

EDUCATION LABOUR RELATIONS COUNCIL

Established in terms of the S (37)(2) of the LRA of 1995 as amended



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EDUCATION LABOUR
RELATIONS COUNCIL

23 AUGUST 2016

CONSTITUTION:

PART C

DISPUTE RESOLUTION PROCEDURES

(BASIC EDUCATION AND TVET)

H.M. Uy



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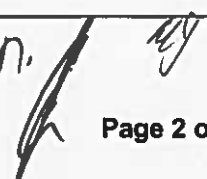
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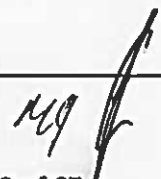
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PART 1: INTRODUCTION TO *DISPUTE RESOLUTION PROCEDURES*

1 Application

- 1.1 These procedures apply to all disputes that arise within the scope of the Council except disputes in respect of those matters that:
- 1.1.1. are regulated by uniform rules, norms and standards that apply across the *Public Service*;
 - 1.1.2. apply to terms and conditions of service that apply to two or more sectors.
 - 1.1.3. fall within the jurisdiction of the PSCBC;
 - 1.1.4. are not capable of being determined by the Council as the employer or employers in the Council do not have the requisite authority to resolve the dispute; or
 - 1.1.5. are not contemplated in clauses 3 – 7, 19 & 20¹)
- 1.2 Despite the provisions of clauses 1.1.1 to 1.1.4, the *Council* must deal with all individual rights *disputes*, in the first instance.
- 1.3 A dispute of right declared in terms of a collective agreement concluded in the PSCBC may be referred to the ELRC, if the employer is the same as the employer in the ELRC.
- 1.4 Panellists, in the ELRC, arbitrating disputes referred to in clause 1.3 are bound by the jurisprudence, in as far as such jurisprudence binds panellists of the PSCBC itself.

2 Jurisdictional *disputes* between the *Council* and the *PSCBC*

If there is a jurisdictional *dispute* between two or more bargaining councils in the *Public Service*, including the *PSCBC*, any party to the *dispute* may refer the *dispute* to the *CCMA*.

¹ The following *disputes* are not dealt with by the ELRC unless the *parties* agree otherwise in terms of clause 19: closed shop *disputes* (section 26 of *the Act*); workplace forum *disputes* (section 86 and 94 of *the Act*). If there is no such agreement, they must be dealt with by the *CCMA*.

PART 2: DISPUTES OF INTEREST

3 Procedures applicable to all *mutual interest disputes*

- 3.1 A party who may refer a *dispute of mutual interest* to the *General Secretary* for conciliation in terms of *Council's Constitution* or *these procedures*, may do so by completing the ELRC Form E1 and filing it with the *Council*:
- 3.1.1 in case of a referral in terms of clause 1.10 in this *constitution*: *Negotiation and Consultation Procedures (Part B)* or clause 4 of *these procedures*, within 6 months from the date on which any party referred a *dispute* in terms of clause 3.1;
- 3.1.2 in case of a referral in terms of clause 5.1 of *these procedures*, within 6 months from the date upon which the *employer* has implemented unilaterally the change to terms and conditions of employment, or that it has come to the notice of the *employee party* that the *employer* intended to implement such change unilaterally (whichever is the later).
- 3.2 The provisions of Part 5 of *these procedures* apply to the conciliation to be conducted in terms of this clause 3.
- 3.3 If the *dispute* is not settled on the first date of the conciliation, the *panellist* must try to get agreement on:
- 3.3.1 further conciliation meetings to settle the *dispute* within the 30 day conciliation period or thereafter;
- 3.3.2 the referral of the *dispute* to voluntary arbitration; or
- 3.3.3 which *panellist* is to be appointed to arbitrate the *dispute*, if the *dispute* must be referred to arbitration.
- 3.4 If no settlement is reached and if no Collective Agreement covering the issues listed here exists, the *panellist* must try to facilitate agreement on:
- 3.4.1 rules about the conduct of a strike or lockout, if applicable; and
- 3.4.2 picketing rules, if applicable.
- 3.5 If the *dispute* is about a refusal to bargain or consult, a party to the *dispute* may request the *panellist* to issue an advisory award and:
- 3.5.1 the *panellist* must issue the advisory award within 14 days of the

request; and

3.5.2 no *party* may give notice in terms of section 64(1) of *the Act* before this award is given, provided the award is given within the period provided in clause 3.5.1.

3.6 If the *dispute* is not settled, the *parties* to the *dispute* may exercise their rights in terms of *the Act*.

3.7 After the conclusion of the conciliation the *Council* will usually not process the *dispute* any further, unless at the written request of a *party* for further conciliation or for an advisory arbitration award by the *Council*.

3.8 If a *party* has made a written request for an advisory arbitration award, the procedures in clause 17 apply in respect of the arbitration hearing.

4 Procedure for *mutual interest disputes* in respect of non-*parties* to the *Council*

4.1 Application of this clause:

4.1.1 In this clause a *dispute* means any *dispute* of *mutual interest*, other than one contemplated in clauses 1 and 5 of this *constitution*: Negotiation and Consultation Procedures (Part B), between the *employer* or *employers* and a non-*party* to the *Council*, which concerns a matter of *mutual interest* contemplated in section 134 of *the Act*.

4.1.2 If there is a *dispute* about whether or not a matter is a matter contemplated in section 134 of *the Act* the *dispute* must be referred to arbitration in terms of clause 17.

4.1.3 *Disputes* involving the *employer* or *employers* on one side and *parties* and non-*parties* to the *Council* on the other may be consolidated in terms of clause 48, provided that all *parties* to the relevant *disputes* agree thereto.

4.2 Negotiations

4.2.1 Any non-*party* to the *Council* may make a proposal in writing on a *mutual interest* issue to the *employer*.

4.2.2 The *employer* may make a proposal in writing on a *mutual interest* issue to a non-*party*.

4.2.3 The *parties* may negotiate with each other about such proposal.

4.2.4 If the *parties* do not conclude a Collective Agreement within 30 days

of the date on which the proposal has been made in terms of this clause 4.2, any *party* may declare a *dispute* by referring a *dispute* to the *Council* in terms of *these procedures*.

5 Unilateral change to terms and conditions of employment


- 5.1 Notwithstanding the other provisions of *these procedures* or *this Constitution*, any *employee party* to a *dispute* regarding an alleged unilateral change to terms and conditions of employment may refer such *dispute* to the *General Secretary* in terms of clause 3.
- 5.2 Regarding such a *dispute* the *employee party* may on ELRC Form E1 require of the *employer*, for the 30-day conciliation period:
- 5.2.1 not to implement unilaterally the change to terms and conditions of employment; or
- 5.2.2 if the *employer* has already implemented the change unilaterally, to restore the terms and conditions of employment that applied before the change; and
- 5.2.3 the *employer* must comply with this requirement.
- 5.3 The employer must comply with a requirement in terms of subsection (4) within 48 hours of service of the referral on the employer.
- 5.4 If the *employer* fails to comply with it, the *employee party* may refer the matter for arbitration, and the procedures contained in clause 17 shall apply with the changes required by the context.

6 Strikes, lock-outs, picketing and protest action

- 6.1 Every *employee* has the right to strike and every *employer* has recourse to lock-out if:
- 6.1.1 the issue in *dispute* has been referred to the *General Secretary* and remains unresolved;
- 6.1.2 the *Council* has issued ELRC Form E3 stating that the *dispute* remains unresolved;
- 6.1.3 or a period of 30 *days* has lapsed after the referral was received by the *Council*. (The period of 30 *days* may be extended by agreement;
- 6.1.4 seven *days* notice of the commencement of the strike or lock-out has been given to the *employer* or the *Trade Unions*, as the case may be, and the *Council*.

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- 6.2 *Parties* shall comply with codes of practice as provided for by *the Act* or as contained in any Collective Agreement of the *Council*.
- 6.3 The *employer* must keep a record of the prescribed details of any strike lockout or protest action involving *employees*. The *employer* must submit those records by completing LRA Form 9.2 and submitting it to the *Registrar* of Labour Relations.

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PART 3: *DISPUTES OF RIGHT: GENERAL*

7 *Dispute of right*

7.1 In this clause, a *dispute* means any *dispute* other than a *mutual interest dispute* that a *party* must or may elect² to refer to the *General Secretary* in terms of a statute or in terms of this collective agreement for:

7.1.1 conciliation³;

7.1.2 arbitration⁴;

7.1.3 conciliation-arbitration⁵; or

7.1.4 expedited joint conciliation and arbitration⁶;

7.1.5 inquiry by arbitration.⁷

7.2 Any *party* to a *dispute* may elect to refer such *dispute*:

7.2.1 to Council for arbitration, in addition to Council conciliation that is already provided for in terms of *the Act*, if the *dispute* concerns:

7.2.1.1 a dismissal that is alleged to be automatically unfair;

7.2.1.2 a dismissal based on the *employer's operational requirements* as contemplated in Sections 189 and 189A of *the Act*;

7.2.2 for a compliance order in terms of clause 69 regarding:

7.2.2.1 any *dispute* concerning a contract of employment, irrespective whether a basic condition of employment

² For example, in case of a *dispute* regarding an *operational requirements* dismissal of a single *employee* following a *consultation* procedure that applied to that *employee* only, the *employee* can elect in terms of section 191(12) of *the Act* to refer the *dispute* to Council arbitration or to the Labour Court.

³ *Disputes* contemplated are those that must be conciliated by *the Council* and may be referred to the Labour Court for adjudication. For example, dismissals for participating in an unprotected strike.

⁴ *Disputes* concerning the interpretation of *the Council's* constitution, subject to clause 38.1 of *this Constitution*.

⁵ *Disputes* contemplated are those *disputes* that the *Council* must set for conciliation-arbitration. For example, dismissals for misconduct and incapacity – see section 191(5)(a)– unfair labour practice *disputes*.

⁶ *Disputes* contemplated include a collection of *disputes* which may otherwise be referred to conciliation-arbitration. For example, multiple *disputes* concerning promotions and appointments.

⁷ *This process* is normally invoked by written consent of both the *employer* and the *employee*.

set in the *BCEA* constitutes a term of that contract; or

7.2.2.2 any *dispute* regarding the alleged non-compliance with a provision of the *BCEA*, subject to clause 7.5.

7.3 A dispute with regard to promotions insofar as it affects the right of educators to a fair labour practice, any party to such dispute may refer it to the General Secretary for conciliation-arbitration:

7.3.1 When the Head of Department of the Department of Education has made a decision with regard to such promotions.

7.3.2 The General Secretary must set down the dispute for Arbitration within 30 days of it being referred to the Council and may utilise the expedited process referred to in clause 20 hereinafter.

7.3.3 The conciliation-arbitration process must be completed within a maximum of three hearings, any further hearings shall be at the cost of the parties.

7.4 If a *dispute* had already been referred for conciliation, arbitration, or conciliation-arbitration to another forum with jurisdiction to conduct such process(es), it cannot thereafter be referred to the *General Secretary* for the same process(es) unless that forum refers the *dispute* to the *General Secretary*.

7.5 If a *dispute* had already been referred for conciliation, arbitration, or conciliation-arbitration, to another forum which has no jurisdiction to conduct such process(es), it can thereafter be referred to the *General Secretary* for the same process(es) provided that the dispute is withdrawn from that forum or that forum has determined that it has no jurisdiction.

7.6 If any *party* to a *dispute* regarding the alleged non-compliance with a provision of the *BCEA* had already referred a complaint in that regard to the Department of Labour or any of its labour inspectors, it cannot thereafter be referred to the *General Secretary* in terms of *these procedures*.

8 Exhausting of internal procedures

8.1 A *party* may not refer a dismissal *dispute*, where the dismissal has been appealed against unless:

8.1.1 The appeal had not been concluded by the *employer* within 45 days; and

8.1.2 The *employer* had been served with 7 days written notice to remedy the default.

9 Time Periods for the referral of a *Dispute*

9.1 A party may refer a *dispute* to the *General Secretary*:

9.1.1 In the case of a dismissal *dispute*

9.1.1.1 Within 30 *days* of the date of dismissal, or if it is a later date, within 30 *days* of the *employer* making a final decision to dismiss or uphold the dismissal; or

9.1.2 In the case of an unfair labour practice *dispute*

9.1.2.1 Within 90 *days* of the date of the act or omission which allegedly constitutes the unfair labour practice, or if it is a later date, within 90 *days* of the date on which the *employee* became aware of the act or omission.

