IN THE SECTION 194 INQUIRY

HELD AT THE NATIONAL ASSEMBLY, CAPE TOWN

In respect of

THE PUBLIC PROTECTOR SOUTH AFRICA

THE PUBLIC PROTECTOR'S APPLICATION FOR THE REMOVAL AND/OR REPLACEMENT OF THE EVIDENCE LEADERS

A: INTRODUCTION

1. This is an application for the section 194(1) Committee to take a decision, based on the grounds canvassed below, to remove and/or replace the current Evidence Leaders whose conduct has disqualified them from discharging the duties imposed on the Committee in terms of Rule 129 of the National Assembly Rules.

2. In terms of Rule 129AD (2) of the Rules of the National Assembly:-

> "***The Committee must ensure that the enquiry is conducted in a reasonable and procedurally fair manner, within a reasonable timeframe***".

3. The meaning of that rule, in the context of this application will be duly unpacked during the oral presentation of the application.

4. In terms of clause 10.2 of the Directives issued by the Chairperson of the Section 14 (1) committee dated 14 July 2022:

"***Any person wishing to make an application to the Committee, which is not otherwise provided for in this Procedure, or in the Assembly Rules, must do so in writing to the Chairperson***."

5. In terms of the notification sent to the Chairperson on the 21 November 2022,

> "….***we hold instructions to make an application at the next sitting of the Committee...*"**

6. For the avoidance of any doubt the Public Protector who is aggrieved by the alleged misconduct of the Evidence Leaders, is solely concerned about the adverse effect such conduct has on her own procedural rights as afforded in the Rules, PAJA and the Constitution. She is only indirectly concerned with whether the alleged conduct also amounts to unprofessional conduct and only in so far as it affects her rights. Otherwise, the latter issue clearly does not fall within the scope of the Committee, and it will or will not be dealt with by the relevant statutory and/or non-statutory bodies.

7. In terms of the letter received from the Chairperson, following the aforesaid notification of this application:

> **"*Your client must submit her written application setting out the grounds for the recusal of the evidence leaders on or before 17h00 on Wednesday, 23 November 2022*."**

8. This application is brought on the above basis and on behalf of the Public Protector and in so far as it will be necessary, same will be confirmed at the hearing of the application.

9. The Public Protector deliberately stayed away from the recent application for the "*recusal*" of the Evidence Leaders which was brought by two political parties because that matter concerned external issues which did not directly affect the rights of the Public Protector. The present application is squarely based on the protection of the guaranteed rights of the Public Protector and the south African public at large.

A1: <u>The role of evidence Leaders, specific to this Inquiry</u>

10. Section 5 of the Terms of Reference adopted by the Committee and dated 22 February 2022 provides that:

> "***The Enquiry is inquisitorial in nature and the Evidence Leader <u>does not act as a prosecutor</u>. The role of the Evidence Leader <u>is limited to presenting the evidence and putting questions to the PP or other witnesses with the aim of empowering the Committee to assess the merits of the evidence in line with its mandate</u>***."

A2: <u>Public prosecutors as a reference point</u>

11. Item 7 of the National Prosecution Policy:

> **"*Prosecutors work in an adversarial context and seek to have the prosecution sustained***."

12. The role of prosecutors has been defined in various South African court decisions some of which will be referred to during the oral presentation. Copies will be posted

prior to the presentation, for ease of reference and the convenience of members of the Committee.

A3: Rule 129AD (2) of the Rules of the National Assembly

13. As already stated herein above, the Rule mandates that the proceedings be conducted in a fair manner, meaning that the proceedings should not be tainted with any signs of unfairness, malice or bias.

14. Procedural fairness refers to the rules of natural justice, which are:-

14.1. *Audi alteram partem* (hear the other side); and

14.2. *Nemo iudex in causa sua* (no one can be judge in his own course also known as the rule against bias).

15. Every process is governed by its own set of rules, however, the highwater mark of each process is whether it is being conducted in a manner which does not breach but strictly observes the rules of justice articulated above.

16. So too, is this Section 194 inquiry, as much as it is governed by *inter alia*, the Constitution, the Directives and the Terms of Reference, it should be conducted in a fair and reasonable manner.

17. In this instance, fairness includes everything done under the aegis of the current process. This includes fairness in respect of the Public Protector, the Chairperson, the Committee and all other participants including the Evidence Leaders.

18. It will be demonstrated herein below that the conduct of the Evidence Leaders not only violates Rule 129AD (2) of the Rules of the National Assembly, it also violates the rights of the Public Protector contained in the Constitution, the Terms of Reference as well as the abovementioned Rules of Natural Justice.

19. Having set out the context, we shall now turn to identifying and describing the conduct complained of. Further details will be elaborated upon during the oral presentation.

B: CONDUCT EXHIBITING UNFAIRNESS

20. This application is brought against the Evidence Leaders based on the following acts of alleged misconduct, raised in the context already referred to above:

B1: First Ground: Misconduct

21. On the 2 November 2022 and during Mr Neels Van Der Merwe's testimony the Evidence Leaders caused the names and fees of various black counsel and attorneys who do work for the office the Public Protector to be displayed during the Enquiry while knowing very well that the proceedings are aired on YouTube channel which is watched by millions of people.

