

**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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**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF FAILURE BY THE
COMPENSATION FUND TO REVISE THE 2013 ASSESSMENT FOR EXECUTIVE
APARTMENTS & HOTELS (PTY) LTD**



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Executive Summary

- (i) This is a report 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.
- (ii) The report communicates the findings and the remedial action taken in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of failure by the Compensation to revise the 2013 assessment for Executive Apartments & Hotels (Pty) Ltd.
- (iii) On 26 November 2018, Ms. Yvette Dippenaar (the Complainant), an employee of Coid-Support (Pty) Ltd lodged a complaint on behalf of Executive Apartments & Hotels (Pty) Ltd (the employer) on the following allegations:-
 - a. That on 27 October 2014, the employer has incorrectly declared an amount of R146 908 580-00 as the return of earnings instead of an amount of R14 690 858-00 for 2013 assessment year. The error occurred by adding a zero / a decimal number at the end, meanwhile it was not supposed to have been added.
 - b. Upon realising the error, on 21 November 2014, a request for the revision of the 2013 assessment was submitted to the Compensation Fund for consideration.
 - c. After submission of a request for the revision of the 2013 assessment, the employer was provided with a revised amount of R 174 495-68, as assessment for the year 2013 and it was confirmed that the stipulated amount was paid to the Compensation Fund.
 - d. On 21 November 2014, an acknowledgement letter was received from the Compensation Fund advising the employer that a request for the revision of 2013 assessment was declined on the basis that a request was not submitted within the prescribed period of thirty (30) days.

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- e. It was further stated that the employer was barred from obtaining a Letter of Good Standing even though it had continued to pay the correct amount in each subsequent year.
 - f. Several enquiries and meetings were held between the employer, the Complainant and the Compensation Fund.
 - g. On 31 July 2018, the employer was provided with another outcome by the Compensation Fund stating that the request by the employer was again rejected, without considering all the supporting documents that were submitted by the employer.
- (iv) On analysis of the complaint, the following issue was identified and investigated:
- (a) Whether the Compensation Fund improperly declined to revise the employer's 2013 assessment upon request?
- (v) The investigation process was conducted by way of analysis of the documents and information obtained from the Complainant, meetings and written communication with relevant officials of the Compensation Fund, as well the application of all relevant laws and related prescripts.
- (vi) The Constitution and the Compensation for Occupational Injuries and Diseases Act, 130 of 1993 (COIDA) was taken into account to assist the Public Protector to determine whether there had been improper conduct by the Compensation Fund and prejudice to the employer was principally those imposing administrative standards that should have been upheld by the Compensation Fund when processing the employer request.
- (vii) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, the following findings are made: -

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- (a) Whether the Compensation Fund improperly declined to revise the employer's 2013 assessment upon request:-**
- (aa) The allegation that the Compensation Fund improperly declined to revise the employer's 2013 assessment upon request, is substantiated.
 - (bb) The Compensation Fund failed to accept its own document dated 21 November 2014 as enough evidence to prove that the employer did approach the Compensation Fund and request for the revision of the 2013 assessment. The refusal by the Compensation Fund was improper and lacks any basis.
 - (cc) It is also found that the employer paid an amount of R174 495-68 to the Compensation Fund during November 2014 and that was only one (1) month after the submission of the 2013 assessment.
 - (dd) The conduct by the Compensation Fund has resulted in not issuing the employer with a Letter of Good Standing. Furthermore, the conduct by the Compensation Fund resulted in the interest amount levied on the employer's account.
 - (ee) Accordingly, the conduct of the Compensation Fund was in contravention of section 33(1) of the Constitution and section 87 of COIDA.
 - (ff) The conduct of the Compensation Fund thus constitutes improper conduct as envisaged in Section 182(1) of the Constitution and maladministration as envisaged in Section 6(4)(i) & (ii) of the Public Protector Act.
- (viii) The Public Protector has taken note that the Compensation Commissioner has taken a decision to accept the employer's application for the revision of the 2013 assessment, as stated in the response to the section 7(9) which was earlier addressed to the



Compensation Commissioner and the commitment to start the process of revision as at 10 March 2021.

