

**COLLECTIVE AGREEMENT ON THE RULES GOVERNING
CONCILIATING AND ARBITRATING DISPUTES AND THE DISPUTE
RESOLUTION FUND IN THE TRANSNET BARGAINING COUNCIL**

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PART A: WHAT WORDS MEAN IN THESE RULES

1. Meaning of words in these Rules

All expressions and words in these rules that are defined in the Constitution of the *Council* have the same meaning as in the Constitution unless defined in these rules and:

- 1.1 “*con-arb*” means proceedings held in terms of section 191(5A) of the *Act* where the arbitration commences immediately after certifying that the dispute remains unresolved after conciliation;
- 1.2 “*deliver*” means to *serve* on the other parties and to *file* with the *Council*;
- 1.3 “*dispute of interest*” means any dispute concerning a matter of mutual interest excluding any dispute that a party has the right to refer to arbitration or to the Labour Court under the Labour Relations Act, a collective agreement or an arbitration agreement;
- 1.4 “*dispute of right*” means any dispute involving legal rights and obligations to which a party in the employment relationship is entitled to by virtue of the employment contract, a collective agreement, statute or the common law;
- 1.5 “*file*” means to lodge with the *Council*;
- 1.6 “*legal practitioner*” means a practising attorney, a practising advocate and a candidate attorney;
- 1.7 ‘*party*’ means, for purposes of these rules only:
 - 1.7.1 on the one side:
 - 1.7.1.1 one or more trade unions;
 - 1.7.1.2 one or more employees; or
 - 1.7.1.3 one or more trade unions and one or more employees; and
 - 1.7.2 on the other side:
 - 1.7.2.1 one or more employers’ organisations;
 - 1.7.2.2 one or more employers; or
 - 1.7.2.3 one or more employers’ organisations and one or more employers.
- 1.8 ‘*rules*’ means these rules for conciliating and arbitrating disputes; and

- 1.9 “serve’ means to serve in accordance with rule 6 and service has a corresponding meaning.

PART B: DISPUTE RESOLUTION PROCEDURES

Notwithstanding the provisions of section 191 of the *Act* the following procedures apply in respect of dismissal and unfair labour practice disputes:

2. Dispute Resolution Procedure in Dismissal Disputes:

- 2.1 The provisions of this rule applies, regardless of whether the employee is a member of a trade union that is a *party* to the *Council* or not.
- 2.2 If the dispute is about the substantive or procedural fairness of a dismissal for misconduct or incapacity (poor work performance or illness), the dismissed employee must refer the dispute directly to the *Council* and the employee has no right to lodge an internal appeal against the decision of the *employer*.
- 2.3 If the dispute is about the substantive or procedural fairness of a dismissal for misconduct:
- 2.3.1 the dismissed employee may refer the dispute in writing to the *Council* within thirty (30) days of the date of dismissal or if it is a later date, within thirty (30) days of the *employer* making a final decision to dismiss the employee, to the *Council* for arbitration without the need for the *Council* to convene a conciliation.
- 2.3.2 If the employee shows good cause at any time the *Council* may permit the employee to refer the dispute after the time period in sub-clause 2.3.1 has expired
- 2.3.3 The *Council* must schedule an arbitration within forty five (45) days of the date of referral of the dispute in accordance with the procedures laid down in these rules.
- 2.3.4 No conciliation or *con-arb* of the dispute will be held unless specifically agreed to in writing by the *parties* to the dispute.

2.3.5 There is no requirement for the *Council* or a panellist to certify that the dispute remains unresolved, in terms of section 191(5) of the *Act* before the *Council* may schedule the arbitration.

3. **Disputes Resolution Procedure in respect of Section 191(5A) of the Act**

Subject to clause 2.3, in respect of all other disputes, which in terms of section 191(5A) of the *Act* proceed to a *con-arb* process, including disputes concerning the dismissal of an employee for any reason relating to probation or any unfair labour practice relating to probation, the dispute must be referred to conciliation and thereafter may be referred to a separate arbitration process, unless the parties specifically agree in writing to the matter being dealt with as a *con-arb* process in terms of section 191(5A) of the *Act*.

PART C: SERVING AND FILING DOCUMENTS

4. ***Council* address at which documents must be filed**

4.1 The addresses, telephone, telefax numbers and email of the *Council* are:

Transnet Bargaining Council

Physical address: No 7, 4th Avenue Houghton.

Postal address: PO Box 2951, Houghton, 2041

Tel: (011) 486 3003

Telefax: (011) 486 1226

Email: secretary@tbc.co.za

4.2 Documents may only be *filed* with the *Council* at the physical or postal addresses, telefax number or email address.

5. **How to calculate time periods**

5.1 For the purpose of calculating any period of time in terms of these rules –

5.1.1 a day means a calendar day; and

5.1.2 the first day is excluded and the last day is included, subject to sub-rule 5.2.

5.2 The last day of any period must be excluded if it falls on a Saturday, Sunday, *public holiday* or on any day between 16 December to 7 January.

6. **How to serve documents on other parties**

- 6.1 A party must *serve* a document on the other parties to the dispute –
 - 6.1.1 by handing a copy of the document to –
 - 6.1.1.1 the person if that person is a *party* to the dispute;
 - 6.1.1.2 a person authorised in writing to accept service on behalf of a *party* to the dispute;
 - 6.1.1.3 a person who appears to be at least 16 years old and in charge of a *party's* place of residence, business or employment;
 - 6.1.2 by faxing or emailing a copy of the document to that *party*;
 - 6.1.3 by sending a copy of the document by registered post to the last-known address of the *party* or to an address chosen by the *party* to receive service.
- 6.2 The *Council* may order service in a manner other than prescribed in this rule.

