

Rogue regulations set to deepen the rot in the Compensation Fund

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Government has gone rogue. In gazetting draconian, irrational and unreasonable regulations pertaining to the Compensation Fund the day after Parliament rose for recess, the Minister of Employment and Labour has cynically abused his executive power to avoid oversight and evade public scrutiny. By so doing, he has undermined core constitutional principles and legislative good practice. The details of the rogue regulations are simple, but their implications are wide-ranging, not least for medical practitioners. If passed into law, on 30 September, the regulations will effectively remove the right of medical service providers to use the services of banks and third-party pre-funding administrators to ensure that they are paid for treating injured workers.

It is common cause that, due to the structural dysfunctionality of the Compensation Fund, even if medical service providers are able to navigate their way through the 'CompEasy' system, clinicians are forced to wait up to two years for payment. Yet, unlike other state-managed funds, the Compensation Fund is not only solvent, it is bloated with R60 billion in assets and R26 billion in reserves via some R9 billion in annual contributions from 400 000 employers.

The depth of the Compensation Fund's dysfunctionality is borne out, not by hearsay, but rather by other government institutions. For 10 years, the Auditor-General has published disclaimers and adverse opinions about the Compensation Fund. In addition to material non-compliance with legislation, so deep are its pathologies that the Auditor-General this year lamented that, if not required by legislation, she would withdraw from auditing the Compensation Fund.

In May, Parliament's Standing Committee on Public Accounts (SCOPA) expressed its outrage at the collapse of internal controls and 'absolute chaos' within the Compensation Fund. The Minister of Employment and Labour declared that he was 'mad about this' and promised that forensic auditors would be appointed at the end of June to get to the bottom of the rot at the Fund. Accused by SCOPA of not taking Parliament seriously, the Minister, Director-General and Commissioner further promised a slew of improvements and turn-around measures to improve an institution that, while mandated to help vulnerable injured workers, was 'rotten to the core'.

Parliament's Employment and Labour Committee has considered Compensation Fund matters on no less than 12 occasions this year, including a number of virtual appearances made by the Minister, Director-General and Commissioner. Most importantly, the Minister introduced the Compensation for Injuries and Diseases (COID) Amendment Bill, which, after a constitutional court finding and immense public pressure, finally provided for the inclusion of domestic workers as beneficiaries of the fund. Yet, for all its welcome improvements, the COID Amendment Bill embedded a catastrophic and possibly unconstitutional clause that sought, for no given reason, to prevent medical service providers from ceding their claims to third-party administrators for payment by the Compensation Fund.

In response to measured, evidence-based and persuasive presentations by worker, employer, financial and medical bodies, Parliament removed the offending clause from the Bill and instructed the Minister and Department to develop regulations to ensure that those dealing with the

Compensation Fund are registered. While Parliament is to be congratulated for its legislative, deliberative and oversight functions with respect to the COID Amendment Bill, at no point was it clarified why the offending clause was included in the original Bill. Nor were reasons provided or justifications made for Parliament directing that regulations be drafted, requiring third-party service providers to be registered with the Compensation Fund.

Yet, on 10 September, even before the COID Amendment Bill was considered by the National Council of Provinces, the Commissioner published regulations that, by 30 September, would result in medical service providers no longer being able to use the services of third-party pre-funding administrators to maintain their cash flow, keep their practices solvent and, in effect, allow them to treat injured workers without having to wait two years for payment. The consequences of the Department's Stalingrad tactic are dire. First, and most important, many medical service providers will reluctantly cease treating injured workers; they simply cannot afford to do so. Consequently, one assumes that trades union and employer bodies will be outraged by the regulations and will lobby intensively to have them removed. Second, Parliament has been outmanoeuvred by the Commissioner, which sets a dangerous precedent that undermines the entire balance of power, oversight and accountability foundations on which our parliamentary democracy is built. Third, one element of the rotten Compensation Fund that works efficiently, namely third-party administrators, risks being put out of business by the regulations, potentially hastening the collapse of the Fund itself.

Speaking of the crisis in the Compensation Fund in April this year, the chair of Parliament's Employment and Labour Committee stated, "This is something that we really have to exhaust our energies on. We should be able to confront the situation; we have to go where eagles dare." For the sake of injured workers, medical service providers, employers and, indeed, national interest, these disastrous, irrational and possibly unconstitutional regulations must be withdrawn before it is too late.

Postscript

Having withdrawn the peremptory regulations published in September, the Department of Employment and Labour published the General Notice 615 of 2021 in the *Government Gazette* (Vol. 676, No. 45344), on 19 October: *Notice on Banking Information Requirements for Occupational Injuries and Diseases Related Claims*. The Notice states that the Compensation Fund will no longer accept banking details and nominated bank accounts of agents and other representatives. Only banking details belonging to the medical service provider or relevant healthcare organisation that provided the service to the injured or diseased beneficiary will be accepted. The Notice is available from: https://www.gov.za/sites/default/files/gcis_document/202110/45344gen615.pdf.

Interested parties have 60 days to submit comments in writing, by mail, to the Compensation Commissioner.