- (ix) The appropriate remedial action in terms of section 182(1)(c) of the Constitution, with the view to placing the employer as close as possible to where it would have been had the improper conduct and maladministration not occurred, is the following:
- (aa) The Compensation Fund Commissioner must, within thirty (30) days from the date of this report, ensure that the process of revising the employer's assessment for the year 2013 is finalised and furnish this office and the employer with the outcome of the revision thereof.
 - (bb) The Compensation Commissioner is to ensure that all the interest accrued or levied on the employer's account is reversed.
 - (cc) The Compensation Commissioner is to issue a written apology to the employer within thirty (30) days from date of this Report, for the inconvenience and prejudice that the employer suffered as a result of the refusal by the Compensation Fund to revise the 2013 assessment.

**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF FAILURE BY THE
COMPENSATION FUND TO REVISE THE 2013 ASSESSMENT FOR EXECUTIVE
APARTMENTS & HOTELS (PTY) LTD**

1. INTRODUCTION

- 1.1. This is a report 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 Director-General of the Department of Labour (the DG), Mr Thobile Lamati; and
- 1.2.2 The Compensation Commissioner, Mr Vuyo Mafata.
- 1.3. A copy of the report is also provided to Mr Christo de Wet, the Managing Director of Coid-Support (Pty) Ltd, to inform him about the outcome of this investigation.
- 1.4. A notice was issued in terms of section 7(9) of the Public Protector Act to Mr Vuyo Mafata, the Compensation Commissioner, on 26 May 2020 affording him an opportunity to respond to the evidence obtained during the investigation and the intended findings. A response was received on 10 March 2021.

2. THE COMPLAINT

2.1 On 26 November 2018, Ms. Yvette Dippenaar (the Complainant), an employee of Coid-Support (Pty) Ltd lodged a complaint on behalf of Executive Apartments & Hotels (Pty) Ltd (the employer) on the following allegations:

2.1.1 That on 27 October 2014, the employer incorrectly declared an amount of R146 908 580-00 as the return of earnings instead of an amount of R14 690 858-00 for the 2013 assessment year. The error occurred by adding a zero / a decimal number at the end, meanwhile it was not supposed to have been added.

2.1.2 Upon realising the error, on 21 November 2014 a request for the revision of the 2013 assessment was submitted to the Compensation Fund for consideration.

2.1.3 After submission of a request for the revision of the 2013 assessment, the employer was provided with a revised amount of R 174 495-68, as assessment for the year 2013 and it was confirmed that the stipulated amount was paid to the Compensation Fund.

2.1.4 On 21 November 2014, an acknowledgement letter was received from the Compensation Fund advising the employer that a request for the revision of the 2013 assessment was declined on the basis that a request was not submitted within the prescribed period of thirty (30) days.

2.1.5 It was further stated that the employer was barred from obtaining a Letter of Good Standing even though it had continued to pay the correct amount in each subsequent year.

2.1.6 Several enquiries and meetings were held between the employer, the Complainant and the Compensation Fund.



2.1.7 On 31 July 2018, the employer was provided with another outcome by the Compensation Fund stating that the request by the employer was again rejected, without considering all the supporting documents that were submitted by the employer.

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 and is also given the power to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.



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- 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*¹ the Constitutional Court per Chief Justice Mogoeng stated the following when confirming the powers of 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;²
- 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;³
- 3.5.3 Taking appropriate remedial action is much more significant than making a mere endeavor to address complaints which was the most I could do in terms of the Interim Constitution. However sensitive, embarrassing and far – reaching the implications of her report and findings, I am constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint;⁴
- 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;⁵
- 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

¹ CCT 143/15; CCT171/15 [2016] ZACC 11, 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC); 31 March 2016.

² Para [65].

³ Para [67].

⁴ Para [68].

⁵ Para [69].



the time, that would determine the legal effect it has on the person, body or institution it is addressed to;⁶

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 the investigation and the type of findings made;⁷

3.5.7 Implicit in the words “take action” is that the Public Protector is 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 the Public Protector 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;⁸

3.5.8 The Public Protector has the power to determine the appropriate remedy and prescribe the manner of its implementation;⁹

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.¹⁰

3.5.10 The remedial action taken by the Public Protector has a binding effect.¹¹ 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*

⁶ Para [70].

⁷ Para [71].

⁸ Para [71(a)].

⁹ Para [71(d)].

