Vision

A champion of Public Service excellence in democratic governance in South Africa.

Mission

To promote the constitutionally enshrined democratic values and principles throughout the Public Service by -

- investigating, monitoring, evaluating the organisation and administration, and personnel practices;
- proposing measures to ensure the effective and efficient performance;
- issuing directions with regards to personnel procedures relating to the recruitment, transfers, promotions and dismissals;
- advising on personnel practices; and
- reporting on its activities.
GUIDE TO CORRECT IRREGULAR APPOINTMENTS

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1. INTRODUCTION AND BACKGROUND

1.1 It has come to the attention of the Public Service Commission (PSC) that some departments have, subsequent to receipt of the PSC’s recommendations on irregular appointments, enquired as to how they should go about implementing the recommendations. In view of this, it was decided that a brief guide be developed to assist departments in this regard.

1.2 Irregular appointments are often discovered when disgruntled employees or third parties—
- complain to the PSC that there were irregularities in the filling of certain posts by departments, or
- refer grievances/complaints relating to posts for consideration by the PSC in terms of section 196(4)(g)(ii) of the Constitution of the Republic of South Africa, 1996 (the Constitution) read with section 35 of the Public Service Act, 1994.

1.3 Irregular appointments or promotions are potentially unlawful. It was found in Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal [2013] ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC) (18 December 2013) (the Khumalo case), that appointments made irregularly are not automatically null and void1—because the appointed candidate has labour rights. It was further held in this case that only a court can grant a “just and equitable” order in terms of section 172(1)(b) of the Constitution, when considering the consequences of declaring a decision unlawful. Until a court pronounces on the validity of the act (the appointment), the act exists in fact and has legal effect in terms of which its legal consequences will continue to exist. This would mean that the appointment or promotion, irrespective of the irregularities, would remain valid until and unless a court of law declares the action unlawful. The Court explicitly viewed functionaries as being not entitled but duty bound to seek redress of an irregularity in a court of law.

1.4 There are also instances where departments / executive authorities (EAs) themselves discover irregularities that occurred in the process of appointing employees (without the matter having been investigated by the PSC).

2. PURPOSE

2.1 The purpose of the Guide is to assist EAs to—
- implement the PSC’s recommendations relating to appointments made irregularly;
- on own accord and upon discovering that an appointment was made irregularly, correct the action or omission;
- ensure accountability, promote and maintain a high standard of professional ethics;
- ensure fair labour practices and administrative actions that are lawful, reasonable and procedurally fair; and
- ensure compliance with the basic values and principles governing public administration.

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1 Null and void means cancelled or invalid
3. **PSC MANDATE**

3.1 The mandate of the PSC is as outlined in the table below.

<table>
<thead>
<tr>
<th>Legislation</th>
<th>Stipulations</th>
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<tbody>
<tr>
<td>Section 196(2) of the Constitution</td>
<td>The PSC must, amongst others, exercise its powers and functions in the interest of the maintenance of effective and efficient administration and a high standard of professional ethics in the Public Service.</td>
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<tr>
<td>Section 196(4) of the Constitution</td>
<td>The powers and functions of the PSC are –</td>
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<td>(a) to promote the values and principles set out in section 195, throughout the public service;</td>
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<td>(b) to investigate, monitor and evaluate the organisation and administration, and the personnel practices, of the public service;</td>
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<td>(c) to propose measures to ensure effective and efficient performance within the public service;</td>
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<td>(d) to give directions aimed at ensuring that personnel procedures relating to recruitment, transfers, promotions and dismissals comply with the values and principles set out in section 195;</td>
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<td>(e) to report in respect of its activities and the performance of its functions, including any finding it may make and directions and advice it may give, and to provide an evaluation of the extent to which the values and principles set out in section 195 are complied with; and</td>
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<td>(f) either of its own accord or on receipt of any complaint –</td>
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<td>(i) to investigate and evaluate the application of personnel and public administration practices, and to report to the relevant executive authority and legislature;</td>
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<td>(ii) to investigate grievances of employees in the public service concerning official acts or omissions, and recommend appropriate remedies;</td>
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<td>(iii) to monitor and investigate adherence to applicable procedures in the public service; and</td>
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<td>(iv) to advise national and provincial organs of state regarding personnel practices in the public service, including those relating to the recruitment, appointment, transfer, discharge and other aspects of the careers of employees in the public service.</td>
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</table>
This Guide is therefore issued in terms of the PSC’s mandate as outlined above with specific reference to the powers to give advice, propose measures and recommend appropriate remedies to departments.

