

**DEPARTMENT OF PUBLIC SERVICE AND ADMINISTRATION****NOTICE 1754 OF 2023****PUBLICATION OF EXPLANATORY SUMMARY OF THE PUBLIC SERVICE  
AMENDMENT BILL, 2023**

1. Notice is hereby given in terms of Rule 276(1)(b) of the Rules of the National Assembly that the Minister for the Public Service and Administration intends to introduce the Public Service Amendment Bill, 2023 ("the Bill"), in the National Assembly shortly.

2. The explanatory summary of the Bill is hereby published in accordance with Rule 276(1)(c) of the Rules of the National Assembly.

The main objects of the Bill are to provide for the vesting of administrative powers to heads of department; to augment the role of the Director-General in the Presidency to support the President; to provide a mechanism for the recovery of overpaid remuneration and benefits; to clarify the role of the Public Service Commission in respect of grievances; to clarify the role of the President and the Premier in the appointment and career incidents of heads of department.

3. A copy of the Bill can be found on the websites of the Department of Public Service and Administration at <https://www.dpsa.gov.za/legislation/> and that of the Parliamentary Monitoring Group at <http://www.pmg.org.za> and, after introduction, may also be obtained from Government Printers: Cape Town (Telephone number: (021) 465 7531).



**MEMORANDUM ON THE OBJECTS OF THE PUBLIC SERVICE AMENDMENT BILL,  
2023**

**1. BACKGROUND**

- 1.1 The Public Service Act, 1994 (Proclamation 103 of 1994) ("the principal Act") was last amended in 2007 through the Public Service Amendment Act, 2007 (Act No. 30 of 2007), to introduce a new dispensation in the public service in line with the basic values and principles contained in the Constitution of the Republic of South Africa, 1996 ("the Constitution") and other legislative reforms applicable to the public service.
- 1.2 Following the proposed policy reforms initiated within government through the National Development Plan 2030 ("NDP"), various court decisions relating to the field of public administration and matters identified by the South African Law Reform Commission's Report on legislation administered by the Department of Public Service and Administration, it has become necessary to amend the principal Act.
- 1.3 The Public Service Amendment Bill, 2023 (the "Bill") seeks to amend the principal Act to—
- a) vest administrative powers with the heads of department while retaining strategic powers with the executive authorities;
  - b) augment the functions of the Director-General in the Presidency to include the functions envisaged by the Nation Development Plan for an administrative head of the public service;
  - c) clarify the role of the President and the Premier, respectively, as the executive authority in respect of heads of department;
  - d) correct the reference in section 31(3)(c);
  - e) amend section 35 to clarify the role of the Public Service Commission in determining the internal grievance procedures;
  - f) limit the political rights of heads of department and employees reporting directly to heads of department;
  - g) amend section 38 to provide an alternate mechanism for departments to lawfully deduct overpaid remuneration from an employee's salary; and
  - h) amend section 42A(3) to clarify the meaning of 'Minister'.



## 2. OBJECTS OF THE BILL

The main objects of the Bill are to provide for the vesting of administrative powers with heads of department; to augment the role of the Director-General in the Presidency to support the President; to provide a mechanism for the recovery of overpaid remuneration and benefits; to clarify the role of the Public Service Commission in respect of grievances; to clarify the role of the President and the Premier in the appointment and career incidents of heads of department.

## 3. CLAUSE-BY-CLAUSE SUMMARY OF THE BILL

### 3.1 Clause 1

3.1.1 Clause 1 of the Bill provides for amendments to the definitions of “executive authority” and “heads of department” contained in the principal Act and the addition of a definition of “political office” for ease of interpretation.

3.1.2 With regard to the definition of “executive authority”, a new paragraph (b), which states that “*‘executive authority’, in relation to a head of a national department or national government component, means the President and in relation to a head of the Office of a Premier, provincial department or provincial government component, means the Premier*”. Section 85(1) and (2) of the Constitution provides that the executive authority of the Republic is vested in the President and the President exercises the executive authority, together with the other members of the Cabinet. The proposed amendment is aligned to the policy objective, which seeks to clarify the role of the President as executive authority in respect of heads of department.

### 3.2 Clause 2

3.2.1 Clause 2 of the Bill seeks to replace section 3(7) of the principal Act, which regulates the powers and duties of the executive authority. Section 3(7) of the principal Act was redrafted to provide strategic powers to the executive authority and remove administrative powers from the executive authority to enable the executive authority to focus on providing strategic and policy direction. The necessary checks and balances



for the delineation of the powers between the executive authority and the head of department have been provided for to ensure accountability.