22. The Evidence Leaders failed to give any prior warning to the advocates and attorneys concerned. They also failed to give context to the figures that were flighted in terms of:-

22.1. The period over which the fees were earned;

22.2. The number of matters that each advocate was briefed on;

22.3. The complexity of each matter;

22.4. The volume of work to be done;

22.5. The complexity of the matter;

22.6. The applicable tax deductions and other associated expenses.

23. Furthermore, the witness through whom the evidence was led testified that he only assumed the position of Senior Manager, Legal Services on the 01 August 2022. He testified that Mr Thembinkosi Muntu Sithole is the person who had been in charge of the legal Department. Despite the fact that Mr Sithole was one of the witnesses who gave testimony before the Committee, the Evidence Leaders decided to lead the evidence in question from someone who clearly did not have personal knowledge of such evidence. This was bound to be problematic. There is no suggestion that Mr Sithole was unwilling or unavailable to deal with the evidence. After all it was during Mr Sithole's evidence that Mr Kevin Mileham made the initial statement which led to the leading of the said evidence.

24. The Evidence Leaders are themselves advocates and they knew that their conduct was prejudicial to the privacy and dignity rights of their colleagues and prejudicial to the legal profession at large. They knew that their conduct would cause professional harm to the advocates and attorneys in question. Furthermore, the

Evidence Leaders knew very well that flighting such globular amounts without proper context would be misleading to the Committee, the public and to anyone who watched the proceedings and paint the incorrect picture which was originally sought by Mr Mileham who had referred to practitioner who had "*benefitted*" from the legal fees paid by the Office of the Public Protector.

25. In some instances, the amounts flighted were not correct because the Evidence Leaders did not take time to at least consult the advocates and attorneys concerned for clarity.

26. Had they done so, it is reasonable to assume that such inaccuracies would have been avoided. The Evidence Leaders conduct sparked confusion and mayhem in the country and the legal fraternity. A screen shot containing the fees and the names of the concerned advocates and attorneys predictably went viral on social media to the detriment of the family members of the concerned advocates and attorneys. The persons involved were also exposed to criminality and other forms of harassment and insults.

27. It transpired during cross examination that there was no impropriety on the part of the advocates and attorneys concerned and that the amounts in question were fees legitimately earned by the concerned advocates and attorneys during the course and scope of their duties.

28. At the beginning of Mr Van Der Merwe's testimony on the legal fees, Adv Mpofu SC raised an objection against such evidence on the basis that the evidence was

in any event irrelevant. However, Adv Nasreen Bawa SC indicated that the Committee had requested to have a breakdown of the fees.

29. The Evidence Leaders, *inter alia*, failed to discharge their duties to:

29.1. recognise or acknowledge, once it was pointed out, that the evidence was irrelevant in that it deals with legal fees while the motion of Ms Mazzone refer to legal costs, which is a different thing as correctly conceded by the witness;

29.2. recognise or acknowledge that the evidence was irrelevant in that it has nothing to do with wasteful and/or unauthorised expenditure;

29.3. inform the members that, even if the display of the evidence was necessary, which is denied, there was absolutely no reason to include the names of the practitioners;

29.4. apologise even when the hardship associated with their conduct was explained and elected, unreasonably, to limit the apology to the peripheral issue of "*inaccuracies*";

29.5. repeated the conduct on 11 November 2022 even after the presentation of Advocates Sikhakhane SC and Ngalwana SC on 10 November 2022.

30. The Chairperson acted outside the scope of his duties in shouting down the objections of the Public Protector and unilaterally taking the decision to allow the repetition of the exercise on 11 November 2022 while he (the Chairperson) had

requested for written representations on the issue. The focus of this application is however the role of the Evidence Leaders in wilful and voluntarily participating in such illegality.

31. It should be self-evident that the term legal costs, which possibly includes personal costs, is not the same thing as legal fees legitimately worked for and earned by specific legal practitioners, some of whom were involved in matters where no legal costs were even awarded, were awarded in the ordinary scale. In any event this charge did not pass muster with the independent panel. This can be confirmed by making reference to the findings if the panel summarised in annexure A of its report, which forms part of the record. In fact, the panel did not include the legal costs charge in its recommendations regarding *prima facie* evidence.

32. The conduct of the evidence Leaders has caused great harm to the concerned advocate's and attorneys' families who had to contend with insinuations in social media that they are corrupt and or involved in alleged "*looting*" of taxpayers money.

33. On 10 November 2022 Adv Muzi Skhakhane SC and Vuyani Ngalwana SC attended the Enquiry proceedings and addressed the members regarding the conduct of the Evidence Leaders. Adv Skhakhane impressed upon the Committee that people like Adv Bawa can abuse the manner and content of a good process such as this because of her conduct.

34. The two senior counsel delivered a statement which it is hoped the Committee has deliberated on by now. Just to highlight a few of the concern raised for the benefit of this application:

35. The aforesaid statement is attached herein as Annexure "**RA1**". Its contents are self-explanatory, and it was already partly read into the record.

36. Likewise, the Johannes Society of Advocates released a media statement expressing their shock and dismay at the conduct of the Evidence Leaders.

36.1. It concerns the JSA that no worthy justification was provided for singling out the selected few advocates.

36.2. The nature and extent of professional services rendered by the selected few advocates was not disclosed either, nor the time – period within which those services were rendered.

36.3. This seemingly malicious disclosure of evidence presented as it was regrettable.

36.4. The National Assembly and the Nation must please note that advocates render professional legal services, and they are obliged to accept any work from any person.

36.5. The singling out of these few selected advocates for having executed their professional obligations is improper and unfair. The National Assembly should not tolerate such conduct in its proceedings.

37. The aforesaid statement is attached herein as Annexure **"RA2".**

38. The Pan African Bar Association of Southern Africa (PABASA) also released a statement wherein they condemned the conduct of the Evidence Leaders.

39. The aforesaid statement is attached herein as Annexure **"RA3**".

40. Furthermore, and as previously indicated at the most recent sitting of the Committee, it was specifically brought to our attention (and that of the Committee) that, as a result of the conduct of the Evidence Leaders Adv Sikhakhane SC had no option but to withdraw his representation of the Office of the Public Protector in the **Oscar Mabuyane** matter which will definitely result in fruitless and wasteful expenditure. We attach hereto, marked "**RA4**" the recent letter in that regard, sent by the Acting Public Protector to Adv Sikhakhane SC dealing with that issue. The contents of the letter are self-explanatory particularly in so far as it explains the role of the Evidence Leaders in the conduct which led to the withdrawal.