4. DISCUSSION

4.1 The Constitution makes reference to recommendations in the context of grievances section 196(4)(f)(ii)) and determines as follows:

The PSC either of its own accord, or on receipt of any complaint:

“ii. investigate grievances of employees in the Public Service concerning official acts or omissions and to recommend appropriate remedies”;

In addition, section 35 of the Public Service Act, 1994 determines the following:

“(1) For the purposes of asserting his or her right to have his or her complaint or grievance concerning an official act or omission investigated and considered by the Commission, an employee may lodge that complaint or grievance with the relevant executive authority under the prescribed circumstances, on the prescribed conditions and in the prescribed manner, and if that complaint or grievance is not resolved to the satisfaction of such an employee, that executive authority shall submit the complaint or grievance to the Commission in the prescribed manner and at the prescribed time or within the prescribed period.

(2) After the Commission has investigated and considered any such complaint or grievance, the Commission may recommend that the relevant executive authority acts in terms of a particular provision or particular provisions of this Act or any other law if, having regard to the circumstances of the case, the Commission considers it appropriate to make such a recommendation.”

- The word “recommendation” is not defined in the Constitution; the Public Service Commission Act, 1997; the Public Service Act 1994 or the Grievance Rules, 2003. In terms of the Collins Dictionary, “recommendations of a person or a committee are their suggestions or advice on what is the best thing to do”. The words suggestions and advice suggest that recommendations by nature are not enforceable.

4.2 According to the Oxford Dictionary, the word "recommend" is defined as “suggest as fit for some purpose or use” and “advise as a course of action, etc.” The Thesaurus indicates that the word "recommendation" is similar to that of “advice (proposal, suggestion and counsel) and reference (commendation, blessing, approval, sanction and good word”).

Given the above definitions it can be concluded that there is a similarity between recommendations and advice. However, given the constitutional mandate, the PSC’s Protocol Document on the Issuing of Directions indicates that the following principles should apply:

(i) Recommendations can be made regarding a wide spectrum of public administration and personnel issues which can range from providing guidance for public administration and service delivery improvement to instances of addressing
non-adherence to prevailing prescripts;

(ii) A distinction needs to be drawn between generic and specific recommendations. Generic recommendations provide guidance on how public administration or service delivery can be improved. Specific recommendations, on the other hand, require very specific administrative action from departments especially regarding non-adherence to prescripts.

(iii) Whether generic or specific, departments can either implement the recommendations or disagree with the recommendations, but reasons need to be furnished to the PSC for non-implementation of specific recommendations. The PSC needs to monitor the implementation of its recommendations by departments. The monitoring of the implementation of the PSC’s recommendations is guided by a Protocol for Monitoring Implementation of the Recommendations of the PSC.

(iv) Where recommendations are not implemented and valid reasons are not provided by the relevant department, the PSC will advise the Portfolio Committee for Public Service and Administration accordingly.

(v) Where it is found that the departmental policies and procedures relating to personnel practices on recruitment, transfers, promotions and dismissals are not aligned to the values and principles set out in section 195, directions must be issued instead of recommendations. According to section 196(4)(d) of the Constitution, the powers and functions of the Commission are to “give directions aimed at ensuring that personnel procedures relating to recruitment, transfers, promotions and dismissals comply with the values and principles set out in section 195.”

4.3 Given the above, a recommendation can therefore be defined as a measure taken by the PSC of its own accord or on receipt of a complaint regarding the organisation, administration and application of personnel practices in the Public Service, with the aim of either providing guidance (generic recommendation) or requiring very specific administrative action (specific recommendation) from departments with reasons having to be furnished by the recipient for not implementing a specific recommendation.

4.4 From the mandate as outlined in section 196, the oversight role of the PSC can therefore be summarised to include the following:

- Investigating, monitoring and evaluation,
- Advisory function,
- Recommending corrective action,
- Issuing directions, and
- Proposing measures.

4.5 In issuing recommendations relating to irregular appointments, the PSC should advise EAs to test their application of public administration against the Constitutional values and principles outlined in section 195 of the Constitution. Such values and principles put emphasis on amongst others ability; objectivity; fairness; good human resource management; career development practices; efficient, economic and effective use of resources; and accountable public administration.
4.6 Recommendations provided by the PSC to departments relating to irregular appointments should focus on the processes/methods followed by departments in filling posts.

