
Allegations pertaining to the failure by the Compensation Fund to finalise an objection

REPORT NO 15 OF 2017/18

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF UNDUE DELAY AND MALADMINISTRATION BY THE COMPENSATION FUND TO FINALISE THE OBJECTION HEARING OF MRS GERTRUIDA MAGDALENA ROBERTSON (PREVIOUSLY STEYN): 95/D28639
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Executive Summary

(i) This is a report by 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 communicates the Public Protector’s findings and the remedial action she is taking in terms of section 182(1)(c) of the Constitution, following an investigation into the allegations of undue delay and maladministration by the Compensation Fund (the CF) to finalise the objection hearing of Mrs Gertruida Magdalena Robertson (hereinafter referred to as the Complainant).

(iii) The Public Protector received a complaint from the Complainant, in which complaint she alleged that (a) She injured her back in 1995 whilst on duty. The injury occurred when the Complainant attempted to move a large pot of breakfast cereal on a table; (b) she received a repudiation letter from the Compensation Fund on 13 February 2008. Her claim was rejected on the basis that the Final Medical Report provided by the attending doctor indicated that she did not suffer any Permanent Disablement (hereinafter referred to as PD); and (c) following the receipt of the repudiation letter, she lodged an objection against the Compensation Commissioner’s decision on 14 August 2008. Her complaint to the Public Protector was that, by 2014, her objection had still not been finalised.

(iv) The main allegations were that the Complainant lodged her objection with the CF in 2008, but that the CF never set the matter down for hearing.

(v) The CF did not dispute that the Complainant had lodged her objection in terms of section 91 of the Compensation for Occupational Injuries and Diseases Act, 1993 (COIDA).

(vi) On analysis of the complaint, the following issues were identified and investigated:

(a) Whether there was an undue delay by the Compensation Fund to finalise the objection hearing of the Complainant, and
(b) Whether the Complainant suffered any prejudice as a result of the alleged undue delay by the Compensation Fund.

(vii) The investigation process was conducted through meetings and interviews with the Complainant and relevant officials of the CF as well as inspection of all relevant documents and analysis and application of all relevant laws, and related prescripts.

(viii) Key laws taken into account to help the Public Protector determine if there had been maladministration by the CF and prejudice to the Complainant were principally those imposing administrative standards that should have been upheld by the CF. Those are the following:

a. Section 195(1) of the Constitution, which provides, amongst others, that services must be provided impartially, fairly, equitably and without bias; that public administration must be accountable and that transparency must be fostered by providing the public with timely accessible and accurate information;

b. Section 237 of the Constitution which requires that all constitutional obligations should be performed diligently and without delay;

c. Section 91 of COIDA was relied on to determine whether the Complainant lodged her objection timeously.

(ix) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, the Public Protector now makes the following findings. In this regard, it is noted that the CF has accepted the Public Protector’s findings of maladministration and improper prejudice, and has already implemented some of the Public Protector’s remedial action.
(a) Whether there was undue delay by the Compensation Fund to finalise the objection of the Complainant, it is found that:

(aa) The allegation that there was an undue delay by the CF to finalise the objection hearing of the Complainant is substantiated;

(bb) The CF failed to set the objection down for hearing for a period of six (6) years after the objection was lodged. Since then, the objection was postponed eight (8) times, and to date; has not been finalised. All the postponements were as a result of the failure by the CF to timeously make arrangements, as obliged by COIDA, to ensure that the hearing would proceed. Only twice however, did the CF notify the Complainant beforehand of the postponements;

(cc) The service delivery of the CF falls far short of the requirements set by sections 195 and 237 of the Constitution, and in addition, falls short of the required service delivery standards required by the Batho Pele principles. The CF failed to adhere to the principle laid down in case law that administrative decision – making must reach finality without delay;

(dd) The CF’s conduct constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(b) Whether the Complainant suffered any prejudice as a result of the alleged undue delay by the CF, it is found that:

(aa) The allegation that the Complainant suffered prejudice as a result of the undue delay to finalise her objection hearing, is substantiated;

(bb) The failure of the CF to set the objection of the Complainant down for hearing, and the numerous postponements of the objection hearing of the Complainant caused the Complainant frustration, inconvenience and distress;
The CF's conduct constitutes improper conduct as envisioned in section 182(1) of the Constitution and improper prejudice as envisioned in section 6(4)(v) of the Public Protector Act.

