
PUBLIC PROTECTOR SOUTH AFRICA

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Allegations of undue delay by the Compensation Fund to print awards for Exempted 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 EXEMPTED 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 Exempted Employers (the Complainants).

(iii) The Public Protector received complaints from five (5) Complainants, all employees of State institutions, alleging that the Compensation Fund was unable to print awards for Exempted Employers (the term used in the Compensation for Occupational Injuries and Diseases Act, 1993 for employers who do not have to pay assessment fees based on their workers’ earnings and the risks associated with the type of work. These employers include national and provincial government, local authorities who have exemption certificates, municipalities and employers fully insured by a mutual association).

(iv) The Public Protector received complaints from the following former members of the South African Police Service (SAPS), all suffering from Post-Traumatic Stress Disorder (PTSD) - Mr P M Bester, a 55 year old, who was diagnosed with the occupational disease in March 1993; Mr B Rampersad, a 61 year old who was diagnosed with the occupational disease in November 2001; Ms A M Lock, a 59 year old who was diagnosed with the occupational disease in October 2008 and Mr W C van Niekerk, a 56 year old who was diagnosed with the occupational disease in May 2002. In addition, the Public Protector also received a complaint from Mr J Pretorius, a former SAPS member, who was given an award by the CF in November 2013, which award wrongly assessed his PD (Permanent Disablement) for a back injury as 30% instead of 20%.
(v) In the main, the allegations were that the Complainants had qualified for compensation as a result of sustaining an occupational disease, but the CF had failed to issue awards to enable the payment of the corresponding benefits.

(vi) 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).

(vii) 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

(b) Whether the Complainants were improperly prejudiced by the alleged conduct of the Compensation Fund.

(viii) 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.

(ix) 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.

(x) 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, the Public Protector finds that:

(aa) The allegations that the CF unduly delayed to process and pay the Complainants' compensation benefits is substantiated;

(bb) The CF, due to the deficiencies of the Umehluko system, has been unable to print awards for Exempted Employers since August 2014;

(cc) The CF failed to conduct due diligence before the implementation of the Umehluko system to determine whether the system will suit the needs of the CF and would be implementable;

(dd) The CF further failed to explore any other viable solutions to ensure that, pending the full functionality of the system, compensation benefits to the Complainants can be processed and paid, in an attempt to address the delays brought about by the system challenges;

(ee) In so doing, the CF failed to adhere to sections 195 and 237 of the Constitution. The CF further failed to ensure that, taking into account the prejudice suffered by the claimants as a result of the delay, Exempted Employers claims are processed and paid within a reasonable period of time. The CF failed to adhere to the batho pele principle of redress; and
(ff) The conduct of the Compensation Fund constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration and undue delay as envisaged in section 6(4)(a)(i) & (ii) of the Public Protector Act.

(b) Whether the Complainants were improperly prejudiced by the alleged conduct of the Compensation Fund, the Public Protector finds that -

(aa) The allegation that the Complainants suffered prejudice as a result of the undue delay to process and pay compensation benefits by the Compensation Fund, is substantiated;

(bb) The Complainants have been 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 to the Complainants as envisaged in Section 182(1) of the Constitution and improper prejudice as envisaged in Section 6 (4)(v) of the Public Protector Act.

(xi) 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: -

The Compensation Commissioner to: -

(aa) Issue a written letter of apology to each of the Complainants apologising for the delay to process and pay compensation benefits to them, and to further provide full and comprehensive reasons to them regarding the cause of the delay within fourteen (14) days from date of this report.
The Director General to:

(aa) Take urgent steps to ensure that the Compensation Fund pays interest, in line with the applicable interest rate, on the lump sum arrears pension, alternatively lump sum payment, that each of the Complainants were entitled to, from date on which each of these awards became payable, to date of issuing of the correct awards, within ninety (90) days from date of this report;

(bb) Take urgent steps, in consultation with the Minister of Labour, to adopt Standard Operating Procedures (SOP’s) for the handling of claims by the Compensation Fund, within three (3) months from date of this report. These SOP’s must specifically address the speedy finalisation of claims;

