of the services to you.

4.15 A case in point is the fact that when the PPSA did not accede to requests from your legal team to extend its funding commitment to litigation and ancillary legal processes relating to the section 194 proceedings, for which it had similarly not procured the services of Messrs Seanego Inc, they continued to represent you and acted on your behalf in proceedings instituted in both the Western Cape High Court, as well as the Constitutional Court. In the letter addressed to me on 7 July 2022, Messrs Seanego Inc. categorically stated that should their mandate be terminated to act on behalf of the PPSA in the litigation matters, *they will gladly continue to act only for the Public Protector, in her official **and personal capacities**, with no exposure to PPSA for any of the costs, save as agreed with the CEO....”*

4.16 Even prior to the notices to you about the eventual discontinuation of the funding commitments, a letter was written to Seanego on 29 March 2023 requesting them to provide a cost estimate.

4.17 The letter implied that other funding options were being explored. Mentioning “the current legal team” was deliberate to indicate that the PPSA anticipated that Messrs Seanego Inc would continue to represent you, hence it needed to determine how much their services will cost PPSA for the remainder of the process.

4.18 Messrs Seanego Inc. responded and indicated that they are not in a position to provide any estimates as we have indicated that it was not reasonably possible at that stage to give a fair estimate of the legal fees and disbursements because the Public Protector’s legal team and the Evidence Leaders were in the process of discussing final adjustments to the remaining programme, until it became clear that no organ of state was prepared to shoulder the responsibility to pay for the Public Protector’s legal representation.

5 Present position

5.1 The extension of the funding commitment to an additional R4 million rand is based on the same conditions as before whereas you have already appointed Messrs Seanego

Inc. to provide legal and related services to you without the PPSA having issued written instructions or a mandate pertaining to your legal representation pursuant to its internal appointment and governance processes. There is simply no truth in the assertion that the PPSA has directly or indirectly terminated the mandate of your legal team and should start any procurement process afresh to reinstate such mandates or instructions.

- 5.2 There is in my view nothing preventing you from engaging the services of the legal representatives of your choice to represent you in the remainder of the section 194 proceedings with the understanding that the PPSA's contribution towards your legal costs would exceed the committed amount.
- 5.3 Section 38 (1) (b) of the PFMA provides that the accounting officer is responsible for the effective, efficient, economical and transparent use of resources of the institution. PPSA's request to you to manage the allocated funds is precisely to enable the CEO as accounting officer to fulfil this responsibility. Furthermore, in terms of section 63 of the PFMA, the executive authority of the institution is to ensure that the institution complies with the Act and financial policies of the institution.
- 5.4 The funds will obviously remain in the PPSA's account against which expenditure will be defrayed. However, the PPSA expects you to be prudent in the manner in which you utilise the committed funds.

Yours sincerely,



ADVOCATE KHOLEKA GCALEKA
ACTING PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 12 MAY 2023

COPY:

1. Mr QR Dyantyi, MP

Chairperson: Committee for Section 194 Enquiry

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2. Ms Thandi Sibanyoni

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