5. WHEN IS AN APPOINTMENT CONSIDERED TO BE IRREGULAR?

5.1 The term “Irregular” is broadly referred to in instances where action is taken/not taken that is not in accordance with the regulatory framework (i.e. the rules) applicable to the Public Service. It should be noted that an irregularity identified does not automatically render the filling of a post null and void. An appointment can be considered as irregular after an investigation has been conducted by the PSC or the department concerned which has arrived at a finding of irregular appointment. In this regard, it is required that there should be a finding of non-compliance with the regulatory framework applicable to appointment of staff as prescribed in the Public Service Act, 1994, any relevant legislation applicable to a department, Public Service Regulations and departmental policy. In its investigations the PSC has found that departments proceed with the filling of posts without complying with the Public Service Regulations, Senior Management Service (SMS) Handbook, Public Finance Management Act and other provisions.

5.2 Attached at Annexure A is a list of legislative and regulatory provisions relating to appointments in relation to the following actions and omissions (list not exhaustive) that will render an appointment irregular:

- When the organisational structure of the Department was not determined by the EA and/or posts required were not defined.
- If the EA did not confirm that the post is required.
- When Job Evaluation is to be conducted but this does not take place.
- Where the EA does not confirm that sufficient budgeted funds are available to fill the post.
- Appointments made without the post being advertised as required by applicable prescripts.
- If the inherent requirements were not reflected in the advertisement and/or the appointed employee did not meet the advertisement requirements of the post (e.g. educational qualifications, relevant work experience, etc.)
- If the requirements to advertise a vacant post as stipulated in PSR and the SMS Handbook relating to advertising the post within and/or outside the Public Service is not compiled with.
- Not meeting the application requirements specified in the advertisement (i.e. application not on the prescribed Z83 Application for Employment form, post not

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applied for on or before the closing date and original copies of supporting documents not certified).

- If the Selection Committee is not duly appointed, or incorrectly constituted.
- If the official action (including decision making) of an employee results in improper personal gain.
- When an employee who ought to recuse himself/herself from any official action or decision-making process fails to do so, resulting in improper personal gain and this is not declared by the said employee.
- Non-adherence to the selection principles of merit, job related criteria, fairness, equity and transparency and/or if information provided by the nominated candidate is not verified.
- Not providing all candidates with equal opportunities and not recording reasons for the decision of the Selection Panel in line with the SMS Handbook.
- Non-adherence to the directives issued by the Minister for Public Service and Administration (MPSA) such as not conducting criminal record checks, citizenship verification, financial/asset record checks, qualification/study verification, and reference checks.
- If the decision to nominate and approve the appointment of a member of SMS is not informed by the outcome of the prescribed competency assessment tests.
- The permanent appointment of a person that is not a South African citizen/permanent resident and/or not a fit and proper person.
- Appointment not made with due regard to equality and the democratic values and principles enshrined in the Constitution, not all persons who applied and qualify for the appointment were considered and the evaluation of persons were not based on training, skills, competence, knowledge and the need to redress the imbalances of the past.
- The lack of reasons or non-recording of reasons for deviating from the Selection Panel’s recommendations.
- If an EA did not make sure that the candidate qualifies in all aspects for the post and that the claims by the candidate in his/her application have not been verified.
- During facilitation of appointments of national Heads of Department (HoDs) and Deputy Directors-General (DDGs), documents that should be forwarded to the MPSA such as internal and external advertisements for the post, list of candidates who applied for the post, Cabinet Memorandum for submission to Cabinet, copies of curriculum vitae, identity documents, competency assessment reports, written verification of qualifications, organisational structure and evidence of job evaluation conducted are not forwarded in terms of the Executive Protocol to the MPSA.
- The lack of documentary proof (for whatever reason) of the various recruitment & selection processes followed during the filling of the relevant post.
• Departments failing to comply/adhere to the requirements stipulated in their Departmental Recruitment and Selection Policies (provided such requirements are not in conflict with the stipulations of the PSR).

• Actions/decisions taken that are not in accordance with the delegation of authority.

Refer to Annexure A to find which sections of the relevant provisions are applicable.

6. CORRECTING APPOINTMENTS MADE IRREGULARLY

6.1 Legislative framework for correcting appointments made irregularly

❖ Section 23(1) of the Constitution provides that everyone has a right to fair labour practices.

