

**REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1)(b) OF THE  
CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 AND SECTION 8(1)  
OF THE PUBLIC PROTECTOR ACT, 1994**



**PUBLIC PROTECTOR  
SOUTH AFRICA**

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***Allegations of undue delay and maladministration by the Compensation Fund to  
process and to pay compensation benefits to employees of Private Employers***

**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF UNDUE DELAY AND  
MALADMINISTRATION BY THE COMPENSATION FUND WITH REGARD TO THE  
PROCESSING AND PAYMENT OF COMPENSATION BENEFITS TO EMPLOYEES OF  
PRIVATE EMPLOYERS**



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## EXECUTIVE SUMMARY

- (i) This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, and section 8(1) of the Public Protector Act, 1994.
- (ii) The report relates to an investigation into allegations of undue delay and maladministration by the Compensation Fund (the CF) with regard to the processing and payment of compensation benefits to the employees of Private Employers (the Complainants).
- (iii) The allegations were that the Complainants qualified for compensation as a result of sustaining an injury on duty, but that the CF failed to process the claims and pay benefits within a reasonable period after the claims were reported.
- (iv) The CF did not dispute that the Complainants had qualified for compensation in terms of the *Compensation for Occupational Injuries and Diseases Act, 1993* (COIDA).
- (v) On analysis of the complaints the Public Protector decided to conduct a systemic investigation and the following issues were identified and investigated:
  - (a) **Whether there was undue delay by the Compensation Fund to process and pay compensation benefits to the Complainants , and whether such undue delay constitutes maladministration ; and**
  - (b) **Whether the Complainants were improperly prejudiced by the alleged conduct of the Compensation Fund.**



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- (vi) The investigation process was conducted through meetings and interviews with the Complainants and relevant officials of the CF, as well as an inspection of all relevant documents and analysis and application of all relevant laws, and related prescripts.
- (vii) Key laws taken into account to help the Public Protector to determine whether there had been maladministration by the CF and prejudice to the Complainants were principally those imposing administrative standards that should have been upheld by the CF when processing compensation claims. Those are the following:
- a. Section 195(1)(g) of the Constitution, which provides that transparency must be fostered by providing the public with timely, accessible and accurate information, was considered when addressing the issue of undue delay;
  - b. Section 237 of the Constitution which requires that all constitutional obligations to be performed diligently and without delay; and
  - c. Section 22 of COIDA was relied on to determine whether the Complainants qualified to be compensated for their occupational injuries as alleged.
- (viii) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:
- (a) **Whether there was undue delay by the Compensation Fund to process and pay compensation benefits to the Complainants, it is found that:**
    - (aa) The allegations that the CF unduly delayed to process and pay the Complainants' compensation benefits is substantiated and constituted delays from three (3) to fifteen 15 years



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- (bb) The undue delay is in violation of the *Batho Pele* Principle of redress and a contravention of sections 195(1)(g) and 237 of the Constitution; and
- (cc) The conduct of the CF constitutes improper conduct as envisaged in Section 182(1) of the Constitution and maladministration and undue delay as envisaged in Section 6(4) (i) & (ii) of the Public Protector Act.
- (b) Whether the Complainants were improperly prejudiced by the alleged conduct**
- (aa) The allegation that the Complainants suffered prejudice as a result of the undue delay to process and pay compensation benefits to the Complainants, is substantiated;
- (bb) The Complainants were unduly denied an opportunity to access money which could have made their financial position more tenable; and
- (cc) The conduct of the CF resulted in prejudice as envisaged in Section 182(1) of the Constitution and improper prejudice as envisaged in Section 6 (4) (v) of the Public Protector Act.
- (ix) The appropriate remedial action the Public Protector is taking in terms of section 182(1)(c) of the Constitution, with the view of placing the Complainants as close as possible to where they would have been had the improper conduct and maladministration not occurred, is the following: -



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**The Compensation Commissioner to:**

- (a) Issue a written apology to each of the Complainants apologising for the delay to process and pay compensation benefits to them within a reasonable time

**The Director General to:**

7.1.1 Take urgent steps to ensure that the Compensation Fund pays:

- (a) Interest on the arrear monthly pension benefits paid to some Complainants; and
- (b) Interest on lump sum payments that were made to some Complainants, from the date on which each of the awards became payable, to date of actual payment of the awards, within **ninety (90) days** from the date of this report;

- 7.1.2 Interest must be paid at the prescribed rate determined in the *Prescribed Rate of Interest Act, 1975*, as applicable on the date that the debt became payable, i.e. period 01 October 1993 to 31 July 2014, (15.5%), 01 August 2014 to 07 January 2016 (9%), 08 January 2016 to 29 February 2016 (9.75%) and 01 March 2016 to date, (10.25%).