(cc) Take urgent steps, in consultation with the Minister of Labour and the Parliamentary Portfolio Committee on Labour, to explore the viability of amending COIDA to make provision for specific timeframes within which claims and objections must be finalised by the Compensation Fund, and to submit to the Public Protector a report thereon within six (6) months from date of this report;

(dd) Take urgent steps to ensure that the Compensation Fund conducts an audit to establish how many other claimants were also affected by the delays associated with the implementation of the Umehluko system, and to consider in respect of each of those claims / claimants so affected, its obligation to pay interest to the relevant claimant on any lump sum award or lump sum arrears pension that the relevant claimant is / was entitled to. The Compensation Fund is to submit to the Public Protector a report hereon within three (3) months from date of this report.
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 EXEMPTED 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 the following people to note the outcome of this investigation: -

1.2.1 The Minister of Labour, the Honourable Minister Mildred Oliphant;
1.2.2 The Director - General of the Department of Labour, Mr Thobile Lamati;
1.2.3 The Compensation Commissioner, Mr Vuyo Mafata.

1.3 A copy of the report is submitted to the Complainants herein, namely Mr P M Bester, Mr B Rampersad; Ms A M Lock; Mr W C van Niekerk and Mr J L Pretorius.

1.4 A Section 7(9) letter was previously sent to the Compensation Commissioner to enable him to respond to the provisional findings of the Public Protector and no response was received.

1.5 The report relates to a systemic investigation into allegations of undue delay and maladministration by the CF with regard to the processing and payment of compensation benefits to Exempted Employers.
2. THE COMPLAINT

2.1. The Public Protector received five (5) complaints, all from former members of SAPS, relating to the inability of the Compensation Fund to issue awards for Exempted Employers. The first complainant, Mr Paul Mechiel Bester, lodged a complaint on 04 February 2015, alleging that he obtained a court order against the CF on 21 May 2014 wherein the CF was ordered to consider his application for compensation within 30 days. The award was calculated, but the CF could not issue the award and the Complainant alleged that he was informed by his attorney that the award could not be issued because the CF computer system was not working;

2.2. The second complainant, Mr Basdew Rampersad, lodged a complaint on 08 August 2015, alleging that he was medically boarded as a result of PTSD in December 2002. The Compensation Fund also failed to issue an award to him;

2.3. The third complainant, Ms A M Lock, lodged a complaint on 18 March 2016 alleging that she was issued with an incorrect award in October 2013 by the CF. The award issued in favour of the Complainant could not be rectified, as the CF could not issue awards;

2.4. The fourth complainant, Mr W C van Niekerk, lodged a complaint on 26 July 2016, alleging that his claim was repudiated by the Fund on 27 March 2013. He subsequently lodged an objection and the Tribunal found in his favour on 08 June 2015. Subsequently, the Compensation Fund issued five (5) incorrect awards to the GPAA for processing, before finally issuing the correct award on 26 July 2016;

2.5. The fifth complainant, Mr J L Pretorius lodged a complaint on 15 August 2014, alleging that he received an incorrect award from the CF in 2013 pertaining to a back injury. His PD was adjudicated at 30% instead of 20%. The CF however, could not issue a superseding award because of the inability of the Umehluko system to issue awards for Exempted Employers.
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) 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 mechanism. Inherent in this legislative mandate, is the power to also determine if the individual complaints points to possible systemic deficiencies that warrants a systemic investigation. A systemic investigation goes beyond the issue raised in an individual complaint and looks at the underlying root causes of the individual complaint.¹

3.5 In the Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others

the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect. The Constitutional Court further held that: "When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences."3

3.7 The Compensation Fund is an organ of state and its conduct amounts to conduct in state affairs, and, as a result the matter falls within the Public Protector’s mandate to investigate.

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

4. THE INVESTIGATION

4.1. Methodology

4.1.1. The investigation was conducted in terms of section 182 of the Constitution and 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 improper conduct 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.