7. **How to prove that a document was served**

- 7.1 A *party* must prove to the *Council* or a panellist that a document was served in terms of these rules, by providing the *Council* or a panellist:
 - 7.1.1 with a copy of proof of mailing the document by registered post to the other *party*;
 - 7.1.2 with a copy of the telefax transmission report indicating the successful transmission to the other *party* of the whole document; or
 - 7.1.3 if a document was served by hand-
 - 7.1.3.1 with a copy of the 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
 - 7.1.3.2 with 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.
- 7.2 If proof of service in accordance with sub-rule 7.1 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.

7.3 The *Council* may accept proof of service in a manner other than prescribed in this rule, as sufficient.

8. How to *file* documents with the *Council*

8.1 A *party* must *file* documents with the *Council* –

8.1.1 by handing the document in at the office of the *Council*;

8.1.2 by sending a copy of the document by registered post to the *Council*;

8.1.3 by faxing the document to the *Council*; or

8.1.4 by emailing the documents to the *Council*.

8.2 A document is *filed* with the *Council* when –

8.2.1 the document is handed to the office of the *Council*;

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

8.2.3 the transmission of a fax is completed; or

8.2.4 the email is received by the *Council*.

9. Documents and notices sent by registered post

Any document sent by registered mail is presumed, unless the contrary is proved, to have been received by the person to whom it was sent seven (7) days after it was posted.

10. How to seek condonation for documents *served* late

10.1 This rule applies to any document, including a referral or an application, *served* outside of a time period prescribed in the *Act* or these rules.

10.2 A *party* must apply for condonation, in terms of rule 33.

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

10.3.1 the degree of lateness;

10.3.2 the reasons for the lateness and degree of fault;

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

10.3.4 any prejudice to the other *parties*; and

10.3.5 any other relevant factors.

- 10.4 A party applying for condonation must pay the required fee as determined by the *Council* by means of cash, a bank guaranteed cheque or by electronic transfer into the account of the *Council*.
- 10.5 The *Council* must not process any application for condonation until the necessary fee has been paid.
- 10.6 If the party applying for condonation is successful and condonation is granted, the *Council* must refund the *party* the condonation fee paid in terms of sub-rule 10.4.

11. How to refer a dispute to the *Council*

- 11.1 A *party* must refer a dispute to the *Council* by completing the *Council's* referral form and serving it on the *Council*.
- 11.2 The referring *party* must –
- 11.2.1 complete the referral form in full;
 - 11.2.2 sign the referral form;
 - 11.2.3 attach written proof, that the referral form was *served* on the other *parties* to the dispute;
 - 11.2.4 if the referral form is *filed* late, attach an application for condonation in accordance with rule 10 read with rule 33.
- 11.3 The *Council* must refuse to accept a referral until sub-rule 11.2 has been complied with.
- 11.4 If proceedings are jointly instituted by more than one *party*, the referral form may be signed by one *party* who is mandated by the other *parties* to sign the referral. A list in writing of all the *parties* who have mandated the *party* to sign on their behalf must be attached to the referral.

12. Parties without postal addresses and fax numbers

- 12.1 A *party* who intends to refer a dispute to the *Council* and who does not have a postal address or fax number must hand *deliver* the referral form to the *Council*.
- 12.2 If a referral form is received by hand *delivery* by a *party* in terms of sub-rule 12.1, the *Council* must provide the *party* with a case number and written instructions to contact the *Council* by telephone or in person, within seven (7) days of the date of referral, in order for the *Council* to notify the *party* of the date of the hearing.
- 12.3 The staff member of the *Council* who notifies the *party* of the hearing in terms of sub-rule 12.2 must record on the case file and on the case management system that the *party* has been notified of the date of the hearing.
- 12.4 The record made in terms of sub-rule 12.3 will constitute proof that the *party* was notified of the date of the hearing.

PART D: CONCILIATING DISPUTES

13. Appointment of a Conciliator

- 13.1 All conciliators must have been appointed by the *Council* at its Annual General meeting as set out in clause 10.1 of the Constitution of the *Council*.
- 13.2 If the *parties* to the dispute:
- 13.2.1 have agreed on a conciliator within seven (7) days of service of the referral of the dispute, the *secretary* must appoint that conciliator; or
- 13.2.2 have not agreed on a conciliator within the period referred to in sub-rule 13.2.1, the *secretary* must appoint a conciliator from the panel of conciliators appointed by the *Council*.
- 13.3 The *secretary* may not appoint a conciliator if that conciliator has been nominated by one of the *parties* to the dispute and not accepted by any of the other *parties* to the dispute.

13.4 If the conciliator appointed is a member of the Dispute Resolution Agency (and not an employee of the *employer* or an official or office bearer of a trade union that is *party* to the *Council*) the *parties* to the dispute are liable for the full costs of the conciliation. The *parties* must pay the Dispute Resolution Agency the costs of the conciliation:

13.4.1 at least three days before the scheduled date of the conciliation; a

13.4.2 by means of cash, a bank guaranteed cheque or electronic transfer into the account of the Dispute Resolution Agency.

13.5 The costs of the conciliation set out in sub-rule 13.4 must be shared equally between:

13.5.1 the employer paying 50% of the costs; and

13.5.2 the *parties* representing the employees paying 50% of the costs. If there is more than one *party* representing the employees the employee portion of the costs shall be shared equally between the employee *parties*.