The CF was sent a notice in terms of section 7(9) of the Public Protector Act that in the light of the above findings the Public Protector intends takes the following remedial action in terms of section 182(1)(c) of the Constitution, with the view of placing the Complainant as close as possible to where she would have been had the improper conduct and maladministration not occurred:

The Compensation Commissioner to:

(a) Within seven (7) days from date of the report, issue a written apology to the Complainant, apologising for the delay to finalise her objection hearing, and to further provide full and comprehensive reasons to her regarding the cause(s) of each delay;

(b) To ensure that it provides the Public Protector with a date on which the objection hearing will be heard by the Tribunal within fourteen (14) days from date of the report;

(c) To ensure that it finalises the Complainant's objection hearing within a period of three (3) months from date of the report;

(d) To provide to the Public Protector with a copy of its adopted Standard Operating Procedures (SOP's) for the Legal Section within fourteen (14) days from date of this report;

(e) To, within three (3) months after receiving substantiating documentary proof from the Complainant pertaining to her wasted legal costs and travelling expenses, reimburse the Complainant the full value of her wasted legal costs and her travelling expenses which she incurred as a result of the numerous postponements.
of the objection hearing without prior notice to the Complainant and / or her legal representative.

(xi) The CF responded within five (5) working days of receiving the notice and confirmed that the intended remedial action has been implemented as follows:

(a) A letter of apology has been forwarded to the Complainant apologising for the delay to finalise her objection hearing. A copy of the letter dated 29 August 2017 was submitted to the Public Protector;

(b) The objection hearing was sent down for 03 October 2017 and a notice of set down dated 29 August 2017 was sent to the Complainant and a copy submitted to the Public Protector;

(c) A written undertaking was made that the objection hearing will be finalised within 3 months and to this effect copies of the subpoena to the medical doctors that treated the Complainant was submitted to the Public Protector;

(d) A copy of the Standard Operating Procedure for Legal Services was submitted to the Public Protector; and

(e) The onus is on the Complainant to provide documentary proof of her travelling costs and the wasted costs can only be determined by the presiding officer after hearing the arguments.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF UNDUE DELAY AND MALADMINISTRATION BY THE COMPENSATION FUND TO FINALISE THE OBJECTION HEARING OF MRS GERTRUIDA MAGDALENA ROBERTSON (PREVIOUSLY STEYN) 95/D28639

1. INTRODUCTION

1.1. This is a report of the Public Protector 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 also provided to Mrs G M Robertson, the Complainant, to inform her about the outcome of this investigation.

1.4 A section 7(9) letter was previously written to the Compensation Commissioner to enable him to respond to the Public Protector's provisional findings. The Compensation Commissioner has accepted the Public Protector's findings of maladministration and undue delay and has already implemented some of the Public Protector's remedial action.

1.5 The report relates to an investigation into the alleged undue delay and maladministration by the CF to finalise the objection hearing of the Complainant.
2. THE COMPLAINT

2.1. The Complainant is a 46 year old woman from Mooi nooi in the North West Province. She was employed by the Department of Correctional Services (the DCS) from 1989 as a Warrant Officer. She was employed at a correctional facility formerly known as Pretoria Central Prison (now called Kgosi Mampuru II Correctional Centre), and was later transferred to the Atteridgeville Correctional Centre. The Complainant was medically boarded by the DCS in 2005.

2.2. The Complainant approached the Public Protector on 18 June 2014. She alleged that she injured her back whilst on duty in 1995, when she attempted to move a large pot of breakfast cereal on a table. She received a repudiation letter from the CF on 13 February 2008, and subsequently lodged her objection against the repudiation of her claim in August 2008. By the time she lodged her complaint with the Public Protector in 2014, her objection had not been finalised.

