



**the dpsa**

Department:  
Public Service and Administration  
REPUBLIC OF SOUTH AFRICA

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## GUIDELINES TO STREAMLINE DISPUTE MANAGEMENT IN THE PUBLIC SERVICE.

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### JOINDER APPLICATIONS

2023

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## A. INTRODUCTION AND BACKGROUND

1. In terms of section 3(1) of the Public Service Act, Proclamation 103 of 1994, as amended, (*“the PSA”*) the role of DPSA is to develop the norms and standards in relation to, amongst others, labour relations in the public service and any other matters to improve the effectiveness and efficiency of the public service. This, it does through regulations, directives, collective agreements and other measures. The DPSA also provides implementation support and advice to Departments.
2. When DPSA has concluded a collective agreement on the specific matter and issued a directive, the role of the DPSA ceases. Beyond that stage, is the implementation process, which is the competence of Executive Authority, as the employer, as defined in the provisions of the PSA. However, where there are ambiguities or circumstances that are not provided for in the collective agreement, the DPSA may still issue directives to elucidate such collective agreements.
3. Where an employee is of the view that a Department, as the employer, is not implementing a specific provision of a collective agreement, that employee has a right to raise such non-implementation with their employer. In that case, a Department must consider such complaint or grievance and resolve same, promptly.
4. If the complaint or a grievance has not been resolved to the satisfaction of the employee, the employee is at liberty to lodge a dispute with the relevant Bargaining Council, after exhausting internal processes.
5. An employee who is lodging a dispute, must fully complete the prescribed Referral Forms, and send them to the Employer and the Bargaining Council. More importantly, the sections on *Summary of the matter in Dispute/Background of the Dispute, Nature of the Dispute and Outcome Desired* should be fully completed to enable the Departments to properly screen disputes to determine the nature of the dispute, i.e. whether the dispute is about *interpretation and application* of the collective agreement or merely about **non-implementation of a specific collective agreement**.
6. The latter distinction is important because the DPSA's role in disputes from Departments is limited to cases of *interpretation and application* of collective agreements, Regulations, Directives, Determinations, and Circulars. If a dispute pertains to *Unfair Labour Practice* (*“the ULP”*) and where there are no apparent diverse interpretations and application issues involved, the DPSA may not, as a matter of law, be joined nor cited. As indicated above, Departments may, **if needs be**, approach the DPSA for advice and support.
7. Fully completed *Dispute Referral Forms* also enable the Bargaining Councils to properly screen cases and make a call about whether or not the DPSA **has a substantial interest** in the dispute and whether **the outcome of such disputes may affect the DPSA** in which case, DPSA should be joined.

8. According to the DPSA's trends analysis, some Departments have been readily accepting *Dispute Referral Forms*, which are not fully completed. This makes it challenging for the DPSA to determine whether or not it has substantial interests in a case or whether an outcome of the case may affect the DPSA, until the case is at arbitration stage.
9. Disputes of non-implementation of collective agreements are sometimes conflated with or disguised as with *interpretation and application* of collective agreements disputes. Some Departments and employees often require the DPSA to be joined in these disputes, in circumstances where DPSA has no role to play.
10. Heads of Department are the employers and, therefore, are empowered by the public service prescripts to deal with Unfair Labour Practice Disputes/non-implementation of collective agreements and other prescripts.

## B. PROBLEM STATEMENT

1. Firstly, there has been unintended conflation of responsibilities, whereby the DPSA gets involved in the management of disputes in circumstances where it is not supposed to be involved in. This, amongst others, may be occasioned by the belief that, because DPSA is a custodian of policies and a signatory to collective agreements, the DPSA should be involved in the arbitration processes pertaining to such collective agreements.
2. Secondly, there has been an argument that the DPSA should be involved in disputes whose outcomes may potentially create inconstancies in conditions of services and remuneration in the Public Service. **On the face of it, this argument sounds plausible, but unstainable and legally indefensible, as will be demonstrated later.**
3. Thirdly, the Constitutions of both the General Public Service Sector Bargaining Council<sup>1</sup> (*"the GPSSBC"*) and Public Service Coordinating Bargaining Council<sup>2</sup> (*"the PSCBC"*) provide that, when the applicants serve Referral Forms to the employer of the employee (s) concerned, the Chief Negotiator of the State must also be served.
4. This may have created an expectation from some Departments, given the fact that the DPSA was served, the DPSA may have to partake in the arbitration proceedings. However, the rationale for serving the Office of the Chief Negotiator is to make the DPSA aware of disputes in the Public Service so that appropriate interventions are introduced.
5. Finally, capacity issues in some Departments may have also created this need for the DPSA to be involved in some arbitrations, instead of supporting Departments outside the arbitration processes. In any event, the DPSA does not have the capacity to be involved in some of the disputes, where it does not have substantial interests.

