

**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**

REPORT NUMBER: 49 of 2022/23

ISBN NUMBER: 978-1-991244-01-7

**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF UNDUE DELAY AND
MALADMINISTRATION BY THE COMPENSATION FUND TO PROCESS AND
FINALISE A CLAIM OF MR TSAPISHI JAMES MONASHANE IN RESPECT OF AN
OCCUPATIONAL DISEASE, CLAIM NO: A8/153340**

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LIST OF ACRONYMS

CF	Compensation Fund
Constitution	Constitution of the Republic of South Africa, 1996
CMS	Claim Management Systems
COIDA	Compensation of Occupational Injuries and Diseases Act, 130 of 1993
CRM	Customer Relations Management
DoEL	Department of Employment and Labour
DR	Doctor
NIHL	Noise Induced Hearing Loss
PAJA	Promotion of Administrative Justice Act, 3 of 2000
PLH	Permanent Loss of Hearing
PPE	Personal Protective Equipment
Public Protector Act	Public Protector Act, 23 of 1994
PPSA	Public Protector of South Africa
Public Protector Rules	Rules relating to investigations by the Public Protector and Matters Incidental thereto, 2018, as amended
SOP	Standard Operating Procedure

EXECUTIVE SUMMARY

- (i) This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution, which empowers the Public Protector to report on any conduct in state affairs that is suspected to be improper or to result in any impropriety or prejudice and section 8(1) of the Public Protector Act, which provides that the Public Protector may make known the findings, point of view or recommendation of any matter investigated by her.
- (ii) The report relates to an investigation into allegations of undue delay and maladministration by the Compensation Fund (the CF) to process and finalise a claim of Mr TJ Monashane (the Complainant), an employee of a private employer, in respect of an occupational disease.
- (iii) The complaint was lodged with the Public Protector by Mr Monashane on 24 November 2015.
- (iv) In the main, the Complainant alleged that:
 - (a) He was employed by Macsteel Special Steels in Dunswart, a division of Macsteel Service Centre S.A. (the employer). During his employment, he was exposed to high noise levels at the employer's premises. As a result of the exposure, he suffered noise-induced hearing loss;
 - (b) The hearing loss was confirmed by the employer's Medical Practitioner on 13 July 2009 and the employer assisted him to report the matter to the CF;
 - (c) On 02 April 2013, the same employer lodged an objection with the CF, preventing the CF from making any payment in respect of compensation to the Complainant; and

- (d) The CF failed to set the matter down for hearing; to process the payment to the Complainant and/or to furnish the Complainant with reasons for the delay therein.
- (v) Based on the analysis of the complaint, the following issue was considered and investigated:
 - (a) Whether there was undue delay by the CF to process and finalise a claim for compensation to the Complainant, and if so, whether such conduct constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution as well as maladministration and undue delay as envisaged in section 6(4)(a)(i) and (ii) of the Public Protector Act?
- (vi) The investigation was conducted in terms of section 182(1) of the Constitution and section 6(4) of the Public Protector Act. It included an analysis of all the relevant documents, application of relevant laws, case law and related prescripts.
- (vii) On 23 November 2022, a notice in terms of section 7(9) of the Public Protector Act was issued to Mr Vuyo Mafata, the Compensation Fund Commissioner, to provide him with an opportunity for a response on the likely adverse findings and proposed remedial action. Sections 7(9)(a) and (b) of the Public Protector Act provide that persons implicated in an investigation by the Public Protector, are to be allowed the opportunity to make representations regarding same.
- (viii) A written response to the Notice (dated 06 December 2022) was received from the CF. The response and information submitted in response to the notice in terms of section 7(9) of the Public Protector Act, were duly considered by the Public Protector in relation to the substance of any allegations against the CF, on the grounds for adverse findings and the remedial action involving them.

- (ix) Having regard to the evidence and regulatory framework determining the standards that the CF should have complied with, the following findings are made:
- (a) Whether there was undue delay by the CF to process and finalise a claim for compensation to the Complainant, and if so, whether such conduct constitutes improper conduct as envisaged in section 182(1)(a) as well as undue delay as envisaged in section 6(4)(a)(i) and (ii) of the Public Protector Act.
 - (aa) The allegation that there was undue delay by the CF to process and to finalise the Complainant's claim for compensation as a result of occupational disease, is substantiated.
 - (bb) The determining factor(s) for the expediting and/or delay in the processing of a claim to its finality is generally dependent on the period within which the injured employee takes to recover from his/her condition. In the matter at hand however, it took the CF more than four (4) years (from 27 September 2008 to 28 November 2012) to adjudicate the claim lodged by the Complainant.
 - (cc) Thereafter the CF again took an extraordinarily long time to set the objection down for hearing. It took the CF more than six (6) years (from 02 April 2013 i.e. the date of objection by the employer to 24 January 2020, being the hearing date) to proceed with the objection hearing.
 - (dd) The CF further failed to provide the Complainant with regular feedback on his claim and also failed to inform the Complainant of the award that was issued in his favour on 28 November 2012. The Complainant only became aware of the award through interaction with the Public Protector during 2018.

- (ee) The CF failed to inform the Complainant or the Public Protector regarding the change of venue for the objection hearing despite the fact that the CF was already well aware that the Complainant approached the Public Protector for assistance regarding the delay to finalise his claim and the delay to set a date for the objection hearing.
- (ff) The delays as mentioned in paragraph (bb) and (cc) are in contravention of sections 33, 195(1)(a) and (f) and 237 of the Constitution, as the CF failed to process and finalise the claim within a reasonable time period. Furthermore, the CF failed to set the objection hearing down within a reasonable timeframe. The conduct of the CF in this regard further violated the public administration standards set out in the White Paper on Transforming Public Service Delivery (Batho Pele Principles) as published in the government gazette no 18340 of 1 October 1997.
- (gg) The conduct by the CF resulted in the Complainant suffering prejudice as he had to travel from the Limpopo Province on several occasions to attend the objection hearing and only to find that the hearing was either postponed or moved to a different venue without him being informed thereof.
- (hh) The CF's SOP dealing with objections does not contain specific timeframes when handling and processing objections within the CF. Furthermore, the SOP was signed on 24 June 2016, which is more than six (6) years ago and needs to be reviewed in line with emerging needs of the organisation.
- (ii) These issues serve to compound a lack of progress by the CF to address the systemic deficiencies which were identified by the Public Protector during the systemic investigation conducted 13 years ago, as reported in Report 28 of 2009/2010.

- (jj) The complainants and current claimants are therefore evidently still suffering the same delays and inefficiencies at the CF as those identified by the Public Protector as far back as 2009.
- (kk) Accordingly 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)(a) (i) & (ii) of the Public Protector Act.
- (x) The Public Protector is empowered in terms of section 182(1)(c) of the Constitution to take appropriate remedial action to redress the conduct referred to in this report upon the conclusion of an investigation where adverse findings are made.
- (xi) In the matter of 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.
- (xii) Taking into account the submissions that were presented before the Public Protector by the CF, the appropriate remedial action that the Public Protector is taking in terms of section 182(1)(c) of the Constitution, are the following:

The Compensation Fund Commissioner:

- (aa) Within **ninety (90)** calendar days from the date of this report, provide a plan to review the Internal Standard Operating Procedure (SOP) – Legal Services (Hearing section: Objections (section 91) to include specific reasonable timeframes within which objections should be handled, processed and finalised;

- (bb) Once the reviewed SOP is approved, to ensure that staff are trained on the amended SOP, within **sixty (60)** calendar days from the date of implementation thereof;
- (cc) Within **sixty (60)** calendar days from the date of this report, submit a comprehensive report with the steps that the CF has taken to address the recommendations as contained in the Public Protector's Report No. 28 of 2009/2010, as well as the progress made in the implementation of those recommendations in line with section 181(3) and 182(1)(c) of the Constitution;
- (dd) Ensure that the CF complies with the outstanding recommendations and submit an implementation plan within **sixty (60)** calendar days from the date of this report in line with sections 181(3) and 182(1)(c) of the Constitution; and
- (ee) The Public Protector notes that the Compensation Commissioner has already issued a written apology to the Complainant on 06 December 2022, in line with the remedial action proposed in the section 7(9)(a) notice, for the inconvenience and prejudice that the Complainant suffered as a result of the delay by the CF to attend to his claim within a reasonable time in line with section 195 (1)(i) of the Constitution and Principle seven (7) of the Batho Pele principles.