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.

3.5. In the constitutional court, (in the matter of Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016), Chief Justice Mogoeng stated the following, when confirming the powers the public protector:

3.5.1 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (para 65);

3.5.2 An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. (para 67);

3.5.3 Taking appropriate remedial action is much more significant than making a mere endeavor to address complaints as the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint (para 68);

3.5.4 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow. (para 69);
3.5.5 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to. (para 70);

3.5.6 The Public Protector's power to take appropriate remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of investigation and the type of findings made. (para 71);

3.5.7 Implicit in the words "take action" is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And "action" presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence; (para 71(a));

3.5.8 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (para 71(d));

3.5.9 "Appropriate" means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case (para 71(e));

3.6 The Constitutional Court further held that the remedial action taken by the Public Protector has a binding effect, "When remedial action is binding, compliance is not optional, and 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."
3.7 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. This complaint was classified as an Administrative Justice and Service Delivery complaint for resolution by way of a formal investigation in line with sections 6(4) and (5) of the Public Protector Act, 1994.

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 Complainant as close as possible to where she 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 to finalise the objection hearing of the Complainant, and whether such conduct caused improper prejudice to the Complainant 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.

4.3. 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 finalise the objection hearing of the Complainant;

4.3.2. Whether the Complainant suffered any prejudice as a result of the alleged undue delay by the Compensation Fund.
4.4. The Key Sources of Information

4.4.1. Documentation

4.4.1.1. Complaint received from Complainant on 18 June 2014;
4.4.1.2. Confirmation letter received from Mr Gontse Moeti of the CF dated 18 November 2014;
4.4.1.3. Confirmation letter received from Mr Dries Brand of the CF dated 06 March 2015;
4.4.1.4. Confirmation letter received from Mr Dries Brand of the CF dated 09 March 2015;
4.4.1.5. Updated Action Plan received from CF on 17 June 2015;
4.4.1.6. Confirmation letter received from Ms Mathe of the CF, dated 16 July 2015;
4.4.1.7. Confirmation letter received from Ms Malatji of the CF dated 02 December 2015;
4.4.1.8. Report to the Public Protector on the Resolutions of the meeting held with the Compensation Commissioner on 09 March 2016, received from the CF on 18 March 2016;
4.4.1.9. Confirmation letter received from the CF dated 05 April 2016;
4.4.1.10. Documents received from the Complainant on 18 November 2016;

4.4.2. Correspondence Sent and Received

4.2.2.1 Enquiry sent to Mr Mabusela of CF dated 06 October 2014;
4.2.2.2 Enquiry sent to Mr Mabusela of the CF dated 27 October 2014;
4.2.2.3 Email received from Mr Mabusela of the CF dated 27 October 2014;
4.2.2.4 Email sent to Mr Mabusela of the CF dated 28 October 2014;
4.2.2.5 Email sent to Mr Mabusela of the CF dated 13 November 2014;
4.2.2.6 Email received from Ms Kumba of the CF dated 17 November 2014;
4.2.2.7 Email sent to Ms Kumba of the CF dated 17 November 2014;
4.2.2.8 Email sent to Mr Mabusela of the CF dated 20 January 2015;

4.2.2.9 Email to Mr Mabusela of the CF dated 13 February 2015;

4.2.2.10 Email to Mr Mabusela of the CF dated 03 March 2015;

4.2.2.11 Email to Mr Brand of the CF Legal Section on 06 March 2015;

4.2.2.12 Email received from Mr Brand of the CF Legal Section on 06 March 2015;

4.2.2.13 Email sent to Ms Matandela (COO:CF) and Ms Mataboge (PA:DG) confirming Resolutions of meeting held on 14 April 2015, dated 14 April 2015;

4.2.2.14 Email sent to Ms Matandela of the CF on 04 May 2015;

4.2.2.15 Email received from Ms Matandela of the CF dated 05 May 2015;

4.2.2.16 Email sent to Mr Brand of the CF dated 07 May 2015;

4.2.2.17 Email sent to Mr Brand of the CF dated 04 June 2015;

4.2.2.18 Email confirming Resolutions of meeting held on 17 June 2015 and sent to Compensation Fund officials on 18 June 2015;