9.1.3 In the case of promotions, within 30 *days* from the date on which the *employee* became aware of the employer's final decision not to promote the employee.

10 Condonation

10.1 On good cause shown, the *General Secretary* may permit a party to refer a *dispute* after the relevant time limits in clause 9 have expired.

11 Jurisdiction to Conciliate

11.1 The following applies to all *disputes* that must be conciliated:

11.1.1 If it appears during conciliation proceedings that a jurisdictional issue has not been determined, the *panellist* may require the referring *party* to prove that the *Council* has jurisdiction to conciliate the *dispute* through conciliation.

11.1.2 A *panellist* holding a jurisdictional hearing in terms of this clause 11 may decide all jurisdictional points that come to the *panellist's* knowledge during the conciliation. Despite the *panellist's* discretion to decide jurisdictional points at conciliation, condonation must be decided at conciliation.

11.1.3 Before ruling on a jurisdictional point, the *panellist* must require the referring *party* to prove that the *Council* has the necessary jurisdiction to resolve the *dispute* through conciliation and give the other *party* to the *dispute* an opportunity to present evidence and argument in this regard.

12 Pre-Arbitration meeting

12.1 When the conciliation proceedings are brought to a close, in the event that all or some aspects of the *dispute* remain unresolved, the *panellist* conciliating the *dispute* may immediately facilitate a pre-arbitration meeting.

12.2 The provisions of Part 5, clause 15 shall apply to all pre-arbitration hearings.

13 Substantive provision on unfair dismissals and unfair labour practices

The substantive provisions of any applicable statute on unfair dismissals and unfair labour practices, as worded at any given time, apply as substantive provisions of *these procedures*.

PART 4: CONCILIATION

14 Conciliation

14.1 How to request conciliation

14.1.1 A *party* must refer a *dispute* contemplated in clauses 7.1.1 or 19.1.1 to the *Council* for conciliation by delivering a completed ELRC Form E1.

14.1.2 The referring *party* must:

14.1.2.1 sign ELRC Form E1 in accordance with clause 36;

14.1.2.2 attach to ELRC Form E1 written proof, in accordance with clause 37, that ELRC Form E1 was *served* on the other *parties* to the *dispute*;

14.1.2.3 if ELRC Form E1 is filed out of time, attach an application for condonation.

14.1.2.4 the *party* who refers the *dispute* must satisfy the *General Secretary* that clause 14.2 has been complied with.

14.1.3 The *General Secretary* must accept a referral form but may refuse to process it until clause 14.1.2 has been complied with.

14.2 Time period for referring a *dispute* to conciliation

14.2.1 The referral must be made within the period provided for in clause 8 read with 9.

14.3 What the *Council* must do when it receives a referral

If clause 14.1 and 14.2 have been complied with, the *General Secretary* must register the *dispute* by recording it in a *Dispute Register* and thereafter:

14.3.1 appoint a *panellist* to attempt to resolve the *dispute* through conciliation within the 30-day conciliation period;

14.3.2 decide the date, time and venue of the conciliation meeting; and

14.3.3 notify the *parties* in writing of the conciliation hearing at least fourteen (14) days prior to the scheduled date, unless the parties

agree to a shorter period or reasonable circumstances require a shorter period. The time period of fourteen (14) days runs from the date the notification is sent by the Council. If a notification is sent by registered mail an additional seven (7) days must be allowed.

14.4 Appointment of *Conciliator*

14.4.1 If the *parties* to a *dispute* have agreed on a particular *panellist* to conciliate and any of the *parties* to the *dispute* has informed the *General Secretary* of such agreement within four *days* of the date on which the *Council* had received the referral, the *General Secretary* must appoint the person agreed upon if that person is available to conciliate the *dispute* within 30-day conciliation period or a longer period as agreed to between the *parties* to the *dispute*.

14.4.2 Should the *parties* not agree upon the *panellist* within four *days* of the date on which the *Council* had received the referral, the *General Secretary* shall appoint a *panellist* to conciliate.

14.5 The *Council* may seek to resolve a *dispute* before conciliation

The *General Secretary*, a delegated *member* of the *Council* staff or a *panellist* may contact the *parties* by telephone or other means before the commencement of the conciliation to seek to resolve the *dispute*.

14.6 Who may attend a conciliation and what happens if a *party* fails to attend

14.6.1 A conciliation may only be attended by:

14.6.1.1 the *parties* to a *dispute*; and

14.6.1.2 a *member*, an *office bearer* or an official of that *party's Trade Union* in the case of an *employee* or by an *employee* of the *party* in the case of an *employer*.

14.6.2 If a *party* on whose behalf a matter has been referred, fails to attend, a conciliation, the *panellist* may:

14.6.2.1 continue with the proceedings and issue a certificate; or

14.6.2.2 deal with the *dispute* in terms of clause 43.

14.7 Duties of the *Conciliator*

14.7.1 The *panellist* appointed to conciliate the *dispute* must determine the process to attempt to resolve the *dispute* which may include:

14.7.1.1 mediating the *dispute*;

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- 14.7.1.2 conducting a fact-finding exercise;
 - 14.7.1.3 making a recommendation to the *parties*, which may be in the form of an advisory award; and
 - 14.7.1.4 arbitrating the *dispute* immediately if the *parties* request the *panellist*, by written agreement, to do so.
- 14.7.2 At the conclusion of the conciliation, the *panellist* must:
- 14.7.2.1 if the *dispute* is resolved, draw up a written agreement between the *parties*, which must be duly signed by the *parties*, OR
 - 14.7.2.2 if the *dispute* remains unresolved, issue the *parties* with a copy of ELRC Form E3 as provided in clause 14.9;
and
 - 14.7.2.3 issue the *General Secretary*, not later than four *days* thereof, with the original documents, as referred to in (a) or (b).
- 14.8 Conciliation proceedings may not be disclosed
- 14.8.1 Conciliation proceedings are private and confidential and are conducted on "without prejudice" basis so that no *party* may refer to statements made at conciliation proceedings during any subsequent proceedings unless the *parties* have so agreed in writing or as ordered otherwise by a court of law.
 - 14.8.2 Neither the *panellist* dealing with the conciliation process nor anybody else attending the conciliation hearing may be called as a witness during any subsequent proceedings to give evidence about what transpired during the conciliation process; provided that any person may be called to testify:
 - 14.8.2.1 as to the existence or not of a written agreement between the *parties* concluded during the conciliation,
 - 14.8.2.2 whether a *party* had signed such agreement,
 - 14.8.2.3 regarding any ruling by the *panellist*, including one contemplated in clause 43.1.


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14.9 Issuing a Conciliation Certificate of Outcome

14.9.1 Should it not be possible to settle the matter during the conciliation or, if no conciliation is held within the 30-day conciliation period, the *panellist* must issue the prescribed Conciliation Certificate of Outcome, ELRC Form E3, in respect of that *dispute*.

14.9.2 The *panellist* must determine the true nature of the *dispute* referred to conciliation. In the event of the panellist classifying the dispute different to how the applicant has, the panellist must write a ruling and give reasons for the change in the nature of the dispute.

14.10 Further conciliation

The *Council* may offer to appoint a *panellist* to assist the *parties* to resolve through further conciliation a *dispute* that has been referred to the *Council* and in respect of which:

14.10.1 a certificate has been issued in terms of clause 14.9 stating that the *dispute* remains unresolved; or

14.10.2 the period contemplated in clause 14.3.1 has elapsed and may appoint a *panellist* to conciliate if all the *parties* to the *dispute* agree.

14.11 Steps by *Council* after conclusion of the conciliation

14.11.1 After the conclusion of the conciliation, the *Council* will not process any *dispute of mutual interest* any further, unless a request is received from all the *parties* to the *dispute* to further explore conciliation or voluntary arbitration through the *Council*.

14.11.2 If an arbitration advisory award is issued in terms of clause, the *General Secretary* must *serve* a copy of the award on each *party* to the *dispute* within 14 days of conclusion of the proceedings or as soon as possible thereafter.

14.12 Steps by Council after conclusion of the pre-arbitration hearing

14.12.1 After the conclusion of the pre-arbitration hearing, the Council will not automatically process the dispute and schedule it for arbitration.

PART 5: PRE-ARBITRATION

15 Pre Arbitration

- 15.1 When a pre arbitration conference may be convened
- 15.1.1 The General Secretary shall set down a pre-arbitration process immediately after a conciliation process, in cases where a *party* referred a *dispute* contemplated in clauses 7.1.1 or 19.1.1 to the *Council* for conciliation. The parties to an arbitration must hold a pre-arbitration conference dealing with the matters referred to in sub-rule 15.1.3.
 - 15.1.2 The General secretay or the panellist may order parties to hold a pre arbitration conference and submit the pre arbitration minutes within a specified period.
 - 15.1.3 In pre-arbitration conference, the parties must attempt to reach consensus on the following:
 - 15.1.3.1 any means by which the dispute may be settled;
 - 15.1.3.2 facts that are agreed between the parties;
 - 15.1.3.3 facts that are in disputes;
 - 15.1.3.4 the issues that the Council is required to decide;
 - 15.1.3.5 the precise relief claimed and if compensation is claimed, the amount of the compensation and how it is calculated;
 - 15.1.3.6 the sharing and exchange of relevant documents, and the preparation of a bundle of documents in chronological order with each page numbered (with a copy for each of the *parties*, the *panellist* and one to be used by the witnesses);
 - 15.1.3.7 the manner in which documentary evidence is to be dealt with, including any agreement on the status of documents and whether documents, or part of documents, will *serve* as evidence of what they appear to be;
 - 15.1.3.8 whether evidence on affidavit will be admitted with or

without the right of any party to cross-examine the person who made the affidavit;

- 15.1.3.9 which party must begin;
 - 15.1.3.10 the necessity of any on-the-spot inspection;
 - 15.1.3.11 securing the presence at the Council of any witness;
 - 15.1.3.12 the resolution of any preliminary points that are intended to be taken;
 - 15.1.3.13 the exchange of witness statements;
 - 15.1.3.14 expert evidence;
 - 15.1.3.15 any other means by which the proceedings may be shortened;
 - 15.1.3.16 an estimate of time required for the hearing;
 - 15.1.3.17 the right of representation;
 - 15.1.3.18 whether an interpreter is required and, if so, for how long and for which languages.
- 15.1.4 At the conclusion of the pre-arbitration hearing, the *panellist* must:
- 15.1.4.1 draw up a pre-arbitration minute which must be duly signed by the *parties*, and
 - 15.1.4.2 the referring party must issue the *General Secretary*, not later than seven *days* thereof, with the original documents, as referred to in 15.1.4.1.

15.2 Jurisdiction to arbitrate

If at any stage during pre-arbitration proceedings it becomes apparent that there is a jurisdictional issue that had not been determined the *panellist* must require the referring *party* to prove that the *Council* has the necessary jurisdiction to resolve the *dispute* through arbitration.

PART 6: CON – ARB

16 Provisions applicable to the con-arb process

The following provisions shall apply to con-arb process:

- 16.1 When a matter has been referred to the *Council* as a con-arb, the arbitration hearing shall commence immediately after the conciliation. The *panellist* must:
- 16.1.1 attempt to resolve the matter by conciliation;
 - 16.1.2 if the matter remains unresolved, issue a certificate of outcome;
and
 - 16.1.3 immediately thereafter continue with the arbitration hearing
- 16.2 Where the other party (respondent) to the dispute objects to a con-arb, the normal conciliation and pre-arbitration process shall follow.
- 16.3 Despite any other provision in *the Act* or *these procedures*, the *panellist* must commence the arbitration immediately after certifying that the *dispute* remains unresolved if the *dispute* concerns:
- 16.3.1 the dismissal of an *employee* for any reason relating to probation;
 - 16.3.2 any unfair labour practice relating to probation;
 - 16.3.3 any other *dispute* contemplated in clause 7.1.3.
- 16.4 The *General Secretary* must give the *parties* at least 21 *days* notice in writing that a matter has been scheduled for con-arb.
- 16.5 The *General Secretary* must postpone a con-arb hearing at the written request of a *party* provided that:
- 16.5.1 such request is received by the *General Secretary* at least 7 *days* prior to the hearing
 - 16.5.2 the con-arb hearing is rescheduled within 21 *days* from the date on which the *dispute* was initially set down for hearing; and
 - 16.5.3 any further postponements must be dealt with in terms of the provisions of *these procedures* applicable to postponements of

arbitrations hearings.