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**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF UNDUE DELAY AND MALADMINISTRATION BY THE COMPENSATION FUND WITH REGARD TO THE PROCESSING AND PAYMENT OF COMPENSATION BENEFITS TO EMPLOYEES OF PRIVATE EMPLOYERS**

**1. INTRODUCTION**

- 1.1. This is a report of the Public Protector issued in terms of Section 182 (1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and Section 8(1) of the Public Protector Act, 1994 ( the Public Protector Act).
- 1.2. This report is submitted in terms of section 8(3) of the Public Protector Act to:
- 1.2.1 The Minister of Labour, Ms Mildred Oliphant;
- 1.2.2 The Director - General of the Department of Labour, Mr Thobile Lamati (the DG);  
and
- 1.2.3 The Compensation Commissioner, Mr Vuyo Mafata (the Commissioner).
- 1.3 A copies of the report are also submitted to the Complainants in this matter.
- 1.4 A Section 7(9) letter was sent to the Commissioner to enable him to respond to the provisional findings of the Public Protector in this report. The Commissioner elected not to provide any inputs or comments on the matter.
- 1.5 The report relates to an investigation into allegations of undue delay and maladministration by the CF with regard to the processing of claims and the payment of compensation benefits to employees of Private Employers.



1.6 This report should be read in conjunction with report no 9 of 2015/2016, "*Another long road to justice*", issued by the Public Protector on 31 March 2016, as well as report no 21 of 2016/2017, "*Allegations of undue delay by the Compensation Fund to print awards for Exempted Employers*", issued by the Public Protector on 31 March 2017. Both reports dealt with similar issues. The remedial action taken by the Public Protector in both reports was *inter alia* the payment of interest on the arrear benefits that was paid to the Complainants. The DG and the CF adhered to the remedial action in both reports.

## 2. THE COMPLAINT

2.1 The Public Protector received several complaints from Complainants employed by Private Employers. The allegations were that the Complainants had qualified for compensation as a result of sustaining an injury on duty, but the CF failed to process the claims and pay benefits within a reasonable period after the claims were reported.

2.2 The Complainants are:

2.2.1 JM Engelbrecht – claim no H 20171061

2.2.2 PD Grobler- claim no B1/035341

2.2.3 ACJ Wiese - claim no AO/032840

2.2.4 J Pienaar – claim no 97040474

2.2.5 F G Mahlangu – claim no B0/008839

2.2.6 R Steenkamp – claim no H1/0004839

2.2.7 Z Nxumalo – claim no A4/069480

2.2.8 K H Maganedisa – claim no A8/228341

2.2.9 L Nkabinde – claim no H3/0002320

2.2.10 C J M 27Nagel– event no G346250

2.2.11 M Day (late DJ Day)-event no 515502-



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### 3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1. The Public Protector is an independent constitutional body established under section 181(1)(a) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

3.2 Section 182(1) of the Constitution provides that:

*“The Public Protector has the power as regulated by national legislation –*

- (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;*
- (b) to report on that conduct; and*
- (c) to take appropriate remedial action.”*

3.3 Section 182(2) of the Constitution directs that the Public Protector has additional powers and functions prescribed by legislation.

3.4 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector is also given power to resolve disputes through conciliation, mediation, negotiation or any other appropriate Alternative Dispute Resolution (ADR) mechanism. Inherent in this legislative



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mandate, is the power to also determine if the individual complaints points to possible systemic deficiencies that warrants a systemic investigation.<sup>1</sup>

3.5 The Compensation Fund is an organ of state and its conduct falls within the mandate of the Public Protector to investigate.

3.6 The Public Protector's power and jurisdiction to investigate and take appropriate remedial action was not disputed by any of the parties.

3.7 In *EFF v Speaker of the National Assembly & Others; DA v Speakers of the National Assembly & Others*,<sup>2</sup> the Constitutional Court held the following in respect of the Public Protector's remedial powers: *"No decision grounded on the Constitution or law may be disregarded without recourse to a court of law. To do otherwise would 'amount to a licence to self-help.' Whether the Public Protector's decisions amount to administrative action or not, the disregard for remedial action by those adversely affected by it, amounts to taking the law into their own hands and is illegal. No binding and constitutionally or statutorily sourced decision may be disregarded willy-nilly. It has legal consequences and must be complied with or acted upon. To achieve the opposite outcome lawfully, an order of court would have to be obtained."*

3.8 Regarding the exercise of my discretion in terms of section 6(9) to entertain matters which arose more than two (2) years from the occurrence of the incident, and in deciding what constitute 'special circumstances', some of the special circumstances

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<sup>1</sup> A systemic investigation goes beyond the issue raised in an individual complaint and looks at the underlying root causes of the individual complaint [G Jones (2009) *Conducting Administrative Oversight and Ombudsman Investigations* 1<sup>st</sup> Edition: Canada]. The systemic deficiencies identified in this report are further addressed in a comprehensive report on poor service delivery by the CF, to be issued by the Public Protector in due course.