¹⁰ Para [71(e)].

¹¹ Para [76].

*action taken against those under investigation cannot be ignored without any legal consequences”.*¹²

- 3.6 Section 6(9) of the Public Protector Act grants the Public Protector discretionary powers to accept complaints which are lodged more than two years after the occurrence of the incident. Some of the special circumstances that have been taken into account when exercising this discretion favorably to accept the complaint, include the nature of the complaint and the seriousness of the allegations; whether the outcome could rectify systemic problems in state administration; whether there were prospects of successfully investigating this 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 Complainant and the overall impact of the investigation.
- 3.7 Admittedly, in terms of section 6(9) of the Public Protector Act, the Public Protector is barred from entertaining complaints reported after two years from the date of an incident unless special circumstances exist. However, the mere fact that the incident occurred more than two years before being reported to this office does not, in itself, prevent the complaint from being investigated. Instead, it is mainly *the interests of justice* that dictate whether the Public Protector should investigate the matter or not. In this case, we submit that there is a huge public interest in the manner in which public administration performs its administrative duties. There is an expectation that just administrative action will be upheld in all decisions taken by state organs.
- 3.8 Since the incident or matter concerned occurred more than two years prior to the reporting of the matter to the Public Protector, the Public Protector has exercised the discretion in terms of section 6(9) of the Public Protector Act to entertain the complaint based on the following special circumstance as envisaged in Rule 10(1) of the Public Protector Rules:-

¹² Para [73].

3.8.1 The employer continued to suffer prejudice as a result of the Compensation Fund's refusal to revise the company's assessment. Accordingly, a decision was taken to accept the complaint and conduct an investigation into the matter.

3.9 The Compensation Fund is an organ of state. Its conduct amounts to conduct in state affairs and, therefore, the matter falls within the mandate of the Public Protector to investigate.

3.10 The power and jurisdiction of the Public Protector 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 sections 6 and 7 of the Public Protector Act.

4.1.2. The Public Protector Act confers upon the Public Protector the sole discretion to determine how to resolve a dispute relating to maladministration.

4.1.3. The 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.

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:

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- 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 amounts 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 had the undue delay and/or maladministration not taken place?
- 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 maladministration and whether such conduct caused 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 Compensation Fund or an organ of state to prevent maladministration.
- 4.2.4. The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration. Where a Complainant has suffered prejudice, the idea is to place him or her as close as possible to where he or she would have been had the Compensation Fund or organ of state complied with the regulatory framework setting the applicable standards for good administration.
- 4.2.5. A notice in terms of section 7(9) of the Public Protector Act was issued to Mr Vuyo Mafata, the Compensation Commissioner, on 26 May 2020 affording him an

opportunity to respond to the evidence obtained during the investigation and the intended findings. A response to the section 7(9) notice was received from the Compensation Commissioner on 10 March 2021.

