



Committee for Section 194 Enquiry

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15 February 2023

Adv B Mkhwebane

Public Protector of South Africa

By email: buisiwe.m.t@gmail.com

Dear Madam Public Protector, Adv. B Mkhwebane,

FAILURE TO GIVE INSTRUCTIONS

It is with deep concern and frustration that I address this urgent letter to you.

On 31 January 2023 when you raised with me, in writing, your concerns about the alleged non-payment of fees to your legal team I took immediate steps to intervene on your behalf and dispatched a letter, during the course of the hearings itself, to the CEO of the PPSA requesting urgent feedback and imploring that the matter of legal fees be attended to. I did so despite the fact that I have no legal standing to interfere in the procurement and payment processes of the PPSA.

My team has made various follow up's on behalf of your legal team and have involved themselves in a matter that is not within the performance of their duties to this Committee nor in fact within the ambit of the Committee's business. However, this was done because on the one hand the matter was impacting on the work of

the Committee and on the other because of what appeared to be a sincere appeal to assist your legal team with 'bread and butter' issues. In fact, you had gone so far as to say that the matter had the effect of bringing your legal team to "*financial ruin*" and I took this plea to heart.

On 1 February 2023 the CEO responded and explained in some detail that the delay was occasioned by discrepancies in the invoices and the need to ensure that invoices are verified. In addition, I was informed that invoices were not submitted timeously or in accordance with the format and tariffs prescribed by the PPSA. The CEO however undertook to pay at least 33% of the invoiced amounts. Whilst payment may not have happened as swiftly as your team may have preferred, it was made thereafter on 9 February 2023. On the same day Adv Mpofo, SC informed the evidence leaders and Ms Ebrahim that they had not done any work in preparation for the appearance of Ms Mvuyana because you had not issued them with instructions to do so pending the fees issues. Ms Ebrahim, after placing an urgent call to the PPSA CEO, informed the team that the PPSA had paid the 33% and were processing a further amount which would total approximately 74% of the invoiced amounts by the next day, 10 February 2023. It was her understanding that if these amounts were paid the proceedings would continue and she shared proof of payment and requested the PPSA to do the same. She in fact went further by informing Ms Mvuyana that your team wished to consult with her and Ms Mvuyana was then contactable and available. On 10 February I took the time to also inform you in writing that a substantial payment totalling **R7 408 286.30** had been made and that your team is expected to be present at the hearing scheduled for 13 February 2023 to question Ms Mvuyana, who as I have stressed, was called at the instance and request of yourself.

On Saturday 11 February Adv Mpofo indicated to Adv Bawa, SC that he was willing to proceed but could not speak in respect of his juniors with whom he was meeting later in the day. Your attorneys of record, Seanego Inc. failed to communicate with the Committee despite confirming on Friday, 10 February 2023 that they were still on brief when asked by the secretariat who, in that correspondence, again reminded Mr Seanego that Ms Mvuyana was scheduled to appear on Monday. At all material times the Committee was led to believe that it was your legal

representatives that were refusing to take further steps until the fee issue had been attended to with PPSA, based on the correspondence and interaction.

This was confirmed just moments before the start of the hearings on Monday when I was informed that you had addressed a letter to the Committee indicating that you are not in a position to instruct your team to continue as *“they have made it clear they will only do so upon payment of the outstanding fees or the negotiation or conclusion of suitable arrangements.”* Despite you attending the hearing physically on the day, with Adv Mpofo, SC on the virtual platform (later joined by a representative of Seanego Inc.), the hearings could not proceed and yet another day was wasted. This delay wastes not only precious time of all persons involved, including members who have many other matters to attend to, an already overstretched Parliamentary team and witnesses but also the limited resources of both Parliament and the PPSA who carry the costs of your legal representation and travel. I am informed that you then remained in Cape Town following the adjournment on Monday and that you are only travelling back to Pretoria today. Clearly this was not related to Committee work given that you had failed to give your legal representatives any instructions and in that way impeding the work of the Committee.

I ruled that the hearings will continue today based on the fact that a significant portion of the monies had been paid and that the PPSA could not be compelled to pay disputed invoices until due process had been followed. In addition, I took into account that your team would now have two days in which to consult with Ms Mvuyana and that she was willing to avail herself. In respect of that I note however that a subpoenaed witness cannot be compelled to consult with you- the fact that you do not know what she may say or not say cannot be an issue when it is you who wished to put questions to her in the first place, clearly being well aware of what you sought to ask her. Nevertheless, she indicated to Ms Ebrahim that she will lend her assistance and this was communicated to your team on 9 February 2023. It appears that your failure to provide instructions prevented such consultation from taking place, and yet you remained in Cape Town.

After the meeting, I then further addressed a detailed letter to Mr Seanego setting out my concerns with the manner in which the fees matter is being attended to and

again emphasising that we will resume hearings on Wednesday. My team also continued and continue to engage with the PPSA with the view to resolving the fees issue, while at all-time paying heed to the fact that the PPSA is an organ of state and is accountable in terms of the PFMA for the expenditure of funds. Ms Ebrahim also once again informed your team yesterday that Ms Mvuyana was contacted and indicated yet again that she will avail herself to consult. No one replied to that message to give any indication that something may be amiss. Yesterday I was requested to postpone hearings to allow for consultation to take place and in fact the request was made for such hearings to be postponed to Tuesday, 21 February in order to afford the team some time to prepare. I was assured that this request was being made on the back of an undertaking that the legal team was back on board and that the issue of fees would not in future be an obstacle to this Committee's proceedings but would be sorted out with the PPSA. The secretariat confirmed this understanding in a letter to Mr Seanego.