14. What notice must the *Council* give of a conciliation hearing

After the appointment of a conciliator in terms of rule 13, the *Council* must give the *parties* at least fourteen (14) days notice in writing of a conciliation hearing, unless the *parties* agree to a shorter period of notice.

15. *Council* may seek to resolve dispute before a conciliation hearing

The *Council* or a *Council* conciliator may contact the *parties* by telephone or by other means prior to the commencement of the conciliation in order to seek to resolve the dispute.

16. What happens if a party fails to attend or is not represented at conciliation

If a *party* to a dispute fails to attend in person or be represented at a conciliation, the conciliator may deal with it in terms of either rule 31 or rule 32.

17. How to determine whether a Conciliator may conciliate a dispute

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

18. Issuing of Certificates in terms of section 135(5) of the Act

- 18.1 A certificate issued in terms of section 135(5) of the *Act* that the dispute has or has not been resolved, must identify the nature of the dispute as described in the referral document or as identified by the conciliator in the conciliation process.
- 18.2 In the event of the parties failing to resolve the dispute through conciliation within the time frame allowed for it, the *secretary* of the *Council* may issue a certificate of non-resolution of the dispute.

19. Conciliation Proceedings may not be disclosed

- 19.1 Conciliation proceedings are private and confidential and are conducted on a without prejudice basis. No person may refer to anything said in conciliation proceedings during any subsequent proceedings, unless the *parties* agree in writing.
- 19.2 No person, including the conciliator, may be called as a witness during any subsequent proceedings in the *Council* or in any court to give evidence about what transpired during conciliation.

PART E: ARBITRATIONS

20. When parties may be directed to *file* statements

- 20.1 The *secretary* or an arbitrator, after having considered the complexity of the dispute, may direct –
- 20.1.1 the referring *party* in an arbitration to *file* a statement of case within a specified time period; and
- 20.1.2 the other *parties* to *file* an answering statement within a specified time period.
- 20.2 A statement in terms of sub-rule 20.1 must –
- 20.2.1 set out the material facts upon which the *party* relies and the legal issues that arise from the material facts;
- 20.2.2 be *filed* within the time-period specified by the *Council* or the arbitrator.

21. **When the parties may be directed to hold a pre-arbitration conference**

The *parties* to an arbitration must hold a pre-arbitration conference if directed to do so by the *secretary* of the *Council* with the purpose of narrowing the issues in dispute.

22. **Appointment of an Arbitrator**

22.1 All arbitrators must have been appointed by the *Council* at its Annual General meeting as set out in clause 10.1 of the Constitution of the *Council*.

22.2 If the *parties* to the dispute:

22.2.1 have agreed on an arbitrator within seven (7) days of the service of the referral, the *secretary* must appoint that arbitrator; or

22.2.2 have not agreed on an arbitrator in terms of sub-rule 22.1.1, the *secretary* must appoint an arbitrator from the panel of arbitrators appointed by the *Council*.

22.3 The *secretary* may not appoint an arbitrator if that arbitrator has been nominated by one of the parties to the dispute and not accepted by any of the other parties to the dispute.

22.4 Nothing in this procedure prevents the parties to the dispute agreeing that the conciliator is appointed as the arbitrator.

23. **What notice must the *Council* give of an arbitration**

23.1 After the appointment of an arbitrator in terms of sub-rule 22, the *Council* must give the *parties* at least twenty-one (21) days notice in writing of an arbitration hearing, unless the parties agree to a shorter period.

23.2 If a referring *party* to the dispute is not a member of a trade union party to the *Council* or a trade union party to the *Council* has declined to represent the member in the dispute, the *secretary* must not set the dispute down for arbitration until the *secretary* has received confirmation that the referring party to the dispute has paid the fees in terms of rule 24.1 and 24.2.

24. Costs of the Arbitrator and the Dispute Resolution Agency Fee

24.1 The costs of the arbitrator and the fees of the Dispute Resolution Agency will be shared equally by the *parties* to the dispute, unless otherwise agreed to by the *parties*, on the following basis:

24.1.1 the employer paying 50% of the costs; and

24.1.2 the *parties* representing the employees paying 50% of the costs. If there is more than one *party* representing the employees, the employee portion of the costs shall be shared equally between the employee *parties*.

24.2 The fees referred to in sub-rule 24.1 must be paid to the Dispute Resolution Agency:

24.2.1 at least five (5) days before the scheduled date of the arbitration; and

24.2.2 by means of cash, a bank guaranteed cheque or electronic transfer into the account of the Dispute Resolution Agency.

24.3 If a dispute is withdrawn by a *party*, after it has been scheduled for arbitration, the *party* withdrawing the dispute is responsible for any cancellation costs incurred, such as the booking fee and administration fee of the Dispute Resolution Agency.

24.4 Any *party* receiving an arbitration award in its favour may apply for a refund of its portion of the costs of the arbitrator and the fees of the Dispute Resolution Agency from the *Council*.

24.5 The *party* against whom an arbitration award is issued has no claim to any costs against the *Council*.

24.6 In a dismissal dispute concerning the dismissal of more than one employee, the *party* in whose favour the award is issued may claim their pro rata costs of the arbitrator and the fees of the Dispute Resolution Agency from the *Council*.

24.7 A *party* who requests the Council to issue a subpoena is responsible for all costs associated with the issue and service of the subpoena as well as any witness fees that may be payable. The *Council* is only responsible for the

costs of issuing and serving the subpoena and any witness fees as provided for in these rules.

- 24.8 Save for the costs of the arbitrator and the fees of the Dispute Resolution Agency, the *parties* remain liable for all other costs associated with the arbitration.