4.3. On analysis of the complaint, the following issue was considered and investigated:

4.3.1 Whether the Compensation Fund improperly declined to revise the employer's 2013 assessment upon request?

4.4. The Key Sources of Information

4.4.1. Documentation:-

4.4.1.1. Complaint sent through email dated 26 November 2018;

4.4.1.2. Power of Attorney dated 8 January 2018;

4.4.1.3. Employer registration papers from Companies and Intellectual Property Commission;

4.4.1.4. EAH Consolidated Annual Financial Statements for the year ended 28 February 2014;

4.4.1.5. Independent Auditors' Report dated 18 July 2014;

4.4.1.6. Employer Reconciliation Declaration / EMP501 from SARS;

4.4.1.7. Letter dated 31 March 2017 from Stein Registered Auditors;

4.4.1.8. Declaration by the employer Mr. John Skelton dated 15 January 2018;

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- 4.4.1.9. Copy of the financial chronology for the employer;
 - 4.4.1.10. Copy of the invoice indicating an amount of R942 904.12, due on 27 November 2014;
 - 4.4.1.11. Affidavit by Mr Darren Wachsberger dated 15 January 2018;
 - 4.4.1.12. Notice of assessment dated 28 October 2014;
 - 4.4.1.13. Letter by L Fourie: the Financial Manager dated 19 November 2014;
 - 4.4.1.14. Unsigned Letter / Notice by B Mahlomuza from the Compensation Fund, dated 21 November 2014;
 - 4.4.1.15. Letter / Notice from the Compensation Fund signed by Magakabeti dated 24 January 2017;
 - 4.4.1.16. Letter / Notice from the Compensation Fund signed by Nomhlekhabo Mahlomuza dated 31 July 2018;
 - 4.4.1.17. Email correspondence between Mr John Skelton and the Compensation Fund dating back from 23 August 2017 to 31 August 2017;
 - 4.4.1.18. Email correspondence between the Compensation Fund and the Complainant dating back from 25 January 2018 to 23 November 2018; and
 - 4.4.1.19. Affidavit by Liezel Fourie dated 16 September 2019.

4.4.2. Correspondence Sent and Received

- 4.4.2.1. Letter from PPSA to Compensation Fund (Mr Johnny Modiba), dated 23 January 2019 informing the Compensation Fund of the investigation;

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- 4.4.2.2. Email from the Compensation Fund responding to the allegations dated 5 February 2019;
 - 4.4.2.3. Email correspondence from PPSA to the Complainant dated 3 April 2019;
 - 4.4.2.4. Email correspondence from the Complainant to PPSA dated 3 April 2019;
 - 4.4.2.5. Email correspondence from PPSA to the Compensation Fund dated 3 April 2019;
 - 4.4.2.6. Email correspondence from the Compensation Fund to PPSA dated 3 July 2019;
 - 4.4.2.7. Email correspondence from PPSA to the Compensation Fund dated 3 July 2019;
 - 4.4.2.8. Email correspondence from the Compensation Fund to PPSA dated 23 July 2019;
 - 4.4.2.9. Email correspondence from PPSA to the Compensation Fund dated 23 July 2019;
 - 4.4.2.10. Email correspondence from PPSA to the Compensation Fund dated 16 September 2019;
 - 4.4.2.11. Email correspondence from the Compensation Fund to PPSA dated 9 October 2019;
 - 4.4.2.12. Letter from the Compensation Fund to PPSA dated 27 February 2020;
 - 4.4.2.13. Notice in terms of section 7(9)(a) dated 21 May 2020;
 - 4.4.2.14. Proof of delivery by Sky Net dated 26 May 2020; and
 - 4.4.2.15. Letter from the Compensation Commissioner, Mr V Mafata dated 10 March 2021.

4.4.3 Meetings held:-

- 4.4.3.1 Meeting between PPSA and the Compensation Fund on 25 April 2019;
- 4.4.3.2 Meeting between PPSA and the Compensation Fund on 4 September 2019;



- 4.4.3.3 Meeting between PPSA and the Compensation Fund on 14 October 2019; and
- 4.4.3.4 Meeting between PPSA and the Compensation Fund on 1 March 2021.

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 (Public Protector Act);
- 4.4.4.3 Compensation for Occupational Injuries and Diseases Act, 130 of 1993 (COIDA),
and
- 4.4.4.4 Government Gazette No. 40406, Volume 617 dated 07 November 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 the Compensation Fund improperly declined to revise the employer's 2013 assessment upon request:-

Common cause facts

- 5.1.1 It is common cause that the employer is registered with the Compensation Fund, as required in terms of the Compensation for Occupational Injuries and Diseases Act, 1993 (COIDA) under reference number 990000-638-833, BP No. 2001322927.
- 5.1.2 That on 27 October 2014 the employer incorrectly declared an amount of R146 908 580-00 as the return of earnings instead of an amount of R14 690 858-00 for the 2013 assessment year. As a result, the employer was furnished with an invoice to the amount of R942 904-12, as an assessment fee for the year 2013.
- 5.1.3 Subsequently, the employer approached the Compensation Fund and submitted an application for a revision of the 2013 assessment on the basis that an amount

of R146 908 580-00 was incorrectly declared instead of R14 690 858-00, due to human error.

5.1.4 It is also not in dispute that on 28 November 2014, the employer paid an amount of R 174 495-68 to the Compensation Fund.

5.1.5 It is further not in dispute that the request for the revision of the 2013 assessment was declined on several occasions by the Compensation Fund as per the letters dated 21 November 2014, 24 January 2017, 31 July 2018 and 23 November 2018.

