



**PUBLIC SERVICE COMMISSION
REPUBLIC OF SOUTH AFRICA**

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CIRCULAR NO. 5 of 2024

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

RE: CIRCULAR TO ADVISE EXECUTIVE AUTHORITIES, HEADS OF DEPARTMENTS AND EMPLOYEES REGARDING THE PREVENTION AND MANAGEMENT OF UNLAWFUL INSTRUCTIONS

1. The Public Service Commission 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 or senior managers. The unlawful instructions in the Public Service also brought up a crippling effect on service delivery, department stability, and respect for human rights, and have derailed the developmental state objectives.
2. The purpose of this Circular is therefore to:
 - 2.1 Advise Executive Authorities (EAs) and Heads of Departments (HoDs) as well as all public servants regarding their responsibility to perform their duties within the confines of applicable legislative frameworks and to report irregularities as well as unlawful instructions to relevant authorities;
 - 2.2 Appeal to HODs and all public servants to remain professional and to support the new administration within the confines of the law, in line with the framework for professionalization; and
 - 2.3 Appeal to EAs to act within the confines of the law to ensure organisational stability and service delivery continuity to the people.
3. The basis for legislative frameworks governing public administration is the Constitution of the Republic of South Africa, 1996. Section 1 provides that South Africa is founded

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on the supremacy of the Constitution and the rule of law, and 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. In addition, section 195 requires 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.

4. Consequently, there are several Acts and Regulations governing public administration broadly and in the public service. These prescripts place a positive duty on employees to abide by the legislative frameworks and to report irregularities to higher authorities such as ethical and accountable senior managers, law enforcement institutions and oversight bodies.
5. In this instance, the applicable prescripts include the following:
 - a. Section 16A of the Public Service Act, 1994, which requires EAs 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 for Public Service and Administration. Section 16A also requires HoDs 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.
 - b. Regulations 11, 13 and 14 of the Public Service Regulations, 2016, provide that employees must abide by and be familiar with all legislation and lawful instructions applicable to their conduct and official duties and must further report fraud, corruption, nepotism, maladministration, criminal offences and non-compliance with the Public Service Act to the relevant authorities.
 - c. Section 64 of the Public Finance Management Act, 1999, 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 unauthorized expenditure. If 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. *[These provisions are also applicable to instructions that are given to other employees by the EA, accounting officer or senior/middle managers.]*

6. The evidence that emerged 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, acting in cahoots with businesses, have looted the state in the procurement of Personal Protective Equipment during COVID 19. The Judicial Commission of Inquiry into Allegations of State Capture as well the Auditor General's reports also revealed systemic procurement irregularities that have taken root in the public sector.
7. Similarly, the PSC has investigated grievances and complaints related to employee appointment irregularities due to non-compliance with prescripts as well as allegations of nepotism, favouritism, manipulation or disregard of appointment processes and requirements, unethical conduct by appointment panel members and/or approving authorities. The Judicial Commission of Inquiry into Allegations of State Capture has also alluded to employee appointment irregularities in some of the organs of state.
8. 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."*
9. In light of the findings made by Chief Justice Zondo in the Judicial Commission of Inquiry into State Capture (JSCC) in the Public Sector including Organs of State, the November 2023 progress update by government indicated that measures have been put in place to, amongst others, ensure "the devolution of administrative powers from EAs to HoDs" and "requiring that executive advice and directives need to be channeled through Accounting Officers to have force and effect. This would prevent the proliferation of conflicting instructions to officials and interference by executive authorities in the operational matters of departments".
10. Executive Authorities sometimes hide behind the notion that they do not know the law and act on the advice of officials. In the Life Esidimeni Arbitration Award, referred to above, the claims by the Executive Authority that she was not correctly advised by the Administration, and the claims by the Administration that they acted on instructions from the Executive Authority were rejected. Accordingly, they were held accountable for their

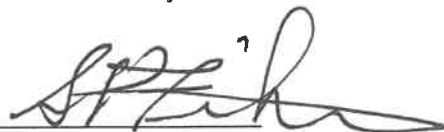
¹ [2014] ZACC 6 at paragraph 82.

² Arbitration Award dated 19 March 2018 at paragraph 157

actions. This demonstrated that ignorance of the law is an inadequate defense for issuing and implementing unlawful instructions.

11. In light of the above, it is imperative that Executive Authorities and all public servants are familiar with the legislative framework in which they operate. Where there is doubt about the lawfulness of an instruction or proposed action, legal advice should be sought from 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 mitigate against potential tensions at the political-administrative interface.
12. To assist in preventing unlawful instructions, the Public Service Commission has published a Manual on *Unlawful Instructions and Handling of Ethical Dilemmas in the Workplace* in 2021. The primary purpose of this manual is to-
 - Promote exemplary and ethical conduct and lawful instructions.
 - Empower public servants to take ethical decision in respect of unlawful instructions that have become systemic in the Public Service.
13. The effective implementation of the Constitutional Values and Principles as well as the Framework for Professionalisation in the Public sector as well as strict compliance with the provisions of section 217 of the Constitution including relevant procurement prescripts is paramount in the promotion of good governance and clean administration.
14. The manual should be read in conjunction with the Code of Conduct and other prescripts to assist in maintaining the integrity, accountability and impartiality of the public service. This manual is accessible from the PSC's website: <https://www.psc.gov.za/documents/docs/guidelines/Manual%20on%20Unlawfull%20Instructions%202021.pdf>
15. 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.

Yours faithfully



PROF. SOMADODA FIKENI
CHAIRPERSON

DATE: 7-6-2024