

Ref: 771939

18 December 2021

Commissioner Vuyo Mafata
Compensation Fund
Compensation House
167 Thabo Sehume Street, Delta Heights Building
Pretoria
0001

By e-mail: commentsAV@labour.gov.za

Cc: mduniwa@parliament.gov.za (Chairperson of the Portfolio Committee on Employment and Labour)

zsakasa@parliament.gov.za (Committee Secretariat)

Dear Commissioner

COMMENTS ON NOTICE ON BANKING INFORMATION REQUIREMENTS FOR OCCUPATIONAL INJURIES AND DISEASES RELATED CLAIMS

1. We present herewith, on behalf of the South African Institute of Chartered Accountants (SAICA), our written submission on the request for comments on the draft notice on Banking Requirements for Compensation for Occupational Injuries and Diseases Act (COID Act) issued on 19 October 2021 and its impact on both employees, employers, medical services providers and financial intuitions.
2. In this respect, our submission and the discussions at the Portfolio Committee for Employment and Labour on 23 June and 30 June 2021 has reference, as the same concerns apply as relates to this draft notice. We also refer to our submission dated 22 September 2021 given that this draft notice does not in essence differ to the “*draft requirements*” issued on 10 September 2021 and subsequently withdrawn. We accordingly raise similar concerns with this draft notice.
3. In this regard, we will also send a copy of this submission to the Portfolio Committee for Employment and Labour who are tasked with the relevant oversight role.
4. Our concerns relate specifically to the limitation that the Compensation Fund (Fund) will no longer accept banking details and nominated bank accounts of agents and other representatives other than that of the Medical Service Provider or the Healthcare Organisation which provided the service to the injured or diseased beneficiary.



5. We however have additional concerns with the relevant notice.

Legality of notice scope

6. The essence of the notice is that it seeks to create a legal instrument to limit the customers / clients that COIDA wishes to transact with, that extends beyond the current enabling Act.
7. Medical service providers and Healthcare Organisations are in fact currently legally transacting with other service providers and in some cases they are ceding their claims to these service providers, who in turn then have to submit these claims to the Compensation Fund for payment.
8. This is within the ambit and scope of the current legislation which the Compensation Fund has sought to amend with the same purpose as the notice, to exclude third party intermediaries from transacting with the Compensation Fund.
9. The Notice has the implication that service providers that provide pre-funding and legally accept cession of debt claims against Compensation Fund, will now be operationally excluded from registering with the Fund to secure payment of their debt claims. This is achieved by the Notice stating that only the bank accounts of Medical Service Providers or Healthcare Organisations will be accepted, whilst the Fund is well aware of the lawful practice where claims are ceded to so called “pre-funders”.
10. This is the exact same legal outcome the Compensation Fund was seeking through its proposed legislative amendment.
11. In this regard, the Compensation Fund has acknowledged with its proposed amendments to the COIDA Act that imposing such material and far-reaching limitation would be the function of Parliament and would require primary legislative amendment, a position we concur with.
12. The legislative instrument used by the Commissioner for the draft notice are powers afforded in terms of section 6A COIDA which state:

6A. Functions of commissioner

The commissioner shall-

(a) receive notices of accidents and occupational diseases, claims for compensation, medical reports and accounts, objections, applications, returns of earnings and payments due to the compensation fund;

(b) by notice in the Gazette prescribe the rules referred to in section 56(3)(c), as well as the forms to be used and the particulars to be furnished in connection with notice of occupational injuries and diseases, claims for compensation or any other form or matter which he or she may deem necessary for the administration of this Act.