5.1.6 On 21 November 2014, an acknowledgement letter signed by Ms. B Mahlomuza was issued by the Compensation Fund stating as follows:

“With reference to your letter 21/11/2014 in respect of the request for a revision of the 2013 assessment:-

The following boxes were also ticked in the letter:

5.1.6.1 *Audited / independently reviewed Annual Financial Statement;*

5.1.6.2 *Detailed Payroll Report;*

5.1.6.3 *Power of attorney (consultants, book keepers and attorneys when representing the employer);*

5.1.6.4 *A request of revision of the assessment /s on earnings is declined.*

N/B! *A request of revision of the assessment/s on earnings will be considered only if your request was lodged / submitted within 30 calendar days from date invoiced / assessed”.*



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- 5.1.7 It is also not in dispute that Mr. John Skelton, the Group Human Resources Manager approached the Compensation Fund on several occasions and met with different officials for assistance, dating back to August 2017.
- 5.1.8 In an email correspondence dated 31 August 2017, the Compensation Fund requested Mr. John Skelton to submit proof of the first correspondence with the Compensation Fund, i.e. application for revision of the 2013 assessment.
- 5.1.9 In his reply, Mr. John Skelton stated that *“the only proof I have is the letter from the department indicating the receipt of our appeal. I don’t unfortunately have our initial email to the department as I only joined the group last year. My predecessor applied for it so I’ll go through her files and see what I can find”*.
- 5.1.10 On 12 October 2018, the Compensation Fund requested information from the Complainant proving that the application for the revisions of assessment was submitted within 30 days. The Complainant submitted a copy of a letter dated 21 November 2014, as an acknowledgement of the request for the revision of the 2013 assessment, issued by the Compensation Fund as proof that a request was submitted within 30 days.
- 5.1.11 Again, on 31 July 2018 and 23 November 2018 respectively, the Compensation Fund declined the application for revision of the assessment and further stated that:
- “the letter that the employer is relying upon dated 21 November 2014 is a rejection letter and not an acknowledgement letter”*. The email correspondence further stated that unless *“the company / employer can provide proof either in a form of an email or letter of request with receipt stamp dated together with the required request timeframe. The employer continuously failed to provide proof of request therefore, the request is closed from our records”*.

Issues in dispute

- 5.1.12 The issue for determination is whether the Compensation Fund improperly declined to revise the employer's 2013 assessment upon request.
- 5.1.13 The Complainant stated that on 21 November 2014, the employer submitted a request for the revision of the 2013 assessment. On the same day, the Compensation Fund issued the employer with an acknowledgement letter / rejection letter.
- 5.1.14 In an email correspondence dated 31 August 2017, Mr. John Skelton informed the Compensation Fund that his predecessor submitted a request for the revision of the 2013 assessment. However, the proof as requested by the Compensation Fund i.e. *"proof either in a form of an email or letter of request with receipt stamp dated"* is not available for submission to the Compensation Fund.
- 5.1.15 The only proof in possession of the employer is the acknowledgement letter / rejection letter that was issued by the Compensation Fund dated 21 November 2014, whereby the same letter makes reference to the letter that was submitted on *"21 November 2014 in respect of the request for a revision of the 2013 assessment"*.
- 5.1.16 The Complainant submitted the following chain of events on the matter:
- 5.1.16.1 Date of submission of the 2013 assessment by the employer electronically, 27 October 2014;
- 5.1.16.2 Date of the 2013 assessment Notice - 28 October 2014, as per the invoice generated by the system upon submission of the earnings;

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- 5.1.16.3 Due date for the 2013 Notice of Assessment - 27 November 2014, as per the invoice generated by the system upon submission of the earnings;
- 5.1.16.4 Date of application for the revision of the 2013 assessment was 21 November 2014;
- 5.1.16.5 Acknowledgement letter / rejection letter stating the information that must be submitted by the employer / company, for the application to be considered dated 21 November 2014;
- 5.1.17 In support thereto, the employer submitted a statement under oath signed by Ms. Liezel Fourie dated 16 September 2019 wherein it is stated as follows:
- 5.1.17.1 That on 27 October 2014, she completed and submitted the return of earnings for the employer.
- 5.1.17.2 After having filed the return electronically and also received the printed version of the return of earnings, that is when she realised that she made a mistake when submitting the returns.
- 5.1.17.3 On 07 November 2014, she personally went to the offices of the Compensation Fund in Pretoria and consulted with one of the consultants on duty.
- 5.1.17.4 The consultant advised her on the process to be followed in order to correct the error. She further advised that the following documents must be submitted:
- 5.1.17.4.1 A letter requesting for a revision of the 2013 assessment;
- 5.1.17.4.2 Audited Financial Statement;
- 5.1.17.4.3 Detailed Payroll Report; and
- 5.1.17.4.4 Power of Attorney.