<sup>2</sup> [2016] ZACC 11, 31 March 2016 at paragraph [74].



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that I took into account to exercise my discretion favourably to accept this complaint, includes the nature of the complaint and the seriousness of the allegations; whether the outcome could rectify systemic problems in state administration; whether I would be able to successfully investigate the matter with due consideration to the availability of evidence and/or records relating to the incident(s); whether there are any competent alternative remedies available to the Complainants and the overall impact of the investigation; whether the prejudice suffered by the complainants persists; whether my refusal to investigate perpetuates the violation of section 195 of Constitution; whether my remedial action will redress the imbalances of the past. What constitute 'special circumstances' depends on the merits of each case.

#### **4. THE INVESTIGATION**

##### **4.1. Methodology**

- 4.1.1. The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act.
- 4.1.2. The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged undue delay or maladministration.
- 4.1.3. These complaints were classified as an Administrative Justice and Service Delivery complaints for resolution by way of a formal investigation in line with sections 6(4) and (5) of the Public Protector Act, 1994.



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## **4.2. Approach to the investigation**

- 4.2.1. Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:
- (a) What happened?
  - (b) What should have happened?
  - (c) Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration?
  - (d) In the event of maladministration what would it take to remedy the wrong or to place the Complainants as close as possible to where they would have been but for the maladministration or improper conduct?
- 4.2.2. The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether there was an undue delay and maladministration on the part of the CF in processing and paying the compensation benefits to the Complainants and whether such conduct caused prejudice to the Complainants as envisaged in section 6(4)(a)(v) of the Public Protector Act.
- 4.2.3. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by an organ of state to prevent maladministration and prejudice.
- 4.2.4. The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of the undue delay and maladministration. Where a Complainant has suffered prejudice the idea is to place him or her as close as possible to where they would have been had the organ of state complied



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with the regulatory framework setting the applicable standards for good administration.

**4.3. On analysis of the complaint, the following issues were considered and investigated:**

4.3.1 **Issue 1:** Whether there was an undue delay to process and pay compensation benefits to the Complainants, and whether such undue delay constitutes maladministration; and

4.3.2 **Issue 2:** Whether the Complainants were improperly prejudiced by the alleged conduct of the Compensation Fund.

**4.4. The Key Sources of Information**

**4.4.1. Documentation**

**4.4.1.1 JM Engelbrecht- claim no H 20171061**

- a) Proof of post registration of claim by employer
- b) Copy of award issued by CF dated 16 November 2016

**4.4.1.2 PD Grobler- claim no B1/035341**

- a) Copy of award issued by the CF on 29 June 2016.

**4.4.1.3 ACJ Wiese - claim no AO/032840**

- a) Copy of award issued by the CF on 20 October 2016.



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- b) Computer printout, indicating payment of arrear benefits to the Complainant on 20 October 2016.

**4.4.1.4 J Pienaar- claim no 97/040474**

- a) Copy of award issued by the CF on 27 January 2016.
- b) Computer printout, indicating payment of arrear benefits to the Complainant on 27 January 2016

**4.4.1.5 K H Maganedisa – claim number A8/228341**

- a) Copy of award issued by the CF on 15 May 2012.

**4.4.1.6 Z Nxumalo – claim number A4/069480**

- a) Supporting documents received from the Complainant on 28 February 2014.

**4.4.1.7 R Steenkamp – claim number H1/0004839**

- a) Supporting documents received from the Complainant on 29 October 2014; and
- b) Copy of award dated 13 May 2016.

**4.4.1.8 F G Mahlangu – claim number B0/008839**

- a) Copy of award issued by the CF dated 13 May 2014.



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#### **4.4.2. Correspondence Sent and Received**

##### **4.4.2.1. JM Engelbrecht- claim no H 20171061**

- a) Letter of complaint to the PPSA, dated 19 April 2016;
- b) Email from PPSA to CF (Mr Mnene), dated 12 July 2016 and informing the CF of the investigation;
- c) Email from CF to PPSA, dated 1 July 2016, acknowledging receipt of the complaint;
- d) Email from CF to PPSA, dated 23 November 2016, informing that the award was issued and the Complainant was paid on 16 November 2016; and
- e) Letter from the attorney of Complainant to the CF, dated 28 November 2016, claiming interest on the benefits for the period of delay.