❖ Section 33 of the Constitution provides that “Everyone has the right to administrative action that is lawful, reasonable and procedurally fair”, and that national legislation must be enacted to provide for the review of administrative action. The Promotion of Administrative Justice Act, 2000 (PAJA), deals with issues of administrative justice and review. See especially sections 6 to 9 for this purpose.

❖ Section 195 of the Constitution provides that public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

“(h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.

(i) Public administration must be broadly representative of the South African people, with employment and personal management practices based on ability, objectivity, fairness and the need to redress the imbalances of the past to achieve broad representation”.

❖ Section 195(1) of the Constitution provides for basic values and principles governing public administration which include, amongst others, ● a high standard of professional ethics must be promoted and maintained; ● efficient, economic and effective use of resources must be promoted; and ● public administration must be accountable. Therefore, an executive authority has a duty to ensure compliance with these values and principles within his or her department.

❖ In terms of section 196(4)(d) of the Constitution, the PSC may issue directions in order to ensure that personnel procedures relating to recruitment, transfers, promotions and dismissals comply with the values and principles set out in section 195 of the Constitution.

❖ Section 237 of the Constitution provides that all constitutional obligations must be performed diligently and without delay.
Section 5 (7)(a) of the Public Service Act, 1994 ("the PSA") states that "A functionary shall correct any action or omission purportedly made in terms of this Act by that functionary, if the action or omission was based on error of fact or law or fraud and it is in the public interest to correct the action or omission." It further stipulates in subsection (b) that "The relevant executive authority shall in the prescribed manner keep record of and report to the Minister any correction by a functionary of a department within the portfolio of that executive authority."

In line with this constitutional provision, section 5(8)(a) of the PSA provides that the PSC may investigate compliance with the PSA and issue directions in order to ensure compliance (with the PSA) and provide advice to promote sound public administration. It further stipulates in subsection (b) that executive authority of a department to which the PSC has issued a direction must implement it as soon as possible after the receipt of the direction, but within 60 days of receipt of the direction.

According to section 9 of the PSA, an executive authority (EA) may appoint any person in his or her department in accordance with the Act and in such manner and on such conditions as may be prescribed.

The Labour Relations Act, 1995 ("the LRA") was enacted to give effect to section 23 of the Constitution, whereas the PAJA was enacted to give effect to section 33 of the Constitution.

6.2 Remedies available to the EA in correcting an irregular appointment

A department may make an irregular appointment as a result of an act or omission from its part or from the part of an irregularly appointed employee. Once an irregular appointment had been discovered, the following remedies are available:

(a) Promptly engage the appointed employee for mutual agreement.
   • If the person found to be irregularly appointed agrees to resign, then the irregularity would be resolved.
   • The department may agree with the appointed employee to be transferred or demoted. This will apply in cases where the irregularity stemmed from an appointment on a higher post than was intended, or an appointment on a salary level higher than the one indicated in the outcome of the job evaluation report. This should only be done if there is a vacant post for which the appointed employee is suitable to occupy.
   • In agreeing with the appointed employee, the department should not-
     ✓ commit another irregularity such as transferring/appointing the affected employee to a post that is not approved on the structure; or
     ✓ agree to a ‘golden handshake’ without first consulting the National Treasury and the Department of Public Service and Administration since there is currently not regulatory framework governing such agreements.
   • If the affected person does not agree to resign or be transferred to an available post, the step (b) below should be followed.

(b) Make an application to the Labour Court to declare the appointment null and void.
   • This should be made without delay and the affected employee should be informed of the steps taken by the department
• Note that in the Khumalo case the EA’s application was dismissed due to, *inter alia*, unreasonable delay. The Court also dealt with potential prejudice to the employees.
• The principle of proportionality, which requires a balancing of competing interests and values should be taken into account. In S v Makwanyane and Another (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665, the Court held that the limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values and ultimately an assessment based on proportionality.

(c) *Follow the Disciplinary Code and Procedure applicable in the Public Service.* (This should be followed in a case where the irregular appointment emanates from an act or omission on the part of the appointed employee through fraud / misrepresentation).

(d) *Accountability for act or omission caused by the department: Actions to be taken against employees that contributed towards the irregular appointment in order to promote accountability*

The *audi alteram partem*³ rule must be applied in all instances. Each of these steps are explained in detail below.

6.2.1 **Correcting an irregular appointment that resulted in an irregular appointment through direct engagement/dealing with the appointee**

a) An EA may only be able to reverse an irregular appointment/promotion without approaching the Labour Court, if the appointed person agrees thereto.