- 3.2.2 Clause 2 further provides the executive authority with powers to intervene in the event that a head of department fails or refuses to fulfil a power or duty in terms of the Act. The provision is important as, currently, a head of department exercises administrative powers as delegated by an executive authority, who may withdraw the said delegation in the event the head fails or refuses to perform certain powers or duties delegated to him or her. The vesting of administrative powers from the executive authority to the head of department means that the executive authority can no longer withdraw a delegation and therefore necessitates a process to allow the executive authority to intervene where justified.

### **3.3 Clause 3**

Clause 3 of the Bill proposes to amend the provisions of section 5 of the principal Act by relocating section 3(8) of the principal Act to the new section 5(9). The provision is being amended to include the head of department and to provide for both the executive authority and the head of department to deal with any matter which relates to or arises from the employment or conditions of services of a person formerly employed in the public service.

### **3.4 Clause 4**

- 3.4.1 Clause 4 of the Bill seeks to amend section 7(3) of the principal Act to provide for the vesting of administrative powers to heads of department in national departments, provincial departments and government components. The amendments to section 7(3) provide for the head of department to—

- (a) report to the executive authority as and when required;
- (b) assist the executive authority in fulfilling the executive authority's accountability and responsibility obligations as contemplated in section 92 of the Constitution;
- (c) implement the strategic plan.

- 3.4.2 In addition, clause 4 seeks to amend section 7 of the principal Act to provide for the additional functions placed on the Director-General in the Presidency to align with the



NDP objective to create an administrative head of the public service to whom Directors-General would report on operational, organisational and administrative matters.

### **3.5 Clause 5**

Clause 5 of the Bill seeks to amend section 9 of the principal Act to provide the head of department with the authority to appoint persons in a department. The vesting of this power is to ensure the alignment of the financial responsibility with human resources administrative functions, which enables an executive authority to focus on providing strategic and policy direction.

### **3.6 Clause 6**

Clause 6 of the Bill seeks to amend section 13 of the principal Act to provide that a head of department may appoint an employee on probation for such period as may be prescribed. The vesting of this power is to ensure the alignment of the financial responsibility with human resources administrative functions, which enables an executive authority to focus on providing strategic and policy direction.

### **3.7 Clause 7**

Clause 7 of the Bill seeks to amend section 14 of the principal Act to provide the head of department with the authority to transfer employees within a department and to other departments.

### **3.8 Clause 8**

Clause 8 of the Bill seeks to amend section 14A of the principal Act to—

- (a) remove reference to section 14 transfers, as section 14 which deals with transfers is being repealed by the Public Administration Management Act, 2014 (Act No. 11 of 2014); and
- (b) provide for the continuation of employment when a person, who is already employed by an organ of state, is appointed in terms of section 9.
- (c)



**3.9 Clause 9**

3.9.1 Clause 9 of the Bill seeks to amend section 16 of the principal Act, which deals with retirement and the retention of services. It is proposed that the term “officer” be substituted with the defined term “employee”.

3.9.2 Furthermore, the proposed amendment seeks to provide the power to a head of department to authorise an employee to retire from the public service before reaching the age of 60. The vesting of this power is to ensure the alignment of the financial responsibility with human resources administrative functions, which enables an executive authority to focus on providing strategic and policy direction.

**3.10 Clause 10**

Clause 10 of the Bill seeks to amend section 16B of the principal Act to prohibit a head of department from agreeing to a shorter notice period for resignation, in instances where an employee wishes to resign after notice of disciplinary hearing was given against the employee. The vesting of this power is to ensure the alignment of the financial responsibility with human resources administrative functions, which enable an executive authority to focus on providing strategic and policy direction.

**3.11 Clause 11**

Clause 11 of the Bill seeks to amend section 17 of the principal Act to provide a head of department with the power to dismiss an employee. The vesting of this power is to ensure the alignment of the financial responsibility with human resources administrative functions, which enable an executive authority to focus on providing strategic and policy direction.

**3.12 Clause 12**

Clause 12 of the Bill seeks to amend section 30 of the principal Act to provide that no employee shall perform or engage himself or herself to perform remunerative work outside his or her employment in the relevant department, except with the permission of the head of department. The vesting of this power is to ensure the alignment of the



financial responsibility with human resources administrative functions, which enable an executive authority to focus on providing strategic and policy direction.

### **3.13 Clause 13**

3.13.1 Clause 13 of the Bill seeks to amend section 31 of the principal Act to allow the head of department, in exceptional circumstances, to approve the paying out of revenue an amount equal to that salary, allowance, fee, bonus or honorarium, or a portion thereof, to an employee. The vesting of this power is to ensure the alignment of the financial responsibility with human resources administrative functions, which enable an executive authority to focus on providing strategic and policy direction.

3.13.2 Clause 13 further seeks to make technical amendments to section 31(3) to take into account concepts already defined and to correct the reference to "section 30(b)".