2 [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].
3 Supra at para [73].
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 the Department or 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 Department or organ of state complied with the regulatory framework setting the applicable standards for good administration.
4.2.5. Due to the number of similar complaints, the Public Protector looked beyond the resolution of the individual complaints and conducted a systemic investigation to look at the underlying root causes of these individual complaints.

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

4.3.1. Whether there was undue delay by the Compensation Fund to process and pay compensation benefits to the Complainants, and

4.3.2. 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. Completed Complaint Form received from Mr Rampersad on 03 August 2015;

4.4.1.2. Complaint received from Mr P M Bester on 04 February 2015;

4.4.1.3. Action Plan received from the CF dated 19 May 2015;

4.4.1.4. Updated Action Plan received from the CF dated 17 June 2015;

4.4.1.5. Incorrect award issued in respect of the claim of Mr P M Bester, received from the CF on 13 October 2015;

4.4.1.6. Incorrect award issued in respect of the claim of Mr B Rampersad, received from the CF on 29 April 2016;

4.4.2. Correspondence Sent and Received

4.4.2.1. Letter sent to the Director – General of the Department of Labour dated 25 March 2015 and transmitted electronically on 07 April 2015;

4.4.2.2. Email to officials who attended the meeting on 14 April 2015 confirming Resolutions of the meeting;

4.4.2.3. Email to Ms Matandela, the COO of the CF on 04 May 2015;

4.4.2.4. Email received from Ms N Moseamedi of the CF dated 20 May 2015;

4.4.2.5. Email to the COO of the CF, Ms Matandela dated 26 May 2015;

4.4.2.6. Email received from Ms N Moseamedi of the CF dated 02 June 2015;

4.4.2.7. Email to Ms N Moseamedi of the CF dated 02 June 2015;

4.4.2.8. Letter to the COO of the CF, Ms Matandela dated 03 June 2015 and electronically transmitted on 04 June 2015;

4.4.2.9. Email dated 18 June 2015 to officials who attended the meeting held on 17 June 2015, confirming the Resolutions of the meeting held;

4.4.2.10. Email to Ms Matandela and other CF officials dated 09 July 2015;

4.4.2.11. Email dated 10 March 2016 to the Compensation Commissioner and other CF officials who attended the meeting on 09 March 2016, confirming the Resolutions of the meeting so held;

4.4.2.12. Correspondence received from Ms Matandela, the COO of the CF, dated 18 March 2016;

4.4.2.13. Correspondence between the PPSA investigator and the COO of the CF, Ms Matandela, dated 22 March 2016;

4.4.2.14. Email received from Ms P Sihlangu of the CF dated 11 April 2016;

4.4.2.15. Email from PPSA investigator to Ms Sihlangu of the CF dated 03 May 2016;

4.4.2.16. Email to Ms Sihlangu and Ms Matandela of the CF dated 19 May 2016;

4.4.2.17. Letter from the Deputy Public P to the Compensation Commissioner dated 25 May 2016 and transmitted electronically on 26 May 2016;

4.4.2.18. Email to Mr Mnene of the CF dated 30 May 2016;
4.4.2.19. Letter received from the Compensation Commissioner dated 23 June 2016 and received electronically on 27 June 2016;

4.4.2.20. Letter from the Deputy Public Protector to the Compensation Commissioner dated 22 July 2016 and transmitted electronically on 25 July 2016;

4.4.3 Interviews, Meetings and Inspections *in loco*

4.4.3.1 Meeting with the COO of the Compensation Fund on 09 April 2015;

4.4.3.2 Meeting with the Director – General of the Department of Labour and other relevant officials of the CF on 14 April 2015;

4.4.3.3 Meeting with Compensation Fund officials on 17 June 2015;

4.4.3.4 Meeting held with Compensation Fund officials on 08 February 2016;

4.4.3.5 Meeting held with Compensation Fund officials on 09 March 2016.

4.4.4 Legislation and other prescripts


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.

