

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



**PUBLIC PROTECTOR
SOUTH AFRICA**

REPORT NO 44 OF 2007/08

**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF UNDUE
DELAY BY THE MEDICAL BUREAU FOR OCCUPATIONAL DISEASES
IN CERTIFICATION OF APPLICATIONS FOR COMPENSATION FOR
DIAGNOSED MINE RELATED OCCUPATIONAL DISEASES**

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Executive Summary

The Office of the Public Protector investigated complaints lodged by Dr Kahn on behalf of his patients (both active and former miners) on allegations of undue delay by the Medical Bureau for Occupational Diseases (MBOD) in processing, adjudicating and certifying applications for certification for compensation in diagnosed mine related occupational diseases.

Dr Kahn alleged that he resorted to this office for assistance out of frustration due to the MBOD's delay in certifying his patients' applications. He further alleged that his efforts in trying to impress upon the MBOD, the importance of expediting the certification process were in vain. He mentioned that some of the applicants for certification died whilst awaiting certification and others continued working underground as a result of the aforesaid delay, thus prejudicing them in so far as their constitutional right to working under healthy conditions.

Dr Kahn further averred that his patients' diagnoses were Occupational Diseases such as pneumoconiosis, tuberculosis, pulmonary tuberculosis, progressive systematic sclerosis, and that their applications for certification had not been either expeditiously processed, adjudicated upon and/or timeously certified as a consequence of which, families of the deceased applicants receive little or no compensation in the end. Some of these applicants are residents of neighbouring countries such as Lesotho who worked in mines in the Free State.

It is the complainant's averment that the delay by the MBOD in processing, adjudicating and ultimately certifying these applications is severely prejudicial to the applicants, more particularly considering the fact that the Institution's turn around time for the Benefits Medical Examination (BME) is six (6) months.

Out of approximately 60 complaints investigated by this office, 40 applications took in excess of two (2) years to be finalised. Such delays not only prejudiced

the complainants but this office also experienced delays on the part of the MBOD during the course of investigations.

The Public Protector found that:

- The conduct of the MBOD in processing, adjudicating and finally certifying these applications constitutes an undue delay as alleged. The said conduct is inconsistent with Section 33 (1) of the Constitution, which provides that “[e]veryone has the right to an administrative action that is lawful, reasonable and procedurally fair”, and Section 237 which provides that all constitutional obligations must be performed diligently and without delay”. The delay also violated the requirement of due diligence in respect of performance of constitutional obligations. Such a delay is found to have been severely prejudicial to the complainants referred to in this investigation.
- Furthermore, it can be concluded that there is no proper data system in place resulting in the applications not being captured properly and/or accurately, and thus causing undue delay in processing these applications.
- The MBOD failed to meet their strategic objectives, which provide for six (6) month’s turn-around time for finalising certification applications.

It was recommended that the Director-General of the Department of Health take the following remedial actions:

- Implement proper systems or mechanisms within the structures of the Department to expedite and follow-up on the process of certification of applications for compensation of diagnosed mine related occupational diseases.

- Improve the data capturing system of the MBOD and capacitate the MBOD with more personnel to expedite the certification process of the MBOD in this regard.
- Train and capacitate the support staff handling applications, to be efficient in dealing with and following up of these applications;
- Improve the systems to be user friendly so as to thwart the undue delays in providing feedback on the progress to the applicants;
- Improve monitoring on file movement of files and applications for compensation for occupational diseases through different sections having to process them.

The Director-General of the Department of Health should report within 3 months of the date hereof of the steps taken to implement the above recommendations.

REPORT ON AN INVESTIGATION BY THE PUBLIC PROTECTOR INTO ALLEGATIONS OF UNDUE DELAY BY THE MEDICAL BUREAU FOR OCCUPATIONAL DISEASES IN CERTIFICATION OF APPLICATIONS FOR COMPENSATION FOR DIAGNOSED MINE RELATED OCCUPATIONAL DISEASES

1. INTRODUCTION

This report is submitted to the Minister of Health, Director-General: Health and the Director of the Medical Bureau for Occupational Diseases (MBOD), by virtue of the provisions of Section 182(1)(b) of the Constitution, 1996 and Section 8(1) of the Public Protector Act, 1994. This report is in connection with an investigation into allegations of undue delay by the MBOD in certification of applications for compensation for diagnosed mine related occupational diseases.

2. BACKGROUND

- 2.1 The Free State Provincial Office of the Public Protector has since its inception in 2002/3 been inundated from time to time with complaints concerning the administrative procedures with regard to the above.
- 2.2 These complaints mainly emanated from a particular medical practitioner in Welkom (Dr. Khan), who expressed his and his patients' frustration to wait for certifications by the MBOD. These patients have to apply for certification of their diagnosed diseases as being mine related by the MBOD in terms of relevant Health Legislation before their claims can be processed for payment of compensation in terms of the Occupational Diseases in Mines and Works Act, 78 of 1973 as amended.