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF UNDUE DELAY AND MALADMINISTRATION BY THE COMPENSATION FUND TO PROCESS AND FINALISE A CLAIM OF MR TSAPISHI JAMES MONASHANE IN RESPECT OF AN OCCUPATIONAL DISEASE, CLAIM NO: A8/153340

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 The report is submitted in terms of sections 8(1) read with section 8(3) of the Public Protector Act, which empowers the Public Protector to make known the findings of an investigation, to affected parties (including the Complainant) for such persons to note the outcome of the investigation and to implement the remedial action, where applicable:
- 1.2.1 The Director–General of the Department of Employment and 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 Tsapishi James Monashane (the Complainant) to inform him about the outcome of the investigation.
- 1.4 The report relates to an investigation into allegations of undue delay and maladministration by the Compensation Fund (the CF) to process and finalise a claim by the Complainant, an employee of a private employer, in respect of an occupational disease.

2. COMPLAINT

2.1 On 24 November 2015, Mr T J Monashane (the Complainant) lodged a complaint with the Public Protector.

2.2 In the main the Complainant alleged that:

2.2.1 He was employed by Macsteel Special Steels in Dunswart, a division of Macsteel Service Centre SA (Pty) Ltd (the employer). During his employment, he was exposed to high noise levels at the employer's premises. As a result of the exposure, he suffered noise-induced hearing loss;

2.2.2 The hearing loss was confirmed by the employer's medical practitioner on 13 July 2009 and the employer assisted him to report the matter to the CF;

2.2.3 On 02 April 2013, the same employer lodged an objection with the CF, preventing the CF from making any payment in respect of compensation to the Complainant; and

2.2.4 The CF failed to set the matter down for hearing; to process the payment to the Complainant and to furnish the Complainant with reasons for the delay thereto.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The investigation was conducted in terms of section 182(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution) which gives the Public Protector the powers to investigate alleged or suspected improper or prejudicial conduct in state affairs, to report on that conduct and to take appropriate remedial action; and in terms of section 6(4) of the Public Protector Act 23 of 1994, (Public Protector Act), which regulates the manner in which the powers conferred by section 182 of the Constitution may be exercised in respect of government at any level.

- 3.2 Since the incident or matter concerned occurred more than two years prior to the reporting of the matter to the Public Protector, she has exercised her discretion in terms of section 6(9) of the Act to entertain the complaint based on the following special circumstances as envisaged in Rule 10(1) of the Rules.,
- 3.3 In deciding what constitutes '*special circumstances*', some of the special circumstances that were taken into account to exercise the Public Protector's discretion favourably to accept this complaint, included the nature of the complaint; the seriousness of the allegations; whether the outcome could rectify systemic problems in state administration; the availability of the evidence and/or records in relating to the matter; whether there are any competent alternative remedies available to the Complainant and the overall impact of the investigation; whether the prejudice suffered by the Complainant persists; whether the Public Protector's refusal to investigate perpetuates the violation of section 195 of the Constitution; and whether the Public Protector's remedial action will redress the imbalances of the past.
- 3.4 Section 6(9) of the Public Protector Act, 1994 provides that, "*Except where the Public Protector in special circumstances, within his or her discretion, so permits, a complaint or matter referred to the Public Protector shall not be entertained unless it is reported to the Public Protector within two (2) years from the occurrence of the incident or matter concerned*".
- 3.5 In this instance, the special circumstance that the Public Protector took into account was the fact that the alleged undue delay by the CF in this particular case is serious. At the time when the complaint was lodged with the Public Protector, the underlying events, which commenced in 2009, were still unresolved and could not be regarded as having "occurred" (finalised) more than 2 years earlier. The delay to finalise the claim was not as a result of the conduct of the Complainant, but that of the CF, in that it took the CF three (3) years to process the claim and issue an award; and a further seven

(7) years to set down an objection hearing. At the time the Complainant lodged the complaint with the Public Protector South Africa (PPSA) until the /finalisation of the claim in January 2020, he was unemployed and frequently had to contact the CF for feedback on the matter thus impacting on his financial status. The Complainant further incurred travel costs between Limpopo Province and Gauteng Province to enquire from the CF on the status of his claim.

- 3.6 The outcome of the investigation can achieve redress for the Complainant and other claimants who might have similar complaints against the Compensation Fund. It was furthermore identified that the Public Protector has previously issued a formal report (Report no. 28 of 2009/2010) relating to systemic deficiencies identified at the CF. The CF is however, yet to fully implement the recommendations made by the Public Protector in that report. It was also established that records and other information are still readily available to enable the Public Protector to conduct a full investigation and conclude the matter. The complaint relates to serious allegations of maladministration which, if not investigated, may result in further systemic administrative failures at the CF going forward. It was therefore in the interest of justice for the Public Protector to exercise her discretion in favour of investigating this matter.
- 3.7 Noting that there is doubt on the reporting period of the matter which has a possibility of being reported outside the prescribed period of two (2) years, as prescribed in terms of section 6(9) of the Public Protector Act, on 16 August 2022, the Public Protector communicated to the CF the special circumstances considered by the Public Protector in taking a decision to investigate the matter.
- 3.8 The CF responded to the Public Protector on 25 August 2022. That response is discussed in detail under “*issue in dispute*” below.
- 3.9 The Public Protector’s powers and jurisdiction to investigate and take appropriate remedial action were not disputed by the CF.

- 3.10 The CF is an organ of state and its conduct amounts to conduct in state affairs, and as a result, the Public Protector is satisfied that the complaint falls within her competency to conduct an investigation as envisaged in section 182(1)(a) of the Constitution and sections 6(4) and (5) of the Act.

4. ISSUE IDENTIFIED FOR INVESTIGATION

- 4.1 Based on the analysis of the complaint, the following issue was identified to inform and focus the investigation:

- 4.1.1 Whether there was undue delay by the CF to process and finalise a claim for compensation to the Complainant, and if so, whether such conduct constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution as well as maladministration and undue delay as envisaged in section 6(4)(a)(i) and (ii) of the Public Protector Act.

- 4.2 The Public Protector has concluded the investigation and based on the information and evidence obtained during the course thereof, the Public Protector is now in a position to make findings and take appropriate remedial action.

- 4.3 Evidence indicating wrongdoing on the part of the CF was found and since the Public Protector did not receive any additional evidence that refutes the evidence in its possession, the Public Protector has made adverse findings against the CF and taken appropriate remedial action in order to place the Complainant as close as possible to where he is likely to have been had the CF acted properly.

5. THE INVESTIGATION

5.1 Methodology

5.1.1 The investigation was conducted in terms of section 182 of the Constitution and Section 6 and 7 of the Public Protector Act.