- 16.6 If a *party* fails to appear or be represented at a hearing scheduled in terms of this Part *the panellist* must proceed with the matter on the date specified in the notice issued in terms of clause 16.4 above and issue an award, notwithstanding the *party's* failure to appear or be represented at that hearing, unless the *panellist* is satisfied that there are adequate reasons for that *party's* absence.
- 16.7 The provisions of *the Act* and *these procedures* that are applicable to conciliation and arbitration respectively apply, with the changes required by the context, to con-arb proceedings.
- 16.8 If the arbitration does not commence on the date specified in terms of the notice issued in this Part, the *General Secretary* must schedule the matter for arbitration either in the presence of the *parties* or by issuing a notice in terms of clause 42.

PART 7: ARBITRATION

17 Arbitration

17.1 How to request an *arbitration*

17.1.1 A *party* must refer a *dispute* contemplated in clauses 7.1.2 or 19.1.2 to the *Council* for arbitration by filing a completed ELRC Form E1.

17.1.2 The referring *party* must:

17.1.2.1 sign the referral form in accordance with clause 36;

17.1.2.2 attach to the referral form written proof, in accordance with rule 38, that the referral form was *served* on the other *parties* to the *dispute*;

17.1.2.3 if the referral form is filed out of time, attach an application for condonation in accordance with clause 53;

17.1.2.4 satisfy the *General Secretary* that clause 9 has been complied with in the event of an unfair labour practice *dispute*.

17.1.3 The *General Secretary* must accept a referral form but may refuse to process it until clause 17.1.2 has been complied with.

17.2 What the *Council* must do when it receives a referral

If clause 17.1.2 has been complied with, the *General Secretary* must register the *dispute* by recording it in a *Dispute Register* and thereafter:

17.2.1 appoint an *panellist* to arbitrate the *dispute* within 45 days of the date on which the *Council* received the referral;

17.2.2 decide the date, time and venue of the arbitration; and

17.2.3 notify the *parties* in writing of an arbitration hearing at least twenty-one (21) days prior to the scheduled date, unless the the parties agree to a shorter period or reasonable circumstances require a shorter . The time period of twenty-one (21) days runs from the date the notification is sent by the Council unless sent by registered mail in which case an additional seven (7) days must be allowed.

17.3 Appointment of a *panellist(s)* to arbitrate

17.3.1 If the *parties* to a *dispute* have agreed on a particular *panellist* to arbitrate and have informed the *General Secretary* of such agreement within four *days* of the date on which the *Council* had received the referral, the *General Secretary* must appoint the *panellist* agreed upon, provided that such *panellist* is available to arbitrate the *dispute* within the 45 *day*-period or a longer period as agreed to between the *parties* to the *dispute*.

17.3.2 Upon an application by a *party* the *General Secretary* may appoint more than one *panellist* to arbitrate, provided that the nature of the issue in *dispute* and/or the financial implications of the *dispute* justify this.

17.4 Who may represent a *party* in arbitration

17.4.1 Subject to clause 17.4.2, an *employee party* to the *dispute* may appear in the arbitration proceedings in person and or be represented by a legal practitioner or by a *member*, office bearer or official of that *party's Trade Union*. In the case of the *employer*, the *employer* may be represented by a delegated *employee* of the *employer* and or by a legal practitioner.

17.4.2 If the *dispute* being arbitrated is about the fairness of a dismissal and a *party* has alleged that the reason for the dismissal relates to an *employee's* conduct or capacity, the *parties* are not entitled to be represented by a legal practitioner in these arbitration proceedings unless:

17.4.2.1 the *panellist* and all the other *parties* consent; or

17.4.2.2 the *panellist* concludes that it is unreasonable to expect a *party* to deal with the *dispute* without legal representation, after considering:

17.4.2.2.1 the nature of the questions of law raised by the *dispute*;

17.4.2.2.2 the complexity of the *dispute*;

17.4.2.2.3 the public interest; and

17.4.2.2.4 the comparative ability of the opposing *parties* or their representatives to deal with the arbitration of the *dispute*.

17.5 *Parties* must prepare and copy documents for arbitration

17.5.1 If the *parties* to a *dispute* do not reach agreement on the bundle(s) of documents to be made available at an arbitration hearing, each *party* shall ensure that the documents that it wishes to submit to the arbitration is collated in a bundle in chronological order with each page numbered, and that it makes the necessary copies of such bundle, as follows: one for the *panellist*, or for each *panellist* if more than one *panellist* hears the matter, one for each *party* and one to be used as the witnesses' copy.

17.5.2 It is the responsibility of the *parties* and not of the *Council* to reproduce documents for arbitration. The *Council* may reproduce documents for the arbitration at the cost for the *parties*.

17.6 Further powers of a *panellist* acting as *Arbitrator*

17.6.1 The *panellist* may attempt to resolve the *dispute* through conciliation at any time, provided all the *parties* to the *dispute* agree.

17.6.2 The *panellist* appointed to arbitrate in the *dispute* must determine the procedure to be followed in the arbitration in order to resolve the *dispute* as fairly and quickly as possible, but must deal with the merits of the *dispute* with a minimum of legal formalities. In this respect the *panellist* may make any other direction to the *parties* concerning the conduct of the arbitration.



17.7 Jurisdiction to arbitrate

If at any stage during arbitration proceedings it becomes apparent that there is a jurisdictional issue that had not been determined the *panellist* must require the referring *party* to prove that the *Council* has the necessary jurisdiction to resolve the *dispute* through arbitration.

18 Statement of case

18.1 If, in the view of the *panellist*, it is necessary, the referring party/applicant shall be directed to submit a written Statement of Case setting out the factual and legal issues relating to the *dispute*. The other parties/respondents will be required to submit a written Response to the Statement of Case. Should a party that submits the Statement of Case or the Response to the Statement of Case not be legally represented, then such party shall not be unduly restricted to the issues raised in the Statement of Case or Response.

18.2 Where *parties* were directed to file a statement of case the *panellist* may, after receiving such statement of case, and up to 9 days before the date set down for arbitration:

H.M.  

- 18.2.1 direct the *General Secretary* to set the matter down for arbitration on a later date than the date for which the arbitration was set down in terms of clause 17.2.1; and/or
- 18.2.2 direct the *parties* to hold a further pre-arbitration meeting to clarify issues raised in the statement of case
- 18.3 If a *party* fails to attend a pre-arbitration meeting chaired by a *panellist* in terms of clauses 12.1 or 12.2, the *panellist* may deal with the matter in terms of clause 43, which applies with the changes required by the context.
- 18.4 Should all the *parties* to the *dispute* agree the *panellist* may attempt to resolve the *dispute* through further conciliation.
- 18.5 Award
- 18.5.1 Within 14 *days* of the conclusion of the arbitration proceedings the *panellist(s)* must, having had regard to the *Council's* policy on arbitrations, issue an arbitration award with reasons and it must be signed by the *panellist* or *panellists*, as the case may be.
- 18.5.2 Within four *days* of receipt of the award from the *panellist* the *General Secretary* must *serve* a copy of the award on each *party* to the *dispute* or to the person who represented a *party* in the arbitration proceedings.
- 18.5.3 The *General Secretary* may, on good cause shown, extend the period within which the arbitration award is to be issued.
- 18.5.4 An award issued in terms of *these procedures* shall be final and binding.

PART 8: REFERRAL OF A *DISPUTE BY AGREEMENT*

19 Provisions applicable

The following provisions shall apply:

- 19.1 If all the *parties* to any *mutual interest dispute* or any other labour *dispute* not listed in clause 7 agree thereto in writing, the *Council* may:
- 19.1.1 conciliate such *dispute*;
 - 19.1.2 arbitrate such *dispute*;
- 19.2 Any such *dispute* may include one that must otherwise, in terms of *the Act* or any other statute, be determined by the Labour Court⁸ or by the *CCMA*.
- 19.3 A written agreement to arbitrate a *dispute* referred to in this clause 19 must be concluded by completing and signing the appropriate part of ELRC Form E1.
- 19.4 The *General Secretary* may, within 14 *days* of receiving such referral, refuse to accept such referral for conciliation and arbitration or both, by informing all the *parties* to the *dispute* of such decision.
- 19.5 If the *dispute* is one that must or may be referred to conciliation in terms of clause 19.1.1 of *these procedures*, the conciliation procedure of clause 14 applies.
- 19.6 If the *dispute* is one that must or may be referred to arbitration in terms of clause 19.1.2, the arbitration procedure of clause 17 applies.
- 19.7 Notwithstanding any provisions to the contrary the *General Secretary* may determine that any *dispute* referred to the *Council* by agreement may be resolved by any other alternate method contained in this *dispute* procedure.
- 19.8 If the *dispute* is one that may be referred in terms of clause 7.2.2 for a compliance order, clause 69 applies.

⁸ For example a dismissal *dispute* where an *employee* has been dismissed because the *employee* refused to join, was refused membership of, or was expelled from, a *Trade Union party* to a closed shop agreement (s 26(5)(b) of *the Act*).

PART 9: EXPEDITED *DISPUTE* RESOLUTION

20 General Provisions Applicable

The following provisions shall apply to the expedited *dispute* resolution process:

- 20.1 The *General Secretary*, subject to clause 20.2 or a Collective Agreement of the *Council* including its *Provincial Chambers* may refer any collection of *disputes* that may otherwise be referred to the *General Secretary*, for expedited joint conciliation and arbitration.
- 20.2 A collection of *disputes* that may be referred to the *General Secretary* for expedited joint *dispute* resolution are *disputes* that:
- 20.2.1 have arisen within the same province;
 - 20.2.2 involve matters of *mutual interest* or that are arbitrable in terms of clause 7;
 - 20.2.3 involve the application of similar legal principles or facts; and
 - 20.2.4 would be more economically and effectively resolved as compared to such *disputes* being processed individually in terms of the provisions of *these procedures* that would otherwise apply.
- 20.3 When referring a collection of *disputes* in terms of clause 20 the *General Secretary* must publish a notice in this regard in any circulars, bulletins or gazettes.
- 20.4 A notice referred to in clause 20.3 shall include the following:
- 20.4.1 a description of the category of cases that shall be subject to such procedure ('the published category');
 - 20.4.2 an invitation to any *party* or individual *employee* who may have a *dispute* falling within the published category to refer such *dispute* to the *Council* by a specified expiry date ('the expiry date');
 - 20.4.3 the address(es) and fax number(s) where such referrals must be delivered or faxed.
- 20.5 All *parties* and *employees* must refer further *disputes* falling within the published category to the *Council* by the expiry date. After the expiry date no *dispute* falling within the published category may be referred to the *Council*, provided that the *General Secretary* may allow a *party* on good cause shown

to refer a *dispute* after the expiry date.

21 Procedures applicable

The following clauses will apply to *disputes* contemplated in this Part, read with the changes required by the context:

- 21.1 regarding conciliations, clause 11;
- 21.2 regarding arbitration, clause 17;
- 21.3 regarding *service* and filing of documents, the provisions of clauses 33 to 41;
- 21.4 regarding procedures that apply to both conciliations and arbitrations, the provisions of clauses 42 to 56;
- 21.5 regarding applications, the panellist may dispense with the provisions of clause 57;
- 21.6 regarding other ancillary matters, the provisions of clauses 58 to 62 will apply.

22 Conciliators and Arbitrators

22.1 Appointment of a co-ordinator and a panel of *Conciliators* and *Arbitrators*

- 22.1.1 The *General Secretary* must appoint a panel of *Conciliators* and *Arbitrators* and the co-ordinator.
- 22.1.2 The *General Secretary* must inform the *employer* and the representative *Trade Unions* of the appointment of the panel of *Conciliators* and *Arbitrators* and the co-ordinator, as contemplated in clause 22.1.1.

22.2 Mandate of *Conciliators* and *Arbitrators*

The mandate and responsibilities of *Conciliators* and *Arbitrators* shall be:

- 22.2.1 to conciliate and arbitrate the *disputes* as a team or individually where appropriate;
- 22.2.2 in collaboration with the *General Secretary*, to agree on a list of cases to be dealt with in this process;
- 22.2.3 to identify issues that are common to the *disputes*;
- 22.2.4 to conciliate and or arbitrate the *disputes* collectively or individually as provided for in this procedure;

- 22.2.5 to determine the procedures to be followed in order to resolve the *disputes* as fairly and quickly as possible;
- 22.2.6 to forward to the *General Secretary* all records of the proceedings within 14 *days* of the conclusion of the proceedings.