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<sup>1</sup> Clause 5(2) of the *Dispute Resolution Procedure for GPSSBC, 2004*.

<sup>2</sup> Clause 5(2) of the *Rules for the Conduct of the Proceedings before the PSCBC, 2005*.

6. The consequence of the above-mentioned situation is that the DPSA tends to get pre-occupied with the implementation matters such as non-implementation of leave, overtime, non-attendance of grievances and other enforcement matters, in circumstances where it is supposed to give implementers space to implement policies. The DPSA is not the primary employer of the employees who have lodged disputes. It must monitor the implementation of collective agreements.
7. The DPSA finds itself inundated with disputes where it is joined thus creating an unmanageable workload and inefficiencies in the system. The Unit handling the disputes has not been configured to represent the DPSA in unfair labour practices<sup>3</sup> or individual disputes. The further consequence is that, the Policy Units within DPSA have to assist by representing DPSA in disputes. These units also do not have the capacity to assist in all these cases.
8. Given the magnitude of the case load, there is a risk of not being able to appear in some disputes, where the DPSA is joined. The risk here is cost orders, which may be imposed at the discretion of the Commissioner. The aforementioned state of affairs must be rectified.
9. To conclude, all the above-mentioned factors necessitates the streamlining of the dispute management function in the public service particularly in respect of **Joinder Applications** to bring about efficiency and effectiveness in the system and compliance with the legal principle of Joinder.

### C. PURPOSE

The purpose of this Guide is to:

1. Operationally clarify the role of the DPSA *versus* the role of Departments in dispute resolution, *thus* the employer representation at conciliations and arbitration hearings.
2. Improve the efficiency and effectiveness of dispute management in the public service.
3. Introduce a Guide on Joinder Applications to streamline dispute management.
4. Contextualize the powers and functions of the MPSA, the Executive Authorities, and Heads of Departments in terms of the legislation and case law in the context of labour relations, particularly, in dispute management.

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<sup>3</sup> See section 186 (2) of the Labour Relations Act, 66 of 1995 – Unfair Labour Practice means, any act or omission that arises between the employer and employee.

## D. LEGAL FRAMEWORK

### Powers of the Minister

1. The role of MPSA is to develop norms and standards in relation to, amongst others, labour relations in the public service<sup>4</sup> and any other matters to improve the effectiveness and efficiency of the public service. The DPSA also provides implementation support and advice to Departments.
2. Section 3(2) of the PSA, states that the Minister for the Public Service and Administration (the MPSA) exercises the afore-mentioned functions by making regulations, determinations and directives and by performing any other acts provided in the PSA.
3. Further, section 3(5) (a) of the PSA provides that:  
  
*"Subject to the Labour Relations Act and any collective agreements, the Minister may make determinations regarding any conditions of service of the employees generally or categories of employees, including determinations regarding salary scale for all employees or salary scale for particular categories of employees and allowances for particular categories of employees"*<sup>5</sup>
4. In addition, section 3(6) (a) of the PSA provides that,  
  
*"if so requested by the President or an executive authority, the Minister may advise, or assist in such manner or on such conditions as the Minister may determine, the President or the relevant executive authority as to any matter relating to-*
  - i. the public service;*
  - ii. any staffing arrangements or employment practice regarding any organ of state; or*
  - iii. the remuneration or other conditions of appointment of the office-bearers of any board, institution or body*
5. Section 5(6) (a) and (b) of the PSA, state that,  
  
*(a) "any provision of a collective agreement contemplated in subsection (4), concluded on or after the commencement of the Public Service Amendment Act, 2007, shall, in respect of conditions of service of employees appointed in terms of this Act, be deemed to be a determination made by the Minister in terms of section 3 (5)".*  
  
*(b) "The Minister may, for the proper implementation of the collective agreement, elucidate or supplement such determination by means of a directive, provided that the directive is not in conflict with or does not derogate from the terms of the agreement".*
6. In relation to this section, the role of the Minister is ancillary to formalising of collective agreement in terms of section 3(5) (a) of the Public Service Act in their advisory role as provided for in terms

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<sup>4</sup> Section (3) (1) the Public Service Act, 1994, as amended.