41. In any event, the conduct of the Evidence Leaders indicate that they are biased towards Adv Mkhwebane and that they will do anything in their power, by hook or crook to make sure that she is found guilty.

42. The conduct of the Evidence Leaders falls far below the acceptable standard in that their behaviour would not even be expected from prosecutors. Generally, prosecutors are allowed a reasonable amount of latitude of relative partisanship since they are involved in an adversarial process. However, they are still required to act professionally and not to chase a conviction at the expense of fairness to the accused person. Evidence Leaders, by way of contrast do not even enjoy that residual latitude. Their role is purely confined to assisting the process by bringing

forth both implicating and exculpatory evidence. They certainly have a duty only to bring relevant evidence and to ensure the exclusion of irrelevant, procedural and unfairness evidence.

43. The present Evidence Leaders have failed every test of expected minimum behaviour, over an extended period of time.

44. A case in point was their cross-examination of Mr Sithole simply because he was giving evidence which to them seemed to be helpful to the Public Protector. That goes not only against the applicable directives but also what the role of Evidence Leaders should be. Further misconduct includes at least four witnesses who testified or displayed that their witness statements were written and spoonfed by the Evidence Leaders. Such conduct is not calculated to give the members a full picture but to skew the inquiry towards an adverse finding against the Public Protector. This is a violation of every rule of fairness or natural justice. These issues are dealt with in more detail below and will be further elaborated upon during the oral application.

45. They have abandoned what is stipulated in the terms of reference which states "***The Enquiry is inquisitorial in nature and the Evidence Leader does not act as a prosecutor***".

46. Their colleagues countrywide call their conduct disgraceful, malicious and/or racist. These are not issues which can be washed away, swept under the carpet or be left unaddressed by the Committee. To do so will amount to abdication of the duties and powers of the Committee to ensure a fair process.

47. Such conduct cannot and should not be allowed to have any place in the democratic Parliament of the people for the people.

48. As a result of the Evidence Leaders conduct, the Public Protector definitely apprehends bias on the part of the Evidence Leaders. There is actual bias on the part of the Evidence Leaders and as a result should they be allowed to proceed, these whole proceedings will be tainted with inherent bias and unfairness.

B2: <u>Second Ground: cross examination of witnesses</u>

49. On 9 September 2022, the Evidence Leaders violated the Directives by cross-examining Mr Thembinkosi Muntu Sithole, a witness who was called and prepared by the Evidence Leaders to an extent that the witness felt unprotected by the Chairperson until he cautioned the Chairperson to be more in control of how witnesses are questioned. This occurred despite an objection from the legal representatives of the Public Protector who brought it to the attention of the Chairperson that Adv Bawa was in fact cross examining the witness. In an attempt to get Mr Sithole to testify against the Public Protector Adv Bawa adopted a hostile and adversarial attitude and posture against Mr Sithole. Her repetitive "*I put it to you..*" which she as Senior Counsel knows very well is signature cross-examination.

50. Unfortunately, the Chairperson's ruling was to the effect that the questioning did not amount to cross-examination. The Chairperson can be pardoned for this, he is no legal scholar, however, the Evidence Leaders are advocates, and Adv Bawa is

a Senior Counsel. Unless he was colluding with the Evidence Leaders, he was taken advantage of. On either alternative, the conduct was unfair.

51. There is a very good reason why the applicable Directive clearly differentiate between the right of the Public Protector to cross-examine and the right of the Evidence Leaders to put questions. The Evidence Leaders have no right to cross-examine simply because, unlike the Public Protector, they have no version to assert or test by way of cross-examination. Neither do they have a right to "*discredit*" any witnesses. That can only be done by a person or party which has a version and a desired outcome which is in conflict with the evidence of that particular witness. That is the sole purpose of cross-examination. For that reason, and to clearly illustrate this important point:-

51.1. Clause 6.8 of the Directive provides that:-

> "***After the Evidence Leaders have presented the Evidence of a witness, the Public Protector may cross-examine that witness***"; and

51.2. Clause 6.16 provides that:-

> "***After members have posed questions the Evidence Leaders may ask any questions arising or seek clarity from the witness in relation to questions posed to such witness, whereafter the Chairperson shall excuse the witness***."

52. It is therefore patently clear that the conduct of the Evidence Leaders in cross-examining Mr Sithole (and of the Chairperson, in allowing her to do so despite objections) was in breach of the Directive and fell outside of their mandate(s).

53. All this obviously resulted in manifest and inherent unfairness which will ultimately taint the proceedings as a whole. It is better to mitigate that consequence by the removal and/or replacement of the Evidence Leaders at this relatively earlier stage.

54. Mr Sithole, who himself is an attorney by profession enlightened the Chairperson that what happened to him in the hands of Adv Bawa was cross examination.

55. The conduct of the evidence leaders is indicative of the fact that they have adopted an adversarial stance in this matter and they want the Public Protector to be impeached at all costs.

56. The totality of the factors raised above lead to the ineluctable conclusion of bias on the part of the Evidence Leaders or at a bare minimum, an inability to confirm to the required standard. Even if such inability stems purely from a failure to appreciate the nature of their role, this will not diminish the incurably adverse impact on the Public Protector and the process as a whole.