25. How to postpone an arbitration

- 25.1 The *Council* must postpone an arbitration without the parties appearing if –
- 25.1.1 all the *parties* to the dispute agree in writing to the postponement;
 - 25.1.2 the written agreement for the postponement is received by the *Council* more than eight (8) days prior to the scheduled date of the arbitration; and
 - 25.1.3 there are compelling reasons to postpone.

- 25.2 Any *party* may apply in terms of rule 33 to postpone an arbitration, by serving an application on the other *parties* to the dispute and filing a copy with the *Council* before the scheduled date of the arbitration.

- 25.3 The *party* applying for the postponement is liable for any costs of the Dispute Resolution Agency, unless otherwise agreed to in writing by the *parties*.

26. Powers of the Arbitrator

- 26.1 The arbitrator may conduct the arbitration in a manner that the arbitrator considers appropriate in order to deal with the dispute fairly and quickly, but must deal with the substantial merits of the dispute with a minimum of legal formalities.

- 26.2 Subject to the arbitrator's discretion as to the appropriate form of the proceedings, a *party* to the dispute may give evidence, call witnesses, and question witnesses of any other party and address concluding arguments to the arbitrator.

- 26.3 The arbitrator must determine the dispute on terms that are fair and if the dispute is one that must be referred to arbitration in terms of the *Act*, the

Council's constitution or this procedure, the arbitrator may only grant the relief permitted by the *Act*.

26.4 If the *parties* to the dispute agree, the arbitrator may suspend the arbitration proceedings and attempt to resolve the dispute through conciliation.

26.5 The arbitrator may issue a costs order as permitted by the *Act*.

26.6 The arbitrator must issue an award with brief reasons within 14 days of the conclusion of the arbitration, with brief reasons.

PART F: RULES THAT APPLY TO CONCILIATIONS AND ARBITRATIONS AND CON-ARBS

27. Who may represent a party at the Council

A *party* may appear in person at any proceedings before the *Council* or -

27.1 in conciliation may be represented by:

27.1.1 an employee of the *employer*;

27.1.2 a member, official or office bearer of a registered *trade union*, provided that the *party* was a member of the *trade union* when the dispute arose;

27.1.3 a director, employee, trustee or partner in a partnership of that *party*, or

27.1.4 by any other person agreed to by the *parties* to the dispute in writing.

27.2 in arbitration may be represented by:

27.2.1 any of the persons set out in sub clause 27.1 or by:

27.2.2 a *legal practitioner* if all the *parties* to the dispute agree or the arbitrator considers it appropriate after considering:

27.2.2.1 the nature of the questions of law raised by the dispute;

27.2.2.2 the complexity of the dispute;

27.2.2.3 the public interest; and

27.2.2.4 the comparative ability of the opposing parties or their representatives to deal with the dispute.

27.3 If a *party* to the dispute objects to the representation of another *party* to the dispute or the panellist suspects that the representative does not qualify in

term of this rule, the panellist must determine whether the representative may represent the *party*.

27.4 A representative must tender any documents requested by the panellist to determine whether or not the representative qualifies as a representative who may represent a *party* in the *Council*.

28. How to join or substitute parties to proceedings

28.1 The *Council*, a conciliator or arbitrator may join any number of persons as *parties* in proceedings, if the right to relief depends on substantially the same question of law or fact.

28.2 A conciliator or arbitrator 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.

28.3 A conciliator or arbitrator may make an order in terms of sub-rule 28.2 -

28.3.1 of the conciliator or arbitrator's own accord;

28.3.2 on application by a party; or

28.3.3 if a person entitled to join the proceedings applies at any time during the proceedings to intervene as a party.

28.4 An application in terms of this rule must be made in terms of rule 33.

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

28.6 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 persons representative is already in possession of the documents.

28.7 Subject to any order made in terms of sub-rules 28.2 and 28.5, a joinder or substitution in terms of this rule does not affect any steps already taken in the proceedings.

29. **How to correct the citation of a party**

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

30. **When the *Council* may consolidate disputes**

The *Council*, a conciliator or an arbitrator, of its own accord or on application, may consolidate more than one dispute so that the disputes may be dealt with in the same proceedings.

31. **What happens if a party fails to attend proceedings in a rights dispute**

In a *dispute of right*:

31.1 if a *party* to a dispute fails to attend or be represented at any proceedings before the *Council*, and that *party*-

31.1.1 is the referring *party*, a conciliator or arbitrator may dismiss the matter by making an order; or

31.1.2 has not referred the matter to the *Council*, the conciliator or arbitrator may

31.1.2.1 continue with the proceedings in the absence of that party; or

31.1.2.2 adjourn the proceedings to a later date.

31.2 A conciliator or arbitrator must be satisfied that the *party* has been properly notified of the date, time and venue of the proceedings, before making any decision in terms of sub-rule 31.1

31.3 If a matter is dismissed, the *Council* must send a copy of the ruling to the *parties*.

32. **What happens if a party fails to attend proceedings in interest disputes**

In a *dispute of interest*:

32.1 If a *party* to the dispute fails to attend the conciliation hearing or be represented at the hearing, and that *party* –

- 32.1.1 is the referring *party*, the conciliator may extend the conciliation period for another thirty days and notify the *parties* of the extension in writing; or
- 32.1.2 has not referred the dispute to the *Council*, the conciliator may immediately issue a certificate stating that the dispute remains unresolved.
- 32.2 A conciliator must be satisfied that the *party* has been properly notified of the date, time and venue of the proceedings, before making any decision in terms of sub-rule 32.1.