23 Representation of the *parties* at the expedited conciliation and arbitration

- 23.1 This clause must be read together with clause 43 of these procedures.
- 23.2 The applicant must appear in person at the expedited conciliation and thereafter at the expedited pre-arbitration and expedited arbitration if applicable.
- 23.3 The *employer* will appoint officials in its employ to represent the *employer* during this process.
- 23.4 Subject to clause 23.1, above, the *Trade Union* representatives will be entitled to represent all of its affected member(s), if mandated to do so.
- 23.5 Individual *employees/non members of Trade Union parties* may only be represented in person.
- 23.6 Despite clause 17.4.1 the *parties* are not entitled to be represented by a legal practitioner in these expedited joint conciliation and arbitration proceedings unless:
 - 23.6.1 the *panellist* and all the other *parties* consent thereto, in writing; or
 - 23.6.2 the *panellist* concludes, in writing, that it is unreasonable to expect a *party* to deal with the *dispute* without legal representation, after considering:
 - 23.6.2.1 the nature of the questions of law raised by the *dispute*;
 - 23.6.2.2 the complexity of the *dispute*;
 - 23.6.2.3 the public interest; and
 - 23.6.2.4 the comparative ability of the opposing *parties* or their representatives to deal with the arbitration of the *dispute*.

24 Mandate of the *parties* and enforceability of agreements and awards

- 24.1 Participation in this process by officials of the *employer* is, in itself, proof that they are duly mandated to bind the *employer* during the conciliation and

arbitration processes and that any agreement reached by the *parties* or any arbitration award will be enforceable against the *employer*, subject to legal remedies.

- 24.2 Participation in this intervention by *Trade Union* officials is, in itself, proof that they are duly mandated to bind the *Trade Union* during the conciliation and arbitration processes and that any agreement reached by the *parties* or any arbitration award will be enforceable against the *Trade Union*, subject to legal remedies.
- 24.3 Representative *Trade Unions* and or individual *employees* will ensure that the *Dispute Referral Forms* are completed and duly signed by the grievant. The signature of the grievant, recorded on the *Dispute Referral Form*, will confirm that any agreement reached or any arbitration award will be binding and enforceable against the grievants, subject to legal remedies.

25 Identification and registration of *disputes* for this process

- 25.1 The *General Secretary* shall identify the category of *disputes* that qualify to be dealt with in terms of this procedure.
- 25.2 The *Trade Union's parties* and or individuals must submit completed and signed *Dispute Referral Forms* to the *Council* for registration on or before the date determined by the *General Secretary*.
- 25.3 The *disputes* will be registered in terms of the expedited *Dispute Resolution Procedures* of the *Council*, subject to the proviso that time frames for referring these *disputes* have been waived by the *parties*.

26 Collective expedited conciliation of *disputes*

- 26.1 The *General Secretary* will, with reference to the representative *Trade Unions*, the *employer* and the Co-ordinator of the panel of *Conciliators* and *Arbitrators*, determine the period for the *dispute* meetings and shall call the first conciliation the first workshop.
- 26.2 The objectives of the conciliation workshop will, amongst others, be:
- 26.2.1 to identify complications and/or *dispute* issues which are common to all or most of the cases referred to the *Council* for resolution through this process;
- 26.2.2 to facilitate broad in principle agreement between the *parties* aimed at resolving complications and/or issues in *dispute* that are common to all or most of the cases referred;
- 26.2.3 to resolve through collective expedited conciliation as many of the referred cases as possible;

- 26.2.4 to identify all outstanding cases, which, in view of the *parties* are likely to be resolved through conciliation and agree on appropriate processes to achieve that end.
- 26.3 The remaining *days* will be set down and spaced, by the Co-ordinator of the panel of *Conciliators* and *Arbitrators*, in such a way to ensure that the process is completed by the date specified by the *General Secretary*, except for those matters which may be affected by possible labour court reviews.
- 26.4 The next step in the process will be to resolve as many of the *disputes* as possible through collective joint conciliation and thereafter, where necessary, through individual conciliation.
- 26.5 It is anticipated that the expedited *dispute* resolution process, conciliation and arbitration, should not exceed a total number of *days* determined by the *General Secretary*.
- 26.6 The *General Secretary* may, after considering the written request and motivation by the Co-ordinator, extend the date that has already been determined.
- 26.7 At the conclusion of each conciliation, the *panellist* must either:
- 26.7.1 draw up a written agreement between the *parties* if the *dispute* is resolved; such agreement must be duly signed by the *parties*, AND
 - 26.7.2 issue the *parties* with ELRC Form E3, AND
 - 26.7.3 if the *parties* are present when the *panellist* issues ELRC Form E3 and if the *dispute*:
 - 26.7.3.1 may be arbitrated by the *Council* in terms of clause 7, the *panellist* should preferably enquire whether the referring *party* intends to refer the *dispute* for *Council* arbitration;
 - 26.7.3.2 may be arbitrated by the *Council* in terms of clause 17, the *panellist* should preferably enquire whether any of the *parties* intends to refer the *dispute* for *Council* arbitration;and, if so, facilitate the completion and signing of ELRC Form E14;
 - 26.7.4 issue the *General Secretary* of Council, not later than four *days* thereof, with the original documents as required by clauses 26.7.1 to 26.7.3.

- 26.8 The *General Secretary* will, with reference to the co-ordinator compile a list of cases and or issues to be referred to arbitration.

27 Expedited pre-arbitration meetings

- 27.1 In regard to cases not resolved, working from the list referred to in clause 26.8, the *panellists* will facilitate pre-arbitration meetings between the *parties*, the primary purposes of which will be:
- 27.1.1 to identify issues which were resolved during conciliation and which are relevant to the cases referred to arbitration, and
 - 27.1.2 to attempt to find further areas of agreement so that the remaining issues in *dispute* for arbitration can be curtailed as far as possible.
- 27.2 Each matter being referred to arbitration shall be subject to an individual pre-arbitration meeting under the auspices and with the assistance of one of the *panellists*, unless the *General Secretary* decides otherwise.
- 27.3 The following, among others, shall be attended to during such pre-arbitration meetings:
- 27.3.1 the sharing and exchange of relevant documents, and the preparation of a bundle of documents in chronological order with each page numbered (with a copy for each of the *parties*, the *panellist* and one to be used by the witnesses);
 - 27.3.2 facts that are common cause;
 - 27.3.3 facts that are in *dispute*;
 - 27.3.4 the issue/s that the *panellist* is required to decide;
 - 27.3.5 the manner in which documentary evidence is to be dealt with, including any agreement on the status of documents and whether documents, or part of documents, will *serve* as evidence of what they appear to be;
 - 27.3.6 as far as possible, which witnesses each *party* to the *dispute* will call;
 - 27.3.7 any other means by which the proceedings may be shortened; and
 - 27.3.8 whether an interpreter is required and, if so, for how long and for which languages.
- 27.4 The provisions of clauses 15.1.3 will further apply regarding pre-arbitration meetings, read with the changes required by the context.

28 Expedited arbitration proceedings

- 28.1 The appointed *panellists* will determine the procedure to be followed in order to resolve the *disputes* as fairly and as quickly as possible with a minimum of legal formalities, subject to the proviso that the rules of natural justice must be applied.
- 28.2 A single *panellist* will arbitrate each matter referred to arbitration, unless the *parties* and the *General Secretary* agree otherwise, subject to the understanding that the *panellists* will confer with one another to ensure conformity in the application of legal principles.

29 Recording of the expedited arbitration

- 29.1 Despite clause 52, the *Council* will not provide any recording facilities for these arbitrations.
- 29.2 Hand written notes kept by the *panellists* will constitute a record of the proceedings.

30 Administration

- 30.1 The *General Secretary* shall ensure that secretarial *services* and administrative support is provided during conciliation and arbitration proceedings.
- 30.2 The *employer* and the representative *Trade Unions* must provide one person each for liaison with the *General Secretary* and the Co-ordinator, of the panel of *Conciliators* and *Arbitrators*, to facilitate the administration of the expedited *dispute* resolution process.
- 30.3 Any correspondence given to the representatives, referred to in clause 30.2, shall be deemed to be served on the applicant and the respondent.

31 Finality

- 31.1 The *General Secretary's* decision is final and binding.
- 31.2 No person may apply to any court of law to review the *General Secretary's* decision until the resolution of the *dispute* has been concluded in the *Council* through conciliation and/or arbitration, as the case may be.

PART 10: INQUIRY BY ARBITRATOR

32 Provisions Applicable

- 32.1 The *employer* with the written consent of the *employee*, or the *employee* with the written consent of the *employer*, may require the *General Secretary* to conduct an enquiry in the form of an arbitration into allegations about the conduct or capacity of that *employee*.
- 32.2 When the *General Secretary* receives a referral in terms of clause 32.1 the *General Secretary* must convene an arbitration, which will take the place of the internal disciplinary enquiry.
- 32.3 The request must be in the prescribed form ELRC Form E12.
- 32.4 The *General Secretary* of the *Council* must appoint, on receipt of the application on the prescribed form, a *panellist* and set the date of hearing, within 60 days; provided that the *employer* provides proof:
- 32.4.1 of advising the *employee*, in writing, of the allegation and, where clause 32.1 applies, the possibility of the mandatory sanction of dismissal;
- 32.4.2 of serving on the *employee* the referral to the *General Secretary* of the *Council* for inquiry by arbitrator.
- 32.5 The provisions of clause 17.4 shall apply to such arbitration, with the exception that the *employee* may also be represented in the arbitration proceedings by a *co-employee*.
- 32.6 The *panellist* arbitrating in terms of this clause 32 must, in light of the evidence presented and by reference to the criteria of fairness in *the Act*, direct what action, if any, should be taken against the *employee*. The provisions of clause 20 shall not apply to such proceedings and the issue of jurisdiction may be considered at any time.
- 32.7 The provisions on pre-arbitration meetings in clause 12 shall apply with the changes required by the context.

PART 11: SERVICE AND FILING OF DOCUMENTS

33 How to contact the *Council*

- 33.1 The addresses, telephone, tele-fax number and email of the offices of the *Council* are listed in Schedule 2 of *this Constitution*: Schedules (Part D).
- 33.2 Documents may only be filed with the *Council* at the addresses, tele-fax numbers or email listed in Schedule 2 of *this Constitution*: Schedules (Part D).

34 When are the offices of the *Council* open

- 34.1 The offices of the *Council* are open on the *days* and hours as indicated in Schedule 2 of *this Constitution*: Schedules (Part D), unless alternative arrangements to the contrary
- 34.2 Documents may only be filed with the *Council* during the hours referred to in clause 34.1, unless otherwise agreed to in writing by the *General Secretary*.
- 34.3 Notwithstanding clause 34.2 documents may be tele-faxed or electronically transmitted by means of any permissible law.

35 How to calculate time periods

- 35.1 For the purpose of calculating any period of time in terms of *these procedures*:
- 35.1.1 "*days*" mean:
- 35.1.1.1 if the number of *days* referred to is more than 5, calendar *days* including Saturdays, Sundays and public holidays;
- 35.1.1.2 if the number of *days* referred to is 5 or less, calendar *days* excluding Saturdays, Sundays and public holidays; and
- 35.1.2 the first *day* is excluded and the last *day* is included, subject to clauses 35.2 and 35.3.
- 35.2 When calculating time periods the *days* listed in clause 2.1 of Schedule 2 of *this Constitution*: Schedules (Part D) are excluded.

35.3 The last *day* of any period must be excluded if it falls on a Saturday, Sunday, or any *day* referred to in clause 35.2.

35.4 The term "*day*" has a similar meaning to the term "*days*", as defined in this clause 35.

36 Who may sign documents and referral forms

36.1 A document that a *party* must sign in terms of *these procedures* may be signed:

36.1.1 on behalf of an *employee party*, subject to clause 36.3, by:

36.1.1.1 the affected *employee(s)*; or

36.1.1.2 a legal practitioner; or

36.1.1.3 a *member*, office bearer or official of that *party's Trade Union*;

36.1.2 on behalf of the *employer* by:

36.1.2.1 a employee delegated by the employer; or

36.1.2.2 a legal practitioner.

36.2 Where a legal practitioner or a *member*, office bearer or official of that *party's Trade Union* signs a document on behalf of more than one *employee*, a list must be attached containing the names of the *employees* who have mandated such persons to sign on their behalf.

36.3 If proceedings are jointly instituted or opposed by more than one *employee*, documents may be signed by an *employee* who is mandated by the other *employees* to sign documents. A list in writing must be attached to the document, containing:

36.3.1 the names of the *employees* who have mandated the *employee* to sign on their behalf;

36.3.2 such *employees'* signatures.