##### **4.4.2.2. PD Grobler- claim no B1/035341**

- a) Letter of complaint to the PPSA, dated 5 January 2016;
- b) Email from PPSA to CF (Mr Mnene), dated 7 April 2016 and informing the CF of the investigation;
- c) Email from CF to PPSA, dated 27 May 2016, acknowledging receipt of the complaint;
- d) Email from the PPSA to the CF, dated 28 June 2016, requesting reasons for the delay in processing claim;
- e) Email from CF to PPSA, dated 06 July 2016, informing that the award was issued and the Complainant was paid on 6 July 2016 and
- f) Letter from the attorney of Complainant to the CF, dated 28 November 2016 and claiming interest and the benefits for the period of delay

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**4.4.2.3. ACJ Wiese – claim no AO/032840**

- a) Letters of complaint to the PPSA, dated 9 November 2015 and 26 May 2016 ;
- b) Email from PPSA to CF (Mr Mogashoa), dated 05 July 2016 informing the CF of the investigation;
- c) Email from CF to PPSA, dated 30 August 2016, acknowledging receipt of the complaint;
- d) Email from the PPSA to the CF, dated 18 October 2016, requesting reasons for the delay in processing claim;
- e) Email from CF to PPSA, dated 14 February 2017, informing the Public Protector that the award was issued and the arrear benefits were paid to the Complainant on 20 October 2016 -

**4.4.2.4. J Pienaar- claim no 97/040474**

- a) Letters of complaint to the PPSA, dated 8 October 2015 and 11 October 2015;
- b) Email from PPSA to CF (Ms Visagie), dated 07 December 2015 and informing the CF of the investigation;
- c) Email from CF to PPSA, dated 17 December 2015, acknowledging receipt of the complaint; stating a 10% PD award was authorised for the 2000 claim , but never paid “due to a system problem” ;
- d) Email from the PPSA to the CF, dated 11 January 2016, requesting an explanation for the continued failure to pay awards on the “*Umehleko system*”;
- e) Email from CF to PPSA, dated 22 January 2016, dealing with the system failures that resulted in the non-payment of awards; and





- f) Email from CF to PPSA, dated 18 February 2016, confirming the payment of the award to the Complainant.

4.4.2.5 Email from the PPSA to the CF, dated 14 April 2015, confirming the resolutions taken in the meeting held between the PPSA and the DG of Labour on the same day (see 4.4.3.2 below).

**4.4.2.6 L Nkabinde – claim no H3/0002330**

- a) Complaint received from the Complainant dated 21 January 2015 and 27 January 2015 respectively;
- b) Letter of enquiry to the Compensation Fund dated 04 March 2015;
- c) Letter from the CF dated 06 July 2015;
- d) Email from Ms Betty Masilela of the Department of Labour dated 09 September 2015;
- e) Email from Ms Betty Masilela of the Department of Labour dated 01 October 2015;
- f) Email from PPSA to the Department of Labour dated 02 December 2015; and
- g) Email received from the Complainant dated 09 February 2016.

**4.4.2.7 K H Maganedisa – claim number A8/228341**

- a) Complaint received from Complainant dated 10 July 2014;
- b) Enquiry email sent to Mr Mabusela of the CF on 06 October 2014;
- c) Email received from Ms Visagie of the CF on 06 October 2014;
- d) Email received from Mr Mabusela of the CF on 06 October 2014; and
- e) Letter to Mr Mabusela of the CF dated 13 April 2015.



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#### 4.4.2.8 Z Nxumalo – claim number A4/069480

- a) Complaint received from the Complainant on 23 January 2014;
- b) Enquiry sent to Mr Mabusela of the CF dated 24 July 2014;
- c) Email received from Ms Windell of the CF on 11 August 2014;
- d) Email received from Mr Mabusela of the CF dated 04 September 2014;
- e) Email to Mr Mabusela of the CF dated 11 September 2014;
- f) Email to Mr Mabusela of the CF dated 15 December 2014; and
- g) Correspondence received from Ms Kumba of the CF dated 03 November 2015.

#### 4.4.2.9 R Steenkamp – claim number H1/0004839

- a) Complaint received from the Complainant dated 21 October 2014;
- b) Enquiry sent to the CF dated 20 November 2014;
- c) Email received from Mr Mkhwebane of the CF dated 27 July 2015;
- d) Email received from Ms Snippe dated 10 December 2015;
- e) Letter received from the CF dated 02 February 2016;
- f) Email received from Ms Lekalakala of the CF on 29 April 2016; and
- g) Email received from Ms Lekalakala of the CF dated 14 June 2016.

#### 4.4.2.10 F G Mahlangu – claim number B0/008839

- a) Complaint received from Complainant dated 25 February 2016;
- b) Enquiry sent to Ms Lekalakala of the CF dated 05 May 2016; and
- c) Email received from Ms Lekalakala of the CF dated 16 May 2016.