<sup>5</sup> Section 3(5)(a) of the Public Service Act, Proclamation 103 of 1994.

of section 3(6) of the Public Service Act. This function is performed through the issuance of legal instruments in terms of the PSA to deal with the implementation of collective agreements.

### Powers of the Executive Authority

7. Section (3) (7) states that an Executive Authority has all those powers and duties necessary for-
  - (a) The internal organization of the Department concerned, including its organizational structure and establishment, the transfer of functions within that Department, human resources planning, the creation and abolition of posts, and provision for the employment of persons added to the fixed establishment; and;
  - (b) The recruitment, appointment, performance management, transfer, **dismissal and other career incidents of employees of that department, including any other matter, which relates to such employees in their individual capacities**. Such powers and duties shall be exercised or performed by the Executive Authority in accordance with the provisions of the Public Service Act.

### Powers of Heads of Department

8. Section 7(3) (b), furthermore, states that a Head of Department is responsible for the efficient management and administration of their Department, which includes the effective utilization and training of staff, the maintenance of discipline, **the promotion of sound labour relations** and the proper use and care of State property, and he or she shall perform the functions that may be prescribed.
9. 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 said head shall –
  - i. Be the Secretary to the Executive Council of the province concerned;
  - ii. Subject to applicable provisions 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 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.
  - iii. Subject to paragraph (d), be responsible for the giving of strategic direction on any matter referred to in section 3 (1).

### Case Law

10. The Labour Appeal Court (the LAC) had the opportunity to deal with the powers and functions of the Minister in the case of *Minister of Public Service and Administration, MEC Public Works,*

*Roads and Transport Mpumalanga Vs PSA OBO MALEME JOHANNES MAKWELA*<sup>6</sup> (the *Makwela case*). In this case, the DPSA requested the LAC to set aside the decision of the Labour Court (*“the LC”*) to dismiss the review application of the decision of the GPSSBC to dismiss its (DPSA) application for rescission of a settlement agreement, which was entered into between Mr Makwela and the MEC for Public Works, Roads and Transport (Mpumalanga).

11. The case pertained to the failure of the Department of Transport to join the DPSA on the dispute, which dealt with the Occupation Specific Dispensation (the OSD), on the basis that the DPSA **will be affected by the outcome of the dispute.** The DPSA's argument can be summarised as follows:

- i) The Minister was “affected” by the award or was a “necessary” party.
- ii) The Minister had “made” the OSD and had a vested interest in the proper implementation of the OSD and is “responsible for **the uniform and consistent application of all OSDs in the public service**”.
- iii) The Minister (or the department) had **“decided jointly”** with the MEC that Makwela was ineligible to be translated.
- iv) The Minister only learnt of the award after it had been implemented by way of Makwela being translated and his translation was contrary to the “mandate” of the two appellants.
- v) The award was *thus “erroneously sought and erroneously granted”*.

12. The LAC held as follows:

*“It cannot be envisioned that the Minister should be joined to every dispute concerning a “deemed determination” in the form of a collective agreement of a public service bargaining council such as an OSD. For example, in the case that Mr Mashego cited, Western Cape Department of Health v MEC Van Wyk and others (2014) 35 ILJ 3078 (LAC) 2, the LAC took no issue with only the provincial Department (rather than the Minister) having been cited as a respondent in a similar dispute involving the implementation of an OSD – in that case, for nurses.”<sup>7</sup>*

13. To ensure that the DPSA gets involved in disputes within its mandate, the true nature of the case must be determined first. To clarify the issue of nature of dispute, the court in *National Union of Metalworkers of SA and Others v Bader Bop (Pty) Ltd (2003) 24 ILJ 305 (CC)* at paragraph 52 held that:

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<sup>6</sup> *Minister of Public Service and Administration, MEC, Public Works, Roads and Transport Mpumalanga Vs PSA OBO MALEME JOHANNES MAKWELA DIALWA MATHALA N.O. GPSSBC (2017) JA4/2017, LAC at par 6.*

<sup>7</sup> *Minister of Public Service and Administration, MEC, Public Works, Roads and Transport Mpumalanga Vs PSA OBOMALEME JOHANNES MAKWELA DIALWA MATHALA N.O. GPSSBC (2017) JA4/2017, LAC at par 10.*



*"It is the duty of the court to ascertain the true nature of the dispute between the parties. In ascertaining the real dispute, the court must look at the substance of the dispute and not at the form in which it is presented. The label given by a party is not conclusive. The true nature of the dispute must be distilled from the history of the dispute, as reflected in the communications between the parties before and after the referral of such dispute. These would include referral documents, the certificate of outcome and all relevant communications. It is also important to bear in mind that parties may modify their demands in the course of discussing the dispute or during the conciliation process. All must be taken into consideration in ascertaining the true nature of the dispute."*