3. THE COMPLAINT

- 3.1 The Free State office of the Public Protector has received approximately sixty (60) complaints since 2003 from a certain medical practitioner, Dr Kahn, (herein referred to as complainant) on behalf of his patients both being former and active mineworkers suffering and qualifying for compensation for occupational lung diseases such as Pneumoconiosis, Tuberculosis, Permanent Obstructive Airways Disease, Platinum Sensitivity, Progressive Systematic Sclerosis as well as Asbestos Related Lung Disease.
- 3.2 He requested the office of the Public Protector to investigate the alleged undue delays by the MBOD in processing, adjudicating and/or issuing certificates after application for certification was lodged.
- 3.3 The complainant alleges that some of the applications took up to two (2) years to be certified and that by that time some of the patients (some of whom had to continue working under ground as a result of lack of certification by the MBOD of the diagnosed diseases) had already died by the time certification came through.
- 3.4 It is his further allegation that in many cases the families of the deceased found little or no compensation due to the fact that a lot of the stated families are living in far away areas, near borders of Lesotho and elsewhere in remote rural areas, where it is difficult to establish contact with them to enable them to claim compensation, the more so after the death of the diagnosed complainant.
- 3.5 Many of these families claim after death of the mineworker due to the undue delay in certification: if the certification is eventually obtained and

application for compensation is due to be processed for the deceased estate, most of these families at that stage are untraceable due to such delays.

3.6 In some instances, the alleged undue delay contributes to the deterioration of the mineworker's health as some have no option but to work underground in the mines, until the diagnosed ailment is eventually certified by the MBOD.

3.7 It is further alleged that there is no coherence between the processing of the applications and providing the applicants with progress thereof. As a consequence, the office noticed that it would make an enquiry with the MBOD, only to be advised that the patient's ailment has long been certified, but the complainant has not even been advised of the outcome of the process.

4. POWERS OF THE PUBLIC PROTECTOR TO INVESTIGATE THE COMPLAINT

4.1 The provisions of the Constitution, 1996

4.1.1 The Public Protector is an independent institution established as one of a cluster of bodies that have to strengthen and support constitutional democracy of the Republic of South Africa.

4.1.2 Section 181 provides *inter alia* that the Public Protector is independent and subject only to the Constitution and the law.

4.1.3 All organs of state are obliged to assist and protect the Public Protector to ensure independence, impartiality, dignity and effectiveness of the institution.

4.1.4 In order to perform its functions the Public Protector has power to:

4.1.4.1 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;

4.1.4.2 Report on that conduct, and

4.1.4.3 Take appropriate remedial action.

4.1.5 The additional powers and functions of the Public Protector are prescribed by, *inter alia*, the Public Protector Act, 1994.

4.2 The Public Protector Act, 1994

4.2.1 Section 6(4)(a) of the Public Protector Act, 1994 provides, *inter alia*, that the Public Protector is competent to investigate, on own initiative or receipt of a complaint, any alleged:

4.2.2.1 Maladministration in connection with the affairs of government at any level; and

4.2.2.1 Abuse or unjustifiable exercise of power, other improper conduct or undue delay by a person performing a public function.

4.3 The format and procedure to be followed in conducting any investigation is determined by the Public Protector with due regard to the circumstances of each case.

- 4.4 After the conclusion of an investigation, the Public Protector may make appropriate recommendations to the public body affected by it.
- 4.5 The conduct of the MBOD (as a component of the Department of Health) complained against falls within the jurisdiction and mandate of the Public Protector to investigate.

5. APPLICABLE LEGISLATION GOVERNING THE MBOD IN DISCHARGING ITS OBLIGATIONS

- 5.1 For the purposes of this investigation, the following legislation and prescripts were referred to:
 - 5.1.1 Constitution of the Republic of South Africa, 108 of 1996;
 - 5.1.2 Public Protector Act, 23 of 1994;
 - 5.1.3 Occupational Diseases in Mines and Work Act, 73 of 1973;
 - 5.1.4 National Health Act, 61 of 2003;
 - 5.1.5 The Department of Health's Strategic plan 2006/7;
 - 5.1.6 Batho Pele Principles; and
 - 5.1.7 Promotion of Administrative Justice Act, 2 of 2000.

6. THE INVESTIGATION OF THE COMPLAINT

- 6.1 The investigation was conducted in terms of Section 7 of the Public Protector Act. It comprised of the following:

6.1.1 Perusal and analysis of the relevant documentation provided by the complainant pertaining to the complaints dating back to 2003, with a view to establish the nature and reasons for the delays with the processing of applications.