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**4.4.2.11 C J M Nagel – event number G346250**

- a) Correspondence received from Ms Dipico dated 21 October 2014;
- b) Email to Mr Sibi dated 05 November 2014;
- c) Email received from Mr Sibi dated 10 February 2015;
- d) Correspondence received from the CF dated 29 April 2015;
- e) Email to Ms Kumba of the CF dated 27 May 2015;
- f) Email to Ms Kumba of the CF dated 25 June 2015;
- g) Email to Mr Mkhwebane of the CF dated 27 August 2015;
- h) Email to Ms Visagie of the CF dated 26 October 2015;
- i) Email to Ms Madiega of the CF dated 27 October 2015;
- j) Email received from Ms Madiega of the CF dated 27 October 2015;
- k) Email received from Mr Sibi of the CF dated 09 December 2015;
- l) ADR Notice sent to the CF on 12 January 2016;
- m) Email to CF officials dated 18 January 2016;
- n) Email to Ms Sihlangu of the CF dated 08 February 2016;
- o) Email to Ms Sihlangu of the CF dated 23 February 2016;
- p) Email to Ms Sihlangu dated 16 March 2016;
- q) Email to Mr Mnene of the CF dated 16 March 2016; and
- r) Email to Mr Mnene of the CF dated 18 March 2016.

**4.4.2.12 M Day (late DJ Day)-event no 515502**

- a) Complaint received from Complainant dated 25 May 2018;
- b) Email to Ms M Khoza of the CF dated 13 July 2018;
- c) Email from Ms E Moyo of the CF dated 26 July 2018;
- d) Email from Ms P Lekalakala of the CF dated 26 July 2018;
- e) Email to Ms P Lekalakala of the CF dated 26 July 2018;



- f) Email from Ms P Lekalakala of the CF dated 16 August 2018;
- g) Email from Ms P Lekalakala of the CF dated 01 October 2018;
- h) Email to Mr J Modiba of the CF dated 08 November 2018;
- i) Email from Ms N Higa of the CF dated 04 December 2018;
- J) Email from Ms N Higa of the CF dated 24 January 2019; and
- k) Notice of intention to issue a subpoena to Mr J Modiba of the CF dated 04 March 2019.

#### **4.4.3 Meetings held**

- 4.4.3.1 Meeting between the PPSA and the COO of the CF on 9 April 2015; and
- 4.4.3.2 Meeting between the PPSA and the Director General of the Department of Labour and officials of the CF on 14 April 2015;
- 4.4.3.3 Meeting between PPSA and the CF on 17 June 2015;
- 4.4.3.4 Meeting between PPSA and the CF on 09 March 2016;
- 4.4.3.5 Meeting between PPSA and the Commissioner on 15 and 22 May 2018;
- 4.4.3.6 Meeting between PPSA and the CF on 04 July 2018;
- 4.4.3.7 Meeting between PPSA and the CF on 10 October 2018; and
- 4.4.3.8 Meeting between PPSA and the CF on 27 March 2019.

#### **4.4.4 Legislation and other prescripts**

- 4.4.4.1 *The Constitution of the Republic of South Africa, 1996 (the Constitution)*
- 4.4.4.2 *Public Protector Act, 23 of 1994 (PPA);*
- 4.4.4.3 *Compensation for Occupational Injuries and Diseases Act, 130 of 1993 (COIDA);*
- 4.4.4.4 *Promotion of Administrative Justice Act, 3 of 2000 (PAJA);*
- 4.4.4.5 *The Prescribed Rate of Interest Act, 55 of 1975;*
- 4.4.4.6 Policy on Service Delivery – *Batho Pele* principles.



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#### 4.4.5 Case law

4.4.5.1 *Gqwetha v Transkei Development Corporation Ltd and Others* [2005] ZASCA 51, 2006 (2) SA 603 (SCA);

4.4.5.2 *Economic Freedom Fighters v Speaker of the National Assembly & Others; Democratic Alliance v Speaker of the National Assembly & Others* [2016] ZACC 11, 31 March 2016.

#### 4.4.6 Public Protector Touchstones

4.4.6.1 G Jones (2009) *Conducting Administrative Oversight and Ombudsman Investigation*: 1<sup>st</sup> edition: Canada.

### 5. THE DETERMINATION OF ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS

5.1 **Issue 1: Whether there was an undue delay to process and pay compensation benefits to the Complainants, and whether such undue delay constitutes maladministration**

#### *Common cause*

5.1.1 The facts that emerged from the investigation are mostly common cause;

5.1.2 All Complainants sustained injuries on duty, thus qualifying for the payment of compensation benefits to them by the CF;



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- 5.1.3 The claims were all reported by the different employers and subsequently adjudicated by the CF;
- 5.1.4 The CF accepted liability in all the aforementioned matters and awarded compensation to the Complainants;
- 5.1.5 The delays ( indicated below in par 5.1.1.11) occurred in the various phases of processing the claims;
- 5.1.6 The causes of delays identified during individual investigations includes, but is not limited to:
- a) Notification by employers and submission of documents;
  - b) Registration of claims, scanning and loss of documents;
  - c) Acknowledgement letters and requests for outstanding information;
  - d) Adjudication of claims by relevant sections;
  - e) Acceptance of liability for claims;
  - f) Awards to Employers;
  - g) Requisition of banking documents;
  - h) Unsubstantiated repudiation of claims;
  - i) Backlogs Objections/Appeals/Tribunal Hearings;
  - j) Medical practitioners providing medical care services;
  - k) Administrative problems;
  - l) Ineffective IT-system;
  - m) Lack of skills and inefficient performance; and
  - n) Lack of efficient management.