In the reported judgment of Sekhute and Others v Ekhuruleni Housing Company Soc (J1862/17) [2017] ZALCJHB 318 (5 September 2017) the applicants were ordered to pay the respondent’s costs because the Court was of the view that they unreasonably refused to have the error corrected. The Judge held at paragraph 19 that: “I am not satisfied that this is a case where the applicants should not bear the costs of this application, notwithstanding the fact that there is an ongoing relationship. They were disingenuous in trying to retain the undue benefit they had received and the terms on which repayments were to be made were not onerous.”

b) It is obviously much easier in instances where the person appointed acted unlawfully, *but where an employee is innocent in the entire process*, the department might face resistance when it seeks to reverse such appointment. Though the innocent appointed employee has labour rights that cannot be ignored, they must be made to understand the legal position of such appointment with due cognizance of the above-mentioned case relating to unreasonable refusal to agree.

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³ A Latin phrase meaning "listen to the other side", or "let the other side be heard as well". It is the principle that no person should be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against them.
c) It is also imperative that the department should explain to the employee his rights and the steps he/she may take to deal with the matter. That he may consult and request assistance from his/her union or a lawyer.

6.2.2 Correcting an action or omission that resulted in an irregular appointment by approaching the Labour Court

(a) Section 31 of the Public Service Act, 1994, provides that if any remuneration, allowance or other reward (other than remuneration contemplated in section 38 (1) or (3)), is received by an employee in connection with the performance of his or her work in the public service, that employee shall, pay into revenue-
(i) an amount equal to the amount of any such remuneration, allowance or reward; or
(ii) If it does not consist of money, the value thereof as determined by the head of the department in which he or she was employed, at the time of the receipt thereof.
(iii) If the employee fails to so pay into revenue the amount or value, the said head of department shall recover it from him or her by way of legal proceedings and pay it into revenue.

b) If an EA of a department wants to reverse his or her decision to appoint or promote a person, the decision first needs to be declared unlawful by a Court of law before it may be reversed. A review of the administrative decision may be the only legal way to declare an irregular appointment or promotion of a person to be unlawful and with no effect. Until a court pronounces on the validity of an administrative act, it is clear that the said act exists in fact and has legal effect in terms of which its legal consequences will continue to exist.

c) When an administrative official has made a decision which bears directly upon an individual’s interest, that decision-maker has discharged his/her function. This is because of the doctrine of functus officio, which “…in administrative law is that an administrative agency which has finally performed all its statutory functions or duties in relation to a particular matter subject to its decision-making jurisdiction has exhausted its powers and has discharged its mandate in relation to that matter. Consequently, such an agency is without further authority as far as that matter is concerned because its duties and functions have been fully accomplished. Thus, an administrative agency which is functus officio is unable to retract or change its own earlier decision, unless it is authorised by its enabling legislation to do so.”

d) Therefore, in order to correct an irregular appointment, the executive authority should approach the Labour Court to set aside such decision in terms of section 158 (1)(h) of the LRA which provides that the Labour Court may “…review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law.

In order to review the matter in the Labour Court the department’s Labour Relations / Human Resource section should approach its Legal Services section for assistance in referring the matter to the Office of the State Attorney (“the OSA”), as regulated by the State Attorney’s Act, 1957. The OSA will assist the

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4 PT Operational Services (Pty) Ltd v Retail and Allied Workers Union obo Ngwetsana [2013] 3 BLLR 225 (LAC)
5 Act 66 of 1995 as amended.
6 Act No. 56 of 1957. See also the State Attorney Amendment Act No. 13 of 2014.
Department in instituting review proceedings. In the interest of good governance, the department should inform the employee of its intended action in order to afford the employee and opportunity to prepare himself/herself.

e) The EA should institute review proceedings without delay. This is also to minimise the risk of the appointee suffering prejudice if the appointment is set aside. In this regard, it was held in the Khumalo case that the rule of law is a founding value of the Constitution, and that state functionaries are jointly required to uphold and protect it through redress of their departments’ unlawful decisions. Furthermore, that section 237 of the Constitution provides that all constitutional obligations must be performed diligently and without delay.