PART G: APPLICATIONS

33. How to bring an application

- 33.1 An application must be brought: on notice to all persons who have an interest in the application and if the application is for condonation by paying the *secretary* of the *Council* the prescribed fee in terms of rule 10.
- 33.2 The *party* bringing the application must sign the notice of application and must state –
- 33.2.1 the title of the matter;
- 33.2.2 the case number assigned to the matter by the *Council*;
- 33.2.3 the relief sought;
- 33.2.4 the address at which the *party delivering* the document will accept *delivery* of all documents and proceedings;
- 33.2.5 that any *party* that intends to oppose the matter must *deliver* a notice of opposition and answering affidavit within fourteen (14) days after the application has been *delivered* to it;
- 33.2.6 that the application may be heard in the absence of a *party* that does not comply with sub-paragraph 33.2.5;
- 33.2.7 a schedule listing the documents that are material and relevant to the application.
- 33.3 The application must be supported by an affidavit. The affidavit must clearly and concisely set out-
- 33.3.1 the names, description and addresses of the *parties*;

- 33.3.2 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;
- 33.3.3 a statement of legal issues that arise from the material facts, in sufficient detail to enable any *party* to reply to the document;
- 33.3.4 if the application is *filed* outside the relevant time period, grounds for condonation in accordance with rule 10; and
- 33.3.5 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 rules.

- 33.4 Any party opposing the application may *deliver* a notice of opposition and an answering affidavit:
 - 33.4.1 within fourteen (14) *days* from the *day* on which the application was served on that *party*.
 - 33.4.2 which must contain, with the changes required by the context, the information required by sub-rules 33.2 and 33.3 respectively.

- 33.5 The *party* initiating the proceedings may *deliver* a replying affidavit within seven (7) *days* from the *day* on which any notice of opposition and answering affidavit are served on it;

- 33.6 The replying affidavit must address only issues raised in the answering affidavit and may not introduce new issues of fact or law.

- 33.7 A conciliator or arbitrator may permit the affidavits referred to in this rule to be substituted by a written statement.

- 33.8 In an urgent application, the *secretary*, a conciliator or arbitrator may –
 - 33.8.1 dispense with the requirements of this rule; and
 - 33.8.2 only grant an order against a party that has had reasonable notice of the application.

- 33.9 The application will be considered, by a conciliator or arbitrator appointed by the *secretary* to the *Council*, on the documents served and filed after a

replying affidavit is *delivered* or after the time limits for *delivering* a replying affidavit have lapsed, whichever occurs first.

- 33.10 If the conciliator or arbitrator finds that there were no grounds for the relief set out in the application, the *party* bringing the application will be liable for the costs of the conciliator or arbitrator and the costs of the Dispute Resolution Agency.

34. How to apply to vary or rescind arbitration awards or rulings

- 34.1 An application for the variation or rescission of an arbitration award or ruling must be made within fourteen (14) days of the date on which the applicant became aware of—

34.1.1 the arbitration award or ruling which was erroneously made in the absence of any *party* affected by the award or ruling;

34.1.2 an ambiguity or an obvious error or omission, but the application may only be made to the extent of the ambiguity, error or omission; or

34.1.3 a mistake common to the parties to the proceedings.

- 34.2 A ruling made by a conciliator or arbitrator which has the effect of a final order, will be regarded as a ruling for the purposes of this rule.

35. How to refer a dismissal dispute to the Labour Court which otherwise would be adjudicated by the *Council*

- 35.1 An application in terms of section 191(6) of the Act to refer a matter to the Labour Court, which should be referred to the *Council* for arbitration, must be made within fourteen (14) days of:

35.1.1 the referral of the dispute, in the case of a dismissal for misconduct, or

35.1.2 the dispute being certified unresolved in conciliation.

- 35.2 Despite sub-rule 35.1, a party that requests arbitration may not thereafter make an application in terms of section 191(6).

- 35.3 The application must state the grounds on which a party relies in requesting that the dispute be referred to the Labour Court.

- 35.4 If any *party* to the dispute objects to the matter being referred to the Labour Court, that *party* must state the grounds for the objection within seven (7) *days* of receipt of the application.
- 35.5 The *Council* must notify the *parties* of its decision in terms of section 191(8) within fourteen days of receiving the objection.

PART H: PRE-DISMISSAL ARBITRATIONS

36. How to request a pre-dismissal arbitration in terms of section 188A

- 36.1 An *employer* requesting the *Council* to conduct a pre-dismissal arbitration, must do so by *delivering* a completed referral form to the *Council*.
- 36.2 The employee must sign the referral form consenting to the pre-dismissal arbitration. If an employee has consented in terms of section 188A(4)(b), the referral form does not have to be signed by the employee but the copy of the contract containing the consent must be attached to the form.
- 36.3 When *filing* the referral form, the *employer* must pay the fee of the Dispute Resolution Agency appointed by the *Council*. Payment of the fee may only be made by:
- 36.3.1 bank guaranteed cheque; or
- 36.3.2 electronic transfer into the bank account of the *Council*.
- 36.4 Within fourteen (14) days of receiving a request in terms of sub-clause 36.1 and payment of the fee to the Dispute Resolution Agency, the *Council* must notify the *parties* to the pre-dismissal arbitration of when and where the pre-dismissal arbitration will be held.
- 36.5 Unless the *parties* agree otherwise, the *Council* must give the parties at least fourteen (14) *days* notice of the commencement of the pre-dismissal arbitration.

- 36.6 The *Council* is only required to refund a fee paid in terms of sub-rule 36.3, if the matter is withdrawn prior to the *Council* issuing a notice in terms of sub-rule 36.4.