B3: <u>Third Ground: witness statements</u>

57. During Mr Samuel's testimony it appeared during cross examination that in fact, the so called "witness statement" had been prepared by the Evidence Leaders in their own words. The contents of Mr Samuel's statement were not his own personal knowledge but the Evidence Leaders had unethically fed him the information by putting it in his statement. Mr Samuel conceded that he had actually not even read some of the judgments that his statement referred to with precise specificity.

58. This also transpired during Ms Thejane's testimony where she referred to the statement of Ms Mogaladi, only to be caught out that she actually had no knowledge of some of the contents of her statement. She was questioned at length about the charge under which she had to testify, which is charge 4. She had no clue that the charge had in fact been amended by the Evidence Leaders. What was contained in her witness statement was the Evidence Leaders evidence and not Ms Thejane's evidence. This was proved beyond doubt when Ms Thejane confirmed under oath that she had never read Ms Mogaladi's statement. Yet in her affidavit "*she*" referred to specifically numbered paragraphs thereof.

C: APPLICABLE AND RELEVANT PRINCIPLES

59. This application is merely based on the principles of natural justice and the often repeated and true statement that: justice must not only be done but it must be seen to be done. In the absence of time and to avoid voluminous papers, we propose to provide the relevant case law authorities separately and before the oral presentation. Where necessary, it will be referred to or cited at the hearing.

60. The current process is a public process. The Committee must ask itself honestly whether neutral members of the public can be expected to have sufficient confidence that this process can yield fair results whilst in the hands of Evidence Leaders who have conducted themselves as above and who face serious accusations of malicious, unjustified and even racially discriminatory conduct, all of which amounts to unfairness.

61. The Public Protector has certainly lost confidence in the Evidence Leaders. She does not believe that they are capable of playing their legally prescribed role. She also believes that fair and right-minded members of the public must certainly share her reasonable and legitimate concerns and expectations.

62. She also hopes, against all previous evidence to the contrary that the Committee will also agree that its intervention is mandated by the rules and that there can only be one outcome of this application: the removal and/or replacement of the Evidence Leaders.

63. It is essential the adversarial and partisan manner in which the Evidence Leaders repeatedly conducted themselves which has resulted in this application and the Public Protector will not receive a fair hearing when these Evidence Leaders are still responsible for this case.

D: CONCLUSION AND RELIEF SOUGHT

64. This application raises very fundamental issues that go to the core of violation of the principle of fairness, the Constitution, the Directives governing these proceedings as well the Terms of Reference.

65. As a result, this application ought to be granted in that there is a public outcry at the conduct of the Evidence Leaders who act contrary to the Ethics of their profession and in violation of people's rights as enshrined in the Constitution.

D.C. MPOFU SC

B SHABALALA

B MATLHAPE

AS MANDATED BY THE PUBLIC PROTECTOR

AND INSTRUCTED BY SEANEGO ATTORNEYS

23 NOVEMBER 2022

IN THE PARLIAMENT OF SOUTH AFRICA

PRESENTATION TO THE SECTION 194 COMMITTEE

RE: PUBLISHING OF FEES OF BLACK COUNSEL

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1. Chairperson, Hon Mr. Richard Dyantyi, Members of Parliament from all political parties here represented, our Public Protector and her legal team, the Evidence Leaders, we are grateful for this rare opportunity to address you from the street, as it were. I think it was Nelson Mandela himself who said this Parliament is the people's Parliament and they can walk in from the street to receive audience. First of all, we express our greatest respect to you all and for this important process you are involved in.

2. Chairperson, our appearance is indeed an extra-ordinary occurrence and for that we thank you sincerely for the indulgence while in the midst of your important work. We are not here because of what you and Honourable members did or said. But we are here because we believe that what you were told and what happened here last Wednesday was grossly unfair and constituted an abuse of this august House and its democratic processes. It was indeed a cruel and deliberate injustice that a democratic Parliament should not tolerate. WE HEREBY REGISTER OUR OBJECTION AND CONCERN TO THIS AUGUST COMMITTEE OF THE PEOPLE'SPARLIAMENT.

3. You are tasked with a very important matter and to the extent that you will be required to make your decision, we are here to correct a distortion that occurred here on Wednesday last week. We appear before you today in order to assure you that we support the call for accountability for the use of public funds. But we are also here to alert you that people like Ms. Bawa – a supposed colleague – can abuse such an important process to prejudice their colleagues and to fight battles that have nothing to do with your constitutional mandate about which you are here concerned.

4. A very unfortunate event took place in this House last Wednesday. The manner and content of the supposed evidence of the PP Office's expenditure on legal fees point to a clear pattern. It was callous. It was deliberate. It seemed engineered to cause maximum professional harm. And the fact that this was done by someone who is supposed to be a colleague in an otherwise honourable profession is particularly gutting. Consistent with the most common mischief and racist perpetuation of a stereotype against black professionals, Ms. Bawa, knowingly and purposely

brandished our names and, without any context, read out alarming figures she submitted constituted the money we had been “given” by the PP.

5. She knows that Counsel in our referral profession submit their fee notes to the instructing attorney for payment for legal services actually rendered. Counsel is not “given” money by the client. So, why did she try to create a direct correlation between **the person** of the PP and the fees paid out by instructing attorneys to specifically selected counsel? Of what discernible value is it to this committee (and the public) to know that a black advocate was paid R1 million for legal services in 2019 under Adv Mkhwebane, if a white advocate was paid the same amount or more in 2015 under Adv Madonsela?

6. We want to state it categorically that we reject Ms. Bawa’s intended theory to portray black professionals as corrupt simply because she does not like them. We reject as unprofessional her conduct to use her position in front of this august structure to further a stereotype that should be vanquished. We reject her cruelty to condemn us, particularly black juniors with whom we work, to be perceived as corrupt when we do our work just like she and her white friends do in the profession. We work under very testing conditions in a profession that has not been kind to black lawyers as our experience of skewed briefing patterns and other experiences attest. We do not need Ms. Bawa to pour salt into our wounds as black professionals. We have gone through so much and she should realize that her allegiance to whatever she regards as holy in the political arena will be short-lived. She must steer clear of political agendas because she may in the future be hoist with her own petard.