37 How to serve documents on other parties

37.1 A *party* must serve a document on the other *parties*:

37.1.1 by handing a copy of the document to

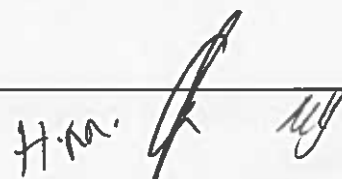
37.1.1.1 the person concerned; or

- 37.1.1.2 a representative authorised in writing to accept service on behalf of the person; or
 - 37.1.1.3 a person who appears to be at least 16 years old and in charge of the person's place of residence, business or place of employment premises at the time; or
 - 37.1.1.4 a person identified in clause 37.2;
- 37.1.2 by leaving a copy of the document at:
- 37.1.2.1 an address chosen by the person to receive *service*; or
 - 37.1.2.2 any premises in accordance with clause 37.3;
- 37.1.3 by tele-fax or any other electronic means (including but not limited to email) permissible by law during the normal working office hours of the *party* on whom a document is being *served*, unless otherwise agreed to in writing by that *party*;
- 37.1.4 by sending a copy of the document by registered post or telegram to the last-known address of the *party* or an address chosen by the *party* to receive *service*.
- 37.2 A document may also be *served* on:
- 37.2.1 a company or other body corporate by handing a copy of the document to a responsible *employee* of the company or body at its registered office, its principal place of business within the Republic or its main place of business within the magisterial district in which the *dispute* first arose;
 - 37.2.2 an *employer* by handing a copy of the document to a responsible *employee* of the *employer* at the workplace where the *employees* involved in the *dispute* ordinarily work or worked;
 - 37.2.3 a *Trade Union* or *employers'* organisation by handing a copy of the document to a responsible *employee* or official at the main office of the *Trade Union* or *employers'* organisation or its office in the magisterial district in which the *dispute* arose;
 - 37.2.4 a partnership, firm or association by handing a copy of the document to a responsible *employee* or official at the place of business of the partnership, firm or association or, if it has no place of business, by *serving* a copy of the document on a partner, the owner of the firm or the chairman or secretary of the managing or other controlling body of the association, as the case may be;

- 37.2.5 a municipality, by *servicing* a copy of the document on the municipal manager or any person acting on behalf of that person;
 - 37.2.6 a statutory body, by handing a copy to the secretary or similar officer or *member* of the board or committee of that body, or any person acting on behalf of that body;
 - 37.2.7 the State or a province, a state department or a provincial department, a minister, premier or a *member* of the executive committee of a province by handing a copy to a responsible *employee* at the head office of the *party* or to a responsible *employee* at any office of the State Attorney;
 - 37.2.8 by any other means authorised by the *Council*.
- 37.3 If no person identified in clause 37.2 is willing to accept *service*, *service* may be affected by affixing a copy of the document to:
- 37.3.1 the main door of the premises concerned or;
 - 37.3.2 if this is not accessible, a post-box or other place to which the public has access.
- 37.4 The *General Secretary* or a *panellist* may order *service* in a manner other than prescribed in this clause 37.

38 How to prove a document was served

- 38.1 A *party* must prove to the *General Secretary* or a *panellist* that a document was *served* in terms of the procedures, by providing the *General Secretary* or the *panellist* with:
- 38.1.1 a copy of proof of mailing the document by registered post to the other *party*; or
 - 38.1.2 a copy of the telegram communicating the document to the other *party*; or
 - 38.1.3 a copy of the tele-fax transmission report indicating the successful transmission to the other *party* of the whole document;
 - 38.1.4 a copy of the email report indicating that the document was received and read by the other party;
 - 38.1.5 if a document was *served* by hand:
 - 38.1.5.1 a copy of a receipt signed by, or on behalf of, the other *party* clearly indicating the name and designation of the



recipient and the place, time and date of *service*; or

38.1.5.2 a statement confirming *service* signed by the person who delivered a copy of the document to the other *party* or left it at any premises.

38.2 If proof of *service* in accordance with clause 38.1 is provided, it is presumed, until the contrary is proved, that the *party* on whom it was *served* has knowledge of the contents of the document.

38.3 Notwithstanding the provisions of this clause 38, the *General Secretary* or the *panellist* has a discretion to make any order as to *service* that such person deems fit.

38.4 The *General Secretary* or a *panellist* may accept proof of *service* in a manner other than prescribed in this clause 38, as sufficient.

39 How to *file* documents with the *Council*

39.1 A *party* must *file* documents with the *Council*:

39.1.1 by handing the document to a designated officer at the office of the *Council* at an address listed in Schedule 2 of *this Constitution*: Schedules (Part D);

39.1.2 by sending a copy of the document by registered post to the office of the *Council* at an address listed in Schedule 2 of *this Constitution*: Schedules (Part D); or

39.1.3 by faxing or e-mailing the document to the *Council* at a number listed in Schedule 2 of *this Constitution*: Schedules (Part D).

39.2 Regarding clause 39.1.1, a *party* can obtain information as to who are designated officers from the *Council's* reception.

39.3 A document is filed with the *Council* when:

39.3.1 the document is handed to a designated officer of the *Council*;

39.3.2 a document sent by registered post is received by the *Council*; or

39.3.3 the transmission of a fax is completed.

39.4 A *party* must only *file* the original of a document sent by fax, if requested to do so by the *Council* or a *panellist*. A *party* must comply with a request to *file* an original document within 14 *days* of the request.

40 When documents sent by registered post are presumed to be received

Any document or notice sent by registered post by a *party* or the *General Secretary* is presumed, until the contrary is proved, to have been received by the person to whom it was sent seven *days* after it was posted.

How to seek condonation for documents delivered late

40.1 This clause applies to any referral document or application delivered outside of the applicable time period prescribed in *the Act* or *these procedures*.

40.2 A *party* must apply for condonation, in terms of clause 57, when delivering the document to the *Council*. The *General Secretary* may require the *parties* to do so on ELRC Form E2.

40.3 An application for condonation must set out the grounds for seeking condonation and must include details of the following:

40.3.1 the degree of lateness;

40.3.2 the reasons for the lateness;

40.3.3 the referring *parties'* prospects of succeeding with the referral and obtaining the relief sought against the other *party*;

40.3.4 any prejudice to the other *party*; and

40.3.5 any other relevant factors.

40.4 The *General Secretary* may assist a referring *party* to comply with this clause.

41 Condonation for failure to comply with time frames

The *General Secretary* or a *panellist* may condone any failure to comply with the time frames in *these procedures*, on good cause shown. An application for condonation must be made in terms of clause 40.3.



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PART 12: PROCEDURES THAT APPLY TO CONCILIATION, PRE-ARBITRATION AND ARBITRATION

42 Where conciliation, pre-arbitration or arbitration must take place and how the *parties* should be notified

42.1 The *General Secretary* shall notify *parties* of:

42.1.1 the date and time of a conciliation and or pre-arbitration at least 14 *days* before such process is due to be held;

42.1.2 the date and time of an arbitration or Inquiry by arbitration at least 21 *days* before such process is due to be held;

42.1.3 the venue where the conciliation or arbitration proceedings will be held at least four *days* before such process is due to be held;

unless otherwise agreed by the *parties*.

42.2 A *dispute* will be conciliated or arbitrated in the province in which the cause of action arose, unless otherwise decided by the *General Secretary* after giving the *parties* to the *dispute* opportunity to comment.

42.3 The conciliation pre-arbitration and /arbitration proceedings shall be held at a venue to be determined by the *General Secretary*, which shall preferably be at the *employee's* workplace or the premises of the *Trade Union* concerned unless otherwise agreed upon by the *parties* concerned.

42.4 All communication concerning the date, the venue and any other logistics by the *parties* and the *panellist* should be done through the *General Secretary*. If any arrangements are made directly among the *parties*, or between the *parties* and the *panellist*, the *General Secretary* must confirm these before the date of the conciliation pre-arbitration or arbitration before they take effect.

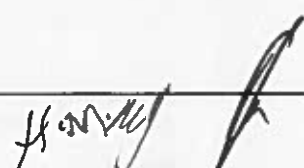
43 What happens if a *party* fails to attend at conciliation

43.1 If a *party* on whose behalf a matter has been referred fails to attend the commissioner may -

43.1.1 Continue with the proceedings;

43.1.2 Adjourn the conciliation to a later date within the 30 day period; or

- 43.1.3 Conclude the proceedings by issuing a certificate that the dispute remains unresolved.
- 43.1.4 In exercising a discretion in terms of sub-rule (1), a commissioner should take into account, amongst other things-
 - 43.1.4.1 Whether the party has previously failed to attend a conciliation in respect of that dispute;
 - 43.1.4.2 Any reason given for that party's failure to attend;
 - 43.1.4.3 Whether conciliation can take place effectively in the absence of one or more of the parties;
 - 43.1.4.4 The likely prejudice to the other party of the commissioner's ruling; and
 - 43.1.4.5 Any other relevant factors.
- 43.2 If the referring party to the dispute fails to appear in person or be represented at a **con-arb** the may declare the conciliation unresolved and proceed to arbitration, at the arbitration stage, the pannelist may
 - 43.2.1 dismiss the matter; or
 - 43.2.2 continue with the proceedings in the absence of the party; or
 - 43.2.3 issue an order of costs, in terms of clause 54, and adjourn the proceedings to a later date; or
 - 43.2.4 in exceptional circumstances and on good cause shown, adjourn the proceedings to a later date.
- 43.3 If the reffering party to the dispute fails to appear in person or be represented at arbitration proceedings, or , the *panellist* may:
 - 43.3.1 dismiss the matter; or
 - 43.3.2 continue with the proceedings in the absence of the party; or
 - 43.3.3 issue an order of costs, in terms of clause 54, and adjourn the proceedings to a later date; or
 - 43.3.4 in exceptional circumstances and on good cause shown, adjourn the proceedings to a later date.
- 43.4 A *panellist* must be satisfied that the *party* had been properly notified of the date, time and venue of the proceedings, before making any decision in terms of clause 43.1.



- 43.5 In exercising the above discretion , a commissioner should take into account, amongst other things-
- 43.5.1 whether the party has previously failed to attend a conciliation in respect of that dispute;
 - 43.5.2 any reason given for that party's failure to attend;
 - 43.5.3 whether conciliation can take place effectively in the absence of that party;
 - 43.5.4 the likely prejudice to the other party of the commissioner's ruling;
 - 43.5.5 any other relevant factors.
- 43.6 If a matter is dismissed, the *General Secretary* must send a copy of the ruling to the *parties within 14 days*.

44 Objections to representatives appearing before the Council.

- 44.1 If a *party* to the *dispute* objects to the representation of another *party* to the *dispute* or the *panellist* suspects that the representative of a *party* does not qualify in terms of *these procedures*, the *panellist* must determine this issue.
- 44.2 The *panellist* may call upon the representative to establish why the representative should be permitted to appear in terms of *these procedures*.
- 44.3 A representative must tender any documents requested by the *panellist*, in terms of clause 44.2, including constitutions, payslips, contracts of employment, documents and forms, recognition agreements and proof of membership of a *Trade Union* or *employers'* organisation.

45 How a arbitration hearing can be postponed

- 45.1 An arbitration may be postponed-
- 45.1.1 by written agreement between the parties; or
 - 45.1.2 by application and on notice to the other parties in terms of sub-rule 45.3.
- 45.2 The Council must postpone an arbitration without the parties appearing if-

- 45.2.1 All parties to the dispute agree in writing to the postponement; and
- 45.2.2 The written agreement for the postponement is received by the Council at least seven (7) days prior to the scheduled date of arbitration.
- 45.3 If the conditions of sub-rule (2) are not met, any party may apply in terms of Rule 53 to postpone an arbitration by delivering an application to the other parties to the dispute and filing a copy with the Council before scheduled date of the arbitration
- 45.4 After considering the written application, the Council may-
 - 45.4.1 Without convening a hearing, postpone the matter; or
 - 45.4.2 Convene a hearing to determine whether to postpone the matter.