In this regard, in the Khumalo case the Constitutional Court held that the delay in bringing the action constrained its ability to assess the lawfulness of the action, and in the absence of a proper explanation for the delay, the Labour Court should not have overlooked it. The Constitutional Court therefore found that the delay was of such a nature that the MEC was non-suited, and therefore not permitted to bring the application.

f) In order to discourage the concept of self-help, the Constitutional Court held, in the case of Public Servants Association obo Olufunmilayi Itunu Ubogo v Head of Department of Health, Gauteng and Others [2017] ZACC 45, that section 38(2)(b)(i) of the Public Service Act, 1994, is unconstitutional.

According to section 38(2)(b)(i) of the Public Service Act, 1994, If an incorrect salary, salary level, salary scale or reward is awarded to an employee, the relevant executive authority shall correct it with effect from the date on which it commenced. This shall apply notwithstanding the fact that the employee concerned was unaware that an error had been made in the case where the correction amounts to a reduction of his or her salary. If the said employee has, in respect of his or her salary, including any portion of any allowance or other remuneration or any other benefit calculated on his or her basic salary or salary scale or awarded to him or her by reason of his or her basic salary, been overpaid or received any such other benefit not due to him or her an amount equal to the amount of the overpayment, shall be recovered from him or her by way of deduction from his or her salary of such instalments as the relevant accounting officer may determine (if he or she is in the service of the State, or, if he or she is not so in service, by way of deduction from any moneys owing to him or her by the State, or by way of legal proceedings, or partly in the former manner and partly in the latter manner).

g) Review of actions or omissions made in the employment relationship are pursued in terms of the LRA. There are, however, instances where PAJA can be used in reviewing employment relationship cases. In reviewing their decisions, EAs should be cautious to know when to use the LRA and when the matter may be instituted from a PAJA perspective. For example, when reviewing employment related issues a functionary should approach the Labour Court to set aside such decision in terms of section 158 (1)(h) of the Labour Relations Act which provides that:

“158. Powers of Labour Court.—(1) The Labour Court may—

(h) review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law;”

Employment related issues will be reviewed in terms of The Promotion of Administrative Justice Act, 2000 for example, in instances where grievances by State or public sector employees have implications or consequences for other citizens. The Labour Appeal Court held in that case that “at times there is a fine line between administrative action under section 33, public and employment relationship issues in the public sector”.

h) It is unfortunate for the person who was irregularly appointed because he/she cannot depend on estoppel to stop the department from asserting the validity of his/her appointment. In other words, he cannot raise the point that by virtue of his appointment letter he was validly appointed to the position, and that he had as a result of the department’s negligence, suffered prejudice. This is because the exercise of public power must be *intra vires* (meaning, public power must be exercised within the legal authority or power to do so).

6.2.3 Correcting irregular appointment by following the Disciplinary Code and Procedure applicable in the Public Service

a) In cases where the appointed employee misrepresented him/herself, whether through application documents submitted, or during the interview, (i.e. appointment based on perjury or fraudulent information), the disciplinary process should be followed.

The department should follow its departmental policy and procedure on discipline to the letter to avoid being taken to court on procedural issues. In MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd (CCT 77/13) [2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC) the Court held that “there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution’s primary agent. It must do right, and it must do it properly.”

b) The department must also institute criminal proceedings against the employee for fraud.

c) An application should, **without undue delay** be made to court to recover the unauthorised remuneration in terms of section 31 of the Public Service Act, 1994.

In Opperman v Minister of Defence and Military Veterans (20752/14) [2015] ZASCA 153 (2 October 2015) the Court held that where public funds are involved, unauthorised remuneration means that it has been made without a lawful basis and must be recovered. The Department was thus duty-bound to recover it from him once the mistake was detected. Similarly this principle should apply where public funds were paid as remuneration to an undeserving employee.

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8 The principle which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person or by a previous pertinent judicial determination.
d) Employees and applicants need to know that employers and prospective employers expect them to be honest with regard to job qualifications they put forward, skills and previous experience and the clients that they serve(d).

e) As there is heavy competition for jobs, it is not unusual for job applicants to deceive prospective employers in order to improve their chances of being offered a job. This type of deception includes:

- Claiming qualifications that do not exist
- Falsification of CVs and academic certificates
- Provision of false reference letters
- Exaggeration of skills and experience
- Lying about reasons for termination of previous jobs
- Lying about the employee’s age
- Provision of incorrect referees. That is, replacing the names of previous superiors with names of friends or colleagues who then give glowing references
- Withholding of information such as criminal convictions and disciplinary action.

Departments/employers should consider the following key questions:

- “What information does the law require the job applicant to provide?”;
- “What legal recourse is there for the employer who subsequently finds that it has employed someone who deceived it prior to employment?”