13. Though delegation of legislative powers can be done by an act of Parliament as relates to secondary legislation, this is not an open ended or unfettered discretion¹ and that there are constitutional implied limitations² and limitations imposed by the empowering legislation itself.
14. Therefore, the first point of reference is the empowering legislation as to the limitations Parliament has imposed.
15. In this regard section 6A(b) COIDA has clearly stated limitations as to specific processes for which this power exists but even its discretionary provision is limited to matters deemed necessary for the administration of the Act.
16. The courts have noted that important factors to consider are³:
 - a. *The extent to which the discretion of the delegated authority (delegatee) is structured and guided by the enabling Act;*
 - b. *The public importance and constitutional significance of the measure - the more it touches on questions of broad public importance and controversy, the greater will be the need for scrutiny;*
 - c. *The shortness of the time period involved;*
 - d. *The degree to which Parliament continues to exercise its control as a public forum in which issues can be properly debated and decisions democratically made;*
 - e. *The extent to which the subject matter necessitates the use of forms of rapid intervention which the slow procedures of Parliament would inhibit;*
 - f. *Any indications in the Constitution itself as to whether such delegation was expressly or impliedly contemplated.*
17. In this regard we agree with the Portfolio Committee that the Commissioner has a right to regulate third parties through administrative checks and balances but it does not and should not have the power to exclude legal transactions which by its very nature empower the public interest by allowing the compensation system and the intent of the legislation to be achieved, namely the timely and cost effective treatment of employees injured on duty.

¹ Dawood v Minister of Home Affairs 2000(3) SA 936 CC

² Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others 1995 (4) SA 877 (CC)

³ Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others 1995 (4) SA 877 (CC) at [206]



18. The proposed amendments to the COID Act, Section 43 amendments to Section 73(4) of the Act was therefore declined by the Portfolio Committee and on 31 August 2021 the following wording was agreed to and accepted in the Compensation for Occupational Injuries and Diseases Amendment Bill, B 21B-2020. Bill 21B-2020 was adopted on 31 August 2021:

“(3) Notwithstanding the provision of subsection (2) the medical practitioner may after the claim has been finalised or the period referred to in subsection (1) has lapsed, apply for reopening of the claim and payment of further medical costs. (4)(a) No third party will be allowed to transact with the Compensation Fund unless they are registered with the Compensation Fund in the manner as prescribed. (b) All third parties that are already transacting with the Compensation Fund must register with the Compensation Fund within six months after the commencement of the Compensation for Occupational Injuries and Diseases Amendment Act, 2021”

19. The Portfolio Committee therefor agreed that third party services providers could and should transact with the Fund but had to administratively register within the prescribed period. The Fund has now through this draft notice proposed not regulating third parties but in fact, again, exclude third party service providers from transacting with the Fund by preventing them to be registered.
20. The Notice therefore goes beyond the scope of administration, to effect a fundamental change in the nature and scope of the legislation under the guise of an “administrative matter” namely registration of banking details.
21. SAICA also notes with concern that the timing and impact of the Notice was after the Compensation Fund already became aware that the Portfolio Committee did not support its argument and policy stance on the matter and yet it persisted with a Notice that would undermine the Parliamentary process that the Compensation Fund itself had initiated.
22. The Portfolio Committee in its deliberation **expressly declined** the inclusion of Section 43 to amend Section 73(4) of the COID Act that prohibited the session of medical claims to third party service providers which **excluded section stated:**

73(4) Any provision of any agreement existing at the commencement of this Act or concluded thereafter in terms of which a service provider cedes or purports to cede or relinquishes or purports to relinquish any rights to medical claim in terms of this Act, shall be void.

23. SAICA has to conclude in these circumstances that the content of the draft notice as relates to barring third parties from registering bank account details is outside of the scope of subordinate legislation such as Regulations and is a matter reserved for Parliament should it be included in the COID Act.

24. **Submission:** It is submitted that the Notice as published contains an unlawful prohibition outside of the authority of the Compensation Commissioner and should be withdrawn and reissued to comply with the empowering legislation.



25. It is submitted that the notice be amended to provide for the details and lawful conditions for third parties to register with the Compensation Fund.