46 How to join or substitute *parties* to proceedings

- 46.1 The *General Secretary* or a *panellist* may at any stage prior to the conclusion of the arbitration hearing, join any number of persons as *parties* in proceedings, if the right to relief depends on substantially the same question of law or fact, or if a party has a substantial interest in the dispute.
- 46.2 A *panellist* may make an order joining any person as a *party* in the proceedings if the *party* to be joined has a substantial interest in the subject matter of the proceedings.
- 46.3 When the *Council* requests from any *party* information as to whether any person has a substantial interest in the subject matter of specific proceedings, that *party* must comply by providing the *Council* with the full name, PERSAL number, full contact details and the interest of that person.
- 46.4 A *panellist* may make an order in terms of clause 46.2:
 - 46.4.1 of the *panellist's* own accord;
 - 46.4.2 on application by a *party*; or
 - 46.4.3 if a person entitled to join the proceedings applies at any time during the proceedings to intervene as a *party*.
- 46.5 An application in terms of *these procedures* must be made in terms of clause 57.
- 46.6 When making an order in terms of clause 46.2, a *panellist* may:
 - 46.6.1 give appropriate directions as to the further procedure in the

proceedings; and

46.6.2 make an order of costs in accordance with these rules.

46.7 If in any proceedings it becomes necessary to substitute a person for an existing *party*, any *party* to the proceedings may apply to the *General Secretary* for an order substituting that *party* for an existing *party*, and a *panellist* may make such order or give appropriate directions as to the further procedure in the proceedings.

46.8 An application to join any person as a *party* to proceedings or to be substituted for an existing *party* must be accompanied by copies of all documents previously, delivered, unless the person concerned or that person's representative is already in possession of the documents.

46.9 Subject to any order made in terms of clauses 46.6 or 46.7, a joinder or substitution in terms of this rule does not affect any steps already taken in the proceedings.

46.10 A person that has been joined or who has been substituted for an existing *party* is bound by any decision made by the *Council*, the *General Secretary* or the *panellist* as if the person had been a *party* to the proceedings from their inception, unless the *panellist* rules otherwise.

47 How to correct the citation of a party

If a *party* to any proceedings has been incorrectly or defectively cited, the *General Secretary* or a *panellist* may, on application and on notice to the *parties* concerned, correct the error or defect.

48 When disputes may be consolidated or hearing separated

The *General Secretary* or a *panellist*, of the *General Secretary's* or *panellist's* own accord or on application, may consolidate more than one *disputes* so that the *disputes* may be dealt with in the same proceedings, or it may order separate hearings to be held in respect of separate *disputes*.

49 Payment of witness fees to subpoenaed witnesses

49.1 A witness subpoenaed in any proceedings in the *Council* is entitled to a fee in accordance with the tariff of allowances prescribed and published by notice in the *Government Gazette* in terms of Section 142 (7) of the *Act*.

49.2 The witness fee must be paid by-

49.2.1 the party who requested the Council to issue the subpoena; or

49.2.2 the Council, if the issuing of the subpoena was not requested by the

party or if the Council waives the requirement to pay witness fees in terms of Section 142 (7)(c).

- 49.3 Despite sub-rule 49.1 the commissioner may, in appropriate circumstances, order that a witness receives no fee or reasonable travel costs and subsistence expenses or only part of such fees or expenses.
- 49.4 Where such witness is an *employee* of the State such witness shall not be paid an allowance for the time that the witness was required to be available to give evidence during such proceedings, unless the witness can show that the witness will not be paid for such time. Such a witness may, however, claim the prescribed fees regarding travel and subsistence expenses.
- 49.5 The *party* calling for the subpoena of a witness shall be responsible for the payment of the prescribed allowances for the witness.
- 49.6 The *General Secretary* may, on good cause shown, waive the requirements of clause 49.5 and approve the payment of witness fees from the *Council's* own funds.

50 How an applicant may withdraw a matter

- 50.1 The applicant may withdraw a matter by filing a notice of withdrawal on the *General Secretary* on prescribed Form ELRC E16.
- 50.2 The applicant shall inform the *General Secretary* in writing if the *dispute* had been resolved between the *parties* and if any settlement agreement has been reached, such written settlement agreement must be attached to the Notice of Withdrawal.
- 50.3 From a date 14 *days* after a matter had been withdrawn an applicant will be barred from reinstating a referral. If the applicant wants the matter to be processed again, the applicant must then re-refer it as a new *dispute*.

51 How to have a subpoena issued

- 51.1 Any party who requires the commissioner to subpoena a person in terms of section 142(1) of the Act, must file a completed Form ELRC E10 together with a written motivation setting out why the evidence of the person to be subpoenaed is necessary.
- 51.2 A *party* requesting the *General Secretary* to waive the requirement for the *party* to pay witness fees must set out the reasons for the request in writing at the time of requesting the *General Secretary* to issue a subpoena in respect of that witness.
- 51.3 An application in terms of clause 51.1 must be filed with the *General Secretary* at least 14 *days* before the arbitration hearing, or as directed by

the *panellist* hearing the arbitration.

- 51.4 The *General Secretary* or a *panellist* may refuse to issue a subpoena if:
- 51.4.1 the *party* does not establish why the evidence of the person is necessary;
 - 51.4.2 the *party* to be subpoenaed does not have a reasonable period in which to comply with the subpoena;
 - 51.4.3 the *General Secretary* or a *panellist* is not satisfied that the *party* has arranged to pay the witness fees and the reasonable travel costs of the person subpoenaed.
- 51.5 A subpoena must be *served* on the witness subpoenaed:
- 51.5.1 by the person who has requested the issue of the subpoena or by the Sheriff, at least seven (7) *days* before the scheduled date of the arbitration;
 - 51.5.2 and accompanied by payment of the prescribed witness fees for one or more *days* in accordance with the tariff of allowances published by notice in the Gazette in terms of section 142(7) of *the Act* and the witnesses' reasonable travel costs.
- 51.6 If a subpoena is *served* upon the witness by way of fax, the person requesting the subpoena shall ensure that that witness is telephoned or otherwise contacted to establish whether the subpoenaed person has received the subpoena, and shall *serve* a written statement to this effect with the *General Secretary* and the *panellist*. This note must include the date of the call, details of the person making the call and of the people to whom the person spoke in this regard, and of the content of the call.
- 51.7 Any *party* who requires the *Council* to subpoena a person should bear the costs of *service* of the subpoena on that person. That *party* may apply to the *General Secretary* to waive this clause and to pay the cost of *service*, providing full motivation. Where exceptional circumstances are present, the *General Secretary* may grant this request.
- 51.8 Clauses 51.4.3 and 51.5.2 do not apply if the *General Secretary* has waived the requirement to pay witness fees.
- 51.9 A party intending to call an expert witness shall give seven (7) days, prior to the hearing, notice thereof to the Council and the other party to the dispute together with a summary of the proposed evidence of such witness, any document on which the witness will rely during evidence and basis on which the witness is regarded to be an expert to enable the other party to consider the summary and obviate the need for any postponement.

52 How conciliation pre-arbitration and arbitration proceedings must be recorded

- 52.1 English shall be the language of the record of all *dispute* proceedings, although a *panellist* acting as an *Arbitrator* shall be free to record proceedings in the language that it was conducted, provided that all key participants, including *parties* and representatives, understand that language.
- 52.2 Any *party* to a *dispute* may request the *General Secretary* to provide the services of an interpreter. Such request must be made in writing at least 14 days prior to the hearing.
- 52.3 The *General Secretary* will not provide any recording facilities at conciliation or its related activities.
- 52.4 *The General Secretary* shall keep a record of:
- 52.4.1 any pre-arbitration minute;
 - 52.4.2 any evidence given in an arbitration hearing;
 - 52.4.3 any sworn testimony given in any proceedings before the *General Secretary*; and
 - 52.4.4 any arbitration award or ruling made by a *panellist*.
- 52.5 Subject to clause 52.6, the *General Secretary* shall, upon request, provide mechanical or electronic recording facilities, at the cost of the *Council*, for arbitration proceedings.
- 52.6 The *General Secretary* shall determine the type of recording facility to be provided, based on the availability of resources in the *Council*.
- 52.7 The *parties* may make arrangements for mechanical or electronic recording of the arbitration proceedings.
- 52.8 If the *parties* or the *Council* do not make such arrangements the *panellist* shall keep notes or make a mechanical or electronic recording or the proceedings, in the *panellist's* discretion, as follows:
- 52.8.1 if the *panellist* keeps notes of the proceedings, these notes may be by legible hand-written notes and must reflect the *panellist's* understanding of the essence of the proceedings and the evidence given, but need not be a verbatim record of the proceedings; or
 - 52.8.2 if the *panellist* makes a mechanical or electronic recording the *panellist* or, if the *parties* so agree, one of the *parties* shall provide the necessary equipment and devices, including the medium upon

which the recording will be done such as cassette or other tapes. The *panellist* shall submit copies of the recording, in the medium through which it is recorded, to the *General Secretary*, and the *Council* shall reimburse the *panellist* for any cost incurred in procuring such medium, whether cassette tapes or another medium is used.

- 52.9 Except where the *parties* make their own arrangements for mechanical or electronic recording, the *Council* shall keep any mechanical recordings made of arbitration proceedings in a place determined by the *General Secretary*, and such recordings may only be available to the *parties* for a period not exceeding 180 *days* from the date that the hearing ended.
- 52.10 A *party* may request a copy of the transcript of a record or a portion of a record kept in terms of this clause 52, on payment of the costs of the transcription.
- 52.11 The person who makes the transcript of the record must certify that it is correct. The transcript of a record so certified as correct is presumed to be correct unless the Labour Court decides otherwise.
- 52.12 Such mechanical or electronic recording and the transcript shall be the property of the *Council*.
- 52.13 The *Council* reserves the right to destroy the recordings after the 180 *days* referred to in clause 52.9.

53 What are the powers of *panellists*⁹

- 53.1 A *panellist* appointed to attempt to resolve a *dispute* may:
- 53.1.1 subpoena for questioning any person who may be able to give information or whose presence at the conciliation or arbitration proceedings may help to resolve the *dispute*;
- 53.1.2 subpoena any person who is believed to have possession or control of any book, document or object relevant to the resolution of the *dispute*, to appear before the *panellist* to be questioned or to produce that book, document or object;
- 53.1.3 call, and if necessary subpoena, any expert to appear before the *panellist* to give evidence relevant to the resolution of the *dispute*;
- 53.1.4 call any person present at the conciliation or arbitration proceedings

⁹ Clause 53 applies by virtue of section 128(3)(a) of *the Act*, which empowers an accredited Council to confer on any person appointed by it to resolve a *dispute* the powers of a Commissioner in terms of section 142 of *the Act* read with the changes requires by the context.

- or who was or could have been subpoenaed for any purpose set out in this section, to be questioned about any matter relevant to the *dispute*;
- 53.1.5 administer an oath or accept an affirmation from any person called to give evidence or be questioned;
- 53.1.6 at any reasonable time, but only after obtaining the necessary written authorisation:
- 53.1.6.1 enter and inspect any premises on or in which any book, document or object, relevant to the resolution of the *dispute* is to be found or is suspected on reasonable grounds of being found there; and
- 53.1.6.2 examine, demand the production of, and seize any book, document or object that is on or in those premises and that is relevant to the resolution of the *dispute*; and
- 53.1.6.3 take a statement in respect of any matter relevant to the resolution of the *dispute* from any person on the premises who is willing to make a statement; and
- 53.1.7 inspect, and retain for a reasonable period, any of the books, documents or objects that have been produced to, or seized by, the *Council*.
- 53.2 A subpoena issued for any purpose in terms of clause 53.1 must be signed by the *General Secretary* and must:
- 53.2.1 specifically require the person named in it to appear before the *panellist*;
- 53.2.2 sufficiently identify the book, document or object to be produced; and
- 53.2.3 state the date, time and place at which the person is to appear.
- 53.3 The written authorisation referred to in clause 53.1.6:
- 53.3.1 if it relates to residential premises, may be given only by a judge of the Labour Court and with due regard to section 13 of the *Constitution*, and then only on the application of the *panellist* setting out under oath or affirmation the following information:
- 53.3.1.1 the nature of the *dispute*;