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- 5.1.7 In August 2014 the CF implemented a new case management system, named Umehluke. It soon became apparent that the CF was unable to process and pay different awards due to deficiencies in the system.
- 5.1.8 On 09 April 2015 the PPSA met with Ms Lungisa Matandela, the then Chief Operating Officer of the CF, to address this concern and the issues identified above.
- 5.1.9 On 14 April 2014, the Deputy Public Protector, Advocate Malunga (the DPP) and Investigators of the PPSA met with the DG of the Department of Labour, Mr Lamati, as well as senior officials from the CF. The Public Protector continued to pursue the individual complaints.
- 5.1.10 An analysis of the evidence reveals the processing periods by the CF as follows:

No	Complainant	Claim no	Date of injury/ death	Reporting date	Date award issued	Permanent Disability %	Date paid	Amount paid	Period of delay
1	JM Engelbrecht	H20171061	23 May 2012	8 July 2013 (Final medical report dated 18 July 2013)	16 November 2016	15% Lump sum	17 November 2016	R102 225	3 years 4 months
2	D Grobler	B1/035341	13 April 2011	10 May 2011 (Final medical report dated 27 September 2011)	29 June 2016	10% Lump sum	6 July 2016	R27 500	5 years
3	ACJ Wiese	AO/032840	2002	06 April 2000 (allegedly all documents re-submitted in 2014)	17 November 2004	25%	10 July 2015	R86415.00 (lump sum)	14 years
4	R Steenkamp	H1/0004839	4 November 2011	04 Nov 2011	October 2016	Increased to 31% in Oct 2016 Monthly	20 October 2016	R226 068.65 Arrears on monthly pension)	4 years 6 months
5	F G Mahlangu	B0/008839	21 January 2010	20 August 2010	13 May 2016	15% Lump sum	13 June 2016	R75 000.00	6 years and 3 months
6	K Maganedisa	A8/228341	September 2008	08 October 2008	15 May 2012	8% Lump sum	19 April 2016	R26 968.56	7 years and 7 months





No	Complainant	Claim no	Date of injury/ Death	Reporting date	Date award issued	Permanent Disability %	Date paid	Amount paid	Period of delay
7	H Pienaar	97/040474	26 March 1997	14 April 1997 (re-opened in 2000 and all documents resubmitted in 2015)	Earlier Permanent Disability of 20 % approved in year 2000 – Permanent Disability was paid by cheque on 22 June 2015 Additional 10% approved in year 2000 but never paid.	Final Permanent Disability awarded 30 % Lump sum	27 January 2016	R22 650.00	15 Years
8	CJM Nagel	G346250	12 November 2008	15 September 2010	Section 54: 18 August 2015	1. Lump sum	17 March 2016	1. R15 000.00	6 years
					Burial expense: 18 August 2015	Lump sum	17 March 2016	R10 132.00	
					Monthly Pension: 16 March 2016	Monthly Spouse pension	17 March 2016	R469 293.01 arrears on monthly spouse pension)	



*Report of Public Protector*

No	Complainant	Claim no	Date of injury/Death	Reporting date	Date award issued	Permanent Disability %	Date paid	Amount paid	Period of delay
9	L Nkabinde	H3/000 2320	06 Feb 2013	06 March 2013	Section 54: 18 August 2015  Burial expense: 18 August 2015	Lump sum  Lump sum	Section 54: 21 August 2015  Burial expense : 21 August 2015	R36 502.00  R13 716.00	3 years
					Spouse Pension: 09 February 2016	Monthly Spouse pension	Pension :09 February 2016	R279 875.67 (arrears on monthly spouse pension)	
10	Z Nxumalo	A4/069 480	20 May 2004	Original documents not processed (re-submitted 24 July 2014	25 Jan 2010	No Permanent Disability TTD payment	20 October 2015	R506.06	5 years 9 months
11	M Day (late DJ Day)	515502 -	3 Feb 2015	22 April 2014 (documents never processed and was re- submitted in period 2016- 2018)	December 2018	1. Death benefit lump sum 2. Arrears on monthly spouse pension	25 March 2019	R85 1025.15	3 year s

- 5.1.11 The evidence exposes the fact that the processing of the claims were delayed by the CF for periods from 3 years up to 15 years.

*Application of the relevant law-*

- 5.1.12 The standard of service delivery by organs of State, such as the CF, is set out in the provisions of the Constitution, national legislation regulating administrative action, applicable policy frameworks and case law.