6.1.2 Correspondence with the Complainant.

6.1.3 Consultations with the complainant and other affected medical practitioners.

6.1.4 Correspondence with the MBOD with regard to the complaints.

6.1.5 Perusal and analysis of responses supplied by the MBOD.

6.1.6 Weighing up the number of claims, period of delay and the reason thereof, on the one hand and prejudice caused to the complainant, on the other hand.

6.2 First-off, it is important to note the following Legislative provisions:

6.2.1 Section 2 of the Occupational Diseases in Mines and Works Act, 1973 provides for the establishment of the MBOD with the primary task of conducting medical examinations of current mineworkers for purpose of certifying the fitness of mineworkers, as well as certifying the compensatable diseases for current and former mineworkers.

6.2.2 Sections 39 to 52 of the above-mentioned Act sets out the establishment, powers and functions of the Certification Committee to deal with applications for medical examinations to determine if a person is suffering from a compensatable disease in terms of the Act.

- 6.2.3 Furthermore, Section 32(1) of Occupational Diseases in Mines and Work Act, states that any person who works and worked at a mine or works, or any other person acting on behalf of such a person, may at any time apply to the director for a medical examination of such person for the purpose of determining whether such person is suffering from compensatable diseases, or, if he or she has previously been found to be suffering from such a disease, the degree of such disease.
- 6.2.4 Section 33(1) of this Act further stipulates that “whenever a medical practitioner in the Republic considers or suspects that the person medically examined or treated by him or her, who has to his or her knowledge worked at a mine or works, or who he or she believes on reasonable grounds to have so worked, is suffering from a compensatable disease, such practitioner shall forthwith communicate to the director his or her findings at the examination. (This section relates to the role of complainant on this matter.)
- 6.3 The Public Protector noted that initially there were individual complaints brought by the Complainant, but the number increased gradually.
- 6.4 The Public Protector further noted that the doctors dealing with similar claims more particularly doctors at Ernest Oppenheimer Hospital in Welkom were of the view that delays in processing the patients’ applications for compensation by the MBOD were unreasonable.
- 6.5 The Public Protector raised the matter with the MBOD, in particular the Office of the Director of MBOD, Dr Ndelu. It was noted with concern that out of sixty (60) complaints received, approximately forty (40) complaints took in excess of two (2) years to investigate and finalise due to lack of co-operation by MBOD with this office’s investigation. Dr Ndelu raised concerns

such as lack of personnel to conduct certifications, as the challenge facing her Bureau.

6.6 Further thereto, it has been established that in some instances the submissions of applications were not captured in the database by the MBOD.

7. OBSERVATIONS AND FINDINGS

7.1 The following observations and findings have been made from the investigation:

7.1.1 That out of approximately 60 complaints investigated by this office since 2003, forty (40) applications took a period in excess of two (2) years to be finalized despite the fact that the Department undertook to have six months turn-around to process the applications for mine related diagnosed diseases.

7.1.2 The conduct of the MBOD in processing, adjudicating and finally certifying these applications constitutes an undue delay as alleged. The said conduct is inconsistent with Section 33 (1) of the Constitution, which provides that “[e]veryone has the right to an administrative action that is lawful, reasonable and procedurally fair”, and Section 237 which provides that all constitutional obligations must be performed diligently and without delay”.

7.1.3 The delay also violated the requirement of due diligence in respect of performance of constitutional obligations. Such a delay is found to have been severely prejudicial to the complainants referred to in this investigation.

7.1.4 Furthermore, it can be concluded that there is no proper data system in place resulting in the applications not being captured properly and / or accurately and thus causing undue delay in processing these applications.

7.1.5 The MBOD failed to meet their strategic objectives, which provide for six (6) month's turn-around time for finalising certification applications.

8. RECOMMENDATIONS

8.1 In terms of Section 182(1)(c) of the Constitution, 1996 and Section 6(4)(c)(ii) of the Public Protector Act, 1994, it is recommended that the Director-General of the Department of Health take the following remedial actions:

8.1.1 Implement proper systems or mechanisms within the structures of the Department to expedite the process of certification of applications for compensation of diagnosed mine related occupational diseases.

8.1.2 Improve the data capturing system of the MBOD and capacitate the MBOD with more personnel to expedite the certification process of the MBOD in this regard.

8.1.3 Train and capacitate the support staff handling applications, to be efficient in dealing with these applications;

8.1.4 Improve the systems to be user friendly so as to thwart the undue delays in providing feedback on the progress to the applicants;

8.1.5 Improve the monitoring on file movement of files and applications for compensation for occupational diseases through different sections having to process them.

8.2 The Director-General of the Department of Health should report within 3 months of the date hereof of the steps taken to implement the above recommendations.

**ADV M L MUSHWANA
PUBLIC PROTECTOR OF THE
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DATE:

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