PART I: GENERAL

37. Condonation for failure to comply with the rules

The *Council*, a conciliator or arbitrator may condone any failure to comply with the time frames in these rules, on good cause shown.

38. Making Settlement Agreements Arbitration Awards

- 38.1 The Council or the Dispute Resolution Agency may, by agreement between the parties or on application by a party, make any settlement agreement in respect of any dispute referred to the Council, an arbitration award.

- 38.2 For the purpose of sub-clause 38.1, a settlement agreement is any 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).

39. Recordings of *Council* proceedings

- 39.1 The Dispute Resolution Agency appointed by the *Council* must keep a record of –

- 39.1.1 any evidence given in an arbitration or pre-dismissal arbitration; and
39.1.2 any sworn testimony given in any arbitration or pre-dismissal arbitration.

- 39.2 The *Council* or Dispute Resolution Agency must keep a copy of any arbitration award or ruling made by a conciliator or arbitrator.

- 39.3 The record must be kept by legible hand-written notes of the arbitrator, unless the *parties* request that a recording is kept of the proceedings, in which event:

- 39.3.1 if the *parties* agree on a recording, any costs associated with the recording will be shared equally between the *parties*;

39.3.2 if there is no agreement on the costs of the recording, the *party* making the request will be responsible for payment of any costs associated with the recording.

39.4 The costs referred to in sub-clause 38.3 do not include the costs of making a transcript of the recording. The *party* requesting the transcript is responsible for the costs associated with the transcript, unless otherwise agreed to by the *parties*.

39.5 The notes of the arbitrator are presumed to be correct, unless the Labour Court decides otherwise.

40. **How to have a subpoena issued**

40.1 Any *party* who requires the *Council* or an arbitrator to subpoena a person in terms of section 142(1) of the *Act*, must file a completed subpoena form, requesting a subpoena together with a written motivation setting out why the evidence of the person to be subpoenaed is necessary.

40.2 Any person requesting the *Council* to issue a subpoena must pay the witness fees, as prescribed by the tariff of allowances published by notice in the Government Gazette in terms of section 142(7) of the *Act* and the witnesses' reasonable travel costs, to each person who is subpoenaed to appear in an arbitration.

40.3 A *party* requesting the *Council* to waive the requirement for the *party* to pay witness fees in terms of section 142(7)(c) of the *Act* must set out the reasons for the request in writing at the time of requesting the *Council* to issue a subpoena in respect of that witness.

40.4 An application in terms of sub-rule 39.1 must be *filed* with the *Council* at least ten (10) *days* before the arbitration hearing, or as directed by the arbitrator hearing the arbitration.

40.5 The *Council* or an arbitrator may refuse to issue a subpoena if–

40.5.1 the *party* does not establish why the evidence of the person is necessary;

- 40.5.2 the person subpoenaed does not have a reasonable period in which to comply with the subpoena; or
- 40.5.3 the *Council* or an arbitrator is not satisfied that the *party* has made arrangements to pay the witness fees and the reasonable travel costs of the person subpoenaed.
- 40.6 A subpoena must be served on the witness subpoenaed –
- 40.6.1 by the person who has requested the subpoena or by the Sheriff, at least seven (7) *days* before the scheduled date of the arbitration;
- 40.6.2 and if so directed by the *Council*, accompanied by payment of the prescribed witness fees for one day 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.
- 40.7 Sub-rules 39.5.3 and 39.6.2 do not apply if the *Council* in terms of section 142(7)(c) of the *Act* has waived the requirement for the party to pay witness fees.

41. Payment of witness fees

- 41.1 A witness subpoenaed in any proceedings in the *Council* must be paid a witness fee in accordance with the tariff of allowances published by notice in the Gazette in terms of section 142(7) of the *Act*.
- 41.2 The witness fee must be paid by –
- 41.2.1 the party who requested the *Council* to issue the subpoena; or
- 41.2.2 the *Council*, if the issue of the subpoena was not requested by a party or if the *Council* waives the requirement to pay witness fees in terms of section 142(7)(c) of the *Act*.
- 41.3 Despite sub-rule 40.1, the arbitrator may, in appropriate circumstances, order that a witness receive no fee or only part of the prescribed fee.

42. **Taxation of Bills of Cost**

- 42.1 An arbitrator may make an order as to costs in any arbitration according to the law and fairness.
- 42.2 The *secretary* of the *Council* may appoint a person or an agency to tax any bill of costs in terms of these rules.
- 42.3 The tariff to be applied when taxing a bill of costs for services rendered in connection with proceedings in the *Council* is the applicable High Court tariff set out in the Supreme Court Act, no 59 of 1959, unless the parties have agreed to a different tariff.
- 42.4 At the taxation of any bill of costs, the person appointed by the *Council* in terms of sub-clause 41.2 may call for any book, document, paper or account that in opinion of the person appointed is necessary to properly determine any matter arising from the taxation.
- 42.5 Any person requesting a taxation must apply in writing to the *Council* for a taxation, by *servicing* a copy of the request on all other parties to the dispute.
- 42.6 The *Council* must schedule a taxation by serving a notice of the date of the taxation on all parties to the dispute. The *Council* need not give notice to any *party* if the *party*:
- 42.6.1 failed to appear or to be represented at the hearing; or
- 42.6.2 consented in writing to the taxation taking place in that *party's* absence.
- 42.7 Any decision by a *taxing officer* is subject to review by the Labour Court.

43. **Transitional Arrangements**

Any dispute that has been referred to the *Council*, prior to the implementation of the provisions of this agreement, must be dealt with as if this agreement had not been implemented.