5.1.2 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.

5.2 Approach to the investigation

5.2.1 The approach to the investigation included the exchange of documents, analysis of the relevant documentation and consideration and application of the relevant laws, regulatory framework and prescripts.

5.2.2 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 amounts to maladministration, abuse of power or other improper conduct?
- (d) In the event of a violation, what action should be taken?

5.2.3 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 or not the alleged conduct was inconsistent with the applicable prescripts.

5.2.4 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standards that should have been met by the CF.

5.2.5 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of improper conduct and maladministration; what it would take to remedy the wrong or, where appropriate, to place the Complainant as close as possible to where he would have been, but for the improper conduct or maladministration.

5.3 The Investigation Process

5.3.1 The investigation process commenced with correspondence to the CF on 23 May 2016, wherein the institution was informed of the investigation, the legislation in terms of which the investigation was conducted, as well as what information was required and the format thereof.

5.3.2 The format and the procedure followed in conducting the investigation included:

- a) Communication by telephone, email and letters to the CF;
- b) Meetings and interviews with the Complainant and relevant officials of the CF;
- c) Obtaining records or documents relevant to the investigation which were in the possession or under control of the CF;
- d) Inspection and perusal of all relevant documents; and
- e) The analysis and application of all relevant laws, policies and related prescripts.

5.4 Key sources of information

5.4.1 Documents and e-mail correspondence

- 5.4.1.1 The complaint letter and supporting documents dated 24 November 2015;
- 5.4.1.2 Copy of an Award dated 13 December 2012;
- 5.4.1.3 Copy of the Notice of Objection by the employer dated 02 April 2013;
- 5.4.1.4 Enquiry letter from the Public Protector to the CF dated 23 May 2016;
- 5.4.1.5 Email correspondence from the CF to the Public Protector dated 05 December 2016;
- 5.4.1.6 Email correspondence from the CF to the Public Protector dated 13 August 2018;
- 5.4.1.7 Email correspondence from the CF to the Public Protector dated 20 February 2019 and attachment dated 19 February 2019;
- 5.4.1.8 Email correspondence from the CF to the Public Protector dated 02 May 2019;
- 5.4.1.9 Copy of a letter from the CF to the employer dated 29 April 2019;
- 5.4.1.10 Email correspondence from the Public Protector to the CF dated 28 November 2019;
- 5.4.1.11 Email correspondence from the CF to the Public Protector dated 04 December 2019;
- 5.4.1.12 Copy of a letter from the CF to the employer dated 04/12/2019;
- 5.4.1.13 Copy of the objection outcome dated 24 January 2020;

- 5.4.1.14 Email correspondence from the CF to the Public Protector dated 08 July 2020;
 - 5.4.1.15 Copy of a letter from the Public Protector to the CF dated 16 August 2022;
 - 5.4.1.16 Copy of a letter from the CF to the Public Protector dated 25 August 2022;
 - 5.4.1.17 Notice in terms of section 7(9)(a) of the Public Protector Act, 1994 and cover letter to the Compensation Commissioner dated 23 November 2022;
 - 5.4.1.18 A letter from the Public Protector to the CF dated 29 November 2022;
 - 5.4.1.19 A letter from the CF to the CF dated 06 December 2022;
 - 5.4.1.20 Copy of a letter from the CF addressed to the Complainant dated 06 December 2022; and
 - 5.4.1.21 Copy of the CF Action Plan.
- 5.4.2 **Legislation and other prescripts**
- 5.4.2.1 The Constitution of the Republic of South Africa, 1996 (the Constitution);
 - 5.4.2.2 Public Protector Act, 23 of 1994 (Public Protector Act);
 - 5.4.2.3 Promotion of Administrative Justice Act 3 of 2000;
 - 5.4.2.4 The Compensation for Occupational Injuries and Diseases Act, 1993 (COIDA);
 - 5.4.2.5 The White Paper on Transforming Public Service Delivery issued by the Government in 1997;
 - 5.4.2.6 Internal Operating Procedure (SOP) – Legal Service (Hearing Section) – Objection (Section 91) dated 24 June 2016; and

5.4.2.7 Rules relating to investigations by the Public Protector and Matters Incidental thereto, 2018, as amended;

5.4.3 **Meetings held**

5.4.3.1 Meeting between the Investigation Team and the CF on 27 January 2020; and

5.4.3.2 Meeting between the Investigation Team and the CF on 06 December 2022.

5.4.4 **Case Law and touchstones**

5.4.4.1 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC);*

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

5.4.4.3 Public Protector Report Number 28 of 2009/2010 dated 08 October 2009.

5.4.5 **Notice issued in terms of section 7(9)(a) of the Public Protector Act.**

5.4.5.1 On 23 November 2022, a notice in terms of section 7(9)(a) of the Public Protector Act was issued to Mr Vuyo Mafata, the Compensation Fund Commissioner to provide him with an opportunity for response on the likely adverse findings and proposed remedial action. Sections 7(9)(a) and (b) of the Public Protector Act provide that persons implicated in an investigation by the Public Protector, are to be allowed the opportunity to make representations regarding same.

5.4.5.2 A response to the notice was received from the CF dated 06 December 2022. The response and information/ evidence submitted in response to the notice in terms of section 7(9)(a) of the Public Protector Act, were duly considered by the Public Protector in relation to the substance of any allegations against the CF, on the grounds for adverse findings and the remedial action involving the CF.

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

6.1 Whether there was undue delay by the CF to process and finalise a claim for compensation to the Complainant, and if so, whether such conduct constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution; as well as maladministration and undue delay as envisaged in section 6(4)(a)(i) &(ii) of the Public Protector Act

Common cause issues

6.1.1 The Complainant was employed by Macsteel Special Steels in Dunswart. He was assisted by his employer to lodge claim with the CF, as a result of him suffering a hearing loss.

6.1.2 On 28 November 2012, the CF accepted liability and thereafter issued an award dated 13 December 2012 of eight percent (8%) permanent total disablement in favour of the Complainant, calculated at an amount of twenty seven thousand, six hundred rand (R27 600-00).

6.1.3 On 02 April 2013, the employer lodged an objection in line with section 91(1) of the Compensation for Occupational Injuries and Diseases Act, 1993 (COIDA) with the CF, which automatically halted the process and prohibited the CF from making any payment to the Complainant until finalisation of the objection.

- 6.1.4 The grounds furnished by the employer for lodging an objection were that “*the sudden hearing loss of an employee who was not exposed to 85 decibels could not be attributed to the Noise Induced Hearing Loss (NIHL) from workplace exposure*”; and that the employee used Personal Protective Equipment’s (PPE) at the workplace; the employer also submitted reports from three (3) different medical doctors and audiograms in support of its contentions.

Issue in dispute

- 6.1.5 The issue for determination is whether the CF unduly delayed to process and finalise a claim for compensation by the Complainant.

Complainant’s version

- 6.1.6 The Complainant stated that during his employment at the employer’s premises, he was exposed to high noise levels. As a result of the exposure, he suffered a noise-induced hearing loss;
- 6.1.7 The Complainant submitted that the exposure was confirmed by the employer’s medical practitioner where after the employer assisted him to report the matter to the CF;
- 6.1.8 According to the Complainant, the CF failed to set the matter down for the objection hearing after the employer had filed an objection and further failed to furnish him with reasons for the delay.

The CF’s version

- 6.1.9 On 23 May 2016, an enquiry letter was sent to the CF to respond to the Complainant’s allegations. On 05 December 2016, the CF submitted a response to Public Protector stating that the ‘court roll’ (roll for objection

hearing) for 2016 was fully booked and that the matter would only be set down for the objection hearing in 2017.

