

REPUBLIC OF SOUTH AFRICA

PUBLIC SERVICE AMENDMENT BILL

*(As agreed to by the Select Committee on Cooperative Governance and Public Administration
(Traditional Affairs, Human Settlements, Water and Sanitation))
(The English text is the official text of the Bill)*

(MINISTER FOR THE PUBLIC SERVICE AND ADMINISTRATION)

[B 13D—2023]

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Public Service Act, 1994, to provide for the devolution of administrative powers from executive authorities to heads of department; to augment the role of the Director-General in the Presidency to support the President; to provide for a mechanism to deal with the recovery of overpayments of 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 respect of the appointment and career incidents of heads of departments; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act promulgated under Proclamation 103 of 1994, as amended by Proclamation 105 of 11 June 1994, Proclamation R171 of 18 November 1994, section 32(1) of Act 38 of 1994, section 1 of Act 47 of 1997, section 1 of Act 86 of 1998, section 40(1) of Act 65 of 2002 and section 25(1) of Act 52 of 2003, and substituted by section 1 of Act 30 of 2007

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1. Section 1 of the Public Service Act, 1994 (hereinafter referred to as the “principal Act”) is hereby amended—

(a) by the substitution for the definition of “executive authority” of the following definition:

“‘**executive authority**’, in relation to—

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(a) the Presidency or a national government component within the President’s portfolio, means the President;

(b) a head of—

(i) a national department or national government component, means the President; and

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(ii) the Office of a Premier, provincial department or provincial government component, means the relevant Premier;

(c) a national department or national government component within a Cabinet portfolio, means the Minister responsible for such portfolio;

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(d) the Office of a Premier or a provincial government component within a Premier’s portfolio, means the Premier of that province;

(e) a provincial department or a provincial government component within an Executive Council portfolio, means the Member of the Executive Council responsible for such portfolio; and

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(f) the Office of the Commission, means the Chairperson of the Commission;”;

- (b) by the substitution for the definition of “head of department” of the following definition:
- “‘head of department’, ‘head of a department’ or ‘head of the department’ means the [incumbent of a post mentioned in Column 2 of Schedule 1, 2 or 3 and includes any employee acting in such post] head contemplated in section 7(3)(a);”**; and
- (c) by the insertion after the definition of “organ of state” of the following definition:
- “‘political office’, in relation to a political party or structure thereof, means—**
- (a) the position of chairperson, deputy chairperson, secretary, deputy secretary, treasurer of the party or membership of a party’s executive committee nationally or in a province, region or other area in which the party operates; or

(b) any position in the party equivalent to a position referred to in paragraph (a), irrespective of the title designated to the position;”.

Amendment of section 3 of Act promulgated under Proclamation 103 of 1994, as amended by Proclamation R175 of 2 December 1994, section 3 of Act 47 of 1997 and section 2 of Act 86 of 1998, and substituted by section 3 of Act 30 of 2007

- 2. Section 3 of the principal Act is hereby amended—**
- (a) by the substitution in subsection (1) for paragraphs (h) and (i) of the following paragraphs:
- “(h) integrity, ethics, conduct and anti-corruption in the public service; [and]**
- (i) transformation, reform[,] and innovation[and any other matter to improve the effectiveness and efficiency of the public service and its service delivery to the public.]; and”**;
- (b) by the addition in subsection (1) after paragraph (i) of the following paragraph:
- “(j) any other matter to improve the effectiveness and efficiency of the public service and its service delivery to the public.”**;
- (c) by the substitution for subsection (7) of the following subsection:
- “(7) An executive authority—**
- (a) is accountable for the department in his or her functional area;

(b) is responsible for approving the strategic plan of the department, including, but not limited to, the department’s core objectives, based on its legislative mandate;

(c) shall ensure that the head of department’s role and responsibilities are aligned to the strategic plan of the department;

(d) shall establish clear relationships and facilitate co-operation, co-ordination and communication with the head of department and other employees of the department;

(e) shall hold the head of department accountable for the administration of the department; and

(f) may exercise other powers and shall perform other duties conferred or imposed on the executive authority by this Act.”
- (d) by the deletion of subsection (8); and
- (e) by the addition after subsection (8) of the following subsection:
- “(9) (a) If a head of department refuses or fails to fulfil a power or duty as required in terms of this Act, the executive authority of the relevant department may intervene by taking appropriate steps to ensure the fulfilment of that power or duty—**
- (i) by issuing a written instruction to the head of department, describing the extent of the refusal or failure and stating any steps required to fulfil that power or duty; and

(ii) in the event that the head of department fails to take such steps, the executive authority shall report such failure to the President or the Premier, as the case may be.”.