6.2.4 Accountability for act or omission caused by the department: Actions to be taken against employees that contributed towards the irregular appointment in order to promote accountability

In cases where the irregularity is as a result of the department’s failure to follow the procedure, (e.g. appointing a person that does not meet the minimum requirement of the post; appointing a person to a post not advertised; etc. the matter should be investigated and employee(s) responsible to be subjected to disciplinary process. This is to promote accountability because the correction of appointment made irregularly end up with huge costs for the department when taken to court.

6.3 Recording and reporting the correction to the Minister for Public Service and Administration (MPSA)

Once the irregular appointment has been corrected the EA has to record it in the prescribed manner and report to the MPSA in line with section 5(7)(b) of the PSA.

7. STEPS TO CORRECT IRREGULAR APPOINTMENTS

As soon as an irregular appointment is detected, the EA must liaise with the Office of the State Attorney to lodge a Court application to declare the appointment/promotion as irregular or unlawful. This must be done immediately, as a delay will perpetuate wrong payment resulting in financial misconduct.

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9 https://www.labourguide.co.za/general/265-disclosure-of-information-at-interviews
Below is an overview of steps to follow to correct irregular appointments.

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<th>EA / department discovers that an appointment/promotion is irregular</th>
<th>Recommended steps when following paragraph 6.2.1</th>
<th>Recommended steps when following paragraph 6.2.3</th>
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<tr>
<td><strong>Recommended steps when following paragraph 6.2.1</strong></td>
<td><strong>Recommended steps when following paragraph 6.2.3</strong></td>
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<td>Invite the appointed employee to a meeting for discussion. The invite should be in writing, and the employee should be advised of— ✓ the purpose of the meeting; ✓ the date, time and venue of the meeting; and ✓ his/her right to bring his or her union representative.</td>
<td>Once the action / omission is discovered the employee should be informed in writing and an investigation be conducted. The disciplinary process should be followed as outlined in the department’s policy and procedure on discipline.</td>
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<td>Engage with the appointed employee to highlight and discuss the error committed and why it is seen or regarded as an irregular appointment, as well as its effect and impact on the values and principles in terms of section 195 of the Constitution. Detailed minutes of the meeting should be taken.</td>
<td>The EA should, through the department’s Legal Section and without undue delay, approach the Office of the State Attorney to be assisted with court application to recover in terms of section 31 of the Public Service Act, 1994.</td>
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<td>Provide the appointed employee with copy/copies of the signed minutes of the meeting(s).</td>
<td>The EA should institute criminal proceedings for fraud committed.</td>
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<td>Where agreement was reached during the discussion meeting, the following must be put in writing,— ✓ signed resignation letter by the appointed employee, (if applicable) which must be accepted by the employer; or ✓ draft written offer (e.g. for transfer or demotion, if applicable) to the appointed employee. The employee / his or her union must acknowledge receipt thereof. If communication is between the department and the union, it is advisable that the employee should be copied in all correspondence.</td>
<td>As soon as the Court finds that the irregular appointment should be set aside, the EA should process the dismissal of the said employee from the Public Service.</td>
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<td>Once the offer is accepted in writing, a settlement agreement to be signed by both parties.</td>
<td>In an instance where the Court finds that the act/omission by the employee does not warrant dismissal, the decision of the Court relating to the sanction to be imposed by the EA must be implemented immediately.</td>
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<td>Record the correction in terms of section 5(7)(b) of the PSA.</td>
<td><strong>Recommended steps when following paragraph 6.2.2</strong></td>
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<td>Where the employee does not agree to the correction, initiate the review process in court. Through the Department’s Legal Services section approach the Office of the State Attorney for assistance with the litigation proceedings in the Labour Court or as advised.</td>
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8. CONCLUSION

In the interest of upholding Section 195 (b), (f), (h) & (i) of the Constitution, it is imperative that executive authorities EAs as well as HoDs together with staff vital to the recruitment and selection of personnel, understand the implications of non-compliance with the applicable legislative and regulatory framework. Compliance with prescripts will prevent irregular appointments and the time and/or costs involved in correcting such.