- 6.1.10 On 14 December 2016, the Public Protector closed the file on the basis that the matter was receiving attention and further that, a commitment was made by the CF to set the matter down for hearing during 2017.
- 6.1.11 On 09 March 2018, the Complainant informed the Public Protector that the CF had failed to communicate the date of the objection hearing and/or the outcome on his claim. Accordingly, the investigation was reopened.
- 6.1.12 On 10 August 2018, an email enquiry was sent to the CF by the Public Protector to obtain feedback and/or a status update on the matter.
- 6.1.13 On 13 August 2018, the Legal Section from the CF submitted a progress report on the matter to the Public Protector stating the following:
- 6.1.13.1 It was confirmed by the Legal Section that the Complainant's claim was referred to Medical Services for review after receipt of the objection from the employer for awarding the employee / Complainant with 8% permanent disablement for Noise Induced Hearing Loss (NIHL);
- 6.1.13.2 The CF submitted that an objection was lodged by the employer after the CF awarded the Complainant 8% permanent total disablement for hearing loss. The reason submitted by the employer in support of the objection was that the Complainant's hearing loss could not be attributed to (NIHL) from workplace exposure, as he was not exposed to 85 or more decibels; and
- 6.1.13.3 The CF further submitted that a review was conducted by the internal Medical Services into the Complainant's claim and a decision of 8% permanent total disablement was confirmed by the Medical Services as follows:

- (a) *There was no baseline audiograms done by the employer in order to confirm the permanent loss of hearing (PLH);*
- (b) *There were no screening tests done or submitted by the employer from 1995 until 2004;*
- (c) *The screening test dated 21 September 2004, confirmed PLH of 10.4, while the one dated 05 November 2008 is 3.2. As a result, there was no consistency on the tests conducted;*
- (e) *There was also some consistencies between the screening tests done between 2006 and 2008;*
- (f) *The medical report dated 26 May 2008 by Dr van Heerden confirmed the Complainant's hearing loss. Further, the diagnostic audiograms done on 11 September 2008 and 25 January 2010 also confirmed the hearing loss;*
- (g) *The level of exposure has indicated the level below 85 decibels, as per the employer's report. However, the Complainant was exposed for a relatively longer period i.e. for a period of 13 years. The fact that an employee has been provided with PPE, does not guarantee use or proper use.*

6.1.14 On 16 August 2022, the Investigation Team informed the CF of the special circumstances which were considered by the Public Protector in respect of the investigation. The CF responded thereto on 25 August 2022, and its response can be summarised as follows:

6.1.14.1 The CF explained the history of the Complainant's matter stating:

- a) The First Medical Report as per the Complainant's first date of consultation with the Doctor (the Dr) dated 11 September 2008;
 - b) The Complainant's date of diagnoses: 17 September 2008;
 - c) Progress Report from the Dr dated 17 September 2008;
 - d) The date upon which the Complainant reported the matter to the CF was on 27 September 2008;
 - e) The Employer signed Employer's Report of accident form on 29 October 2008;
 - f) Claim was registered by the CF on 29 October 2008; and
 - g) The finalisation letter was dated 28 November 2012 accepting liability and confirming 8% payment and both employee and employer were advised to lodge an objection within 180 days.
- 6.1.14.2 The CF submitted that during the period within which the Complainant's claim falls, the CF went through a Claim Management Systems (CMS) enhancement process in an effort to mitigate risks. The CF went further and explained that the implementation of the CMS resulted in the delay in finalising the Complainant's claim on time;
- 6.1.14.3 The CF submitted that their Legal Services Section had a substantial amount of objections to deal with and this resulted in delays in setting up hearing dates within the standard period;
- 6.1.14.4 The CF averred that the Complainant's objection hearing was heard and finalised on 24 January 2020. It was further submitted that during the tribunal hearing, the Presiding Officer did not make a ruling regarding the referral of the matter back to the CF for further attention;

- 6.1.14.5 The CF also stated that based on the Final Award issued on 28 November 2012, the Employer decided to lodge an objection;
- 6.1.14.6 The CF contended that all communication pertaining to the objection case was only directed through the employer as their contact details were supplied on the objection form. The reason furnished by the CF for only directing the correspondence to the employer was that *“Legal had no direct contact with Mr Monashane”*;
- 6.1.14.7 The CF submitted that according to the Legal Section’s records, *“the Complainant formed part of the hearing process that took place on 24 January 2020 where a final decision or outcome was made on his objection request”*;
- 6.1.14.8 The CF made further submissions that they do not see a need to conduct any further investigation in the matter. However, as part of their process of improvement, the CF submitted that they have implemented *“quality monitoring tools to ensure that quality is conducted on all interactions and the enforcement of compliance to the Complaints Management policy by all internal stakeholders to ensure that complainants are responded to as per the policy provisions. Furthermore, SOP’s were reviewed to align the current workflow process to the Customer Relation Management tool (the CRM) system work flow process where Complaints Management policy is also integrated”*. (sic)
- 6.1.14.9 The CF conceded that the office *“continues to face unprecedented service delivery challenges despite the service delivery improvements that have been put in place resulting in instances of poor service delivery and most importantly failure to provide feedback on time to its clients”*. In conclusion the CF submitted that they *“continue to strive for process improvement and research best practice methods to ensure that the quality of service meets customer expectations”*.

Application of the relevant law

The Constitution of the Republic of South Africa, 1996

- 6.1.15 Section 2 of the Constitution provides that *“the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”*.
- 6.1.16 Section 33 of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- 6.1.17 Section 195 of the Constitution sets out the values and principles governing good public administration, providing as follows:
- (1) *Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:*
- (a) *A high standard of professional ethics must be promoted and maintained.*
 - (b) *Efficient, economic and effective use of resources must be promoted.*
 - (c) *Public administration must be development-oriented.*
 - (d) *Services must be provided impartially, fairly, equitably and without bias.*
 - (e) *People’s needs must be responded to, and the public must be encouraged to participate in policy-making.*
 - (f) *Public administration must be accountable.*
 - (g) *Transparency must be fostered by providing the public with timely, accessible and accurate information.*
 - (h) *Good human-resource management and career-development practices, to maximise human potential, must be cultivated.*

- (i) *Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.*

(2) *The above principles apply to —*

- (a) *administration in every sphere of government;*
- (b) *organs of state; and*
- (c) *public enterprises.*

6.1.18 Administrative decisions must be taken within a reasonable period. According to the evidence received from the CF on 25 August 2022, the CF became aware of the Complainant's claim for the first time on 27 September 2008 and only adjudicated thereupon on 28 November 2012, more than 4 years later. Further, the objection hearing was lodged by the employer on 02 April 2013 and was only heard on 24 January 2020 i.e. six (6) years later. The period taken by the CF to process the claim and the objection, can be considered as public administration within the context of section 195 of the Constitution.

6.1.19 Furthermore, the conduct of the CF needs to be tested against the principles of public administration as envisioned in section 195(1) of the Constitution. The CF as an organ of state as envisaged in section 195(2) in the execution of its mandate, had a responsibility to do so in line with the prescripts of section 195(1)(a). While the Public Protector acknowledges the challenges that were faced before and after the implementation of the CMS and the steps that the CF took to address the service challenges, it must be noted that the CF is not immune from complying with the Constitution, more especially sections 33 and 195 of the Constitution. Accordingly, the conduct of the CF in not communicating any feedback and/or progress pertaining to the Complainant's claim, failed to live up to

the standards of professional ethics which must be promoted and maintained in public administration. It can also not be said that the CF responded timeously to the Complainant in relation to his claim considering the exorbitant period that it took the CF to finalise this matter.