*The Constitution*

- 5.1.13 The conduct of the Compensation Fund needs to be tested against the principles of public administration as envisioned in section 195(1) of the Constitution. Section 195(1) (d) states that services must be provided impartially, fairly, equitably and without bias. In addition, section 195(1) (f) requires that public administration must be accountable. In terms of section 195(1) (g), transparency must be fostered by providing the public with timely, accessible and accurate information.
- 5.1.14 Section 237 of the Constitution provides that all constitutional obligations must be performed diligently and without delay. Social security is a Constitutional imperative. The CF and its officials are required to handle claims of injured persons with diligence and without delay.

*The Compensation for Occupational Injuries and Diseases Act 130 of 1993, (COIDA)*

- 5.1.15 In terms of section 80 of the *Compensation for Occupational Injuries and Diseases Act (COIDA)*, 130 of 1993, all private employers must register with the Compensation Fund and pay an annual assessment fee based on their workers' earnings and the risks associated with the type of work.

- 5.1.16 Section 39(1) obliges an employer to report the accident to the Commissioner within seven days after having received notice of an accident or having learned in some way that the employee has met with an accident.
- 5.1.17 Section 42(2) further obliges an employer to submit any claim, report, documents or information to the Commissioner within seven days after receiving same.
- 5.1.18 Section 45 creates an obligation on the Commissioner to adjudicate the claim. In terms of section 44, a claim will prescribe after a period of twelve months, and may then no longer be instituted by the employer or employee.
- 5.1.19 Unfortunately no time frames are however prescribed by COIDA for the processing and finalisation of a claim. It however should not exceed a period of twelve (12) months, deemed fit as the prescription period.
- 5.1.20 The White Paper on Transforming Public Service Delivery issued by the Government in 1997 identified eight *Batho Pele* Principles for transforming public service delivery. The principle relevant to the present complaints is *Redress* which states that if the promised standard of service is not delivered, citizens should be offered an apology, a full explanation and a speedy and effective remedy; and when complaints are lodged, citizens should receive a sympathetic, positive response.
- 5.1.21 The Supreme Court of Appeal in *Gqwetha v Transkei Development Corporation Ltd and Others*<sup>3</sup> held that an assessment of an undue delay involves the examining of firstly, a factual enquiry upon which a value judgment is made in the light of all the relevant circumstances, and if so, secondly, whether, in the discretion of the court, such delay should be excused or overlooked. In the first leg of the enquiry, any explanation offered for the delay is considered. The second part of the enquiry, however, cannot be evaluated in a vacuum, but must be assessed with reference to its potential to prejudice the affected parties.<sup>4</sup> In other words, the examination of

<sup>3</sup> [2005] ZASCA 51; 2006 (2) SA 603 (SCA)

<sup>4</sup> Para [5], [24] and [33].

whether a delay is undue or not, requires that a value judgment be made, where the reasons provided for the delay is weighted up against the possibility of prejudice as a result of the delay.

### *Conclusion*

- 5.1.22 An analysis of the evidence point towards the fact that the processing of the claims were delayed by the Fund for periods from 3 years up to 15 years.
- 5.1.23 The CF is required to offer an explanation if the expected standard of service delivery is not adhered to, to offer a speedy and effective remedy, with due regard to the prejudice that the lack of service delivery caused to the Complainants.
- 5.1.24 The CF unfortunately did not offer explanations for the delays in most cases. The only partial explanation offered for the delay in the Pienaar matter was the payment was delayed “*due to a system problem*”.
- 5.1.25 The CF further acknowledged that it failed to conduct due diligence on the “*Umehleko system*” before it went operational, as the system was bought “as is”, and was prematurely “signed off” by officials within the CF.
- 5.1.26 In some claims the award was approved soon after submission of the claims, but left unpaid for several years (Mr Wiese and Mr Pienaar refers).
- 5.1.27 Of great concern is the fact that several spouses’ pensions were delayed for several years after the passing on of the breadwinner of the family (Ms Day, Ms Nkabinde and Ms Nagel). The CF afforded an explanation relating to an IT problem it experienced, causing the delays.
- 5.1.28 The Fund was requested to provide the Public Protector with evidence on the dates of submission of the final medical reports/claim documents in each of the matters mentioned above. During a meeting held with the Commissioner he indicated that

the Fund was unable to supply the information, as the earlier electronic records were inaccessible and some of the hard copies of documents could not be retrieved.

5.1.29 It remains the duty of the employer to report the claim to the Fund. Most of the employees (Complainants) are not in possession of copies of the documents that were submitted to the Fund by the employers.

5.2 **Issue 2: Whether the Complainants were improperly prejudiced by the alleged conduct of the Compensation Fund.**

*Common cause issues*

5.2.1 It is not in dispute that the CF failed to process and pay compensation benefits to claimants within a reasonable time period, aggravated by the failures of the “*Umehleko system*” as from August 2014. This is inherently prejudicial, as these claimants were unable to access their compensation benefits.

5.2.2 The Complainants were also unable to continue their respective employments because of the nature of the occupational injuries they suffered; they suffered the loss of a regular income and needed medication and continuous medical treatment for their conditions.