4.2.2.19 Email received from Mr Mkhwebane of the CF dated 07 July 2015;

4.2.2.20 Email received from Mr Mkhwebane of the CF dated 07 July 2015;

4.2.2.21 Email sent to Ms Mathe of the CF dated 01 September 2015;

4.2.2.22 Email received from Ms Mathe of the CF dated 02 September 2015;

4.2.2.23 Email received from Mr Mnguni of the CF dated 27 October 2015;

4.2.2.24 Email sent to Mr Mnguni of the CF dated 27 October 2015;

4.2.2.25 Email sent to Mr Mnguni of the CF dated 02 November 2015;

4.2.2.26 Email sent to Mr Mnguni of the CF dated 10 November 2015;

4.2.2.27 Email received from Mr Mnguni of the CF dated 11 November 2015;
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<td>Email sent to Mr Mnguni of the CF dated 01 December 2015;</td>
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<td>Email received from Ms Malatji of the CF dated 27 January 2016;</td>
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<td>Email received from Ms Malatji of the CF dated 29 January 2016;</td>
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<td>Letter sent to Adv Phasha dated 17 February 2016;</td>
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<td>4.2.2.24</td>
<td>Email sent to the Compensation Commissioner and CF officials confirming</td>
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<td>Resolutions of meeting held on 09 March 2016, dated 10 March 2016;</td>
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<td>Email received from the Complainant dated 26 June 2016;</td>
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<td>4.2.2.36</td>
<td>Email sent to Mr Lephot of the CF dated 01 July 2016;</td>
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4.2.2.39 Email sent to Mr Lephoti of the CF dated 05 September 2016;
4.2.2.40 Email received from Mr Lephoti of the CF dated 05 September 2016;
4.2.2.41 Email sent to Mr Lephoti of the CF dated 10 October 2016;
4.2.2.42 Email received from Mr Lephoti of the CF dated 10 October 2016;
4.2.2.43 Email sent to Mr Lephoti of the CF dated 30 November 2016;
4.2.2.44 Email received from Mr Lephoti of the CF dated 01 December 2016;
4.2.2.45 Email to the Complainant’s legal representative dated 15 August 2017;
4.2.2.46 Email received from the Complainant’s legal representative dated 15 August 2017;
4.2.2.47 Email to the Complainant’s legal representative dated 15 August 2017.

4.4.3 Interviews, Meetings and Inspections in loco

4.4.3.1 Meeting held with the Director – General of the Department of Labour and Compensation Fund officials on 14 April 2015;
4.4.3.2 Meeting held with Compensation Fund officials on 17 June 2015;
4.4.3.3 Meeting held with Ms Molefi of the CF on 27 October 2015;
4.4.3.4 Meeting held with Compensation Fund officials on 09 March 2016;
4.4.3.5 Meeting held with Compensation Fund officials on 17 March 2016.

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 Policy on Service Delivery – Batho Pele principles.
4.4.5 Case Law

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

4.4.5.2 *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) All SA 369 (A);

4.4.5.3 *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.

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

5.1 Regarding whether there was undue delay by the Compensation Fund to finalise the objection hearing of the Complainant: -

Common cause facts

5.1.1 The Complainant lodged her objection with the CF in 2008, but her objection was never set down for hearing. The investigator sent the first enquiry to the CF on 06 October 2014. The hearing was subsequently set down for 26 November 2014. Notably, the first date of set down was five years after the objection was initially lodged.

5.1.2 The investigator communicated with the CF again on 20 January 2015, and requested the CF to allocate a date on which the hearing would proceed. The hearing was subsequently set down to proceed on 14 April 2015.