Amendment of section 5 of Act promulgated under Proclamation 103 of 1994, as amended by Proclamation 105 of 1994, substituted by section 3 of Act 47 of 1997, and amended by section 7 of Act 30 of 2007

3. Section 5 of the principal Act is hereby amended by the addition after subsection (8) of the following subsection:

“(9) (a) The relevant executive authority or head of department may, subject to paragraphs (b) and (c), perform any act in connection with any matter which relates to or arises from the employment or the conditions of service of a person formerly employed in the public service whilst he or she was so employed in the department concerned.

(b) An executive authority or a head of department may only so perform an act if he or she would, at the relevant time, have been competent in terms of this Act or any other law to perform any such act in respect of a serving employee.

(c) No such act shall be to the detriment of the person formerly employed in the public service, and the relevant executive authority or head of department shall not perform any such act in respect of any such person after the expiry of a period of three years after he or she ceased to be so employed.

(d) On request of the relevant executive authority or head of department and on good cause shown, the Minister may, in respect of a particular person, extend the period of three years with such period as the Minister considers appropriate.”.

Amendment of section 7 of Act promulgated under Proclamation 103 of 1994, as substituted by section 4 of Act 47 of 1997, and amended by section 4 of Act 86 of 1998 and section 9 of Act 30 of 2007

4. Section 7 of the principal Act is hereby amended by the substitution for subsection (3) of the following subsection:

“(3) (a) Each department shall have a head who shall be the incumbent of the post on the establishment bearing the designation mentioned in Column 2 of Schedule 1, 2 or 3, opposite the name of the relevant department.

(b) A head of department—

- (i) shall facilitate co-operation, co-ordination and communication with all other relevant departments;
- (ii) shall ensure that he or she performs all duties conferred or imposed on him or her by this Act and other applicable legislation;
- (iii) shall assist the executive authority to fulfil the executive authority’s accountability and responsibility obligations as contemplated in section 92 of the Constitution;
- (iv) shall report to the executive authority, upon request or as may be necessary, on matters regarding the department or any other matter determined by the executive authority;
- (v) shall implement the strategic plan of the department;
- (vi) shall manage the department’s administration efficiently and effectively in accordance with this Act and other applicable legislation by—
 - (aa) creating appropriate management structures and assigning clear responsibilities to such structures;
 - (bb) ensuring efficient decision-making within the department and co-ordination of functions between different units;
 - (cc) managing, effectively utilising and training employees;
 - (dd) maintaining discipline of employees; and
 - (ee) managing sound labour relations;
- (vii) may, in accordance with this Act, exercise the powers and shall perform the duties that are necessary for—
 - (aa) the internal organisation of the department, including the establishment and the transfer of functions within the department;
 - (bb) human resource management; and
 - (cc) the recruitment, appointment, performance management, transfer, dismissal, remuneration and other career incidents of employees of that department, including any other matter which relates to such employees in their individual capacities.

(c) The head of the Presidency shall, in addition to any power or duty entrusted or assigned to him or her by or under this Act or any other law—

- (i) be the Secretary to the Cabinet;
- (ii) co-ordinate, convene and chair the Forum of South African Directors-General comprising all heads of departments listed in Column 2 of Schedule 1;
- (iii) subject to sections 85(2)(c) and 125(2)(e) of the Constitution, be responsible for intergovernmental relations on an administrative level between the Presidency and national departments, provincial departments and government components, including the co-ordination of their actions and legislation; 5
- (iv) support the President on any matter entrusted or assigned to the President by or under this Act or any other law; and 10
- (v) perform any other function, if so requested by the President, subject to the Constitution or any other law.
- (d) In addition to any power or duty entrusted or assigned by or under this Act or any other law to the head of the Office of a Premier, the head of department shall— 15
 - (i) be the Secretary to the Executive Council of the province concerned;
 - (ii) subject to sections 85(2)(c) and 125(2)(e) of the Constitution, be responsible for intergovernmental relations on an administrative level between the relevant province and other provinces, as well as national departments and national government components, and for the intra-governmental co-operation between the relevant Office of the Premier and the various provincial departments and provincial government components, including the co-ordination of their actions and legislation; and 20
 - (iii) subject to paragraph (e), be responsible for the giving of strategic direction on any matter referred to in section 3A. 25
- (e) The head of the Presidency or the head of the Office of a Premier shall exercise no power or perform no duty which is entrusted or assigned by or under this Act or any other law to any other head of the department.”.

