



**PUBLIC SERVICE COMMISSION
REPUBLIC OF SOUTH AFRICA**

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Public Service Commission House, Office Park Block B, 536 Francis Baard Street, Arcadia, Pretoria

PSC Circular 1 of 2020: Reference Number 7/3/P

TO: ALL EXECUTIVE AUTHORITIES AND HEADS OF NATIONAL AND PROVINCIAL DEPARTMENTS AND GOVERNMENT COMPONENTS

RE: CIRCULAR TO ADVISE EMPLOYEES AND EXECUTIVE AUTHORITIES REGARDING UNLAWFUL INSTRUCTIONS

1. The Public Service Commission (PSC) has observed that in many instances where irregularities occurred in public administration, the employees involved allege that they acted on unlawful instructions from Executive Authorities (EAs) or senior managers.
2. The purpose of this Circular is therefore to advise EAs and Heads of Department (HoDs), as well as all public servants, regarding their responsibility to perform their duties within the confines of the legislative framework and to report irregularities as well as unlawful instructions to the relevant authorities.
3. The Constitutional context is provided in section 1 of the Constitution of the Republic of South Africa, 1996, which provides that South Africa is founded on the supremacy of the Constitution and the rule of law. Section 195 of the Constitution echoes that public administration must be governed by the democratic values and principles enshrined in the Constitution, including, amongst others, a high standard of professional ethics and accountability. In addition, section 197(1) of the Constitution provides that there is a public service for the Republic which must function and be structured in terms of the national legislation which must loyally execute the lawful policies of the government of the day.
4. There are several Acts and Regulations applicable in the public service which place a positive duty on an employee to abide by the legislative framework and to report irregularities to a higher authority for example reporting of irregularities to a senior manager, to act as a whistle-blower and/or to report irregularities to the South African Police Service and/or oversight bodies such as the PSC and the Public Protector. These Acts and Regulations include:



PROVINCIAL OFFICES:

Free State T: (051) 448 8696 F: (051) 448 4135
Gauteng T: (011) 833 5721 F: (011) 834 1200
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Eastern Cape T: (043) 643 4704 F: (043) 642 1371
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- 4.1. Section 16A of the Public Service Act, 1994, which requires of EA's to take disciplinary action against a head of a department who does not comply with any provision in the Public Service Act and to report the particulars of non-compliance to the Minister of Public Service and Administration. Section 16A also requires HoD's to take disciplinary action against employees who do not comply with a provision of the Public Service Act and to report the particulars of non-compliance to the Director-General of the Department of Public Service and Administration.
- 4.2. Regulations 11, 13 and 14 of the Public Service Regulations, 2016 which provide that employees must abide by and be familiar with all legislation and lawful instructions applicable to their conduct and official duties and further report fraud, corruption, nepotism, maladministration, criminal offences and non-compliance with the Public Service Act to the relevant authorities.
- 4.3. Section 64 of the Public Finance Management Act, 1999 which provides that any directive with financial implications by an EA of a department to an accounting officer must be in writing. If such directive is likely to result in non-compliance with prescripts, the accounting officer will be responsible for such non-compliance unless the EA has been informed of the likelihood of that unauthorised expenditure. In the event that the EA proceeds with the implementation of such directive, the written reasons must be filed immediately with the National Treasury and the Auditor-General as well as the relevant provincial treasury, if a provincial department is involved, by the HoD.
5. The evidence emerging from the Judicial Commission of Inquiry into Allegations of State Capture has shown how some senior leaders and businesses were able to act with impunity. Even more distressing is how senior officials who have been in cahoots with businesses have looted the state in the procurement of Personal Protective Equipment during COVID 19.
6. The Courts have on several occasions pronounced on the repercussions of non-compliance with prescripts.¹ In the **Life Esidimeni Arbitration Award**² the learned judge held that: *"The Constitution goes further to impose overarching duties on wielders of public power. As elected office bearers and so too those in the public service go about their duties, they must first and foremost be faithful to the law. They must act within the stricture of the law and eschew unlawfulness. They may not elevate their personal or arbitrary or political or other preferences above or in a breach of binding law. That is a bare minimum of the constitutional tenet of the rule of law."*
7. EAs sometimes hide behind the notion that they did not know the law and acted on the advice of officials. In the Life Esidimeni Arbitration Award, referred to above, the claims by the EA that she was not correctly advised by the Administration, and the claims by the Administration that they acted on instructions from the EA were rejected. Accordingly they were held accountable for their actions.
8. In light of the above, it is imperative that EAs and all public servants are familiar with the legislative framework wherein they operate. Where there is doubt about the lawfulness of an instruction or proposed action, legal advice should be sought from

¹ [2014] ZACC 6 at paragraph 82.

² Arbitration Award dated 19 March 2018 at paragraph 157

internal legal services or external sources such as the Office of the State Attorney or the Office of the Chief State Law Advisor. This may assist to reduce tension between the political –administrative interface.

9. It will be appreciated if the contents of this circular could be brought to the attention of all employees in your respective departments and that workshops be conducted to ensure optimal exposure.

Kind regards

A handwritten signature in black ink, appearing to read 'RK Sizani', with a stylized flourish underneath.

RK SIZANI
CHAIRPERSON

DATE: 29 September 2020