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- 5.1.17.5 On 21 November 2014, she submitted the documents as advised by the consultant to the Compensation Fund for consideration. She further confirmed that upon consultation with the Consultant, she was assisted to calculate the correct amount which the employer was supposed to pay for the 2013 assessment, including penalties for late submission. The calculated amount was R 174 495-68.
- 5.1.17.6 On 28 November 2014, a total amount of R174 495-68 was paid by the employer to the Compensation Fund, as an amount for the 2013 assessment.
- 5.1.18 On 05 February 2019, the Compensation Fund submitted a report to the office of the Public Protector stating that the request for the revision of the 2013 assessment is declined, as the request was submitted outside the required time frame of 30 calendar days. The report further stated that the decision remains, unless the employer submit proof either in a form of an email correspondence or letter of request with receipt stamp date together with the required timeframe.
- 5.1.19 The Compensation Fund furnished this office with a copy of the Government Gazette No. 40406, Volume 617 dated 07 November 2016 and signed by the Compensation Fund Commissioner dated 29 August 2016, whereby it states that:
- “As the employer has certified the information as correct, in terms of section 82(1) and 82(1A) of COIDA, the Act does not make provisions for request of revision of assessment after it was certified as correct. The Fund will not entertain any requests of revision submitted outside the allowable period of 30 calendar days.*
- Furthermore section 83(5) deals with actual earnings paid that differs to the earnings shown in the return concerned, and therefore it cannot be interpreted or construed as allowing employers the right to revise earnings after they were certified as correct by the employer”.*

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- 5.1.20 The office of the Public Protector engaged the Compensation Fund in writing and meetings were also held on 25 April 2019, 4 September 2019 and 14 October 2019 respectively, wherein this matter was discussed in detail.
- 5.1.21 A final letter dated 27 February 2020 was received from the Compensation Fund whereby it states as follows:
- 5.1.21.1 That the Compensation Fund rejected the application for the revision of assessment on the basis that it was received outside the prescribed 30 calendar days in line with Gazette number 40406 on the notice of revision of assessments;
- 5.1.21.2 The Compensation Fund had a meeting with the employer to explain the procedure and the documents needed for the application to be considered;
- 5.1.21.3 A letter dated 21 November 2014, issued by their office indicating that for an application to be considered, evidence to prove that the application was submitted within 30 calendar days was required; and
- 5.1.21.4 The only proof to that effect submitted by the employer was the same letter dated 21 November 2014 issued by the Compensation Fund.
- 5.1.22 On 21 May 2020, the Public Protector issued a notice in terms of section 7(9)(a) of the Public Protector Act (section 7(9) notice) to Mr. Vuyo Mafata, the Compensation Commissioner, informing him of the adverse preliminary findings and to afford him an opportunity to respond to the evidence obtained during the investigation.
- 5.1.23 No response was received from the Compensation Commissioner until Adv Kholeka Gcaleka, the Acting Public Protector, intervened through her interaction with Mr Jonny Modiba, the Chief Operations Officer of the Compensation Fund.