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- 53.3.1.2 the relevance of any book, document or object to the resolution of the *dispute*;
 - 53.3.1.3 the presence of any book, document or object on the premises; and
 - 53.3.1.4 the need to enter, inspect or seize the book, document or object; and
- 53.3.2 in all other cases, may be given by the *General Secretary*.
- 53.4 The owner or occupier of any premises that a *panellist* is authorised to enter and inspect, and every person employed by that owner or occupier, must provide any facilities that a *panellist* requires to enter those premises and to carry out the inspection or seizure.
- 53.5 The *panellist* must issue a receipt for any book, document or object seized in terms of clause 53.4.
- 53.6 The law relating to privilege, classified information or any other protection from disclosure or discovery, as it applies to a witness subpoenaed to give evidence or to produce any book, document or object before a court of law, applies equally to the questioning of any person or the production or seizure of any document, book or object in terms of this section.
- 53.7 A *panellist* determining the admissibility of evidence in terms of clause 63.3 must require the *party* relying on privilege, non disclosure of classified information, or on any other protection from disclosure or discovery, to prove the inadmissibility of such evidence.
- 53.8 A person commits contempt of the *Council*
- 53.8.1 if, after having been subpoenaed to appear before the *panellist*, the person without good cause does not attend at the time and place stated in the subpoena;
 - 53.8.2 if, after having appeared in response to a subpoena, that person fails to remain in attendance until excused by the *panellist*;
 - 53.8.3 by refusing to take the oath or to make an affirmation as a witness when a *panellist* so requires;
 - 53.8.4 by refusing to answer any question fully and to the best of that person's knowledge and belief subject to clause 53.6;
 - 53.8.5 if the person, without good cause, fails to produce any book, document or object specified in a subpoena to a *panellist*;

- 53.8.6 if the person wilfully hinders a *panellist* in performing any function conferred by or in terms of *the Act*;
- 53.8.7 if the person insults, disparages or belittles a *panellist*, or prejudices or improperly influences the proceedings or improperly anticipates the *panellist's* award;
- 53.8.8 by wilfully interrupting the conciliation or arbitration proceedings or misbehaving in any other manner during those proceedings;
- 53.8.9 by doing anything else in relation to the *Council* that, if done in relation to a court of law, would have been contempt of court.
- 53.9 A *panellist* may:
- 53.9.1 make a finding that a *party* is in contempt of the *Council* for any of the reasons set out in clause 53.8;
- 53.9.2 refer the *panellist's* finding, together with the record of the proceedings, to the Labour Court for its decision in terms of clause 53.11.
- 53.10 Before making a decision in terms of clause 53.11, the Labour Court¹⁰:
- 53.10.1 must subpoena any person found in contempt to appear before it on a date determined by the Court;
- 53.10.2 may subpoena any other person to appear before it on a date determined by the Court; and
- 53.10.3 may make any order that it deems appropriate, including an order in the case of a person who is not a legal practitioner that the person's right to represent a *party* in the *Council* and the Labour Court be suspended.
- 53.11 The Labour Court may confirm, vary or set aside the finding of a *panellist*.
- 53.12 If any person fails to appear before the Labour Court pursuant to a subpoena issued in terms of clause 53.10.1, the Court may make any order that it deems appropriate in the absence of that person.
- 53.13 When the provisions of section 142 of *the Act* is amended, the powers conferred on *panellists* in this clause 53 must be read as if it had been amended to the same extent as the amendment to that section, read with the changes required by the context.

¹⁰ The provisions of clauses 53.9.2 to 53.12 apply by virtue of section 142(9)(b) and 142(10) to (12) read with section 128(3)(a), and are repeated here merely for the sake of completeness.

54 Costs

- 54.1 In any arbitration proceedings, the commissioner may make an order for the payment of costs according to the requirements of law and fairness and when doing so should have regards to:
- 54.1.1 The measure of success that the parties achieved;
 - 54.1.2 Considerations of fairness that weigh in favour of or against granting a cost order;
 - 54.1.3 Any with prejudice offers that were made with a view to settling the dispute;
 - 54.1.4 Whether a party or the person who represented that party in the arbitration proceedings acted in frivolous and vexatious manner –
 - 54.1.4.1 By proceeding with or defending the dispute in the arbitration proceedings, or
 - 54.1.4.2 In its conduct during the arbitration proceedings;
 - 54.1.5 The effect that a cost order may have on a continued employment relationship;
 - 54.1.6 Any agreement concluded between the parties to the arbitration concerning the basis on which costs should be awarded;
 - 54.1.7 The importance of the issues raised during the arbitration to the parties as well as to the labour community at large;
 - 54.1.8 Any other relevant factor.
- 54.2 A commissioner may make an award of cost in favour of a party who is represented in arbitration by a person contemplated by rule 17.4 in respect of reasonable disbursements actually incurred in the conduct of its case in the arbitration. A commissioner who makes an award in terms of this provision must specify clearly the items and amounts respect of which costs are ordered.
- 54.3 A commissioner may make an award of costs in respect of the legal fees of a party that is represented in an arbitration by a legal practitioner, only if the other parties to the arbitration were represented by a legal practitioner.
- 54.4 An award of cost for costs in terms of sub rule (3) must be in the amount of –

- 54.4.1 in respect of the first day of an arbitration (including any arbitration concluded in a single hearing) – R6 000.00 (VAT inclusive)
- 54.4.2 in respect of each additional day of an arbitration – R4 000.00 (VAT inclusive)
- 54.5 The General Secretary may appoint taxing officers to determine any dispute that may arise from any award for costs in terms of this Rule.
- 54.6 Any dispute concerning an award of costs must be submitted on LRA Form 7.17 to which any relevant documentation must be annexed.

55 Circumstances under which the council may charge fees.

- 55.1 The *Council* shall charge a fee only for –
 - 55.1.1 resolving disputes which are referred to it by non-parties to the *Council* and
 - 55.1.2 providing advice or training in terms of section 115(3).
- 55.2 The *Council* may not charge the above fee unless –
 - 55.2.1 the *Executive Committee* has established a tariff of fees; and
 - 55.2.2 the fee that is charged is in accordance with that tariff.
- 55.3 The *Council* must publish through a collective agreement the tariffs for the year at its AGM.

56 Taxation of Bills of Cost

- 56.1 The *General Secretary* may appoint a *panellist* as taxing officer to perform the functions of a taxing officer in terms of *these procedures*.
- 56.2 The taxing officer must tax any bill of costs for services rendered in connection with proceedings in the *Council*, on "Table A of Annexure 2" of the prescribed Magistrate Court tariff, in terms of the Magistrates Court Act, no 32 of 1944, unless the *parties* have agreed upon a different tariff.
- 56.3 At the taxation of any bill of costs, the taxing officer may call for any book, document, paper or account that in the taxing officer's opinion is necessary to properly determine any matter arising from the taxation.
- 56.4 Any person requesting a taxation must complete ELRC Form E11 and must satisfy the taxing officer:
 - 56.4.1 of that *party's* entitlement to be present at the taxation; and

56.4.2 that *party* liable to pay the bill has received notice of the date, time and place of the taxation.

56.5 Despite clause 56.4, notice need not be given to a *party*:

56.5.1 who failed to appear or to be represented at the hearing; or

56.5.2 who consented in writing to the taxation taking place in that *party's* absence.

56.6 Any decision by a taxing officer is subject to review by the Labour Court.

57 How to bring an application

57.1 This clause 57 applies to any:

57.1.1 application for joinder, substitution, variation or rescission;

57.1.2 application in a jurisdictional *dispute*;

57.1.3 other preliminary or interlocutory application.

57.2 An application must be brought on notice to all persons who have an interest in the application.

57.3 The *party* bringing the application must sign the notice of application in accordance with clause 36 and must state:

57.3.1 the title of the matter;

57.3.2 the case number assigned to the matter by the *General Secretary*;

57.3.3 the relief sought;


57.3.4 the address at which the *party* delivering the document will accept delivery of all documents and proceedings;

57.3.5 that any *party* that intends to oppose the matter must deliver a notice of opposition and answering affidavit within 14 *days* after the application has been delivered to it;

57.3.6 that the application may be heard in the absence of a *party* that does not comply with clause 57.3.5;

57.3.7 a schedule listing the documents that are material and relevant to the application.

57.4 The application must be supported by an affidavit. The affidavit must clearly and concisely set out:

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- 57.4.1 the names, description and addresses of the *parties*;
 - 57.4.2 a statement of the material facts, in chronological order, on which the application is based, in sufficient detail to enable any person opposing the application to reply to the facts;
 - 57.4.3 a statement of legal issues that arise from the material facts, in sufficient detail to enable any *party* to reply to the document; and
 - 57.4.4 if the application is filed outside the relevant time period, grounds for condonation in accordance with clause 41;
 - 57.4.5 if the application is brought urgently, the circumstances why the matter is urgent and the reasons why it cannot be dealt with in accordance with the time frames prescribed in *these procedures*.
- 57.5 Further steps by the *parties*:
- 57.5.1 Any *party* opposing the application may deliver a notice of opposition and an answering affidavit within 14 *days* from the *day* on which the application was *served* on that *party*.
 - 57.5.2 The *party* initiating the proceedings may deliver a replying affidavit within seven *days* from the *day* on which any notice of opposition and answering affidavit are *served* on it.
 - 57.5.3 The replying affidavit must address only issues raised in the answering affidavit and may not introduce new issues of fact or law.
- 57.6 A *panellist* may permit the affidavits referred to in this clause to be substituted by a written statement.
- 57.7 In an urgent application, the *General Secretary* or a *panellist* may:
- 57.7.1 dispense with the requirements of this clause 57; and
 - 57.7.2 only grant an order against a *party* that has had reasonable notice of the application.
- 57.8 The *General Secretary* must allocate a date for the hearing of the application once a replying affidavit is delivered, or once the time limit for delivering a replying affidavit has lapsed, whichever occurs first.
- 57.9 The *General Secretary* must notify the *parties* of the date, time and place of the hearing of the application.
- 57.10 Applications may be heard on a motion roll.

57.11 Despite this clause, the *General Secretary* or a *panellist* may determine an application in any manner it deems fit.

57.12 A *panellist* may, on good cause shown, condone non-compliance with this clause 57.

58 Making a Settlement Agreement an Arbitration Award¹¹

58.1 The *Council* may, by agreement between the *parties* or on application by a *party*, make any settlement agreement in respect of any *dispute* that has been referred to the *Council*, an arbitration award.

58.2 For the purposes of clause 58.1, a settlement agreement signed by both *parties* is a written agreement in settlement of a *dispute* that a *party* has the right to refer to arbitration or to the Labour Court, excluding a *dispute* that a *party* is entitled to refer to arbitration in terms of either section 74(4) or 75(7).¹²

59 How an arbitration award can be certified and enforced

59.1 An application to have an arbitration award certified in terms of section 143(3) read with section 51(8) must be made on or contain the information LRA Form 7.18A.

59.2 An arbitration award issued by a commissioner is final and binding and it may be enforced as if it were an order of the Labour Court in respect of which a writ has been issued, unless it is an advisory arbitration award.

59.3 An arbitration award issued that has been certified in terms of Section 143 of the Act that:

59.3.1 orders the payment of an amount of money may be enforced by execution against the property of the employer party by the Sherrif of the court in the Magistrial district where the employer party resides resides, or conducts business;

59.3.2 orders the performance of an act other than the payment of money may be enforced by way of contempt proceedings instituted in the Labour Court. For the purposes of this clause 59 an arbitration award includes an award of costs, a taxed bill of costs in respect of an award of costs and any arbitration fee that the *Council* may charge.

¹¹ The provisions of clause 54 apply by virtue of section 142A read with section 51(8) and are repeated here merely for the sake of completeness.

¹² Respectively being a *dispute* in (a) an essential service or (b) a maintenance service.



60 Effect of arbitration awards

- 60.1 An arbitration award issued by a commissioner is final and binding and it may be enforced as if it were an order of the Labour Court in respect of which a writ has been issued, unless it is an advisory arbitration award.
- 60.2 If an arbitration award orders a *party* to pay a sum of money, the amount earns interest from the date of award at the same rate as the rate prescribed from time to time in respect of a judgment debt in terms of section 2 of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), unless the award provides otherwise.

61 Variation and rescission of arbitration awards as per the provisions of LRA

62 Review of arbitration awards as per the provisions of LRA¹³

¹³ The provisions of clauses 57.1, 57.2, 57.6 and 57.7 apply by virtue of section 145 read with section 51(8) and are repeated here merely for the sake of completeness.