Amendment of section 9 of Act promulgated under Proclamation 103 of 1994, as substituted by section 6 of Act 47 of 1997 and section 14 of Act 30 of 2007 30

5. Section 9 of the principal Act is hereby substituted for the following section:

“Appointments in public service

9. [An executive authority] A head of department may appoint any person in his or her department in accordance with this Act and in such manner and on such conditions as may be prescribed.”. 35

Amendment of section 13 of Act promulgated under Proclamation 103 of 1994, as substituted by section 10 of Act 47 of 1997, amended by section 7 of Act 86 of 1998, and substituted by section 19 of Act 30 of 2007

6. Section 13 of the principal Act is hereby amended—
- (a) by the substitution for subsection (1) of the following subsection: 40

“(1) If so required by regulation, **[an executive authority]** a head of department shall appoint an employee on probation for such period as may be prescribed for the relevant category of employees.”;
 - (b) by the substitution for subsection (2) of the following subsection: 45

“(2) After the completion of a probationary period contemplated in subsection (1), **[an executive authority]** a head of department shall confirm the probationary appointment if the employee concerned has—

 - (a) performed at least satisfactorily during the period; and
 - (b) complied with all the conditions to which his or her appointment was subject.”; and 50
 - (c) by the substitution for subsection (3) of the following subsection:

“(3) If the probationary appointment is not confirmed in terms of subsection (2), the **[executive authority]** head of department may extend the period of probation or dismiss the employee in accordance with the Labour Relations Act.”. 55

Amendment of section 14 of Act promulgated under Proclamation 103 of 1994, as amended by section 11 of Act 47 of 1997 and section 8 of Act 86 of 1998, and substituted by section 20 of Act 30 of 2007

7. Section 14 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection: 5

- “(1) Subject to subsections (2), (3) and (4), any employee of a department may be transferred—
- (a) within the department, by its **[executive authority]** head of department; or
 - (b) to another department by the **[executive authorities]** heads of department of the two relevant departments.”. 10

Substitution of section 14A of Act promulgated under Proclamation 103 of 1994, as inserted by section 21 of Act 30 of 2007

8. The principal Act is hereby amended by the substitution for section 14A of the following section:

“Change in employment capacity 15

14A. (1) An employee of a department who is appointed in terms of section 9 in another capacity in the same or another department, or transferred in terms of section 12(3) or 14, shall be deemed to continue employment in the public service without any break in service.

(2) Any person who was employed by an organ of state immediately before he or she is appointed in terms of section 9 shall be deemed to be transferred to the public service in respect of such conditions of service and to such extent as the Minister may determine in terms of section 3(5).”. 20

Amendment of section 16 of Act promulgated under Proclamation 103 of 1994, as amended by section 3 of Act 13 of 1996, section 13 of Act 47 of 1997 and section 53 of Act 11 of 2013 25

9. Section 16 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

“(1) (a) Subject to the provisions of this section, an **[officer]** employee, other than a member of the services or an educator or a member of the State Security Agency, shall have the right to retire from the public service, and shall be so retired, on the date when he or she attains the age of 65 years: Provided that a person who is an employee on the day immediately before the commencement of the Public Service Amendment Act, 1996, has the right to retire on reaching the retirement age or prescribed retirement date provided for in any other law applicable to him or her on that day. 30 35

(b) If such an **[officer]** employee attains the said age after the first day of a month, he or she shall be deemed to have attained it on the first day of the following month.”; 40

(b) by the substitution in subsection (2) for paragraphs (b) and (c) of the following paragraphs:

“(b) An **[officer]** employee who has the right to an earlier retirement age in terms of paragraph (a), and who wishes to be so retired, shall give written notification to his or her head of department of his or her wish to be so retired, and he or she shall— 45

(i) if that notification is given at least three calendar months prior to the date on which he or she attains the retirement age applicable to him or her in terms of paragraph (a), be so retired on the date on which he or she attains that age or, if he or she attains it after the first day of a month, on the first day of the following month; or 50

(ii) if that notification is not given at least three calendar months prior to the date on which he or she attains the said age, be so retired on the first day of such month as the **[executive authority]** head of department may approve, which day may not be before the date 55

on which he or she attains the said age and not be later than the first day of the fourth month after the month in which the notification is received.