5.1.3 The Public Protector’s investigation team met with the Director – General of the Department of Labour and officials of the Compensation Fund on 14 April 2015.
Subsequent meetings were held with CF officials on 17 June 2015, 27 October 2015, 09 March 2016 and 17 March 2016. The purpose of these engagements were to address pressing issues with the CF, namely the capacity constraints at the Legal Section, the turnaround times for the finalisation of objections and to discuss how the CF will attend to the backlog which existed at the Legal Section.

5.1.4 The Public Protector was subsequently informed by the Complainant that the hearing did not proceed on 14 April 2015, and according to the Complainant, the reason provided by the CF was that the contract for the transcribers came to an end, and a new service provider had not yet been appointed. This matter was raised with the Legal Section of the CF on 07 May 2015, but the Legal Section failed to respond to enquiries about this.

5.1.5 The hearing of the Complainant was again set down for 05 October 2015. The hearing did not proceed however, and the CF failed to provide reasons as to why the hearing did not proceed.

5.1.6 A new hearing date, namely 19 November 2015, was provided by the CF. By 10 November 2015, the CF had not issued a confirmation letter to this effect, and when the Public Protector’s investigator requested confirmation that the hearing would proceed, the CF advised on 11 November 2015 that the hearing could no longer proceed, as the doctor, as well as the medical assessor were unavailable on that date.

5.1.7 On 02 December 2015, confirmation was received that the hearing would proceed on 04 February 2016. On 27 January 2016, Ms Tebogo Mahlatji of the Legal Section of the CF confirmed that the hearing would proceed on 04 February 2016 and that the doctor was subpoenaed. On 29 January 2016, however, the Public Protector’s investigator was advised that the hearing would not proceed as the Presiding Officer, Mr Ngwenya, was not available.

5.1.8 On 17 March 2016, the Public Protector Investigation team was informed that the hearing of the Complainant was set down for 26 April 2016. When the confirmation
letter was received from the CF, it appeared however that the hearing was set down for **04 May 2016**. Yet again, the hearing did not proceed, the reason provided by the CF was that the CF had challenges with availability of medical assessors, and that the CF was attempting to do block bookings. The CF further advised that it tried to contact the Complainant telephonically to convey the message, but could not reach her.

5.1.9 The hearing was thereafter set down for **23 June 2016**. Once again the hearing could not proceed, this time because the transcripts of 05 October 2015 were not available. By agreement, the hearing was postponed to **23 August 2016**.

5.1.10 Again, on 23 August 2016, the objection hearing of the Complainant did not proceed. The CF indicated that the hearing could not proceed as certain witnesses were not available. According to the Complainant however, the hearing could not proceed because the transcripts of the previous session requested by her legal advisor, were not available. By agreement, the hearing was postponed indefinitely to allow the Complainant’s legal representative to provide the CF with a date on which both he and the doctor who should testify, would be available.

**Application of the relevant legal framework**

5.1.12 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.

5.1.13 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.
5.1.14 The Compensation for Occupational Injuries and Diseases Act (hereinafter referred to as COIDA) prescribes specific timeframes for the reporting of a claim by an employer and / or employee, and the submission of documents to the CF. Section 45 creates an obligation on the Commissioner to adjudicate the claim.

5.1.15 In terms of section 91(1), an aggrieved employee can lodge an objection against a decision taken by the Compensation Commissioner within 180 days. Such an objection must be heard by the presiding officer, assisted by two medical assessors (one representing employees and one representing employers) in terms of section 91(2).

5.1.16 No time frames are however prescribed by COIDA for the processing and finalisation of an objection.

5.1.17 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 principles relevant to the present complaints are:

"**Courtespy:** Citizens should be treated with courtesy and consideration.

**Redress:** 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.

**Value for money:** Public services should be provided economically and efficiently in order to give citizens the best possible value for money."