In instances where irregular appointments are identified, the Guide will enable EAs and HoDs to correct such promptly.
<table>
<thead>
<tr>
<th>Recruitment and selection processes</th>
<th>Mandatory requirements</th>
<th>Circumstances rendering the appointment irregular</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Appointment</strong></td>
<td><strong>Public Service Act, 1994 as amended (PSA), section 10:</strong> No person shall be appointed permanently unless he/she is a South African citizen/permanent resident and a fit and proper person.</td>
<td>The permanent appointment of a person that is not a South African citizen/permanent resident and/or not a fit and proper person.</td>
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<td><strong>PSA, section 11:</strong> Appointments must be made with due regard to equality and the democratic values and principles enshrined in the Constitution whilst all persons who applied and qualify for the appointment concerned shall be considered. Furthermore, the evaluation of persons shall be based on training, skills, competence, knowledge and the need to redress, in accordance with the Employment Equity Act, 1998 (Act 55 of 1998), the imbalances of the past.</td>
<td>Appointment not made with due regard to equality and the democratic values and principles enshrined in the Constitution, not all persons who applied and qualify for the appointment were considered and the evaluation of persons were not based on training, skills, competence, knowledge and the need to redress the imbalances of the past.</td>
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<td><strong>PSR Chapter 1/7(3):</strong> If the EA (or employee to whom the power/duty has been delegated) deviates from the panel’s recommendations, the reasons for the deviation must be recorded in writing.</td>
<td>The lack of reasons or non-recording of reasons for deviating from the Selection Panel’s recommendations.</td>
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<td><strong>PSR Chapter 4, Part IV/67(9):</strong> Before making a decision on an appointment, an EA shall make sure that the candidate qualifies in all aspects for the post and that the claims by the candidate in his/her application have been verified.</td>
<td>If an EA did not make sure that the candidate qualifies in all aspects for the post and that the claims by the candidate in his/her application have been verified.</td>
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<td><strong>SMS Handbook, Chapter 6.6:</strong> Following Cabinet’s concurrence the relevant EA is responsible for issuing an appointment letter to the successful candidate which should include the following: - Provisions of the Act in accordance with which the appointment is effected and probation period. - Term of contract and salary per annum. - Indicate need to sign an employment contract and enter into a Performance Agreement. - Date of assumption of duty. - Requirement to disclose financial interests within one month after appointment.</td>
<td>Non issuing of an appointment letter to the successful candidate and/or if the appointment letter does not specify the matters alluded to in Chapter 6.6 of the SMS Handbook.</td>
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<td><strong>Executive Protocol, Part 2, paragraph 7.8:</strong> To facilitate the appointment of national HoDs and DDGs, the following information should be forwarded to the MPSA:</td>
<td>Not forwarding the information specified in Part 2, paragraph 7.8 of the Executive Protocol to the MPSA.</td>
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</tbody>
</table>
- Internal and external advertisement of the post.
- List of the candidates who applied for the post.
- Cabinet Memorandum for submission to Cabinet.
- Copy of the letter from the Domestic Branch of the State Security Agency (SSA) regarding preliminary security vetting.
- Documentary proof of the outcome of personnel suitability checks.
- Exposition of representivity profile per SMS level, before & after the appointment.
- Copy of CV/resume.
- Copy of Identity Document (ID).
- Copy of competency assessment report.
- Copy of written verification of qualification(s) issued by the South African Qualifications Authority (SAQA).
- Copy of a duly completed, signed and dated application form (Z83).
- Copy of the Department’s organizational structure (complying with the MPSA’s Directive effective 1 July 2006).
- Evidence of JE conducted.

**Record keeping**

Public Finance Management Act, 1999, section 38:
The Accounting Officer of a department (i.e. HoD) is responsible for the maintenance of an effective, efficient and transparent system of internal control.

National Archives and Records Service of South Africa Act, 1996, section 13:
Government Bodies should manage their records in a well-structured record keeping system and put the necessary policies and procedures in place to ensure that their record keeping and management practices comply with the requirements of the Act.

PSR Chapter 4, Part IV/70:
A head of department shall keep a record of each employee and of each post on the establishment in accordance with the information requirements as issued by the Minister.

**Other**

Various matters pertaining to the filling of posts alluded to in the documents containing the mandatory requirements and elaborated upon in Departmental Recruitment and Selection Policies.

The delegation of authority of power regarding various matters pertaining to the recruitment and selection processes followed during the filling of posts, including the authority to approve the appointment of the recommended candidate.

Departments failing to comply/adhere to the requirements stipulated in their Departmental Recruitment and Selection Policies (provided such requirements are not in conflict with the stipulations of the PSR).

Actions/decisions taken that are not in accordance with the Delegation of authority.