The Promotion of Administrative Justice Act 3 of 2000 (PAJA)

- 6.1.20 In terms of section 1 of PAJA “*administrative action*” is defined as any decision taken, or any failure to take a decision by an organ of state, when exercising a power in terms of the Constitution or a provincial constitution; or exercising a public power or performing a public function in terms of any legislation; or which adversely affects the rights of any person and which has a direct, external legal effect.
- 6.1.21 Section 3(1) provides that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.
- 6.1.22 The delay by the CF to process the Complainant’s claim within a reasonable time thus amounted to failure by the CF to take a decision in respect of the claim in accordance with section 1 of PAJA.
- 6.1.23 The Complainant’s rights, in this case, had been violated as he was not provided with reasons why his claim was not processed and finalised within a reasonable timeframe. There was also a failure by the CF to take a decision between 27 September 2008 (being the date the CF first became aware of the matter), and 29 October 2008 (being the date upon which the claim was registered by the CF) to 28 November 2012 (being the date of the award), and as a result, the administrative action was not lawful, reasonable or procedurally fair. The conduct of the CF was in violation of section 33 of the Constitution and PAJA.

- 6.1.24 The CF further failed to live up to the provision that states that public administration must be accountable. Failure by the CF to communicate to the Complainant and/or the Public Protector pertaining to the change of venue for the objection hearing is regarded as a failure by the CF to account for their actions. Further, the CF had a duty of accountability to the Complainant and to the public at large and a duty to provide timely, accessible and accurate information when requested to do so through correspondence. In the circumstances, the conduct of the CF did not meet the standards of good public administration as enshrined in section 195(1)(f) of the Constitution.
- 6.1.25 Section 237 of the Constitution provides that all constitutional obligations must be performed diligently and without delay. The CF and its officials are required to handle the claims received with diligence and without delays, and to treat all citizens reasonably, fairly, with courtesy and consideration.
- 6.1.26 As a result, the CF's conduct is found not to be compliant with section 237 of the Constitution which provides that all constitutional obligations must be performed diligently and without delay.

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

- 6.1.27 COIDA prescribes specific timeframes for the reporting of a claim by an employer and/or employee, and the submission of documents to the CF.
- 6.1.28 It must be noted that Schedule 3 of COIDA refers to "*Hearing Impairment*" as exposure to excessive noise and further that it falls within the definition of occupational disease as stipulated in section 1 of COIDA.
- 6.1.29 Section 65(1) of COIDA provides that an employee shall be entitled to compensation if it is proved to the satisfaction of the commissioner that an employee has contracted an occupational disease; or that an employee has

contracted a disease other than an occupational disease and such disease has arisen out of and in the course of his employment.

- 6.1.30 Section 65(4) further states that a right to benefits in terms of Chapter VII (Occupational Diseases) of COIDA shall lapse if any disease referred to in Schedule 3 of COIDA is not brought to the attention of the commissioner or the employer within 12 months from the commencement of that disease.
- 6.1.31 Section 68 states that an employee shall as soon as possible after the commencement of a disease, give written notice thereof to his employer and he may also give written notice of the said disease in the prescribed manner to the commissioner. The employer must within 14 days after having so received notice or having learned that an employee has contracted a disease during the scope of his employment, report such disease in the prescribed manner to the commissioner, irrespective of whether he may be of the opinion that the employee did not contract such a disease in his employment.
- 6.1.32 Section 91(1) of COIDA stipulates that any person affected by a decision may within 180 days after such decision, lodge an objection against that decision with the commissioner in the prescribed manner.
- 6.1.33 The employer exercised the rights as prescribed in terms of section 91(1) of COIDA, by lodging an objection with the CF.
- 6.1.34 It is noted that the employer lodged an objection on 02 April 2013 against the decision that was taken by the Commissioner on 28 November 2012 and that the objection was lodged outside the 90 days period as prescribed in terms of section 91 of COIDA.
- 6.1.35 From the available evidence, it is noted that the employer submitted three (3) reports from different medical Doctors, wherein findings were made, together with the Audiograms in respect of the Complainant. Furthermore, the employer submitted history of the noise level exposure together with

evidence confirming that PPE's were provided to the Complainant at the workplace. This evidence was furnished by the employer to substantiate the objection that the hearing loss could not be attributed to any workplace exposure. Accordingly, the objection succeeded on 24 January 2020.

- 6.1.36 Section 45 creates an obligation on the Commissioner to adjudicate the claim reported to the CF. Unfortunately, no time frames are prescribed by COIDA for the processing and finalisation of a claim by the CF as well as timeframes in order to process and finalise an objection.
- 6.1.37 It is also observed that the Department of Employment and Labour (DoEL) is in the process of amending COIDA and that process is currently pending in Parliament. It is further observed that the proposed Amendment Bill was first introduced in Parliament on 10 September 2020.

Policy on service delivery: *Batho Pele* principles

- 6.1.38 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 complaint are:
- 6.1.38.1 Courtesy: Public servants have to remember that they are employed to help the people and to give them access to the services that are their rights.
- 6.1.38.2 Information: All citizens should be given full information about the services that they have a right to get.
- 6.1.38.3 Best Value: This principle includes giving customers the best service we can using all our resources.
- 6.1.38.4 Customer Impact: Impact means looking at the benefits which we have provided for our customers both internal and external.

- 6.1.38.5 **Redress:** This principles stipulates that when people do not get what they are entitled to from the Public Service, they have a right to redress. Thus requires that the public servant should immediately apologise to the affected people and also tell them what solution they are offering to their problem.
- 6.1.39 The CF contravened the provisions of the Batho Pele principles in not communicating feedback, the outcome of the claim and the change of venue of the objection hearing. The Complainant was also not treated with courtesy and he was not provided with information pertaining to his claim. The Complainant was entitled to receive information about public services that he is entitled to receive and to be told about the level of service he should expect from his interaction with the CF. Furthermore, regarding the failure by the CF to notify Public Protector about the change of venue, the Public Protector is inclined to infer that such conduct was improper and in violation of the provisions of Batho Pele principles when dealing with the public and stakeholders in general.

Internal Standard Operating Procedure (SOP) – Legal Service (Hearing Section) – Objection (Section 91) dated 24 June 2016

- 6.1.40 In terms of clause 4.4 of the SOP under the subject heading “**Untraceable Client process**” it requires the CF or the respective unit to “*perform the untraceable client process or sent file to official who performs the untraceable client process*”.
- 6.1.41 Noting that the CF submitted that they did not have the Complainant’s contact details, the CF failed to comply with their own internal SOP, as they should have traced the Complainant or referred the file to the officials who perform the “*untraceable client process*”.
- 6.1.42 It is further noted that the SOP pertaining to the handling of objections does not contain specific timeframes when handling and processing objections

within the CF. Furthermore, the SOP was signed six years ago during June 2016, and may now need to be reviewed.