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- 5.1.24 Subsequent to their interaction, a meeting was held between the office of the Public Protector and the Compensation Fund on 01 March 2021. Below is a summary of what transpired during the meeting:
- 5.1.24.1 The Compensation Fund still reiterated that the request was not submitted during 2014.
- 5.1.24.2 The Compensation Fund submitted that a letter / notice issued by Magakabeti dated 24 January 2017 is questionable, as the alleged author of the letter was not in the employ of the Compensation Fund at the alleged time;
- 5.1.24.3 A letter / notice that the employer is relying upon as proof that a request was submitted to the Compensation Fund makes reference to the 30 calendar days. The Government Gazette that makes provision to the 30 days was, however not in place during November 2014 as it was signed by the Commissioner on 29 August 2016 and gazetted on 07 November 2016;
- 5.1.24.4 That there are a number of discrepancies on the date stamps from the documents submitted by the employer and the Compensation Fund was of the strong view that their official stamps might have been compromised;
- 5.1.24.5 The Compensation Fund made a submission that most of the compensation fund Consultants including the Complainant (Ms Yvette Dippenaar) were previously employed by the Compensation Fund and that they “might” be in possession of the official stamps, for them to personally stamp their own documents;
- 5.1.24.6 The Compensation Fund submitted that processes have been put in place in order to regulate the use of official stamps;
- 5.1.24.7 With reference to the amount of R174 495-68 that was paid by the employer on 28 November 2014 the Compensation Fund confirmed that the money was indeed paid by the employer. However, the payment made was not made based on any

invoice issued by the Compensation Fund. The Compensation Fund submitted that the rates are published annually and any person can work out the calculations according to the published rates, as there are no records of any official who provided the calculations to the employer.

5.1.25 At the end of the meeting, a resolution was taken that the Compensation Fund is afforded an opportunity to submit a written submission by 05 March 2021, in response to the section 7(9) notice that was issued by the Public Protector on 21 May 2020.

5.1.26 On 10 March 2021, a response to the section 7(9) notice was received from Mr Mafata, the Compensation Commissioner stating as follows:

5.1.26.1 *“After extensive deliberations, the Compensation Fund (CF) has considered your letter issued in terms of Section 7 (9) (a) of the Public Protector Act, 1994 and has come to a decision to accept the application for the revision of the assessment”*

Application of the relevant legal framework

The Constitution of the Republic of South Africa, 1996 (the Constitution);

5.1.27 Section 33(1) of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

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

5.1.28 Section 80(1) requires an employer carrying on business in the Republic to register such business with the Commissioner and also to furnish the Commissioner with the prescribed particulars of such business.



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- 5.1.29 Section 82(1) obliges the employer, excluding exempted employers, to furnish the Commissioner with a return in the prescribed form, not later than the thirty-first of March in each year, certified by him/her as correct and showing the amount of earnings up to maximum paid by the employer or to its employees during the reporting period.
- 5.1.30 Section 83(1) requires the employer to be assessed according to a tariff of assessment calculated on the basis of percentage of the annual earnings of his/her or its employees.
- 5.1.31 Section 86(1) further requires the employer to pay an assessment to the Commissioner within 30 days after the date of the notice of assessment.
- 5.1.32 Section 87 obliges the Director-General to impose a fine to an employer who fails to pay an assessment.
- 5.1.33 The White Paper on Transforming Public Service Delivery issued by the Government in 1997 identified eight (8) Batho Pele Principles for transforming public service delivery. The principle relevant to the present complaint is:

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”.

- 5.1.34 COIDA requires the employer who is carrying a business in the country to register the business in the prescribed form. It is evident that the employer did register the business with the Compensation Fund. Hence reference number 990000-638-833 is allocated by the Compensation Fund as the business reference number.
- 5.1.35 It is also evident that the employer did comply with Section 82(1) of COIDA, as the error occurred at the time when the employer was submitting the returns for the

year 2013. It is also correct to say that the employer, upon submitting the earnings, confirmed that the information that was about to be submitted was correct. It must be noted that human error can occur at any given time and that the same occurred in this matter.

- 5.1.36 Attention must be drawn to the fact that COIDA gives the employers 30 days after the date of the notice to pay an assessment to the Compensation Fund. Failure which, the Director-General will impose a fine as outlined in section 87.
- 5.1.37 It has been noted that COIDA does not make any reference to the revision of the assessment. Hence Government Gazette No. 40406 was issued by the Commissioner, affording the employers 30 calendar days to submit a request for the revision of assessment.
- 5.1.38 It must be noted that during the process of investigation, the Compensation Fund did not dispute the validity of any correspondence that was submitted by the employer to the office of the Public Protector, i.e. letters dated 21 November 2014 and/ or 24 January 2017. Further, no submission was made pertaining to the date stamps and/ or the letters being questionable. These submissions were only made during the meeting on 01 March 2021.
- 5.1.39 Reference is made to the response that was received by the office of the Public Protector whereby the Compensation Fund relied on the Government Gazette with regards to the 30 calendar days. It must be noted that the revision of the assessment in this matter relates to the 2013 assessment and that the Government Gazette was only signed by the Commissioner on 29 August 2016. That, in fact, was longi after the existence of the submission of the request by the employer and which is thus retrospectively applied.
- 5.1.40 Surprisingly, the Compensation Fund changed its stance maintained during the meeting on 01 March 2021 stating that the 30 days period was not applicable during 2014. Meanwhile, in their responses dating back to 05 February 2019 and