7. A person we regard as a colleague did what she did last Wednesday knowing full well that the public and indeed some of you may not be aware that some of her figures are wrong and that she omitted the important context of the period over which these figures were accrued, even if they are accurate. In focusing on the figures, she omitted to explore the precise nature, the complexity, the importance and the value of the legal services actually rendered by us. Section 29 of the Legal Practice Act Code of Conduct sets out what Counsel must take into account when considering what a reasonable fee is to charge in a particular matter. Ms. Bawa ignored all that. Instead, she seems to have sought to perpetuate the common stereotype that black professionals can only have money of that nature by means of corruption.

8. Ms. Bawa hung us out to dry in her attempt to perpetuate a stereotype that black professionals are looters and that their legal knowledge is of no value that should be paid for. A far more useful comparison for purposes of this process, I venture, would have been the legal fees paid to each of the white advocates and white law firms that rendered legal services to Madonsela. To simply say the budget for legal fees was lower then, is no answer. What fees were actually paid to those white advocates and firms and what was the nature, value, importance and complexity of the work they did?

9. Even if the character assassination was not her intention, that is what we have been subjected to since her contrived publishing of our names as mere beneficiaries of the-gift-that-keeps-on-giving PP. What large sums of money has Ms. Bawa herself, and others she does not mention, made through the State at taxpayers’ expenses?

What value did she add? Was the fee she and others were paid commensurate with that value? What is the measure of value in any given case? Is it success, as in a contingency fee arrangement, even in the absence of such an arrangement? Is it Counsel's expertise? Is it Counsel's race or gender? Is it the market's perception of Counsel's ability by reason of his race (white) and gender (male)?

10. Like old stereotypes, Ms. Bawa tried to impute to nature the differences between black and white by selecting us in a poisoned context and theory of abuse of state funds that she sought to sell to you. She throws the names of selected black advocates in order to ride on the old racist stereotype that black is corrupt. Whether she intended it or not is irrelevant. She did this with the full knowledge that she had outside in the media space fertile ground for this kind of sick stereotyping. Predictably, she did find fertile ground in the *Daily Maverick* that now characterizes our fees not as having been earned for legal services rendered but as monies having been ***"funneled through"*** Adv Mkhwebane. Her theory seeks to use this important process to perpetuate an old racist stereotype that Africans are forever children who require policing by other races, otherwise they will be up to no good. Her theory is indeed dangerous and constitutes the anti-thesis of the democratic mandate of this Parliament.

11. She knew full well that what she would achieve was the impression that, as black professionals that she carefully selected, we would be perceived, at least in the eyes of the public, as people who are corrupt or as people that helped themselves to public funds without rendering any service. Her conduct seeks to justify white supremacy and black inferiority. She had no reason to single out our names except for dramatic effect and pursuit of anti-black stereotyping.

12. Ms. Bawa's presentation of her evidence of the Public Protector's spend on legal fees deliberately pays scant attention to our white counterparts in her well calculated list of black legal practitioners. The callous nature of her conduct is not only manifest in how she scandalized us as Black senior counsel, but also in how she added to the prejudice and burden facing black and female junior counsel, who remain with this dark cloud over their heads and face the future with these doubts.

13. From our vantage point, it is hard not to conclude that this is what Ms. Bawa intended. Her cruelty and hatred for her black colleagues should not find space in this august House, which represents South Africans and their new and constitutional resolve to create a non-racial and non-sexist South Africa, in which the prejudices of the past are vanquished. Instead, she abuses her professional status here to further agendas that seek to perpetuate the pain we have always faced as black people in general and as black professionals in particular.

14. The screens on which she displayed our names were hardly off and we were splashed in the *Daily Maverick* and labelled ***"RET Trick-stars"*** and ***"Foes of the Constitution"***. Again, this is an inevitable result of the reckless handling of potentially ruinous evidence by Ms. Bawa. An experienced advocate would have handled things differently and in accordance with the established traditions of the Bar. Despite her seeming inexperience (although she pronounced herself as experienced in these matters at the commencement of these proceedings), Ms.

Bawa does not seem to have sought guidance from senior and more experienced colleagues who would doubtless have dissuaded her from her chosen path.

15. Ms. Bawa's apparent ineptitude in her handing of evidence last Wednesday suggests lack of experience. But that is no excuse because section 26.4 of the Code of Conduct for Legal Practitioners afforded her an opportunity to decline this brief. Alternatively, aware of her shortcomings, she should have sought guidance from more experienced colleagues. Section 26.4 says: ***"Counsel may decline offers of briefs in matters in which they believe they are not competent to render professional services at the appropriate standard reasonably expected of a counsel in such matters or to discharge their duty of diligence, and when declining such offers counsel shall disclose those reasons to the instructing attorneys."***

16. Chairperson, we are here because each one of you is an important service to the citizens of this country. That you come from different political parties is immaterial because you represent the length and breadth of this country, and you are the heartbeat of our nascent constitutional democracy. We are here to plead with you not to allow this august House and this important process to be used for whatever ulterior purpose may be at play here.

17. Most importantly, Chairperson, South Africa emerges from a very sad period of grave prejudice against black people. True, you must hold everyone accountable, but we must be able to see if Parliament is used for nefarious purposes.

18. We would have preferred to address our concerns to her and leave it at that. In fact, Ngalwana has. But Ms. Bawa has done this before in another court case where she wantonly invoked the names of colleagues in her argument and had to be put right by the presiding Judge as to the relevance of that approach. For that reason, and since this is a repeat performance, it appears to us that addressing any concern to her only would not have achieved any correction.

