

MEDIA STATEMENT

Date: Tuesday, 14 February 2023

For immediate release

Attention: Editor / News desks

PPSA RESPONSE FOLLOWING MEDIA INQUIRIES REGARDING ADV. MKHWEBANE'S LEGAL FEES.



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At the commencement of the Section 194 Parliamentary Enquiry, the office of the Public Protector South Africa (PPSA) communicated in writing to the suspended Public Protector, Adv. Busisiwe Mkhwebane, regarding the arrangements to be made in respect of her legal fees, for the purpose of her representation during the enquiry.

The PPSA committed, in principle, to fund the reasonable costs of Adv. Mkhwebane's defence in the impeachment proceedings. It was further agreed in earlier engagements between Adv. Mkhwebane and the PPSA that it would be in Adv. Mkhwebane's best interests if she furnished her legal team with instructions and the requisite mandate.

Both Adv. Mkhwebane and her legal team were advised, at the outset, that the PPSA would seek to ensure that such estimated costs are reasonable, and budgeted for, in line with the Public Finance Management Act, Treasury Regulations, and the PPSA Litigation Management Strategy.

Furthermore, in an attempt to accommodate Adv. Mkhwebane, the PPSA did not expect her to first incur the expenses and, later reimburse her, but rather undertook to provide surety for such reasonable expenses, which in terms of the agreement concluded, could be claimed directly from the PPSA by the services providers.



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In June 2022, soon after the suspension of Adv. Mkhwebane, her attorneys submitted an invoice for a significant amount, for litigation work performed in the High Court matters between the Public Protector, the Speaker of Parliament, the Chairperson of the Section 194 Committee and the President, in respect of the so-called impeachment process.

The invoice became the subject of a dispute between the PPSA and the firm of attorneys involved, primarily because it emerged that the firm was historically permitted to charge the PPSA on rates and quantum (hourly) that did not conform with the PPSA Tariff of Fees for the services rendered.

Efforts to invite the firm to re-align its invoices to the PPSA structure and format were not successful, as it was averred and claimed that the billing methods and invoices were based on a long-standing “*special relationship*” between the PPSA and Adv. Mkhwebane’s legal team.

The first invoice in respect of legal services rendered to Adv. Mkhwebane during the section 194 proceedings, was received by the PPSA on 6 September 2022 and related to Counsel’s fees. This invoice was settled on 14 September 2022. Soon thereafter, and despite the *impasse* between the PPSA and Adv. Mkhwebane’s legal team, the PPSA eventually resolved to approve and process payment of the earlier outstanding invoices in relation to the High Court matters as well, to *inter alia*, avoid the risk of derailing the enquiry process.

Prior to their submission of the next batch of invoices in relation to the services rendered for the section 194 process, Adv. Mkhwebane’s legal team engaged the PPSA on the rate of fees and the quantum of the work performed by the legal practitioners in her defence in the section 194 proceedings and proposed alternative arrangements.

The PPSA agreed to some of the arrangements, including the involvement of more than one attorney on condition that the work is split and that the service



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is not of more than one attorney, but was unable to accede to certain deviations from the PPSA fees structure or tariff of fees. Adv Mkhwebane's legal team was accordingly informed on 13 September 2022 and advised that the PPSA would not be able to accommodate and consider invoices that are not aligned to the PPSA Tariff of Fees, as well as consider information that was insufficient to assess and verify the actual time spent for the work done. More so, in this matter, as there are a number of applications being brought at the committee and in court, which the PPSA expressly indicated will not be paid for.

Between 15 and 18 December 2022, the PPSA received 4 invoices, including the attorney's fees from the commencement of the proceedings until September 2022, as well as Counsel's fees from the period July to September 2022 for a significant amount. At the time when the invoices were received, the PPSA was scaling down its operations and taxations were suspended, normally referred to in the High court Rules as a period of *dies non* (no days).