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PART 13: GENERAL

63 How *panellists* are appointed and terminated

- 63.1 Subject to *the Act*, the *Council* may at any of its meetings for a period as determined by *Council*, appoint to the *Council's* panel of *dispute* resolvers, called *panellists*,
- 63.2 In making these appointments the *Council* must ensure that the panel:
- 63.2.1 is drawn from each of the nine (9) provinces having regard to the anticipated number of *disputes* that are likely to arise in each province and the number of educators employed in the national and provincial departments in the various provinces;
- 63.2.2 has *panellists* with skill and experience in labour relations, knowledge about the education sector and knowledge or experience in conciliation and arbitration;
- 63.2.3 is broadly representative of South African society.
- 63.3 A person appointed to the panel may act as *panellist* only if the *panellist*:
- 63.3.1 has concluded a Contract of Work, as prescribed by the *Council*;
- 63.3.2 has accepted the relevant Fee Policy of the *Council*;
- 63.3.3 considers him or herself bound by the Code of Conduct in Schedule 3 of *this Constitution*: Schedules (Part D).
- 63.3.4 is accredited by the *CCMA*
- 63.4 An error, omission or oversight committed in good faith regarding the appointment of a *panellist* or the requirements of clause 63.3 shall not invalidate anything done by a *panellist* or by a putative *panellist* in terms of *these procedures*.
- 63.5 The *Council* may remove a member of the panel from office because of breach of contract.
- 63.6 The *Council* may, subject to *the Act*, appoint a new member to the panel.
- 63.7 A member of the panel whose term of office expires is eligible for re-appointment.

- 63.8 Notwithstanding the provisions of clause 63.3, the General Secretary may further appoint any person who is not on the panel of the Council, to fulfil any functions of a panellist in these procedures. A person so appointed shall be deemed, for the purposes of such appointment, to be a panellist of the Council by agreement of parties

64 Maintenance of a *dispute* register

- 64.1 The *General Secretary* shall maintain a *dispute* register regarding every *dispute* that is received by the *Council*, whether the *dispute* is properly referred or not.
- 64.2 In this register it must be recorded how the *dispute* is processed, including whether it is referred back to the referring *party* or whether it is cross-referred to another forum.

65 Issue of forms

- 65.1 The *General Secretary* may design and issue forms to give effect to *these procedures*, and may withdraw or replace such forms at any time by giving notice to the *parties*.
- 65.2 Any person completing any such form must comply with the instructions contained in the form. If the instructions contained in such form conflict with the provisions of *these procedures*, *these procedures* will apply in preference.

66 Referral of *disputes* to the Labour Court for adjudication

- 66.1 Despite any other provision of *these procedures*, the *General Secretary* on his/her own, or on application by any *party* to a *dispute*, may refer any *dispute* that is arbitrable in terms of *these procedures* to the Labour Court for adjudication.
- 66.2 An application referred to in clause 66.1 must be made at least nine *days* before the date on which the matter has been set down for arbitration.
- 66.3 In deciding whether to refer a *dispute* to the Labour Court, the *General Secretary* should consider:
- 66.3.1 the nature of the *dispute*;
 - 66.3.2 whether there are questions of law raised by the *dispute*;
 - 66.3.3 the complexity of the *dispute*;
 - 66.3.4 whether there are conflicting arbitration awards that need to be resolved;

- 66.3.5 the public interest.
- 66.4 When considering whether the *dispute* should be referred to the Labour Court, the *General Secretary* must give the *parties* to the *dispute* and the *panellist* who attempted to conciliate the *dispute* an opportunity to make representations.
- 66.5 The *General Secretary* must notify the *parties* to the *dispute* of the decision. The *General Secretary's* decision is final and binding. No person may apply to any court of law to review the *General Secretary's* decision until the *dispute* has been arbitrated or adjudicated, as the case may be.
- 66.6 If the *General Secretary* decides:
- 66.6.1 that the matter should be referred to the Labour Court, the *General Secretary* must refer the *dispute* to the Labour Court within 45 days of the date of the *General Secretary's* decision or the end of the conciliation of the *dispute*, whichever is the later;
- 66.6.2 that the matter should not be referred to the Labour Court, the *General Secretary* must set the matter down for arbitration.
- 66.7 When referring the *dispute* to the Labour Court, the *General Secretary* may supplement the *parties'* papers.

PART 14: FACILITATION

67 General Provisions Applicable

The following provisions shall apply to facilitation processes:

A. Pro- Active Facilitation

- 67.1 The General Secretary may, where s/he deems necessary order a facilitation as a measure of dispute prevention either in the form of capacity building through training, or through relationship building initiatives, or through general facilitation.
- 67.2 In this case, the General Secretary will order the facilitation either through his own identification of potential conflict or through the parties request where conflict might be eminent if not managed.

B. Re-active Facilitation

- 67.3 If the ELRC is aware of a dispute that has not been referred to it, and if resolution of the dispute would be in the public interest, the General Secretary may offer to appoint a panellist to attempt to resolve the dispute through facilitation
- 67.4 In such a case, and where the parties agree, the General Secretary shall within 24 hours appoint a panellist to attend to the facilitation.
- 67.5 The ELRC shall convene a facilitation session with the parties within 48 hours of the parties agreeing to the facilitation.
- 67.6 In the facilitation process, the parties must appear in person. The employer will appoint officials in its employ to represent it during the process. The Trade Union representatives will be entitled to represent all of its affected members(s), if mandated to do so. Individual employees/ non union members of Trade Union parties may only appear in person.
- 67.7 The appointed *panellists* will determine the procedure to be followed in order to resolve the *disputes* as fairly and as quickly as possible with a minimum of legal formalities, subject to the proviso that the rules of natural justice must be applied.
- 67.8 The Facilitation process shall be confidential and without prejudice.

67.9 The panellist may be required, at the request of the parties, or on own accord, to issue an advisory award to the parties in respect of the facilitation. The award shall be independent of the report for the proceedings.

67.10 The *General Secretary* shall ensure that secretarial services and administrative support is provided during facilitation proceedings.

68 Interpretation and application of Collective Agreements

A party to a dispute about the interpretation or application, or non compliance of a Collective Agreement including the provisions of BCEA may refer such dispute to conciliation and arbitration in terms of these procedures

69 Enforcement of Collective Agreements and of BCEA provisions

69.1 The *General Secretary* may promote, monitor and enforce compliance with any Collective Agreement of the Council, within the scope of the Council and in terms of this section 33 and section 33A of the Act.

69.2 For the purposes of this clause 69, a Collective Agreement of the Council is deemed to include:

69.2.1 any basic condition of employment which constitutes a term of a contract of employment of any employee covered by the Collective Agreement in terms of section 49(1) of the BCEA; and

69.2.2 subject to clause 7.5, any other basic condition in the BCEA applicable to an employee falling within the scope of the Council where such employee's employer is a party to the Council;

69.2.3 the rules of any fund or scheme established by the Council.

69.3 Where the *General Secretary* acts in terms of this clause 69 and the matter also involves the interpretation or application of a Collective Agreement, this clause 24 applies to the exclusion of clause 8.

69.4 The *General Secretary* may, in terms of this clause 69, issue an order requiring any person, bound by a Collective Agreement, to comply within a specified period.

69.5 The *General Secretary* may on own discession or on the request of a party refer any unresolved dispute concerning compliance with any provision of a Collective Agreement to arbitration by a panellist appointed by the Council or the CCMA, as the case may be.

69.6 A panellist, conducting an arbitration in terms of this clause 69 and section 33 of the Act, has the powers of a Commissioner in terms of section 142 of the Act, read with the changes required by the context.

69.7 Section 138 of *the Act*, read with the changes required by the context, applies to any arbitration conducted in terms of this section.

70 Definitions

Unless the context indicates otherwise,

70.1 '**Arbitrator**' means a *panellist* who has been appointed to conduct an arbitration, and includes a tribunal of more than one *panellist*, if such tribunal is appointed in terms of *these procedures*;

70.2 '**BCEA**' means the Basic Conditions of Employment Act 75 of 1997;

70.3 '**CCMA**' means the Commission for Conciliation, Mediation and Arbitration;

70.4 '**Chief Executive Officer**' means, in the case of a *Trade Union*, the person finally responsible for administrative matters in that *Trade Union*, irrespective of the terms used within that *Trade Union* to name that position;

70.5 '**Combined Trade Union Party**' shall mean two or more *Trade Unions* acting together as a single party.

70.6 '**Conciliator**' means a *panellist* who has been appointed to conduct a conciliation;

70.7 '**Consultation**' means a meaningful joint consensus seeking process.

70.8 '**Council**' means the Education Labour Relations Council;

70.9 '**Days**' is defined in clause 35;

70.10 '**Dispute**' means a *dispute* that exists in respect of:

70.10.1 matters that are regulated by uniform rules, norms and standards that apply to the education sector; or

70.10.2 matters that apply to terms and conditions of service that apply to the education sector; or

70.10.3 matters that are assigned to the State as employer in the education sector and includes an alleged dispute

70.11 '**Dispute Resolution Procedures**', the *Council's Dispute Resolution Procedures* as adopted by the *Council* by Collective Agreement;

70.12 '**Employee**' means an educator as defined in the Employment of Educators Act 76 of 1998;

- 70.13 **'Employer'** means the State in its capacity as *employer* as defined in the Employment of Educators Act 76 of 1998;
- 70.14 **'File'** means the delivery or transmission of documents to the relevant *Council*, as provided for in clause 39, and "*filing and filed*" shall have a similar meaning;
- 70.15 **'General Secretary'** means the *General Secretary* of the *Council*, appointed in terms of *this Constitution*;
- 70.16 **'Executive Committee'** means the decision making body which comprises of 5 persons representing the *employer* and 5 persons representing the *Trade Unions* shared proportionately in terms of the vote weights determined by the *General Secretary*.
- 70.17 **'Labour Dispute'** means any *dispute* related to the employment relationship between the *employer* and an *employee* in the *Public Service* in relation to clause 19.
- 70.18 **'Mutual interest dispute'** means a *dispute* about any matter of *mutual interest* and shall include a *dispute* regarding, amongst others, a refusal to bargain (as contemplated in section 64(2)), wages, terms and conditions of employment, between:
- 70.18.1 on the one side:
- 70.18.1.1 one or more *Trade Unions*;
- 70.18.1.2 one or more *employees*; or
- 70.18.1.3 one or more *Trade Unions* and one or more *employees*; and
- 70.18.2 on the other side, the *employer*;
- 70.19 **'Operational requirements'** means requirements based on the economic, technological, structural, or similar needs of the *employer*.
- 70.20 **'Panellist'** means a member of the Panel established in terms of clause 63 and, where reference is made to a *panellist's* functions regarding *disputes*, means a *panellist* appointed to conciliate, arbitrate or conciliate and arbitrate a *dispute*;
- 70.21 **'Parties'** means organisations and / or individuals;
- 70.22 **'Party'** means any *party* to proceedings before the *Council*;
- 70.23 **'PSCBC'** means the Public Service Coordinating Bargaining Council

established in terms of *the Act*;

- 70.24 **'Provincial Chamber'** means the *Provincial Chamber* of a given province.
- 70.25 **'Provincial Manager'** means the official appointed in a *Provincial Chamber* in terms of clause 14.3.13 of *this Constitution: General Provisions (Part A)*.
- 70.26 **'Public Service'** means [the service referred to in section 1(1) of the Public Service Act, 1994 (promulgated by Proclamation 103 of 1994) and includes any organizational component contemplated in section 7(4) of that Act and specified in the first column of Schedule 2 of that Act] the national departments, provincial administrations, provincial departments and organizational components contemplated in section 7(2) of the Public Service Act, 1994 (promulgated by Proclamation No. 103 of 1994), but excluding:
- 70.26.1 the members of the South African National Defence Force;
- 70.26.2 the National Intelligence Agency; and
- 70.26.3 the South African Secret Service.'
- 70.27 **'Registrar'** means the *registrar* as defined in *the Act*.
- 70.28 **'Serve'** means the delivery or transmission of documents to the other *parties* to a *dispute*, as provided for in clause 37, and "*servicing and served*" shall have a similar meaning;
- 70.29 **'the Act'** means the Labour Relations Act, 1995 (Act 66 of 1995), as amended;
- 70.30 **'the Constitution'** means the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996);
- 70.31 **'these Procedures'** means this document, constituting the *Dispute Resolution Procedures of the Council*; and
- 70.32 **'this Constitution'** means the constitution of the *Council*;
- 70.33 **'Trade Union'** means an association of *employees* whose principal purpose is to regulate relations between *employees* and *employers*, which is registered in terms of *the Act*, and includes a *Combined Trade Union Party*, unless inconsistent with the context.
- 70.34 **'30-day conciliation period'** means the 30-day conciliation period in terms of any provision of *these procedures*, calculated from the date on which the *Council* receives a referral for conciliation, or for conciliation and arbitration.

71 Interpretation

- 71.1 Any other expression used in this procedure that is defined in *the Act* shall have the same meaning as in *the Act*, except that, if such expression is defined in *this Constitution*, it shall have the same meaning as in *this Constitution*.
- 71.2 Words used in singular in this procedure shall also be read as in plural.



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