19. Since Ms. Bawa seems so concerned about legal fees of black advocates paid from the public purse, we invite her to share with the public how much she has made in these proceedings, in the Mokgoro Inquiry and all the matters in which she has been briefed by the State. If you cared to check their fees, you will be surprised by the double standards of these people that have bestowed upon themselves the duty to police black people they regard as inferior, irrational and child-like beings that require the supervision of the "superior race(s)" and those who have have elected to be an appendage to whiteness.

20. We trust that in the fulness of time Parliament will also be shown the millions of Rand that white legal practitioners have made or accumulated from the State. White Senior Counsel whose names are included in the list seem deliberately glossed over. One is alleged to have been paid over R4,4 million during this Public Protector's tenure. But his name has not featured as prominently as that of Black Counsel. Why? His name (known to us) appears nowhere in the *Daily Maverick* takedown of selected Black Counsel. Why? Ms. Bawa should reasonably have expected this when her presentation of evidence seemed focused on us as Black

Counsel. She should have been conscious of the South African tendency to condemn black for the same conduct that it is not prepared to condemn white.

21. Ms. Bawa's conduct is indeed regrettable, to say the least. The prejudice and pain she has caused to her colleagues is profound and has far-reaching consequences for the lives and reputations of those she has tagged.

22. As for Mr. Van Der Merwe, his conduct is astounding. On 16 August 2022 I, as Muzi Sikhakhane SC, consulted with him in respect of a huge matter I was doing for the Office of the PP. I have since withdrawn from this matter which is being heard as we speak in the Bisho High Court. Not once did he indicate to me that during his testimony, he would be flighting my name and my supposed income in the full glare of the media and the public. He also consulted with Ngalwana SC and omitted to alert him that he would be brandishing his name in this fashion. Had he and Ms. Bawa not been obsessed with brandishing our names, the mistakes they made about figures would have been averted. However, accuracy was never their intention. Instead, they sought to harm our reputation because we represent clients unpopular with dominant classes in South Africa. This hatred is simply unfair and irrational. Like white counsel, who are free to represent white tax dodgers and crooks, we also just represent clients, and we should not be hated and targeted for simply doing our jobs. White counsel who represent people accused of raping scores of young women live their lives without the attacks and the stigma we, as black counsel, have to endure for representing clients viewed as unpopular in the eyes of those who control the dominant narrative in our country. What exactly is the sin in representing such clients and why must only black lawyers be hated for representing certain clients?

23. Chairperson, both Ngalwana SC and I are here to set the record straight and to assure the public and yourselves as the representatives of our citizens, that despite Ms. Bawa's cruel and deliberate display of our names, we have done nothing wrong. She carefully selected those of us she seems to have, for some reason, sought to discredit. She must pursue her own stereotypes outside this forum. Her conduct supports the justification of the structure of domination through racist myths and prejudicial innuendo against her black colleagues.

24. We consider her conduct to be not only unprofessional, but also unlawful, And we are considering pursuing the professional complaint route against her. Her actions seem deliberate and should be frowned upon by this democratic Parliament, regardless of political preferences.

25. We have available our own invoices to demonstrate that she did not only lie to you about the accuracy of the figures, but also to lay bare her own prejudices and unprofessional conduct. Ngalwana will show you communication between himself and Ms. Bawa in the past 72 hours to demonstrate the reckless nature of her conduct in relation to the professional standing of senior colleagues. She herself knows what conversations she has had with Ngalwana SC. Some of it is in writing. Some of it she has admitted here. We are all senior to her and would have expected a measure of courtesy from her. But our skin colour seems to have counted for less than she can suffer to humble herself.

26. We thank you for affording us this opportunity to clear the air and expose this anti-African agenda we all should distance ourselves from. I have never met Ms. Bawa but I am aware that at every opportunity she has tried to target me for discrediting.

27. The impact of what she has done goes against what we do as advocates. She and others like her seek to intimidate advocates never to represent unpopular clients or clients that are hated by powerful forces in society. Of course, no junior counsel would like to be treated and prejudiced the way we have been. So, the effect of what she and those who condemn us for our clients do is to instill the fear of God in advocates to only represent those who are loved and popular with certain classes. This is contrary to our role to represent everyone who needs to be represented regardless of their political views or standing in society.

28. We plead with you not to allow us to be collateral damage in political battles of our clients and their foes. Contrary to popular sentiment, we are distinct from our clients, and we are briefed by attorneys to represent clients. Unfortunately, of late, a narrative is propagated that when black lawyers represent unpopular people, they must be part of some corrupt agenda. When the same people are represented by white colleagues, it is professional, and they are doing their jobs. This sentiment, as typified by Ms. Bawa is also perpetuated by our own colleagues.

29. It is a narrative that seeks to perpetuate the stereotype that all that is black is corrupt and all that is white is professional and good. Unfortunately, this stereotype is also perpetuated by those who are black and should know better. Unfortunately, some regard white validation as more essential for their existence than principles of human emancipation. It is indeed regrettable that we have had to travel so far to make this point. Ordinarily, such anti-black sentiment should have been recognized by all progressive members, regardless of their position on the battle with the suspended Public Protector.

30. In this address to you, Chairperson, we also convey the sentiments of many Black juniors who, for obvious reasons, are not able to stand up for themselves lest they be targeted or further victimized and maligned for speaking the truth. We are aware that we are being targeted, not for what we have done, but for who we represent. However, when white counsel represent the very same people, they face no reprisal or judgment. This attitude itself is premised on an anti-black mindset that uses different standards for judging black people. The clients we are targeted for have been represented by white counsel before us and such white counsel have never been subjected to the onslaught we face.