5.1.18 Our courts have also emphasized that administrative decision – making should reach finality without delay. In Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van
Kaapstad⁴ the court held that "It is desirable and important that finality should be arrived at within a reasonable time in relation to judicial and administrative decisions or acts. It can be contrary to the administration of justice and the public interest to allow such decisions or acts to be set aside after an unreasonable long period of time has elapsed – [...]."²

5.1.19 Similarly, in Gqwetha v Transkei Development Corporations Ltd & Others³ the Supreme Court of Appeal held that "It is important for the efficient functioning of public bodies [...] that a challenge to the validity of their decisions [...] should be initiated without undue delay. The rationale for that longstanding rule – reiterated most recently by Brand JA in Associated Institutions Pension Fund v Van Zyl 2005 (2) SA 302 (SCA) at 321 – is twofold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, and in my view more important, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions."⁴

5.1.20 From the evidence discussed above, it is evident that, firstly, it took the CF six (6) years to set the Complainant’s objection down for hearing. Since the date of first set down, the Complainant’s objection hearing was postponed eight (8) times. Only twice did the CF advise the Complainant prior to the hearing date that the hearing would not proceed (the hearing was part-heard on one occasion). Almost three years after the date of first set down, the hearing has still not been finalised. All the postponements were as a result of the failure by the CF to timeously set the matter down for hearing, to timeously subpoena witnesses, to ensure timeous availability of

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¹ 1978 (1) All SA 369 (A). This case was reported in Afrikaans, and the translation of the relevant portion of the judgment was taken from Gqwetha v Transkei Development Corporations Ltd & Others [2005] ZASCA 51; 2006 (2) SA 603 (SCA) paragraph [22], in which the relevant portion was quoted by Nugent JA in delivering the majority judgment. In this judgment the court dealt with the question whether the court should grant an application to set aside a decision by an Administrator if the application was brought three and a half years after the Administrator gave permission for the subdivision of a property, upon certain conditions.
² Page 386.
³ [2005]ZASCA 51; 2006 (2) SA 603 (SCA).
⁴ Paragraph [22]. In this case the court considered an application for review brought a year and three months after the dismissal of the employee.
transcriptions of previous proceedings and to timeously ensure the availability of the presiding officer and his or her assessors.

5.1.21 The standard of service delivery by state institutions 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 is obliged to finalise objection hearings diligently and without delay, and to treat objectors reasonably, fairly, with courtesy and consideration. If the required standard of service delivery is not met, the CF is required to offer a speedy and effective remedy, with due regard to the prejudice that the lapse in service delivery may cause to the claimant.

5.1.22 In the circumstances, the CF did not provide any explanation for the initial delay to set the objection down for hearing. The period spent by the CF to set the objection down for hearing was therefore unreasonable and improper. The numerous postponements of the objection hearing was caused by the CF. The delay by the CF to finalise the objection was thus also unreasonable and improper.

5.1.23 The conduct of the CF is contrary to the standard of proper and good public administration enshrined in the Constitution.

Conclusion

5.1.24 The service delivery of the CF falls far short of the requirements set by sections 195 and 237 of the Constitution, and in addition, falls short of the required service delivery standards required by the Batho Pele principles. The CF failed to adhere to the principle laid down in case law that administrative decision-making must reach finality without delay.

5.1 Regarding whether the Complainant suffered any prejudice as a result of the alleged undue delay by the CF:
Common cause facts

5.2.1 It is common cause that the objection of the Complainant was not set down for hearing for a period of six (6) years after it was lodged. Since the date of the first set down, the objection hearing had been postponed eight (8) times.

5.2.2 The only issue to be determined by the Public Protector was whether the Complainant was improperly prejudiced by the delay to finalise the Complainant’s objection hearing.

5.2.3 The failure of the CF to set the objection of the Complainant down for hearing, and the numerous subsequent postponements of the objection hearing of the Complainant caused the Complainant frustration, inconvenience and distress. The Complainant had to sacrifice her time, and almost ten (10) years after she lodged her objection, she still has no finality on whether or not the CF will pay compensation benefits to her.

5.2.4 In addition, the Complainant alleged that she is legally represented and, as such, is liable to pay her legal representative for every day that he sets aside to represent her during the objection hearing. Such fees are payable even when the hearing does not proceed. According to the Complainant, her legal representative charges her R 3000.00 per day. In addition, the Complainant incurred unnecessary travelling expenses to and from the CF.