Late yesterday afternoon, a response was received which only indicated that Seanego Inc. had not received instructions in respect of the hearing on Monday and the hearing that was originally scheduled for today, 15 February. The letter stated that *"attorneys are creatures of instruction and therefore can only act upon instructions from clients."* Thus for all intents the message was clear that the legal team is in a position to proceed and the only impediment was your deliberate failure to instruct them. This accords with the interactions between Adv Mpofu, SC and Adv Bawa, SC in which it was said that the team is willing to continue. It is understood that the legal team has been instructed to represent you for the entire s194 Inquiry and not per day. The notion that you have to provide an instruction for each and every occasion for legal representatives to attend to work in the Inquiry is a misnomer. Could you kindly clarify this with your legal team.

The secretariat contacted you this morning for clarity on the letter from Seanego Inc. and the apparent failure to issue instructions. I have now been briefed that you refuse to instruct Seanego Inc. until such time as the outstanding balance has been paid after which you will consult with Ms Mvuyana. It appears that this refusal emanates from you, and not the legal representatives' refusal to work, and it is your actions that have left your legal team with limited preparation time to appear for the

hearing tomorrow. To the extent that this inexplicable refusal was aimed at obtaining a postponement until next week this will not be entertained.

I am also informed that an amount of R1,8 million has now been paid which is the outstanding balance and that a further amount is being processed in respect of. A belatedly submitted amended statement of account leaving no outstanding balance. I am told that you further indicated to the Secretariat that the PPSA ought to have applied for additional funding when the Constitutional Court ruled that you have a right to active legal representation. I am astounded at this development, especially given that at no stage did the Constitutional Court direct that you be represented by a team of five.

In the first instance it has been your plea that your team be paid in order that they can put food on their tables and pay school fees. Every effort was made to ensure that payment is made and yet it seems that not even millions in rands paid in 2022 by the PPSA to your legal representatives, has been sufficient to ward off a supposed "financial ruin" or ensure that outstanding school fees, food and bond/car instalments (as you mentioned in the hearing) as being the basis on which you felt you could not expect them to work. It is not my role to interrogate the financial habits of your legal team, and this letter should not be construed as such, but it appears to be implausible that the payments made last week were not sufficient to resolve the apparent direness of the situation. In addition, I am also perplexed that you have, despite these payments, not provided whatever instructions Seanego Inc. thought it necessary to obtain from you, given that they were never removed from brief. This is particularly so given the averments that your junior legal team have no other matters and that your legal team have not worked on this matter since we had last convened with a witness because of the dispute. It would then appear that they are being deprived of work unnecessarily and the age old adage of cutting one's nose to spite their face seems to ring true.

I am however, most perplexed that despite your insistence that you are entirely committed to this process and that you want the work of the Committee to proceed without delay you now appear to be purposely delaying matters. Indeed, your counsel has reminded the Committee on several occasions that you want nothing

more than to have your say and see this matter to conclusion. The facts however appear to tell a different story.

It is unfortunate that the issue of fees has brought us to this point. As Public Protector, I would expect that you have a particular grasp of the importance of ensuring that public funds are spent in a reasonable manner and that the monies of tax payers are accounted for and not spent fruitfully or wastefully and that you would have an understanding that the 30 days as provided for only runs on invoices confirmed and not when in dispute. It is incredulous that it is being expected that the PPSA should be expected to pay on invoices that it is not satisfied with. It is unfortunate that you interpret your right to legal representation as an unlimited right with an unlimited budget. The Assembly Rules in fact provided for a "legal representative" of your choice in singular yet the PPSA has, as they have indicated, paid for an unusually large team. In addition, a considerable amount has been spent on travel and accommodation costs for the team including your bodyguard who accompanies you despite Parliament offering protection services when you are on the precinct. This has happened too despite the meetings being held in a hybrid format.

In light of the fact that the monies appear to have now all been paid the issue may in fact be moot, and given that Seanego Inc. perhaps on your instructions are not submitting bills timeously to the PPSA, an issue of fees not paid will not be entertained before this Committee. Fee notes for work done in October should have been rendered to the PPSA in November etc and yet Mr Seanego has failed to do so. I therefore expect your legal team to be present tomorrow and to be in a position to proceed and complete leading the evidence of Ms Mvuyana. Nevertheless, should they be unable to proceed because of your unreasonable failure to issue instructions, I will have no choice but to proceed and treat the matter as a waiver on your side to legal representation. I cannot allow the Committee to be held to ransom, as appears to be the case, and I am duty bound in terms of both the Constitution and the Assembly Rules to ensure that the Enquiry proceeds without delay.

In the interim I also intend to engage with the PPSA who are in law the instructing client to ensure that it gives instructions to your legal team to apply itself diligently

to this matter to prevent further delays, and to confirm that they are on brief for the duration. I fail to see the reason why they should be instructed each time to attend hearings that are convened.

I urge you Adv, Mkhwebane to assist the Committee in fulfilling its constitutional functions and to co-operate fully. I have done my best to accommodate you, the extensive time the Committee has spent on this matter is testimony to this, and I trust that you will be mindful of your public obligations and do the same.

Yours faithfully

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Mr QR Dyantyi, MP

Chairperson: Committee for Section 194 Enquiry