31. Although Ms. Bawa has sought to correct the wrong figures she flighted and has apologized to Ngalwana SC and publicly, the damage she intended is done and her apology is contrived and therefore not accepted. We are fully aware that we will be targeted by the white media for daring to defend ourselves. However, we expect such targeting from those whose existence thrives of the denigration of black lives. We await the attacks, but we are clear that we have a duty to rid our society of the remnants of racism, even the sophisticated version that thrives in neo-apartheid South Africa and perpetuated by the self-proclaimed progressives. We know that such racism faces every black professional and exists in the newsrooms as well and

thrives because black people do not own the means by which these grand anti-black narratives are engineered.

32. Although Ms. Bawa has tendered her much belated and, in our view, contrived apology, we implore you, members of this august Committee to correct this distortion and abuse of this process for what we see as nefarious purposes designed to demean black legal practitioners. Such conduct has no place in our country and the Parliament of the people. It was a cruel, insensitive and mean act.

33. We thank you, Chairperson and Honourable Members of our National Assembly represented here for affording us this rare opportunity. We express our sincere apologies for the manner in which we came to this Committee, but we are eternally grateful to the Chairperson and members for granting us the indulgence.

V NGALWANA SC

MUZI SIKHAKHANE SC

Sandton Chambers
PABASA
1O NOVEMBER 2022

"RA2"

JOHANNESBURG SOCIETY OF ADVOCATES

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11 November 2023

Media Release

The Johannesburg Society of Advocates ("JSA") acknowledges and supports the National Assembly in executing its duties to conduct an inquiry in terms of section 194(1)(b) of the Constitution of the Republic of South Africa, 1996.

As a professional body of advocates, the JSA subscribes to the principles of transparency and the rule of law and fully supports the National Assembly's right to conduct an impeachment inquiry to establish whether the Public Protector is fit for office and whether she ought to be removed therefrom.

The JSA notes that on 02 November 2022, and during the said Inquiry, Mr Cornelius "Neels" van der Merwe was led as a witness. He was described to be a senior manager for legal services in the office of the Public Protector.

During the course of his testimony, Mr van der Merwe testified in respect of a spreadsheet setting out the professional legal fees of certain advocates. These professional legal fees were said to have been incurred by the office of the Public Protector between the financial years 2016 to 2022. The JSA notes the purported reason for that evidence having been led, being *"to provide [the] committee with an indication, in broad terms, as to what the [Public Protector] was paying for in relation to legal fees and which matters were regarded as priority, on which limited funds were to be spent"*.

In seeking to achieve this purported objective, evidence in respect of a selected few advocates was led. In doing so, the names and fees of the selected few advocates was disclosed. The singling out of these selected few advocates concerns the JSA.

It concerns the JSA because no worthy justification was provided for having singled out the selected few advocates. The nature and extent of the professional services rendered by the selected few advocates was not disclosed either, nor the time-period within which those services were rendered. This seemingly malicious disclosure of evidence, presented as it was, is regrettable.

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The JSA points out that Advocates are entitled to charge a reasonable fee for the professional legal services they render. If genuine allegations of misconduct exist,

and if any advocate charges unreasonable fees for professional legal services rendered, then that should be reported to the relevant regulatory or professional bodies who are equipped to deal with such misconduct.

The JSA believes that it was inappropriate to disclose and discuss the names and fees of a selected few advocates in the manner the Inquiry permitted. Such conduct is highly prejudicial to legal professionals and to the repute of the profession. It also negatively affects the rights of advocates to practice their profession as guaranteed by section 22 of the Constitution of the Republic of South Africa.

The fact that that was permitted without regard for the junior and black advocates who rendered the said professional legal services in the course of their professional duties is even more disconcerting, especially in public proceedings followed by the Nation and beyond South African borders, and widely reported on by the Media.

The National Assembly and the Nation must please note that advocates render professional legal services. They are obliged to accept any work from any person, provided they have the required capacity and the requisite skills. That is their professional duty as oath sworn officers of the Court and they do so in service of the administration of justice, the rule of law and in defense of the Constitution of the Republic of South Africa.

The singling out of these few selected advocates for having executed their professional obligations is improper and unfair. The National Assembly should not tolerate such conduct in its proceedings.

P G SELEKA SC
CHAIR: JOHANNESBURG BAR COUNCIL

"RA3"

PABASA

PAN AFRICAN BAR ASSOCIATION
OF SOUTH AFRICA

STATEMENT ON DISCLOSURE OF COUNSEL FEES IN THE ABSENCE OF CONTEXT

PABASA has noted a screenshot circulating on social media depicting the fees apparently paid to a selection of individual advocates and attorneys for legal services rendered to the Office of the Public Protector. The screenshot is of one part of a spreadsheet adduced as evidence during the evidence of Mr Cornelius Van Der Merwe, Senior Manager: Legal Services in the Office of the Public Protector, in the s194 Parliamentary Committee Enquiry into the Impeachment of the Public Protector, Adv Busisiwe Mkhwebane on 2 November 2022.

PABASA fully accepts the importance of transparency in the manner in which public funds are used. However, PABASA is seriously concerned by the screenshot and the inaccurate and harmful message that it conveys.

First, the part of the spreadsheet in the screenshot does not indicate a time period during which those fees were paid, nor does it indicate what cases these amounts were for, how many cases were involved or how much time was spent on the cases concerned by the advocates or attorneys involved. Instead, it simply list a series of attorneys and advocates, by name, who were paid by the Office of the Public Protector and total amounts of money that each were apparently paid. While the use of public funds for litigation is obviously a matter that requires appropriate transparency, it is unhelpful and misleading to do so by simply setting out the total fees paid to each legal practitioner without the critical context – including the period concerned, the number of cases, the time spent on the cases, and so on. Presenting the information in this way in public hearings which are live screened inevitably allows the information to be presented in the public domain out of context, with all the damaging consequences that flow from this.