14. In light of the above, Departments and the Bargaining Councils should screen disputes when lodged to determine the nature of the true dispute for jurisdiction and also properly determine whether DPSA should really be involved, instead of readily joining the DPSA.
15. The Dispute Management Rules of the PSCBC<sup>8</sup> and the GPSSBC<sup>9</sup>, respectively, state that, applicants are expected to sufficiently explain the background to the case, the nature of the case, and the outcome required to enable the Respondent Administrator / Commissioner to properly understand the nature of the dispute.
16. Where certain cases do not meet this standard, Departments or Bargaining Councils should bring such to the attention of the applicant (s).

#### **Understanding of Interpretation and application disputes: the Role of DPSA**

17. As indicated above, the DPSA is responsible for determining norms and standards for the public service and also issues directives to elucidate the collective agreements. Arguably, it will be the DPSA that will have a clearer view of the context of these legal instruments and their purpose. In dealing with the interpretation, the court in ***Commercial Workers Union of SA v Tao Ying Metal Industries and Others (2008) 29 ILJ 2461 (CC) at paragraph (90)*** said the following:

*"The proper approach to the construction of a legal instrument requires consideration of the document taken as a whole. The effect must be given to every clause in the instrument and, if two clauses appear to be contradictory, the proper approach is to reconcile them so as to do justice to the intention of the framers of the document. It is not necessary to resort to extrinsic evidence if the meaning of the document can be gathered from the contents of the document"*<sup>10</sup>

18. Further in terms of the interpretation principles, the court in the case of ***Endumeni Municipality (2012) 4 SA 593 (SCA)***:

*"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the documents as a whole and the circumstances attendant*

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<sup>8</sup> PSCBC Resolution 4 of 2005.

<sup>9</sup> GPSSBC Resolution 4 of 2004.

<sup>10</sup> *Commercial Workers Union of SA v Tao Ying Metal Industries and Others (2008) 29 ILJ 2461 (CC) at paragraph (90)*

*upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax, the context in which the provision appears, the apparent purposes to which it is directed, and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all factors. The process is objective, not subjective. A sensible meaning is to be preferred to the one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.....”<sup>11</sup>*

19. So, where there are different interpretations of collective agreements/policy directives, the DPSA, as the policy owner and signatory to relevant collective agreements, would be best placed to ultimately provide clarity on the intention of the document to enable the Commissioners to arrive at appropriate decisions. The DPSA may either interact with the Departments, as part of policy implementation support/advice prior to arbitrations processes or even be joined to the proceedings to provide clarity in the interpretation and application of the collective agreement.

#### **“DPSA not be involved in individual disputes (ULP)”**

20. Where the disputes are about the failure of the employer to implement a collective agreement, the role of DPSA is different. It is about providing oversight on implementation and support the department in implementation and not to be joined in dispute hearings, because DPSA is not the implementer. The recourse available to employees is that of enforcement of collective agreement (failure to implement an agreement).
22. From the above, it is crystal clear that the DPSA should not be joined/partake in all disputes merely because it issued a Directive or was a signatory to the collective agreement. In answering the question of when should the DPSA participate in dispute proceedings, the Court in Makwale provided the following guidelines:

*“First, what is required is not merely that the Minister is “interested” in knowing what various “executive authorities” do when implementing collective agreements. That sort of common-sense “interest” is irrelevant. This is because the Minister has no authority over the executive authorities. The notion that a co-decision was made about Makwela is wrong on the facts. **The role of the Minister is to advise and assist when asked to do so (not to make decisions), and otherwise is obliged to leave the MEC to get on with the implementation.** Were it otherwise, the MEC would be the Minister’s functionary which is an idea incompatible with the constitutional structure of the provinces having original jurisdiction and not being subordinate to the national government, within their scope of authority.”<sup>12</sup> **“The dispute did not trigger an interpretation issue about the meaning of the OSD. However, even had it done so, the Minister as the authority that acts merely as the midwife to the OSD, an instrument which derives from a binding collective agreement, would still not be “affected” by a decision on the meaning in the relevant sense.”***

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<sup>11</sup> *Endumeni Municipality (2012) 4 SA 593 (SCA) paragraph 18. See also Bothma en Seun Transport (Edms) Bpk 2014 (2) SA 494 (SCA) paragraph 12. The Constitutional Court also in Amcu and Others v Chamber of Mines of SA and others (2017) 38 ILJ 831 (CC) footnote 28, DENOSA obo Du Toit and Another WC Department of Health and Others (2016) 37 ILJ 1819 (LAC) paragraph 33.*

<sup>12</sup> Minister of Public Service and Administration, MEC, Public Works, Roads and Transport Mpumalanga Vs PSA OBO MALEME JOHANNES MAKWELA DIALWA MATHALA N.O. GPSSBC (2017) JA4/2017, LAC at par 10.

