EFF STATEMENT ON PARLIAMENT'S LEGAL OPINION PROHIBITING ADV MKHWEBANE FROM PARTICIPATING IN THE INTERVIEWS FOR THE DEPUTY PUBLIC PROTECTOR

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The Economic Freedom Fighters (EFF) rejects the partisan and biased legal opinion of the Legal Services Unit of Parliament, which seeks to provide legal cover to the concerted campaign of excluding EFF Members of Parliament from performing their duties in Parliament. The opinion in question recommends that Advocate Busisiswe Mkhwebane, the former Public Protector, must recuse herself from the interview process for the new Deputy Public Protector due to an alleged conflict of interest.

Parliament's Legal Advisors have persistently played partisan and factional roles with the aim of penalising and excluding EFF Members of Parliament from performing their constitutional obligations. This particular campaign is led by the ruling party and their newly found friends, the Democratic Alliance (DA).

This comes after an objection to the participation of Adv Mkhwebane was raised by Adv Glyniss Breytenbach, a DA member of parliament who was herself formerly with the National Prosecuting Authority (NPA). Breytenbach continues to engage robustly whenever the NPA appears in Parliament, and her previous role at the NPA, and the manner of her departure, have never been questioned.

It is ironic therefore, that it was Breytenbach, supported by the ANC and the ever-pliant legal office in Parliament, who now seeks to deprive Adv Mkhwebane of her constitutional rights as a Member of Parliament. There is no legal basis for this, and it smacks of hypocrisy of the highest order.

Their argument is that during her tenure as Public Protector, Adv Mkhwebane fired one of the candidates for the position of Deputy Public Protector, and that secondly, one of the candidates is currently representing her on a pro bono basis at the African Court for Human Rights.

In relation to the former, Adv Mkhwebane was performing her duties as Public Protector, and there is nothing to suggest that she at any stage, had any personal grudges against the person she fired. Even as the dismissal was overturned by the Labour Court, it could never be argued that Adv Mkhwebane had fired the candidate in bad faith.

In terms of the latter, the candidate is a practicing Advocate of the High Court, who, applying the well-known cab rank rule, decided to represent Adv Mkhwebane in her pursuit of justice. The candidate, and indeed Adv Mkhwebane, can never be demonised for ensuring that all those who need legal representation do have access to it.

Further, as the legal opinion repeatedly mentions, a mere apprehension of bias is not sufficient for recusal, and that actual bias must be proved. The legal opinion premises the entirety of its conclusion on the mere apprehension that Adv Mkhwebane will be biased for or against these two candidates. Instructively, as the Constitutional Court ruled in Bernert v Absa Bank Ltd 2011 (3) SA 92 (CC), the onus rests on the party alleging bias to prove, with facts, that there is indeed reasonable apprehension of bias.

The Court noted:

"The presumption of impartiality and the double-requirement of reasonableness underscore the formidable nature of the burden resting upon the litigant who alleges bias or its apprehension. The idea is not to permit a disgruntled litigant to successfully complain of bias simply because the judicial officer has ruled against him or her. Nor should litigants be encouraged to believe that, by seeking the disqualification of a judicial officer, they will have their case heard by another judicial officer who is likely to decide the case in their favour. Judicial officers have a duty to sit in all cases in which they are not disqualified from sitting. This flows from their duty to exercise their

judicial functions. As has been rightly observed, '(j)judges do not choose their cases; and litigants do not choose their judges.' An application for recusal should not prevail unless it is based on substantial grounds for contending a reasonable apprehension of bias."

Of course, Members of Parliament are not judicial officers, and the standard ought to even be lower. This is so because Parliament is a multi-party institution of democracy. No single member has considerable sway to decide matters such as the appointment of a Deputy Public Protector. Furthermore, Members of Parliament are not even required to act impartially, politics is not an impartial endeavour. They simply need to act lawfully in the exercise of their duties.

Adv Mkhwebane as an individual has no power to sway members of the committee on any of the candidates. Her feelings, if any, cannot sway Parliament to either appoint or refuse to appoint any of the candidates. Therefore her exclusion from the committee is simply a retributive act by those who feel offended by her presence in Parliament. It is, further, a continuation of the misuse of Parliamentary rules to silence and marginalise EFF Members of Parliament.

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