Impact of employees and other parties

26. SAICA has noted the presentations by various industry bodies including banks and medical service providers to the Portfolio Committee on the societal impact should a prohibition as proposed by the Compensation Fund be allowed.
27. As the current notice seeks to achieve the same outcome that Parliament rejected, the same negative impact on society remains.
28. In this regard, our concern remains that injured employees will now be refused private medical treatment due to concerns that payment will not be forthcoming or be subject to much delay or cost from the Compensation Fund. Given the strain and level of service at public hospitals, this will result in either employers or medical schemes having to cover the costs as cover or at least surety to enable treatment.
29. The knock on effect on medical practitioner and financial institutions, given the retrospective nature and impact on even existing debt cessions, are that that these financial institutions will having their current debt surety nullified and the third parties debts essentially extinguished by law. These concerns were also presented to and noted by Parliament, and it is our view that if implemented will have a further detrimental effect on the whole COID scheme services.

30. Submission: It is submitted that even if the notice was lawful, which we believe it is not, it would be materially harmful. It is submitted that the Commissioner has not taken into consideration or wilfully excluded the impact of this draft Notice on the intended beneficiaries of the Compensation Fund, namely injured employees.
31. It also submitted that the Commissioner has seemingly not considered the detrimental impact this proposal will have on current and future medical service providers on whom the Compensation Fund is wholly reliant on in achieving its purpose and well as current legal rights of those who own the debt or have certain security rights on such debt.
32. It is submitted that the draft notice should be amended to merely state the required information that enable third parties to register with the Compensation Fund or that it be withdrawn in its entirety.

Fruitless and Wasteful - Litigation costs

33. Section 1 of the Public Finance Management Act (PFMA) defines fruitless and wasteful expenditure as “**expenditure which was made in vain and would have been avoided had reasonable care been exercised**”.
34. The PFMA applies to the Compensation Fund as a Schedule 3 entity.
35. For the reasons discussed above, we are of the view that the Compensation Fund would face unnecessary litigation should it proceed with the draft notice given that its intent is unlawful.



36. It is also our understanding that the Compensation Fund had indeed faced such litigation when it issued its previous similar draft requirements on 10 September 2021. Such litigation was only withdrawn on receipt by the litigants of a written undertaking issued by the State Attorney's Office confirming that the Compensation Fund would in fact withdraw the 10 September 2021 banking registration requirements.
37. In this regard we are of the view that the State Attorney's Office would only have agreed to such withdrawal had it in fact been in agreement that the actions of the Compensation Fund would be held to be unlawful in a court of law.
38. The pursuance of the exact same matter by the Compensation Fund as a Notice rather than an informal administrative requirement, would in our view result in the same outcome and that such conduct would not constitute "reasonable care being exercised", given what had already been communicated to the Compensation Fund by the Portfolio Committee and Stakeholders.
39. In terms of National Treasury's guidelines⁴ on this matter it states:
Section 51 of the PFMA spells out the following general responsibilities of accounting authorities related to fruitless and wasteful expenditure:
- (i) *Section 51(1)(b)(ii): The accounting authority must take effective and appropriate steps to prevent fruitless and wasteful expenditure;*
 - (ii) *(ii) Section 51(1)(e)(iii): The accounting authority must take effective and appropriate disciplinary steps against any employee who makes or permits fruitless and wasteful expenditure;*
 - (iii) *(iii) Section 55(2)(b)(i) & (ii): The annual report and financial statements must include particulars of fruitless and wasteful expenditure that occurred during the financial year and any disciplinary steps taken as a consequence of such fruitless and wasteful expenditure; and*
 - (iv) *(iv) Section 57(c): An official in a public entity must take effective and appropriate steps to prevent any fruitless and wasteful expenditure within that official's area of responsibility.*
40. It is our understanding that the **Accounting Officer/Accounting Authority** of the Compensation Fund is the current **Director General of Employment and Labour**.
41. Submission: It is submitted that any litigation costs incurred by the Compensation Fund that results in unsuccessfully defending the lawfulness of this draft notice would constitute fruitless and wasteful expenditure in terms of the PFMA and that the Accounting Officer would be compelled to take the steps as set out in section 51 of the PFMA and the relevant National Treasury guidelines.

Yours sincerely

⁴ [GUIDELINE ON FRUITLESS AND WASTEFUL EXPENDITURE \(treasury.gov.za\)](https://www.treasury.gov.za/guidelines/fruitless_wasteful_expenditure)



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