The PPSA proceeded with the verification of the invoices as soon as the office resumed its ordinary activities in January 2023. Adv. Mkhwebane's legal team was informed that owing to the large amounts of public funds involved, the historical challenges, and the risk surrounding conformity with the PPSA fee structures and fiscal governance requirements, the PPSA was taking great care to meticulously verify the tariffs and fees. The verification process was further hampered by capacity constraints, which are historical in PPSA and well-known to Adv. Mkhwebane.

Without getting into detail, it suffices to say that the true nature of the queries on the invoices for legal services rendered under consideration, are significantly distorted in Adv. Mkhwebane's letter, and are not based on a "nonsensical" misapprehension of billing and litigation practices or inexperience, as asserted by Adv. Mkhwebane, but rather, on legitimate governance concerns that have been, and remain under close scrutiny from



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the authorities that the PPSA is accountable to, as well as its responsibilities to the public purse. In terms of the surety agreement with Adv. Mkhwebane's legal team, as informed by the Accounting Officer's responsibility in terms of the Public Finance Management Act and the Treasury Regulations, the PPSA's liability for the payment of the fees in question, would commence on receipt of a valid verified invoice.

Furthermore, the conditions that trigger the commencement of the 30-day period from which the PPSA's funding obligations would have become due and payable, and for the PPSA to verify that the claims are reasonable and budget for, have not been met. In this regard it is worth noting that the Legal Practice Rules provide that "*no legal practitioner shall fail or refuse to carry out, or continue, a mandate on the ground of non-payment of fees and disbursements...if the demand for such payment or provision is made at an unreasonable time or in an unreasonable manner, having regard to the particular circumstances*".

The insinuation by Adv. Mkhwebane that the PPSA is in default of its funding obligations, and specifically that the PPSA is in such default with the deliberate intent to frustrate Adv. Mkhwebane's right to legal representation and the section 194 process is untrue and rejected. The current outcry by Adv. Mkhwebane's legal team, that the PPSA has sought to embarrass Adv. Mkhwebane, financially ruin her legal team and undermine the work of the Section 194 Committee, are leveled under circumstances where valid grounds exist for querying and disputing the reasonability of the rates of fees in terms of the rules of the Legal Practices Council that also apply to the legal practitioners involved.

Despite Adv. Mkhwebane selecting an expansive legal team, well outside the number of Counsel and Attorneys that are ordinarily sourced for litigation purposes, the PPSA has not endeavoured in any way, to limit, restrict or take a punitive approach to the issue of her legal representation, as she has



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alleged. Adv Mkhwebane and her Legal team would be well aware that the legal costs that the PPSA is expected to incur, are already almost twice the amount that they originally provided as an estimate, and have not yet been revised as required.

To support Adv. Mkhwebane's legal team further, the PPSA has taken extraordinary measures to advance on disbursements to make travel and accommodation bookings for Adv. Mkhwebane's legal team.

As recently as 9 and 10 February 2023, the PPSA effected payment of a total of 74 % percent of the claimed amount. The PPSA has taken further steps to process the outstanding balance and to source the services of a cost consultant to review the invoices in question. Should it be confirmed that the invoices do not conform to the fee and tariff structures, the overreach will be recovered from the outstanding invoices of services still to be rendered. The PPSA is also engaging Adv. Mkhwebane's legal team to comply with previous correspondence requesting that they conform to the PPSA tariff of fees in line with what the PPSA had indicated it was paying for, to avoid a repetition of the current events in the interest of ensuring the work of the Section 194 committee continues without delay.

The Acting Public Protector, Adv. Kholeka Gcaleka has also raised the administrative and financial challenges the PPSA is confronted with as a result of the unplanned and unbudgeted responsibilities the institution is faced with as a result of the Section 194 Committee, which is a Parliamentary process. The Portfolio Committee on Justice has as a result resolved to arrange an urgent meeting with the Speaker of the National Assembly to find solutions to the challenges.

Adv. Mkhwebane's right to legal representation in the section 194 proceedings does not imply that the PPSA should be liable for the funding of such representation. Fiscal obligations towards an incumbent are subject to the verification of the grounds for any liability or obligations. As a Constitutional



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Institution, we have a responsibility to ensure that public funds are utilised efficiently and effectively in line with the fiscal framework, as we expect of other organs of state.

End.

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