27 February 2020, reference was made to the Government Gazette that was not applicable during 2014.

5.1.41 The investigation team's observation with regard to the "acknowledgement and/or *rejection letters*" sent to the employer is that on one hand the form requires the employer to provide specified information /documents in order for the revision of the assessment to be considered, whilst on the other hand it indicates that the application has been declined.

5.1.42 Based on the evidence submitted by the employer, it is also evident that the employer paid an amount of R174 495-68 to the Compensation Fund during November 2014. That is the same year after the date of submission of the 2013 assessment by the employer, i.e. 27 October 2014.

Conclusion

5.1.43 The Compensation Fund has failed to consider its own document i.e. the letter issued on 21 November 2014 titled "*Request for the revision of the 2013 assessment*", as the only available evidence in possession of the employer that proves submission of the request for revision of the 2013 assessment.

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 Compensation Fund, the following findings are made:-

6.1. Whether the Compensation Fund improperly declined to revise the employer's 2013 assessment upon request.

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- 6.1.1 The allegation that the Compensation Fund improperly declined to revise the employer's 2013 assessment upon request, is substantiated.
- 6.1.2 The Compensation Fund failed to accept its own document dated 21 November 2014 as enough evidence to prove that the employer did approach the Compensation Fund and request for the revision of the 2013 assessment. The refusal by the Compensation Fund was improper and lacks any basis.
- 6.1.3 It is also found that the employer paid an amount of R174 495-68 to the Compensation Fund during November 2014 and that was only one (1) month after the submission of the 2013 assessment.
- 6.1.4 The conduct by the Compensation Fund has resulted in not issuing the employer with a Letter of Good Standing. Furthermore, the conduct by the Compensation Fund resulted in the interest amount levied on the employer's account.
- 6.1.5 Accordingly, the conduct of the Compensation Fund was in contravention of section 33 (1) of the Constitution and section 87 of COIDA.
- 6.1.6 The conduct of the Compensation Fund thus constitutes improper conduct as envisaged in Section 182(1) of the Constitution and maladministration as envisaged in Section 6(4)(i) & (ii) of the Public Protector Act.

7. REMEDIAL ACTION

- 7.1 The Public Protector has taken note that the Compensation Commissioner has taken a decision to accept the employer's application for the revision of the 2013 assessment, as stated in the response to the section 7(9) which was earlier addressed to the Compensation Commissioner and the commitment to start the process of revision as at 10 March 2021.



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- 7.2 The appropriate remedial action in terms of section 182(1)(c) of the Constitution, with the view to placing the employer as close as possible to where it would have been had the improper conduct and maladministration not occurred, is the following:
- 7.2.1 The Compensation Fund Commissioner must, within thirty (30) days from the date of this report, ensure that the process of revising the employer's assessment for the year 2013 is finalised and to furnish this office and the employer with the outcome of the revision thereof.
- 7.2.2 The Compensation Commissioner is to ensure that all the interest accrued or levied on the employer's account is reversed.
- 7.2.3 The Compensation Commissioner is to issue a written apology to the employer within thirty (30) days from date of this Report, for the inconvenience and prejudice that the employer suffered as a result of the refusal by the Compensation Fund to revise the 2013 assessment.

8. MONITORING

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- 8.1 The Compensation Commissioner must, within thirty (30) days from the date of this report, provide the Public Protector with feedback regarding the compliance with the remedial action and/or on the implementation of the remedial action referred to in paragraph 7 of this report.
- 8.2 The implementation of the remedial action shall, in the absence of a court order directing otherwise, be complied with within the period prescribed in the report.



ADV Kholeka Gcaleka
ACTING PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

DATE: 2021/03/31

Assisted by: Ms A Sombhani & Adv J Raubenheimer