Second, the list of advocates only depicts some of the advocates briefed by the Public Protector during the relevant period and notably excludes white advocates briefed by the Public Protector. We have listened to the evidence before the Inquiry and note that the Evidence Leader explained that the spreadsheet only depicts those counsel who had "*earned a significant amount of money or more money or alternatively where they've been involved in cases which is (sic) before this committee in some way or another so there are many counsel that have been briefed that are not on this list*." But what is very concerning is that by listing the names of a select group of only Black Counsel who represented the Public Protector in a variety of matters of differing complexity and duration, the impression is created that the advocates listed are somehow complicit in the looting of public funds. In fact, on social media the screenshot was circulated with the title "*Mkhwebane and her friends were looting the office*."

We note further that no detail was provided as to what constituted "*a significant amount of money*" in respect of counsel fees, which determined whether the name of counsel was included on this spreadsheet – and the figures paid ranged from approximately R12 million to R200 000. However, in relation to attorney's fees, a clear explanation was provided that only attorneys who were paid more than R2 million were included on the spreadsheet.

While we accept the need for full and comprehensive evidence to be provided to the Parliamentary Process, the unfortunate manner in which this was handled by the Evidence Leaders has enabled the widespread sharing on social media of this spreadsheet, out of context and without any explanation of what counsel were briefed to do or the extent and duration of their involvement. This has a direct and adverse impact on the public perception of the professional integrity of the counsel listed on the spreadsheet and ignores the commercial reality that Counsel provide a service – in return for a reasonable fee which is reflective of their expertise, experience, knowledge and skill. It plays into the unfounded narrative of Black Counsel "fleecing the State", which is reflective of the stereotyping that we continue to see in the media and in the profession. This must now stop.

PABASA has previously issued a statement calling on the South African media and public to remember that Advocates are independent legal practitioners, who are trained to represent all clients equally and to the

best of their abilities. Advocates should not be equated with the clients they represent or maligned for doing so.

The s194 proceedings are public and all evidence presented by the Evidence Leaders is live-streamed. It was thus inevitable that extracts from the evidence would be shared widely on social media. Greater care needed to be taken by the Evidence Leaders and Parliamentary Committee to avoid the negative and unfair consequences of the screenshot. For example, it is not at all clear why the names of the advocates who were paid and the amounts each was apparently paid is relevant to the section 194 enquiry. A simple globular amount of counsel fees for each matter could have achieved the same purpose, without sensationalising the names of particular counsel who were simply doing the job we are all paid to do for our clients.

PABASA is disheartened by the approach of Evidence Leaders in this regard. It has led to the selective, sensationalist and unfair criticism of the counsel involved.

Nasreen Rajab-Budlender SC
Chairperson

Dumisa Buhle Ntsebeza SC
Deputy Chairperson

5 November 2022

For enquiries please contact:

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"RA4"

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Adv Muzi Sikhakhane SC
Per email: muzis@law.co.za

Dear Advocate Sikhakhane

RE: MABUYANE/ MADIKIZELA/MLM v PUBLIC PROTECTOR CASE

1. Your letter to Messrs Gray Moodliar Inc, dated 4 November 2022 has reference.

2. It is unfortunate that you withdrew from the abovementioned matters, however, the evidence presented at the section 194 committee is not at the insistence or within the control of the PPSA leadership.

3. The PPSA is obliged and committed to render its full co-operation in providing access to relevant records and information, for the purposes of assisting the Committee in ensuring that all relevant evidence material to the motion filed by the Chief Whip of the Democratic Alliance to initiate an enquiry in terms of section 194 of the Constitution, for the removal of the Public Protector, Adv. Mkhwebane, is put before the National Assembly.

4. From the proceedings it is noted that the evidence leaders initially, through the evidence of Mr Sithole, presented a high level overview of the legal fees and legal service providers to the Committee. The Members subsequently requested particular evidence, including a breakdown of "*which firms of attorneys and advocates were paid – earning more R2 million or were briefed in matters in respect of matters that are the subject of the enquiry.*"

5. This led to the evidence leaders, through the evidence of Adv. Van der Merwe, presenting legal expenditures in respect of 14 firms of Attorneys and 26 Counsel (of all races), who fall within this category, to the Committee as per its directives.

6. As stated, the leadership of the PPSA is not a party to these proceedings and was not in a position to alert any of the affected service providers of the evidence and information that was presented to or unfolding at the proceedings.

7. While the PPSA fully appreciates the concerns as encapsulated in your letter, it is noted that the matter was raised directly with the Committee on 10 November 2022. The Chairperson, Mr Dyantyi indicated that Members of the committee will not engage on the concerns raised by you and Adv Ngalwana, SC on the said date and will await formal communication on this matter.

8. From the onset, the Acting Public Protector endeavoured to manage any impact of the developments around the suspension of Adv Mkhwebane in a manner that does not adversely affect the operations of the PPSA, including the matters that are the subject of litigation. The availability or not of the Acting Public Protector to sign documents as referred to in paragraph 13 of your letter should not have had an impact on the proceedings, as she had resolved to delegate the necessary authority to depose and sign affidavits and papers on behalf of the PPSA to the relevant officials, including Mr V Dlamini.

9. Thank you for the assistance rendered in respect of this matter. It is trusted that this addresses any concerns that you may have about the *bona fides* of the leadership of the PPSA or the institution as a client.

Yours Faithfully,

Ms T Sibanyoni
Chief Executive Officer:
Public Protector South Africa
Date: 16 November 2022

Copy to: GRAY MOODLIAR INC.
Ms S Roberts