### **3.14 Clause 14**

Clause 14 of the Bill seeks to amend section 32 of the principal Act to provide that—

- (a) a head of department may direct employees to temporarily perform other functions within the department; and
- (b) an executive authority may direct a head of department to temporarily perform other functions within the department;
- (c) an employee may be appointed to act in a post in the relevant department by the head of department or the employee occupying the post; and
- (d) an executive authority may appoint an employee to act as a head of department, after consultation with the President.

### **3.15 Clause 15**

Clause 15 of the Bill seeks to amend section 35(5) of the principal Act to provide that the Minister for the Public Service and Administration shall be responsible to determine the procedure to be utilised when employees refer grievances within the department (i.e. the internal process).



**3.16 Clause 16**

Clause 16 of the Bill seeks to insert section 36A into the principal Act to prohibit a head of department and an employee directly reporting to the head of department from holding the political office. The term “political office” has been defined to reflect the decision making echelon of political parties. Other political rights of heads of department and employees directly reporting to the head of department are unaffected by the amendment and they remain entitled to enjoy and exercise these rights freely. The purpose of the prohibition in respect of a head of department and an employee directly reporting to the head of department from holding office in a political party is to ensure that there is a clear delineation between the political and administrative roles and responsibilities for heads of department and the influence employees reporting to a head of department may have in the department. The provision is limited to heads of department and employees directly reporting to heads of department as these heads are responsible for administrative decisions.

**3.17 Clause 17**

Clause 17 of the Bill seeks to amend section 37 of the principal Act to permit the head of department, if it is allowed by a regulation and to the extent prescribed, to grant an employee salaries higher than the minimum amounts of the appropriate salary levels of the applicable salary scale, grant them special advancement in salaries within the salary scale applicable to them and grant them a salary in accordance with a higher salary level or any other reward, if they have an exceptional ability or special qualification. The vesting of this power is to ensure the alignment of the financial responsibility with human resources administrative functions, which enable an executive authority to focus on providing strategic and policy direction.

**3.18 Clause 18**

Clause 18 of the Bill seeks to amend section 38(2)(b)(i) of the principal Act, which deals with the recovery of remuneration that was wrongly granted to an employee. The provision was declared unconstitutional by the Constitutional Court in the matter of *Public Servants Association obo Ubogu v Head of the Department of Health, Gauteng and Others* 2018 (2) BCLR 184 (CC). The amendment seeks to align with the



provisions of the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997), and sets in place mechanisms to ensure that the rights of employees are not undermined.

### **3.19 Clause 19**

Clause 19 of the Bill seeks to clarify the interpretational challenges in section 42A(3)(a) of the principal Act in so far as it relates to the President's power to delegate matters relating to the appointment and career incidents of heads of department. This section is proposed to be amended to replace the current references to "Deputy President" and "Minister" in the principal Act with a reference to "a member of Cabinet".

### **3.20 Clause 20**

Clause 20 of the Bill provides for the short title of the Bill, once enacted, which is the Public Service Amendment Act, 2023.

## **4. DEPARTMENTS/BODIES/PERSONS TO BE CONSULTED**

National and provincial departments, organised labour, NEDLAC and the public.

## **5. PARLIAMENTARY PROCESS**

5.1 The Constitution distinguishes between four categories of Bills, as follows: Bills amending the Constitution (section 74); Ordinary Bills not affecting provinces (section 75); Ordinary Bills affecting provinces (section 76); and Money Bills (section 77). A Bill must be correctly tagged otherwise it would be constitutionally invalid.

5.2 The Bill must be considered against the provisions of the Constitution relating to the tagging of Bills and against the functional areas listed in Schedule 4 and Schedule 5 to the Constitution. In accordance with section 76(3) of the Constitution, a Bill must be dealt with in accordance with the procedure established by either section 76(1) or (2), if it falls within a functional area listed in Schedule 4 to the Constitution, or provides for legislation envisaged in section 65(2), section 163, section 182, section 195(3) and (4), section 196 and section 197.



- 5.3 This Bill deals with matters that relate to the public service, as contemplated in section 197 of the Constitution.
- 5.4 The Office of the Chief State Law Adviser and the Department of Public Service and Administration are of the view that this Bill must be dealt with in accordance with the procedure set out in section 76 of the Constitution because the Bill deals with matters that relate to the public service, as contemplated in section 197 of the Constitution.
- 5.5 The Office of the Chief State Law Adviser is further of the opinion that it is not necessary to refer the Bill to the National House of Traditional and Khoi-San Leaders in terms of section 39 of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019), since it does not contain provisions pertaining to traditional or Khoi-San communities or pertaining to customary law or customs of traditional or Khoi-San communities, nor any matter referred to in section 154(2) of the Constitution.