4.4.5 Case law

4.4.5.1 *Gqwetha v Transkei Development Corporations 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


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

5.1 Whether there was undue delay by the Compensation Fund to process and pay compensation benefits to the Complainants:

5.1.1 Issues not in dispute

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

5.1.1.2 In August 2014, the CF implemented a new case management system, named Umehluko. The system provides for the online submission of accident reports by employers and medical reports and medical invoices by medical service providers. It also allows the CF to electronically adjudicate and pay compensation benefits to employees and refunds to employers;

5.1.1.3 On 09 April 2015, the investigation team met with Ms Lungisa Matandela, the Chief Operating Officer of the CF, to address allegations that the CF could not print awards for Exempted Employers since the implementation of the Umehluko system. Ms Matandela confirmed that Exempted Employers were not incorporated into the system. The investigation team suggested at that stage that the CF should temporarily revert to a manual processing of awards. It was also resolved during the meeting above that the CF will submit an Action Plan detailing how the CF intended to resolve the problem by 05 May 2015;
On 14 April 2014, the investigation team, led by the Deputy Public Protector, Advocate Malunga (the DPP), met with the Director – General of the Department of Labour, Mr Lamati (the DG), as well as officials from the CF. The DG indicated that Exempted Employers were never incorporated into the Umehluko system. The DG further acknowledged that testing and a full implementation of the Umehluko system was not done. The need for the CF to revert to a manual processing system was again discussed;

An Action Plan dated 19 May 2015 was submitted to the investigation team, in which Action Plan the CF indicated that a manual processing of awards was not feasible, as it required the utilisation of the old system, which was no longer in place. It further indicated that the electronic processing was tested, and would be deployed in the week of 23 May 2015;

No feedback was provided to the Public Protector pertaining to whether the CF successfully deployed the electronic processing during the week of 23 May 2015. The Public Protector had to again request the CF to provide feedback and progress on the printing of Exempted Employers awards to her in person;

Subsequently, the CF was requested to provide feedback and progress on 17 June 2015. The CF indicated that the functionality on Exempted Employers will be deployed on the same date, and that a first report on the number of awards processed will be sent to the investigation team by 01 July 2015. The CF was further requested to submit a report on how it intended to address the backlog brought about by the system failure;

The Public Protector continued to pursue the individual complaints. During this period, the CF started printing the awards of Exempted Employers;

On 08 February 2016, the investigation team again met with the CF and was again informed that the Umehluko system was not 100% compatible and / or responsive
to COIDA. For example, pensions could not be consolidated, and claims not registered by 2011, were not incorporated into the system;

5.1.1.10 Subsequently, all the pension awards for Exempted Employers issued by the CF after June 2015, were returned by the Government Pensions Administration Agency (GPAA), as they were incomplete. Another meeting was held on 09 March 2016, again led by the DPP;

5.1.1.11 During the meeting above, it was established that (a) the awards issued contained an error on the 2008 annual adjustment, and (b) that the printed awards did not provide for a continuation of the pension into the next financial year;

5.1.1.12 On 18 March 2016, the CF informed the investigation team that a meeting was held with the GPAA, and that the parties agreed that the CF will issue corrected superseding awards to enable the GPAA to pay benefits to employees;

5.1.1.13 Ms Alice Motloi of the GPAA informed the Investigator on 30 May 2016 that the comments on the superseding awards issued by the CF were incorrect, and the GPAA was still unable to make payment of those awards;

5.1.1.14 An analysis of the evidence reveals that the corrected awards were only issued by the CF as follows:

<table>
<thead>
<tr>
<th>Complainant</th>
<th>Date on Injury</th>
<th>Date on which CF could have issued correct award</th>
<th>Date on which correct award was printed</th>
<th>Period of undue delay caused by Umehluko</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mr P M Bester</td>
<td>15 March 1993</td>
<td>Court Order: 20 May 2014 (within 30 days)</td>
<td>17 August 2016</td>
<td>Almost 2 years</td>
</tr>
<tr>
<td>Mr B Rampersad</td>
<td>12 November 2001</td>
<td>Unknown</td>
<td>24 August 2016</td>
<td>Almost 15 years</td>
</tr>
<tr>
<td>Ms A M Lock</td>
<td>07 October 2008</td>
<td>First incorrect award: 08 October 2013</td>
<td>28 July 2016</td>
<td>3 years</td>
</tr>
<tr>
<td>Mr W C van Niekerk</td>
<td>30 May 2002</td>
<td>Successful Objection</td>
<td>26 July 2016</td>
<td>13 months</td>
</tr>
</tbody>
</table>