5.2.3 In addition the Complainants were prejudiced by the long periods it took the CF to adjudicate their claims and pay their benefits.

*Applicable legal framework*

5.2.4 The underlying principle of the remedial action that the Public Protector considers in terms of section 182(1)(c) of the Constitution is to ensure that the Complainant is restored to the position that she would have been in had it not been for the maladministration. The Public Protector uses her judgment when applying this

principle and seeks to ensure reasonable and fair remedies, taking into account the circumstances of each case.

5.2.5 In addition, GG 15143 (1 October 1993) determined the prescribed rate of interest at 15.5% per annum. This was the prescribed rate of interest applicable up until the publication of GG 37831 (18 July 2014) which sets the prescribed rate of interest at 9% per annum, starting from 01 August 2014. On 08 January 2016, the Judicial Matters Amendment Act, Act 24 of 2015, was promulgated. It sets the prescribed rate of interest at the repurchase rate of the South African Reserve Bank + 3.5%. On 04 March 2016, GG 397895 was published, which determined the prescribed rate of interest at 10.25% as from 01 March 2016.

5.2.6 This in essence means that for the period 01 October 1993 to 31 July 2014, the prescribed rate of interest was 15.5%. From 01 August 2014 to 07 January 2016, the prescribed rate of interest was 9%. From 08 January 2016 to 29 February 2016, the prescribed rate of interest was 9.75% and from 01 March 2016 to date, the prescribed rate of interest is 10.25%.

### *Conclusion*

5.2.7 The Complainants were unduly denied an opportunity to access money which could have made their financial position more tenable.

## **6. FINDINGS**

After careful examination of the evidence obtained during the investigation, and the regulatory framework setting the standard that should have been upheld by the CF, the Public Protector's findings are as follows: -

**6.1 Whether there was undue delay and maladministration by the Compensation Fund to process and pay compensation benefits to the Complainants, it is found that: -**

- 6.1.1 The allegations that the CF unduly delayed to process and pay the Complainants' compensation benefits is substantiated and amounts to an average of between 3 and 15 years per claim ;
- 6.1.2 The undue delay is in violation of the *Batho Pele* Principle of redress and a contravention of sections 195(1)(g) and 237 of the Constitution; and
- 6.1.3 The conduct of the CF constitutes improper conduct as envisaged in Section 182(1) of the Constitution and maladministration and undue delay as envisaged in Section 6(4) (i) & (ii) of the Public Protector Act.
- 6.2 **Whether the Complainants were improperly prejudiced by the conduct of the Compensation Fund, it is found that:**
- 6.2.1 The allegation that the Complainants suffered prejudice as a result of the undue delay to process and pay compensation benefits to the Complainants, is substantiated;
- 6.2.2 The Complainants were unduly denied an opportunity to access money which could have made their financial position more tenable; and
- 6.2.3 The conduct of the CF resulted in prejudice as envisaged in Section 182(1) of the Constitution and improper prejudice as envisaged in Section 6 (4) (v) of the Public Protector Act.

## 7 REMEDIAL ACTION

The appropriate remedial action I am taking in terms of section 182(1) (c) of the Constitution, with the view to placing the Complainants as close as possible to where they would have been had the improper conduct and maladministration not occurred, is the following:

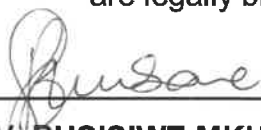
- 7.1.1 **The Compensation Fund Commissioner to:**



- 7.1.1.1 Issue a written apology to each of the Complainants apologising for the delay to process and pay compensation benefits to them within a reasonable time;
- 7.1.1.2 Take urgent steps to pay the Complainants as follows:
- (a) Interest on the arrear monthly pension benefits paid to some Complainants, and
  - (b) Interest on lump sum payments that were made to some Complainants, from the date on which each of the awards became payable, to date of actual payment of the awards, within **ninety (90) days** from the date of this report;
- 7.1.1.3 Interest must be paid at the prescribed rate determined in the *Prescribed Rate of Interest Act, 1975*, as applicable on the date that the debt became payable, i.e. period 01 October 1993 to 31 July 2014, (15.5%), 01 August 2014 to 07 January 2016 (9%), 08 January 2016 to 29 February 2016 (9.75%) and 01 March 2016 to date, (10.25%).

## 8 MONITORING

- 8.1 The Public Protector's remedial action will thereafter be monitored until such time as it has been complied with in full.
- 8.2 I wish to bring to your attention that in line with the Constitutional Court judgement in the matter of *Economic Freedom Fighters v Speaker of the National Assembly and Other; Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11*, and in order to ensure the effectiveness of the Office of the Public Protector, the remedial actions prescribed in this Report are legally binding.



ADV. BUSISIWE MKHWEBANE  
PUBLIC PROTECTOR OF THE  
REPUBLIC OF SOUTH AFRICA

DATE: 30/04/2019