- (c) (i) In the case of an **[officer]** employee who occupies the **[office]** post of head of department, he or she shall give notification, to the relevant executive authority, of his or her wish to be retired from the public service at least six calendar months prior to the date on which he or she attains the said age, and if he or she has so given notification, the provisions of paragraph (b)(i) apply *mutatis mutandis*. 5
- (ii) If such an **[officer]** employee has not so given notification at least six calendar months prior to the date on which he or she attains the said age, he or she shall be so retired on the first day of the seventh month following the month in which that notification is received.”; 10
- (c) by the substitution in subsection (2A) for paragraph (a) of the following paragraph: 15
- “(a) Notwithstanding the provisions of subsections (1) and (2)(a), an **[officer]** employee, other than a member of the services or an educator or a member of the State Security Agency, shall have the right to retire from the public service on the date on which he or she attains the age of 55 years, or on any date after that date.”; 20
- (d) by the substitution in subsection (3) for paragraph (a) of the following paragraph: 25
- “(a) Subject to this section and the terms and conditions of a contract contemplated in section 12(2), **[an officer who occupies the office of]** a head of department has the right to retire from the public service and he or she shall be so retired at the expiry of the term contemplated in that section, or of any extended term contemplated therein, as the case may be.”; 30
- (e) by the substitution for subsection (4) of the following subsection: 35
- “(4) An **[officer]** employee, other than a member of the services or an educator or a member of the State Security Agency, who has reached the age of 60 years may, subject in every case to the approval of the relevant **[executive authority]** head of department, be retired from the public service.”; 40
- (f) by the substitution in subsection (5) for paragraphs (a) and (b) of the following paragraphs: 45
- “(a) Subject to the terms and conditions of a contract contemplated in section 12(2), an executive authority may, at the request of an employee occupying the **[office]** post of a head of department, allow him or her to retire from the public service before the expiry of the term contemplated in section 12(2), or any extended term contemplated therein, and notwithstanding the absence of any reason for dismissal in terms of section 17(2) or the contract concluded with the employee, as the case may be, if sufficient reason exists for the retirement. 50
- (b) If an **[officer]** employee is allowed to retire from the public service in terms of paragraph (a), he or she shall, notwithstanding anything to the contrary contained in subsection (4), be deemed to have retired in terms of that subsection, and he or she shall be entitled to such pension as he or she would have been entitled to if he or she had retired from the public service in terms of that subsection.”; 55
- (g) by the substitution in subsection (6) for paragraph (a) of the following paragraph: 60
- “(a) **[An executive authority]** A head of department may, at the request of an employee, allow him or her to retire from the public service before reaching the age of 60 years, notwithstanding the absence of any reason for dismissal in terms of section 17(2), if sufficient reason exists for the retirement.”; and
- (h) by the substitution for subsection (7) of the following subsection:
- “(7) If it is in the public interest to retain an **[officer]** employee, other than a member of the services or an educator or a member of the State Security Agency, in his or her post beyond the age at which he or she is required to be retired in terms of subsection (1), he or she may, with his or her consent and with the approval of the relevant **[executive**

authority] head of department, be so retained from time to time for further periods which shall not, except with the approval of Parliament granted by resolution, exceed in the aggregate two years.”.

Amendment of section 16B of Act promulgated under Proclamation 103 of 1994, as inserted by section 24 of Act 30 of 2007

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10. Section 16B of the principal Act is hereby amended by the substitution for subsection (6) of the following subsection:

“(6) If notice of a disciplinary hearing was given to an employee, the relevant **[executive authority]** head of department shall not agree to a period of notice of resignation which is shorter than the prescribed period of notice of resignation applicable to that employee.”.

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Amendment of section 17 of Act promulgated under Proclamation 103 of 1994, as amended by section 14 of Act 47 of 1997, and substituted by section 25 of Act 30 of 2007

11. Section 17 of the principal Act is hereby amended—

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(a) by the substitution in subsection (1) for paragraph (a) of the following paragraph:

“(a) Subject to paragraph (b), the power to dismiss an employee shall vest in the relevant **[executive authority]** head of department and shall be exercised in accordance with the Labour Relations Act.”; and

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(b) by the substitution in subsection (3) for paragraph (b) of the following paragraph:

“(b) If an employee who is deemed to have been so dismissed, reports for duty at any time after the expiry of the period referred to in paragraph (a), the relevant **[executive authority]** head of department may, on good cause shown and notwithstanding anything to the contrary contained in any law, approve the reinstatement of that employee in the public service in his or her former or any other post or position, and in such a case the period of his or her absence from official duty shall be deemed to be absence on vacation leave without pay or leave on such other conditions as the **[said authority]** head of department may determine.”.