TRANSNET BARGAINING COUNCIL DISPUTE RESOLUTION PROCEDURE

[The Transnet Bargaining Council is an Accredited Bargaining Council]

DISPUTE RESOLUTION PATH IN TERMS OF THE LABOUR RELATIONS ACT

| Dispute | Conciliation by <i>Council</i> | Conciliation by CCMA only | Arbitration by <i>Council</i> | Arbitration by CCMA only | Adjudication by Labour Court | Arbitration by Essential Services Committee |
|---|-----------------------------------|---------------------------------|----------------------------------|--------------------------------|------------------------------------|--|
| Chapter 2 | | | | | | |
| Freedom of Association | X | | | | X | |
| 1. Exercise of freedom of association rights Sections 9 & 10. | | | | | | |
| Chapter 3 | | | | | | |
| Collective Bargaining (Organisational Rights, Collective Agreements, Closed and Agency Shops, <i>Councils</i>) | | X | | X | | |
| 2. Rights of Access, meetings, stop orders, trade union representatives, leave of office bearers. Sections 19, 20, 21 & 22. | | | | | | |
| 3. Trade union representative taking reasonable time off, with pay, during working hours. Section 14 | | X | | X | | |
| 4. Disclosure of information to representatives for collective bargaining and consultation purposes. Sections 16 & 21 | | X | | X | | |
| 5. Dispute over the interpretation or application of a Collective Agreement. Section 24 | X | | X | | | |
| 6. Interpretation or application of collective agreements where collective agreement arbitration procedure is non-existent or not functioning. Section 24 | | X | | X | | |

| Dispute | Conciliation by <i>Council</i> | Conciliation by CCMA only | Arbitration by <i>Council</i> | Arbitration by CCMA only | Adjudication by Labour Court | Arbitration by Essential Services Committee |
|---|---|--|--|---|---|--|
| 7. Dispute over interpretation or application of a settlement agreement concluded in terms of Section 142A or Section 158(1)(c). Section 24(8) | X | | X | | | |
| 8. Interpretation of closed shop and agency shop agreements. Sections 25 & 26 | | X | | X | | |
| 9. Appeals against CCMA arbitrations on utilisation of agency and closed shop funds. Sections 25 & 26 | | | | | X | |
| 10. Organisational rights disputes. Section 22 | | X | | X | | |
| 11. Admission of a union to a closed shop agreement. Section 26 | | X | | | X | |
| 12. Jurisdictional dispute between two or more bargaining <i>councils</i> in the public service, including the PSCBC. Section 38 | | X | | X | | |
| 13. Interpretation or application of a statutory council determination. Section 45 | | X | | X | | |
| 14. Refusal to admit a registered union or employer's organisation to a bargaining council. Section 56 | | | | | X | |
| 15. Winding up and liquidation of a statutory or bargaining council. Sections 59 & 60 | | | | | X | |
| 16. Demarcation of sectors and areas. Section 62 | | | | X | | |
| Chapter 4 Industrial Action | | | | | | |
| 17. Matters that may give rise to a strike or lockout. Sections 65 & 134 | X | | | | | |