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5.1.1.15 To date, the claims of all the affected employees were paid. As far as the Public Protector is aware, the Umehluko system is currently functional and awards can be printed for Exempted Employers.

5.1.2 Application of the relevant law-

5.1.2.1 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.

5.1.2.2 As social security is a Constitutional imperative, section 237 of the Constitution is also relevant, which provides that all constitutional obligations must be performed diligently and without delay.

5.1.2.3 COIDA prescribes specific timeframes for the reporting of a claim by an employer and/or employee, and the submission of documents to the Compensation Fund. Section 39(1) obliges an employer to report the accident to the Compensation 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.

5.1.2.4 Section 42(2) further obliges an employer to submit any claim, report, documents or information to the Compensation Commissioner within seven days after receiving same. 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 no longer be instituted by the employer or employee. No
time frames are however prescribed by COIDA for the processing and finalisation
of a claim.

5.1.2.5 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 made, citizens should receive a sympathetic, positive response.

5.1.2.6 The Supreme Court of Appeal in Gqwetha v Transkei Development Corporations
Ltd and Others⁴ 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.⁵ In other words, the examination of
whether a delay is undue or not, requires that a value judgment be made, where
the reasons provided for the delay is weighed up against the possibility of prejudice
as a result of the delay.

5.1.2.7 The evidence discussed above indicates that, in August 2014, the CF introduced a
new case management system, named Umehluko. Exempted Employers were
never incorporated into the system, and as such, no awards could be printed for
Exempted Employers from August 2014. Around June 2015, the CF finally started
issuing awards for Exempted Employers. All the awards were however incorrect,
and were returned by the GPAA to the CF to be corrected before GPAA could
proceed with the payment thereof. In respect of pension claims, corrected awards
were only issued from July 2016 onwards. Lump sum payments were successfully

⁴ [2005] ZASCA 51; 2006 (2) SA 603 (SCA)
⁵ Para [5], [24] and [33].
deployed at an earlier stage, and a corrected award was issued to Mr Pretorius in September 2015.

5.1.2.8 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 CF and its officials are required to handle claims of injured persons with diligence and without delay, and to treat claimants reasonably, fairly, with courtesy and consideration.

5.1.2.9 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 lapse in service delivery may cause to the claimant. The only explanation offered for these delays was the fact that the system could not print awards for Exempted Employers;

5.1.2.10 The CF further acknowledged that it failed to conduct due diligence on the system before it went operational, as the system was bought "as is", and was signed off without Exempted Employers being incorporated into the system. It then follows that the period spent by the CF to issue these awards was unreasonable and improper, especially since the CF was on numerous occasions advised to revert to a manual system.

5.1.3 Conclusion

5.1.3.1 In the circumstances, the periods taken by the CF is unreasonable and contrary to the standard of proper and good public administration enshrined in the Constitution, the Batho Pele principles and case law.
5.2 Whether the Complainants were improperly prejudiced by the alleged conduct of the Compensation Fund: -

5.2.1 Issues not in dispute

5.2.1.1 It is not in dispute that the CF had been unable to process and pay compensation benefits to claimants from August 2014. This is inherently prejudicial, as these claimants were unable to access their compensation benefits since August 2014. It should be borne in mind that the Complainants are also unable to proceed in their respective employments because of the nature of the occupational disease that they suffer from; and that they all need medication and continuous medical treatment for their conditions;

5.2.1.2 Mr. Rampersad specifically submitted that he lost his house because of the undue delay in finalising the payment of the award. He was barely making ends meet to survive from month to month.