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

- 6.1.43 In the Gqwetha case, the majority of the Supreme Court of Appeal held that the 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. 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 weighted up against the possibility of prejudice as a result of the delay.
- 6.1.44 On 25 August 2022, the CF indicated the change of systems and a high number of objections that were received as the cause of the delay to process the claim and further to set the matter down for hearing. It is noted that it took the CF more than 4 years (27 September 2008 to 28 November 2012) to process the Complainant's claim. Furthermore, available evidence also indicates that after the employer had lodged an objection in terms of section 91 of COIDA in April 2013, the matter was only adjudicated upon in January 2020, after a further period of more than 6 years had passed. Therefore, it can be said that the delay by the CF was unreasonable and unjustifiable.
- 6.1.45 The evidence indicates that the matter had initially been set down for a hearing to consider the employers' objection on 27 November 2019, but the hearing did not proceed due to the non-appearance of the CF. It is noted from the response by the CF dated 04 December 2019 that the Legal

Officer who was allocated the matter was attending training. The Legal Officer did not deem it fit to communicate his/her unavailability before the date of the hearing. The objection hearing was postponed to 24 January 2020. The Complainant again availed himself on the day, but both the CF and the employer were not in attendance at the venue i.e. at the offices of the Department of Labour in Boksburg. The CF later informed the Public Protector that the hearing proceeded at another venue but conceded that the Complainant had not been informed of the change of venue.

- 6.1.46 Based on the response that was received from the CF on 08 July 2020, it is noted that the CF submitted that they did not have the Complainant's contact details in order to notify the Complainant of the changes. From the response, the CF did not submit any evidence in respect of the steps that they took to trace the Complainant, especially since they already had the details of both the employer and the Complainant in the application that was lodged with the CF. Even though the objection was not lodged by the Complainant, the CF knew that the Complainant had an interest in the matter and further that he reported the matter to the Public Protector for assistance. However, the CF failed to inform the Complainant or the Public Protector about the change of venue and proceeded with the hearing in his absence.
- 6.1.47 The Public Protector rejects the contention by the CF as submitted on 25 August 2022 that '*the Complainant formed part of the hearing process that took place on 24 January 2020 where a final decision or outcome was made on his objection request*'. The CF was informed on 27 January 2020 that the Complainant went to the venue at the Department of Labour in Boksburg and there was no appearance on the side of the CF or the employer. In response, the CF acknowledged that communication about the change of venue was only directed to the employer and not the Complainant.

6.1.48 COIDA obligates the Compensation Fund Commissioner to adjudicate a claim reported for compensation. The evidence at the Public Protector's disposal indicates that it took the CF more than (4) years (from 27 September 2008 to 28 November 2012) to adjudicate the claim lodged for compensation.

6.1.49 It further took the CF more than six (6) years (from 02 April 2013 i.e. the date of objection by the employer to 24 January 2020 - being the hearing date) to proceed with the objection hearing. It must further be noted that the date for the objection hearing was only obtained after intervention by the Public Protector.

Touchstones

6.1.50 On 08 October 2009 the erstwhile Public Protector, Adv ML Mushwana, issued a Formal Report Number 28 of 2009/2010, which culminated after a systemic investigation was conducted by the Public Protector into poor service delivery issues at the CF.

6.1.51 Amongst the issues that were considered by the Public Protector during the systemic investigation was the following: "... *allegations of lack of transparency and undue delay in processing and finalising claims*".

6.1.52 **The report contained the following findings which are still relevant to this current investigation:**

6.1.52.1 "... *The Compensation Fund failed to give effect to the right to procedurally fair administrative action, when it failed to give Ms Grobler, Mr Baleni and Mr Palm properly formulated written decisions regarding their claims, incorporating the principles of just administrative action as set out in the Constitution and PAJA;*

- 6.1.52.2 *The Compensation Fund unduly delayed in finalising Mr Baleni’s claim, when payment was made to him in respect of permanent disablement three and half years after he was injured on duty;*
- 6.1.52.3 *The Compensation Fund is unduly delaying in finalising Mr Palm’s objection and application for increased compensation. As at the date of issue of this report, three years has lapsed without commencement of the objection and section 56 proceedings...”*
- 6.1.53 **The following recommendations relevant to the current matter were made by the Public Protector in the report:**
- 6.1.53.1 *“The Compensation Fund should ensure that the right to just administrative action, as embodied in the Constitution and PAJA; which includes the right to information and the corresponding duty to inform; is consistently and uniformly applied by Compensation Fund officials when taking decisions regarding claims;*
- 6.1.53.2 *The Compensation Fund should expedite its processes by:*
- (a) *Registering claims, objections and other legal processes within 10 days of receiving accident reports, objection forms, other legal documents and supporting documents;*
 - (b) *Furnishing persons who report workplace accidents or occupational diseases with acknowledgement of receipt, together with claim numbers, within 30 days of receiving reports;*
 - (c) *Furnishing persons who lodge objections or initiate other legal processes with acknowledgement of receipt of documents, within 30 days;*

- (d) *Requesting additional information within 30 days of receiving accident reports, objection forms or documents relating to other legal processes;*
- (e) *Registering incoming documents by means of a proper numbering, tagging and tracking system, 5 days after receipt;*
- (f) *Furnishing progress report regarding claims, objections and other legal processes, to employers and to injured employees or their representatives, every 8 weeks after acknowledging receipt of accident reports, objection forms or other legal documents;*
- (g) *Adjudicating claims, within 6 months of receiving accident reports and other supporting documents required to finalise claims;*
- (h) *Communicating decisions in writing, within 8 weeks of finalising claims; to employers and to injured employees or their representatives, by incorporating the principles of just administrative action as set out in PAJA;*
- (i) *Paying compensation to employees and or injured employees, within 4 weeks of taking decisions; and*
- (j) *Adjudicating and finalising objections and other legal processes, within 90 days of receiving objection forms or other legal documents required to finalise the processes”.*

6.1.54 Based on the findings of the systemic investigation that was conducted by the Public Protector 13 years ago (during 2009), it is clear that the CF still experiences the same or similar challenges that were identified in the 2009 investigation.

6.1.55 It is notable that the claim of the Complainant was reported to the CF after the issuance of Report No 28 of 2009/2010. It is evident that the systemic deficiencies that were identified during that period have not been addressed

by the CF to prevent a recurrence. Furthermore, it is clear that some of the findings that were made in the previous Formal Report of the Public Protector to improve service delivery, such as providing regular feedback to people like the Complainant and the exorbitantly long period it takes to process and finalise objections, have not been rectified.

- 6.1.56 It is noted that the applicable SOP dealing with objections was approved by the CF on 24 June 2016, which was after the issuance of Report No. 2009/2010 on 08 October 2009.

Response of the Compensation Fund to the Notice issued in terms of section 7(9)(a) of the Public Protector Act

- 6.1.57 On 23 November 2022, a notice in terms of section 7(9)(a) of the Public Protector Act was issued to Mr Vuyo Mafata, the Compensation Fund Commissioner, affording him an opportunity to respond to the evidence obtained during the investigation, the adverse findings and the intended remedial action.
- 6.1.58 On 06 December 2022, a meeting was held between the Public Protector and the CF. The purpose of the meeting was to discuss the findings and remedial action as contained in the section 7(9)(a) notice.
- 6.1.59 During the meeting, the CF submitted that they concur with the remedial action as contained in the notice.
- 6.1.60 The CF further indicated that a detailed written response would be submitted to the Public Protector on 07 December 2022.
- 6.1.61 On 07 December 2022, the CF submitted a written response to the section 7(9)(a) notice dated 06 December 2022, which can be summarised as follows:

Part A of the response to the Findings

- 6.1.61.1 The CF conceded that it unduly delayed to process and finalise the Complainant's claim for compensation;
- 6.1.61.2 The CF explained in detail the circumstances which led to the delay to process and finalise the claim as follows:
- (a) The CF submitted that for them to adjudicate and process the claims of the claimants, there are dependencies which in certain circumstances lead to the delay in processing and finalisation of claims. The CF made reference to the submission that was submitted to the Public Protector on 25 August 2022 as discussed in paragraph 6.1.28. above;
 - (b) In addition, the employer was not convinced that the Complainant's condition was related to occupational disease. As a result, the CF and the employer were in discussion regarding the claim. This led to the delay in finalising the adjudication process.
 - (c) The CF submitted that *"the first stage of lodging a claim is for the employer to report an accident in terms of section 39 of COIDA. This is done by submitting a WCL 1 form together with a First Medical report and any supporting medical documents as proof that the accident or occupational disease has occurred. Afterwards, there will be progress reports until a final medical report is submitted, to enable the CF to adjudicate a claim. Therefore, the adjudication of a claim to its finality is subject to the stabilisation of the condition of the injured employee and how soon medical records are received from treating medical service providers to the employer and to the CF"*;
 - (d) The CF contended that the determining factor(s) for the expediting and/or delay in the processing of a claim to its finality is dependent on

the period within which the injured employee takes to recover in his condition which could be weeks, months or years;

- (e) The CF submitted that the above explanation must not be construed as aimed at justifying the inefficiencies by the CF, rather a note to be considered.