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Amendment of section 30 of Act promulgated under Proclamation 103 of 1994, as amended by section 25 of Act 47 of 1997, and substituted by section 26 of Act 30 of 2007

12. Section 30 of the principal Act is hereby amended—

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(a) by the substitution for subsection (1) of the following subsection:

“(1) 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 written permission of the **[executive authority of the]** head of department.”;

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(b) by the substitution for subsection (2) of the following subsection:

“(2) For the purposes of subsection (1) the **[executive authority]** head of department shall at least take into account whether or not the outside work could reasonably be expected to interfere with or impede the effective or efficient performance of the employee’s functions in the department or constitute a contravention of the code of conduct contemplated in section 41(1)(b)(v).”; and

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(c) by the substitution for subsection (3) of the following subsection:

“(3) (a) The **[executive authority]** head of department shall decide whether or not to grant permission, contemplated in subsection (1), within 30 days after the receipt of the request from the employee in question.

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(b) If the **[executive authority]** head of department fails to make a decision within the 30 day period, it would be deemed that such permission was given.”.

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Amendment of section 31 of Act promulgated under Proclamation 103 of 1994, as amended by section 26 of Act 47 of 1997, and substituted by section 27 of Act 30 of 2007

13. Section 31 of the principal Act is hereby amended—
- (a) by the substitution in subsection (1) for paragraph (d) of the following paragraph: 5
 “(d) The provisions of this section shall also apply to an **[officer]** employee who is a head of department, and in such a case a reference to a head of department shall be construed as a reference to the Treasury.”;
 - (b) by the substitution in subsection (2) for paragraph (b) of the following paragraph: 10
 “(b) In circumstances regarded by the relevant **[executive authority]** head of department as exceptional, the **[said authority]** head of department may approve of paying out of revenue an amount equal to that salary, allowance, fee, bonus or honorarium, or a portion thereof, to 15
 the employee concerned.”; and
 - (c) by the substitution for subsection (3) of the following subsection:
 “(3) For the purposes of subsection (1)(a)(i)—
 (a) **‘this Act’** includes any law repealed by this Act;
 (b) **‘determination of the Minister’** includes any recommendation of 20
 the **[Public Service]** Commission, **[established by section 209 (1) of the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993), or of]** any commission for administration[, **public service commission**] or other like institution established by or 25
 under, or which functioned in accordance with, any such law; and
 (c) **‘section 30[(b)]’** includes any corresponding provision of any such law.”.

Amendment of section 32 of Act promulgated under Proclamation 103 of 1994, as substituted by section 28 of Act 30 of 2007

14. Section 32 of the principal Act is hereby amended— 30
- (a) by the substitution for subsection (1) of the following subsection:
 “(1) Subject to such conditions as may be prescribed[, **an**]—
 (a) the relevant executive authority responsible for that portfolio, in respect of the head of department; or
 (b) the head of a department, in respect of other employees, 35
 may direct **[an]** such head or employee under his or her control temporarily to perform any functions within the relevant department, other than those ordinarily assigned to **[the]** that head or employee or appropriate to his or her grade or post.”; and
 - (b) by the substitution for subsection (2) of the following subsection: 40
 “(2) (a) An employee may be directed, in writing, to act in a post within the relevant department, subject to such conditions as may be prescribed.
 (b) An acting appointment in terms of paragraph (a) shall be made—
 (i) by the employee occupying the post, unless otherwise deter- 45
 mined by the head of department;
 (ii) in the case of a vacant post of a head of department, by the relevant executive authority responsible for that portfolio, after consultation with the President or Premier, as the case may be; or
 (iii) in the case of any other vacant post, by the head of department.”. 50

Amendment of section 35 of Act promulgated under Proclamation 103 of 1994, as substituted by section 28 of Act 47 of 1997 and section 31 of Act 30 of 2007

15. Section 35 of the principal Act is hereby amended by the substitution for subsection (5) of the following subsection:
- “(5) For the purposes of subsections (1)(b) and (3)(b), the powers conferred 55
 upon the Commission by section 11 of the Commission Act shall be deemed to include the power to make rules, which are not inconsistent with the provisions of this section, as to the investigation of grievances concerning official acts or

omissions, and ‘prescribed’ means prescribed by the Commission by rule under the Commission Act.”.