5.2.1.3 The Complainants suffered improper prejudice as a result of the conduct of the CF, as they could not access their compensation benefits for the periods as stated hereunder:

(a) Mr P M Bester almost 2 years
(b) Mr B Rampersad almost 15 years
(c) Ms A M Lock- 3 years
(d) Mr W C van Niekerk- 13 months
(e) Mr J L Pretorius-1 year and 10 months

5.2.1.4 In addition the Complainants were prejudiced by the long periods it took to the CF to adjudicate their claims and issue awards.
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 makes the following findings:

6.1 Whether there was undue delay by the Compensation Fund to process and pay compensation benefits to the Complainants, the Public Protector finds that:

6.1.1. The allegations that the CF unduly delayed to process and pay the Complainants’ compensation benefits is substantiated;

6.1.2. The CF, due to the deficiencies of the Umehluko system, has been unable to print awards of Exempted Employers since August 2014;

6.1.3. The CF failed to conduct due diligence before the implementation of the Umehluko system to determine whether the system will suit the needs of the CF and would be implementable.

6.1.4. The CF further failed to explore any other viable solutions to ensure that, pending the full functionality of the system, compensation benefits to the Complainants can be processed and paid, in an attempt to address the delays brought about by the system challenges.

6.1.5. 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

6.1.6. 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, the Public Protector finds 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 the Public Protector is 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 The Compensation Fund Commissioner to:

7.1.1 Issue a written apology to each of the Complainants apologising for the delay to process and pay compensation benefits to them, and to further provide full and comprehensive reasons to them regarding the cause of the delay within fourteen (14) days from the date of this report;

7.2 The Director General to:

7.2.1 Take urgent steps to ensure that the Compensation Fund pays interest on the lump sum arrears pension, alternatively lump sum payment, that each Complainant is
entitled to, from date on which each of the awards became payable, to date of issuing of the awards, within ninety (90) days from the date of this report;

7.2.2 Interest must be paid at the prescribed rate determined in the *Prescribed Rate of Interest Act*, 1975. 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 set the prescribed rate of interest at 9% per annum, starting from 01 August 2014. On 08 January 2016, the *Judicial Matters Amendment Act*, 24 of 2015, was promulgated. It set the prescribed rate of interest at the repurchase rate of the South African Reserve Bank + 3.5%.

5.2.14.1 On 04 March 2016, GG 397895 was published, which determined the prescribed rate of interest at 10.25% as from 01 March 2016. 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%.

7.2.3 Take urgent steps, in consultation with the Minister of Labour, to adopt Standard Operating Procedures (SOP’s) for the handling of claims by the CF, within three (3) months from date of this report. These SOP’s must specifically attempt to address the speedy finalisation of claims;

7.2.4 Take urgent steps, in consultation with the Minister of Labour and the Parliamentary Portfolio Committee on Labour, to explore the viability of amending COIDA to make provision for specific timeframes within which claims and objections must be finalised by the CF, and to submit to the Public Protector a report thereon within six (6) months from date of this report;

7.2.5 Take urgent steps to ensure that the CF conducts an audit to establish how many other claimants were also affected by the delays associated with the implementation of the
Umehluko system, and to consider in respect of each of those claims / claimants so affected, its obligation to pay interest to the relevant claimant on any lump sum award or lump sum arrears pension that the relevant claimant is / was entitled to. The CF is to submit to the Public Protector a report hereon within three (3) months from date of this report.

8. MONITORING

8.1 The DG and the Compensation Commissioner are to submit an action plan to the Public Protector indicating the Compensation Fund’s intentions regarding the implementation of the remedial action referred to in paragraph 7 above within 30 days of the date of this report;

8.2 The Public Protector’s remedial action will thereafter be monitored annually until such time as it has been complied with in full.

[Signature]

ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 31/03/2017

Assisted by: Ms C van Eeden (Investigator: AJSD)
Mrs M Fourie (Senior Investigator: AJSD);
Adv A Dathi (Senior Investigator: AJSD).