23. Therefore, **when the DPSA has concluded a collective agreement on the specific matter and issued a Directive, the role of the DPSA ceases<sup>13</sup>**, beyond that is an implementation process, which is the competence of the Executive Authority, as the employer, as defined in the provisions of the Public Service Act. **That the MPSA issued a directive in relation to a particular collective agreement and therefore the DPSA has a direct interest in the consistent implementation is not the ground for joinder in disputes.**
  
24. As the court indicated:
 

*“The Minister’s role as the provisions of the legislation cited above illustrate, is confined to **the issuing of instruments of general application**, and not, in the least, is the Minister, in any legal sense, **concerned with disputes concerning individual employees**. Even if it be supposed that the decisions taken about Makwela in respect of implementing the OSD were to be wrong or inappropriate, that notional error could not confer on the Minister a legal interest that might found a proper claim to be joined.”*
  
25. What this judgment also confirms is that the DPSA has no business in getting involved in individual disputes between the employees and their employers. These disputes fall within the purview of the Executive Authorities and they must indeed be allowed to deal with the implementation of collective agreements and policies which would in many instances be given life by the DPSA through collective agreements and directives and guidelines in terms of its mandate.
  
26. The DPSA may have to devise other means and put in place other measures to monitor consistent implementation of collective agreements. In addition, other measures pertaining to the enforcement of collective agreements may have to be put in place to ensure that Departments implement collective agreements correctly and fully.
  
27. Prior to the DPSA being joined, the Departments, bargaining councils should establish the *nexus* between the parties. For example, when the application for joinder for DPSA is received one must determine the connection between the applicant and the DPSA. Relevant factors in this regard would for example be whether the DPSA is the employer of the applicant or whether the disputes will affect the DPSA. **The legal principles for joinder must be applied without fail.**

## E. JOINDER APPLICATIONS

1. The involvement of DPSA in dispute resolution and administration must be consistent its mandate. It is not possible to approach this exercise with precision of science. However, upon receipt of the Referral Forms, the following steps are recommended:
  - (a) Departments “and Bargaining Councils” must properly screen the forms to determine the nature of the dispute. If the key sections of the form are not properly completed, trade employee/trade union must be informed accordingly.

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<sup>13</sup> Except for providing support and advice as per the provisions of the Public Service Act, provided that this takes place outside the arbitration proceedings. An expert witness from DPSA may be called on limited cases to provide some clarity on certain matters in the interpretation of certain policy, etc.

- (b) Determine which stakeholder has a substantial interest in the dispute and consider whether a joinder may be required. Cognisance should be taken that the DPSA's role as the provisions of the legislation cited above illustrate, is confined to the issuing of instruments of general application (interpretation and application disputes) and not concerned with disputes concerning individual disputes (ULP).
  - (c) Where the employees apply to join the DPSA in disputes, which are disguised as Interpretation and application disputes, such applications must be opposed. These are non-implementation disputes and the DPSA is not an implementer. Departments must handle these disputes. Where capacity building is required, such may be offered.
2. This approach should eliminate inefficiencies in the dispute management processes and the floodgate of disputes where DPSA has been joined in circumstances that should not be the case.
  3. Where Joinder applications are filed in matters where DPSA does not have substantial interests as mentioned above, such applications should be opposed. Departments may approach the DPSA for support even outside the arbitration processes or even as witnesses, as and when that need arise.

#### **F. APPLICATION**

This document creates a Guidelines within which Joinder applications must be handled within the Public Service to streamline dispute management, subject to the provisions of the Labour Relations Act. This Guidelines is applicable to all National and Provincial Departments.

#### **G. MONITORING AND EVALUATION**

The DPSA will monitor the implementation of the Framework.

For Approval

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**MS YOLISWA MAKHASI**  
**DIRECTOR-GENERAL**  
DATE:

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**MS YOLISWA MAKHASI**  
**DIRECTOR-GENERAL**

**DATE:** 02/10/23