Insertion of section 36A in Act promulgated under Proclamation 103 of 1994

16. The principal Act is hereby amended by the insertion after section 36 of the following section:

“Limitation of political rights

36A. (1) A head of department or an employee directly reporting to the head of department may not hold political office in a political party, whether in a permanent, temporary or acting capacity.

(2) A person who has been appointed as a head of department or as an employee who directly reports to the head of department before subsection (1) takes effect, shall comply with subsection (1) within one year of the commencement of subsection (1).

(3) Except for the limitation of a head of department or an employee directly reporting to the head of department to hold political office, as contemplated in subsection (2), subsection (1) may not be construed as prohibiting a head of department or an employee directly reporting to the head of department from exercising their other political rights as contemplated in section 19 of the Constitution.”.

Amendment of section 37 of Act promulgated under Proclamation 103 of 1994, as amended by section 29 of Act 47 of 1997, and substituted by section 33 of Act 30 of 2007

17. Section 37 of the principal Act is hereby amended by the substitution in subsection (2) for the words preceding paragraph (a) of the following words:

“(2) [An executive authority] A head of department may, only if it is allowed by regulation and to the extent prescribed—”.

Amendment of section 38 of Act promulgated under Proclamation 103 of 1994, as amended by section 34 of Act 30 of 2007

18. Section 38 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for paragraph (a) of the following paragraph:

“(a) If an incorrect salary, salary level, salary scale or reward is awarded to an employee, the relevant [executive authority] head of department shall correct it with effect from the date on which it commenced.”;

(b) by the substitution in subsection (2) for paragraph (b) of the following paragraph:

“(b) been overpaid or received any such other benefit not due to him or her—

(i) an accounting officer shall recover such overpayment by way of deduction from the employee’s salary if the accounting officer and employee agree, in writing, on—

(aa) the amount of the overpayment;

(bb) a reasonable period for the repayment of the amount of overpayment; and

(cc) the amount to be deducted from the employee’s salary, either in full or in monthly instalments, taking into consideration the employee’s income and current financial obligations: Provided that the total monthly deduction is not more than one-quarter of the employee’s monthly salary;

(ii) an accounting officer shall, in the absence of agreement as contemplated in subparagraph (i), recover such amount of overpayment by way of legal proceedings;

(iii) an accounting officer shall, in the event that the person is no longer in the employ of a department, recover such amount by

- way of a deduction from any monies owing to such person by the State or by way of legal proceedings;
- (iv) an accounting officer shall, in the event that the employee is in the employ of another department, request the accounting officer of that other department to recover, in the manner contemplated in subparagraph (i), the overpayment made; and 5
 - (v) that other benefit shall be discontinued or withdrawn as from a current date, but the employee shall have the right to be compensated by the State for any patrimonial loss, which he or she has suffered as a result of that discontinuation or withdrawal.”. 10

Amendment of section 42A of Act promulgated under Proclamation 103 of 1994, as inserted by section 32 of Act 47 of 1997, and substituted by section 37 of Act 30 of 2007

19. Section 42A of the principal Act is hereby amended by the substitution in subsection (3) for paragraph (a) of the following paragraph: 15

“(a) the President, delegate to **[the Deputy President or a Minister]** a member of Cabinet any power conferred on the President by section 12; or”.

Short title and commencement

20. This Act is called the Public Service Amendment Act, 2023, and comes into operation on a date determined by the President by proclamation in the *Gazette*. 20

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) devolve administrative powers to 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 NDP 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 alternative 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 devolution of administrative powers to heads of department; to augment the role of the Director-General in the Presidency to support the President; to provide an alternative mechanism for the recovery of overpaid remuneration and benefits; to clarify the role of the Public Service Commission in respect of grievances; and 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”, the Bill provides for 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 substitute 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 to 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 that the head fails or refuses to perform certain powers or duties delegated to him or her. The devolution 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 service 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 devolution 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; and
 - (c) implement the strategic plan.
- 3.4.2 In addition, clause 4 seeks to amend section 7 of the principal Act to provide for additional functions of 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 devolution 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 devolution 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 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.

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 devolution 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 devolution 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.

3.11 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 devolution 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.

3.12 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 devolution 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.

3.13 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 devolution 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.

3.13.2 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 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 and employees 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 devolution 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.

3.18 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 they relate 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 substitute 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, which is referred to in section 76(3)(f) 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.