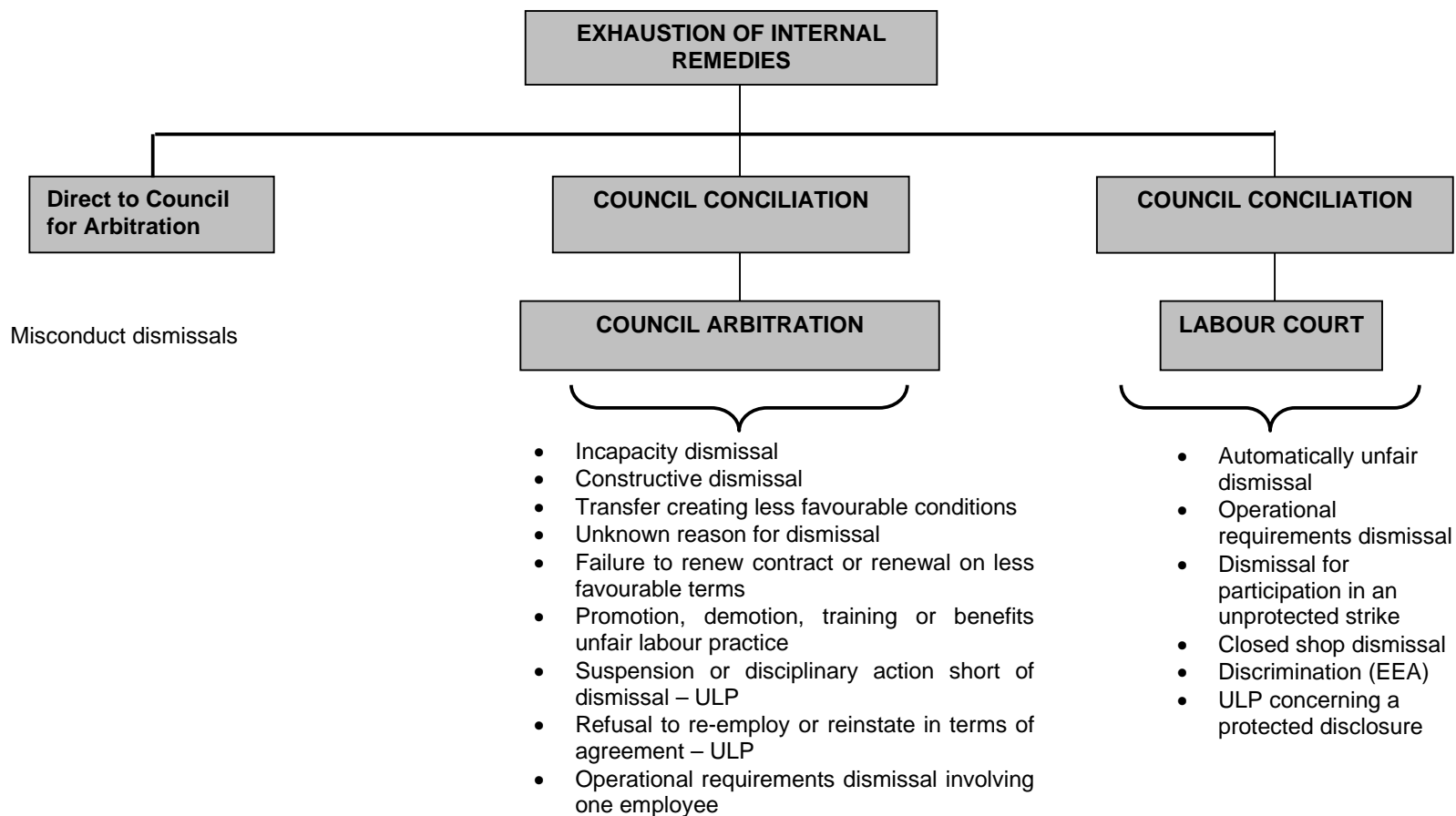
| Dispute | Conciliation by <i>Council</i> | Conciliation by CCMA only | Arbitration by <i>Council</i> | Arbitration by CCMA only | Adjudication by Labour Court | Arbitration by Essential Services Committee |
|--|--|--|--|---|---|--|
| 18. Refusal to bargain (advisory arbitration). Section 64 | X (advisory award must be issued) | | | | | |
| 19. Strike, lockout, secondary action and protest action interdicts. Sections 64, 65 & 66 | | | | | X | |
| 20. Determination of picketing rules if requested. Section 69 | | X | | X | | |
| 21. Exercise of picketing rights. Section 69 | | X | | | X | |
| 22. Determination of what is an essential service. Section 71 | | | | | | X |
| 23. Determination of disputes in essential services. Section 73 & 74 | X | | X | | | |
| 24. Determination of what is a maintenance service. Section 75 | | | | | | X |
| Chapter 5 Workplace Forums | | | | | | |
| 25. If no agreement is reached on the workplace forum constitution. Section 80 | | Facilitate Agreement | | X | | |
| 26. If no agreed arbitration procedure exists for joint decision-making disputes. Section 86 | | X | | X | | |
| 27. Disclosure of information to workplace forum. Section 89 | | X | | X | | |
| 28. Interpretation and application of this Chapter not dealt with elsewhere. Section 94 | | X | | X | | |

| Dispute | Conciliation by <i>Council</i> | Conciliation by CCMA only | Arbitration by <i>Council</i> | Arbitration by CCMA only | Adjudication by Labour Court | Arbitration by Essential Services Committee |
|---|---|--|--|---|---|--|
| Chapter 6 Registration of Unions and Employer Organisations 29. Appeals against decisions of Registrar. Section 111 | | | | | X | |
| Chapter 7 30. Review of arbitration awards of Commissioners Section 145 | | | | | X | |
| Chapter 8 Unfair Dismissal 31. Automatically unfair dismissals (victimisation etc.) Section 187 & 191 | X | | | | X | |
| 32. Dismissal for misconduct. Section 186 and clause 2 of the Council's Rules for Conciliating and Arbitrating Disputes | | | X | | | |
| 33. Dismissal other than automatically unfair and other than dismissals for misconduct e.g. dismissal for incapacity etc. Section 186 and clauses 2 and 3 of the Council's Rules for Conciliating and Arbitrating Disputes | X | | X | | | |
| 34. Dismissals for operational requirements reasons, strikes, etc. Sections 187, 189 & 191 | X | | | | X | |
| 35. Dismissal for operational requirement reasons that applied to one employee only. Section 191(12) | X | | X Employee has option to refer to Council for arbitration | | X | |
| 36. The dismissal of an employee for a reason relating to probation. Section 191(5A) and Clause 3 of the Council's Rules for Conciliating and Arbitrating Disputes | X | | X | | | |

| Dispute | Conciliation by <i>Council</i> | Conciliation by CCMA only | Arbitration by <i>Council</i> | Arbitration by CCMA only | Adjudication by Labour Court | Arbitration by Essential Services Committee |
|---|---|--|--|---|---|--|
| Unfair Labour Practices 37. An unfair labour practice set out in section 186(2)(a) to (d). Section 186(a) to (d) and clause 3 of the Council's Rules for Conciliating and Arbitrating Disputes | X | | X | | | |
| 38. An unfair labour practice concerning an occupational detriment, in contravention of the Protected Disclosure Act, 2000 Section 186(2)(d) and Section 191(13) | X | | | | X | |
| 39. An advisory award in terms of Section 200A(3) | | X | | X | | |
| 40. Entitlement of minimum statutory severance pay Section 41 of the BCEA | X | | X | | | |
| 41. Protection of employees against discrimination. Section 78 and 80 of the BCEA | X | | | | X | |
| 42. Unfair discrimination on arbitrary grounds whether direct or indirect. Chapter 2, Section 10 of EEA | | X | | | X | |

TRANSNET BARGAINING COUNCIL CONSTITUTION: RIGHTS DISPUTES

RESOLVING UNFAIR DISMISSAL & UNFAIR LABOUR PRACTICE DISPUTES



RESOLVING INTEREST DISPUTES