6.1.62 In response to the findings in paragraph 7.1.1.3 of the notice that ‘it took the CF more than six (6) years to proceed with the objection hearing’, the CF submitted that according to their records, the applicable processes were followed when registering the objection by the employer. The CF stated that during 2008 to 2016, they experienced a backlog in processing the objections. The backlog was caused by the centralisation of the CF services and limited capacity/resources. Furthermore, the legal section responsible for dealing with the objections had only five (5) legal officials who were responsible to conduct hearings in nine (9) provinces. As a result of limited resources, it (these factors) led to unreasonable delays in setting down the objection hearings. These has hampered the objectives of the CF and the adherence to the Batho Pele Principles. Accordingly, the CF confirmed that the above challenges have now been rectified.

6.1.63 The CF acknowledged to have failed to provide the Complainant with regular feedback on his claim and of the award that was issued on 28 November 2012. The CF submitted that the failure was as a result of the following:

- (a) That neither the CF nor the employer had the Complainant’s contact details or his physical address;
- (b) That it was also the responsibility of the Complainant to notify the CF about the change of his contact details or address;
- (c) The CF argued that the communication between CF and the employer was indicative that there had been no malicious intent by the CF to

exclude the Complainant in communication and/or informing him of the award but only due to the fact that he could not be traced/ found;

(d) The CF submitted that at the time *“when they became aware of the Complainant’s whereabouts, he was notified about the hearing date and attended to venue on two occasions where he could not find CF representative” (sic).*

6.1.64 In response to the finding in paragraph 7.1.1.5 of the notice that ‘the Legal Services Section of the CF failed to trace the Complainant and further failed to refer the matter to the respective unit that performs the untraceable client process so as to trace the Complainant’, the CF submitted that *“there is no unit that trace untraceable clients, this type of unit was not created since the injured employees are contacted through their employers who provides the Fund with all the information and employer’s records”.*

6.1.65 The CF acknowledged that due diligence should have been done to inform the Complainant about the change of the date(s) and venue for hearing. The CF submitted that the conduct by the CF in not informing the Public Protector about the change of venue was not to undermine the office. However, it was gross negligence on the part of the CF official(s). Therefore, in order to remedy the circumstances and to prevent a similar incident from occurring in the future, the CF committed that ongoing training will be provided to officials/staff.

6.1.66 The CF contended that the tribunal hearings follow the objector (in this case it was the employer) and hearings are held where they reside and/or conduct their business. This is to protect their clients who are mostly indigent against unnecessary expenses.

6.1.67 The CF made a further submission that the Complainant suffered financial losses due to the fact that he was not an objector in the matter but an interested party. It would have been different if the Complainant was the

objector as the objection hearing would have been set around Polokwane closer to his place of residence.

- 6.1.68 The CF submitted that in terms of section 91(1) of COIDA as amended, an objection should be lodged within 180 days of the Commissioner's decision. Accordingly, the employer complied with the prescribed period of 180 days i.e. 28 November 2012 (date of the decision) and 29 April 2013 (objection date).
- 6.1.69 The CF conceded that their conduct was in violation of the prescribed legislation and submitted that the violation was due to certain constraints as alluded to above. The CF made a commitment that the identified deficiencies will be addressed.
- 6.1.70 In conclusion, the CF submitted that in order to address the speedy resolution of Public Protector complaints, a Service Level Agreement was entered into between the two (2) institutions i.e. the Public Protector and the CF in 2019. Furthermore, the Complaints, Compliments and Suggestions Management Policy was implemented by the CF in an effort to address all complaints received by the Fund in an effective and efficient manner. In addition, monthly operational meetings between the Public Protector and the CF were implemented so as to extensively discuss complaints and the resolution thereof.

Part B of the response to the Remedial Action

- 6.1.71 The CF confirmed that the remedial action as contained in the section 7(9) (a) notice will be complied with by the CF, per its letter dated 06 December 2022. Furthermore, the CF submitted an Action Plan detailing how the Remedial Action will be complied with.
- (a) The Compensation Commissioner has issued a letter of apology addressed to the Complainant dated 06 December 2022;

(b) That the SOP for legal services will be reviewed to include the time frames as follows:

“On receipt of an objection by email or hand delivery, the objection is registered and a file is open in 2 days of receipt;

A letter of acknowledgement is issued and sent to the objector;

The file is allocated to a Legal Official within five (5) days of receipt of an objection;

The legal official reviews the objection and makes a decision whether the objection has merits. If the legal official finds that the objection should be referred to a hearing, he or she hands over the file to the court roll master who will allocate the date for hearing in 10 days;

Once the file is allocated, a date is referred to the administrators to arrange a hearing in 2 days to issue subpoenas and notification letters to the objector and his/her witnesses;

A venue is arranged and a panel of members of the tribunal are booked for the hearing”.

6.1.72 The following action plan was provided by the CF for the implementation of the remedial action:

No	Action	Responsible person(s)	Timeframe	Progress
1	CF to issue letter of apology to Complainant	CC	By 14 December 2022`	Issued
2	Steps taken for revision of	CC	By 30 April 2023	Proof will be submitted 10

	<i>Objection SOP for approval, urgent consultation with Minister of Labour to adopt revised SOP</i>			<i>days after approval</i>
3	<i>Arrange dates for training of staff on reviewed SOP</i>	<i>Director Legal Services</i>	<i>By 30 June 2023</i>	<i>5 days after training, proof will be submitted</i>
4	<i>Final report on steps taken by CF to address the recommendations in PP Report of 2000/2010, CF to conduct an audit</i>	<i>CF</i>	<i>30 November 2023</i>	<i>10 days after the final report to the CC.</i>
5	<i>Evaluation on progress made on decentralisation, amendment of the bill, outreach, public consultation, report on systemic inefficiencies identified by the 2009/10 PPSA report, monthly monitoring on progress</i>	<i>CC</i>	<i>28 February 2023</i>	<i>5 days after final report completed, PPSA will be furnished with progress made on outstanding recommendations</i>