5.2.5 The Complainant however failed to provide any documentary proof to substantiate her pecuniary loss.

Application of the relevant legal framework

5.2.6 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.

Conclusion

5.2.7 The failure of the CF to set the objection of the Complainant down for hearing, and the numerous subsequent postponements of the objection hearing of the Complainant caused the Complainant frustration, inconvenience and distress. A finding of maladministration is sufficient to result in a remedy to the Complainant, irrespective of whether the Complainant was able to prove injustice or prejudice as a result of maladministration.

6. FINDINGS

In this regard, it is noted that the CF has accepted the Public Protector’s findings of maladministration and improper prejudice.

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 finds as follows: -

6.1 Regarding whether there was undue delay by the Compensation Fund to finalise the objection hearing of the Complainant, it is found that: -

(aa) The allegation that there was an undue delay by the CF to finalise the objection hearing of the Complainant is substantiated;

(bb) The CF failed to set the objection down for hearing for a period of six (6) years after the objection was lodged. Since then, the objection was postponed eight (8) times, and to date; has not been finalised. All the postponements were as a result of the failure by the CF to timeously make arrangements, as obliged by COIDA, to ensure
that the hearing would proceed. Only twice however, did the CF notify the Complainant beforehand of the postponements;

(cc) The service delivery of the CF falls far short of the requirements set by sections 195 and 237 of the Constitution, and in addition, falls short of the required service delivery standards required by the Batho Pele principles. The CF failed to adhere to the principle laid down in case law that administrative decision – making must reach finality without delay;

(dd) The CF’s conduct constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.2 Regarding whether the Complainant suffered any prejudice as a result of the alleged undue delay by the CF, it is found that:

(aa) The allegation that the Complainant suffered prejudice as a result of the undue delay to finalise her objection hearing, is substantiated;

(bb) The failure of the CF to set the objection of the Complainant down for hearing, and the numerous postponements of the objection hearing of the Complainant caused the Complainant frustration, inconvenience and distress;

(cc) The CF’s conduct constitutes improper conduct as envisioned in section 182(1) of the Constitution and improper prejudice as envisioned in section 6(4)(v) of the Public Protector Act.

7. REMEDIAL ACTION

In this regard, it is noted that the CF has already implemented some of the Public Protector’s 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 Complainant as close as possible to where she would have been had the improper conduct and maladministration not occurred, is the following:

7.1 The Compensation Fund Commissioner to:

7.1.1 Within seven (7) days from date of the report, issue a written apology to the Complainant, apologising for the delay to finalise her objection hearing, and to further provide full and comprehensive reasons to her regarding the cause(s) of each delay;

7.1.2 To ensure that it provides the Public Protector with a date on which the objection hearing will be heard by the Tribunal within fourteen (14) days from date of the report;

7.1.3 To ensure that it finalises the Complainant’s objection hearing within a period of three (3) months from date of the report;

7.1.4 To provide to the Public Protector a copy of its adopted Standard Operating Procedures (SOP’s) for the Legal Section within fourteen (14) days from date of this report;

7.1.5 To, within three (3) months after receiving substantiating documentary proof from the Complainant pertaining to her wasted legal costs and travelling expenses, reimburse the Complainant the full value of her wasted legal costs and her travelling expenses which she incurred as a result of the numerous postponements of the objection hearing without prior notice to the Complainant and / or her legal representative.
8. MONITORING

8.1 The Compensation Commissioner has already complied with paragraph 7.1.1 to 7.1.4 of the remedial actions.

8.2 The Public Protector will monitor compliance with the outstanding remedial action contained in paragraph 7.1.5, on a bi-weekly basis until such time as her remedial action has been complied with in full.

8.3 Each remedial action listed in paragraph 7.1 above is legally binding on the person directed to implement, unless it has been reviewed and set aside by the Court or an appropriate interim Court Order to stay the implementation of the remedial action is obtained within the period stated.

ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 23/09/2017

Assisted by: Ms C van Eeden (Investigator: AJSD)