Conclusion

- 6.1.73 The Oxford Dictionary defines “*undue*” as unwarranted or inappropriate because it is excessive or disproportionate. The available evidence indicates that the CF unduly delayed to finalise the Complainant’s claim by virtue of the period that has elapsed since the application was brought to the CF on 27 September 2008.
- 6.1.74 The conduct by the CF in failing to attend to the hearing on 27 November 2019, and its subsequent failure to inform the Complainant or the Public Protector regarding the change of venue, is also found to be improper.
- 6.1.75 Based on these reasons, Public Protector concludes that the CF’s conduct was contrary to the standard of proper and good public administration enshrined in the Constitution and the *Batho Pele* principles.
- 6.1.76 Furthermore, the Complainant had to travel from Limpopo Province to the venue on two (2) different occasions only to find that the objection hearing was not proceeding on those particular dates or at the particular venues.
- 6.1.77 The Complainant suffered prejudice as a result of the conduct of the CF.
- 6.1.78 The Public Protector notes the challenges that were faced by the CF, as contained in its response to the section 7(9)(a) notice, that may have caused the backlog, including, *inter alia*, the centralisation of the CF services and limited resources. The Public Protector further notes the steps that have been taken by the CF to rectify the identified challenges the steps taken to address the deficiencies as identified during the investigation.
- 6.1.79 The Public Protector, however does not agree with the assertion by the CF that ‘*when they became aware of the Complainant’s whereabouts, they notified him about the hearing date*’. On all occasions, the CF was aware that the Complainant’s whereabouts were known by the Investigation

Team, who also related information to him pertaining to the objection hearing dates and venues.

- 6.1.80 Pertaining to the non-compliance with the approved SOP dealing with **‘the Untraceable Client process’**, the Public Protector notes the submission by the CF that there is no unit that has been established to deal with the tracing of clients and that they rely on the employers to provide the CF with all the information/ records. Accordingly, the CF either failed to implement its own SOP or to amend the SOP to reflect the available and/or applicable processes in place.
- 6.1.81 Regarding the period for the lodgement of the objection, the Public Protector acknowledges that section 91(1) of COIDA stipulates that an objection must be lodged within one hundred and eighty (180) days from the date of the decision and not the ninety (90) days as originally reflected in the section 7(9)(a) notice.
- 6.1.82 The Public Protector further notes the submission by the CF that ‘the tribunal hearings follow the objector’. However, the submission does not exonerate the CF for failing to notify the Public Protector about the change of venue, as the CF was well aware that the matter was reported to the Public Protector and that the communication by the CF pertaining to the matter was directed to the Public Protector.

7. FINDINGS

Having regard to the evidence, the regulatory framework determining the standard the CF should have complied with and the impact on the Complainant, the Public Protector makes the following findings against the CF:

- 7.1 **Whether there was undue delay by the CF to process and finalise a claim for compensation to the Complainant, and if so, whether such**

conduct constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution, as well as maladministration and undue delay as envisaged in section 6(4)(a)(i) & (ii) of the Public Protector Act

- 7.1.1 The allegation that there was undue delay by the CF to process and to finalise the Complainant's claim for compensation as a result of occupational disease, is substantiated.
- 7.1.2 The determining factor(s) for the delay in the processing of a claim to its finality is generally dependent on the period within which the injured employee takes to recover from his/her condition. In the matter at hand however, it took the CF more than four (4) years (from 27 September 2008 to 28 November 2012) to adjudicate the claim lodged by the Complainant.
- 7.1.3 Thereafter the CF again took an extraordinarily long time to set the objection down for hearing. It took the CF more than six (6) years (from 02 April 2013 i.e. the date of objection by the employer to 24 January 2020, being the hearing date) to proceed with the objection hearing.
- 7.1.4 The CF further failed to provide the Complainant with regular feedback on his claim and also failed to inform the Complainant of the award that was issued in his favour on 28 November 2012. The Complainant only became aware of the award through interaction with the Public Protector during 2018.
- 7.1.5 The CF failed to inform the Complainant or the Public Protector regarding the change of venue for the objection hearing despite the fact that the CF was already well aware that the Complainant approached the Public Protector for assistance regarding the delay to finalise his claim and the delay to set a date for the objection hearing.
- 7.1.6 The delays as mentioned in paragraph 7.1.2 and 7.1.3 are in contravention of sections 33, 195(1) (a) and (f) and 237 of the Constitution, as the CF

failed to process and finalise the claim within a reasonable time period. Furthermore, the CF failed to set the objection hearing down within a reasonable timeframe. The conduct of the CF in this regard further violated the public administration standards set out in the White Paper on Transforming Public Service Delivery (Batho Pele Principles) as published in the government gazette no 18340 of 1 October 1997.

- 7.1.7 The conduct by the CF resulted in the Complainant suffering prejudice as he had to travel from the Limpopo Province on several occasions to attend the objection hearing and only to find that the hearing was either postponed or moved to a different venue without him being informed thereof.
- 7.1.8 The CF's SOP dealing with objections does not contain specific timeframes when handling and processing objections within the CF. Furthermore, the SOP was signed on 24 June 2016, which is more than six (6) years ago and needs to be reviewed in line with emerging needs of the organisation.
- 7.1.9 These issues serve to compound a lack of progress by the CF to address the systemic deficiencies which were identified by the Public Protector during the systemic investigation conducted 13 years ago, as reported in Report 28 of 2009/2010.
- 7.1.10 The complainant and current claimants are therefore evidently still suffering the same delays and inefficiencies at the CF as those identified by the Public Protector as far back as 2009.
- 7.1.11 Accordingly 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)(a) (i) & (ii) of the Public Protector Act.

8. REMEDIAL ACTION

8.1 The Public Protector is empowered in terms of section 182(1)(c) of the Constitution to take appropriate remedial action to redress the conduct referred to in this report upon the conclusion of an investigation where adverse findings are made.

8.2 In the matter of 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.

8.3 Taking into account the submissions that were presented before the Public Protector by the CF, the appropriate remedial action that the Public Protector is taking in terms of section 182(1)(c) of the Constitution, are the following:

The Compensation Fund Commissioner

8.3.1 Within **ninety (90)** calendar days from the date of this report, provide a plan to review the Internal Standard Operating Procedure (SOP) – Legal Services (Hearing section: Objections (section 91) to include specific reasonable timeframes within which objections should be handled, processed and finalised;

8.3.2 Once the reviewed SOP is approved, to ensure that staff are trained on the amended SOP, within **sixty (60)** calendar days from the date of implementation thereof;

8.3.3 Within **sixty (60)** calendar days from the date of this report, submit a comprehensive report with the steps that the CF has taken to address the recommendations as contained in the Public Protector's Report No. 28 of 2009/2010, as well as the progress made in the implementation of those

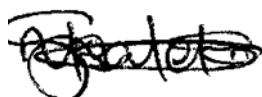
recommendations in line with section 181(3) and 182(1)(c) of the Constitution;

8.3.4 Ensure that the CF complies with the outstanding recommendations and submit an implementation plan within **sixty (60)** calendar days from the date of this report in line with sections 181(3) and 182(1)(c) of the Constitution.

8.3.5 The Public Protector notes that the Compensation Fund Commissioner has already issued a written apology to the Complainant on 06 December 2022, in line with the remedial action proposed in the section 7(9)(a) notice, for the inconvenience and prejudice that the Complainant suffered as a result of the delay by the CF to attend to his claim within a reasonable time in line with section 195 (1)(i) of the Constitution and Principle seven (7) of the Batho Pele principles;

9. MONITORING

9.1 In monitoring the implementation of the remedial action as stipulated in paragraph 8.3 of this report, the Compensation F Commissioner has submitted an implementation plan, which will be monitored on a quarterly basis.



ADV KHOLEKA GCALEKA
ACTING PUBLIC PROTECTOR
OF THE REPUBLIC OF SOUTH AFRICA
DATE: 30 DECEMBER 2022

Assisted by: Adv E de Waal

Acting Executive Manager: PII Inland

