Fish Farming Paralysis

Report on an investigation into allegations of improper prejudice suffered by Aquaculture Project Consultants (APC) as a result of alleged improper conduct by officials of Bojanala District Municipality

Report No: 7 of 2014/15
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Executive Summary

(i) “Fish Farming Paralysis in the North West” is my report as 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).

(ii) The report communicates my findings as Public Protector and remedial action I consider appropriate following an investigation into the allegations of improper prejudice suffered by APC as a result of alleged improper conduct or maladministration by the Bojanala District Municipality with relating to reneging on an agreement involving the implementation of an aquaculture (fish farming project) and refusal to pay 50%(R850,000,00) towards a feasibility study in relation therewith.

(ii) The Complainant, Mr Mmeli Hendrick Mdluli is an emerging entrepreneur and Managing Director of Integrated Fish Farming South Africa (IPFF) trading as Aquaculture Project Consultants (APC), who, in 2009, approached the Bojanala Platinum District Municipality (the Municipality) and others to support the implementation of a Rural Development Project relating to commercial harvesting and farming of fish within poor communities in South Africa as a poverty alleviating project. The project, presented under a proposal titled “An Entrepreneurial Approach providing a Sustainable Solution for ending Hunger and Poverty in Impoverished Rural South Africa Communities”, was to be implemented in 2009/10 as a pilot project, focussing on “the breeding of tilapia fish in ponds or controlled environments.”
(iii) In his complaint lodged in 2010, the Complainant alleged that the Municipality had improperly (unduly) reneged on its undertaking to support and participate as a partner in his pilot project on aquaculture (Fish farming) as an anti-poverty mechanism for poor rural communities. He further alleged that this followed APC being selected by the United Nations Development Programme (UNDP) as an implementation partner on pilot poverty combating projects under programmes referred to as One Municipality One Project (MOP) and One Village One Project (OVOP).

(iv) The Complainant further alleged that the Municipality unfairly “strung him along” for months and wrongfully withdrew after APC’s partial implementation of the project in the form a Pre-feasibility Study for which the Municipality refused to pay despite having agreed to pay for it, thereby causing him severe financial and personal prejudice. He further alleged that, not only did the Municipality improperly renege on the said agreement; it did so after communicating to third parties, including the Development Bank, that it was a party to the fish farming project and feasibility study. The Complainant further alleged that an official of the Municipality, Mr Mike Mokgatsi, unduly substituted the area of Molatedi for the Jericho area, which had been the target of APC’s original proposal and which would not have needed a feasibility study.

(v) On consideration of the complaint and information sourced during various stages of the investigation, the following issues were identified and ultimately became the focus of the investigation:

a) Did the Bojanala Municipality improperly renege on an agreement to support, APC’s fish farming project, including the payment of 50% of a project feasibility study and did its conduct constitute misrepresentation and a violation of the Municipal Finance Management Act (MFMA)?
b) Did Bojanala Municipality improperly renege on a commitment to pay 50% (R850,000.00) towards a project feasibility study by APC on the fish farming project targeting Molatedi after the study had already been undertaken.

c) Did Bojanala Municipality unduly cause Bojanala Pilot Project on Aquaculture to be moved from Jericho in the area of the Madibeng Local Municipality to Molatedi in the area of the Moses Kotane Local Municipality.

d) Was the Complainant, APC, improperly prejudiced by the conduct of the Municipality

e) If the Complainant was prejudiced, what would it take to place him and his company as close as possible to where he would be but for the improper conduct or maladministration?

f) Did the community also suffer any improper prejudice as a result of improper conduct or maladministration by the Municipality?

(vi) The Municipality’s conduct was principally tested against laws regulating administrative rights of citizens and residents doing business with Municipalities, constitutional and legal responsibilities of Municipalities regarding the pursuit of social and economic development and the responsibilities of Municipalities regarding financial and procurement management.

(vii) The starting point was an appreciation of section 33 of the Constitution which gives every person the right to administrative action that is lawful, reasonable and procedurally fair and bearing in mind that this sets the standard that was owed to the Complainant by the Municipality. Section 195 of the Constitution, setting principles of good administration, was also taken into account as was chapter 7, particularly sections 152(1)(c) and 153(a) of the Constitution imposing development facilitation responsibilities and duties on Municipalities, were also
(viii) I ultimately had to take into account responsibilities and constraints imposed on state in local government with regard to financial management and procurement of goods and services. In this regard, section 217 of the Constitution, the Municipal Finance Management Act, 2003 (MFMA) and Treasury prescripts regulating supply chain management, were very instructive.

(ix) In testing proper conduct regarding the treatment of small business persons in procurement within state affairs, I was deeply assisted by *Touchstones* from previous reports of the Public Protector, particularly reports titled *Unsettled Settlement, Against the Rules* and *Against the Rules Too*.

(x) Having considered the evidence and the applicable regulatory framework setting the administrative standard that should have been complied with by the Bojanala Municipality, I make the following findings:

(xi) **General Observations**

There were not many disputes between the Complainant and the Municipality regarding what happened.

It is common cause that the Complainant’s company, APC, approached the Municipality with a proposal involving a pilot rural development project targeting job creation and poverty reduction through commercial harvesting and farming of tilapia fish.

It is further common cause that the pilot site in the Complainant’s project proposal and presentation to the Municipality was Jericho District in Bojanala and that the Municipality swayed the project to the Molatedi area. Also common cause, is the fact that the Municipality advised APC and others that it was considered as part of the yardstick against which the conduct of the Municipality was judged.
committed to the fish harvesting and farming project as it was in line with its aquaculture project articulated in its Integrated Development Plan (IDP).

It is also common cause that the municipality advised the Complainant and others that it was partnering in the project going to the extent of asking APC to prepare a Memorandum of Understanding (MOU) and further communicating to third parties that it was a party to the project and was committed to funding 40% of the cost of its feasibility study with the Development Bank expected to fund the rest.

The Municipality’s IDP for the period in question further shows that the Municipality had within its plan, intentions to support commercial activities as part of rural development, job creation and poverty alleviation. However, the IDP did not specify aquaculture or fish farming per se as part of its development plans despite having persistently communicated that its IDP, specifically included aquaculture as party of anti-poverty interventions.

It is further common cause that after about 8 months of engagement and communication by the Municipality’s officials to the effect that it was on board on the project, the Municipality advised the Complainant that it would not participate in the project and would put its own “planned” aquaculture project on tender. It is also common knowledge that such aquaculture project was never put out on a tender.

Much of the investigation went into determining the nature of the Municipality’s commitment to the Complainant’s project, the circumstances of its withdrawal and its responsibility if any to the Complainant. The investigation also dealt with the reasons behind and the propriety of changing the project pilot site from the Jericho area to Molatedi.
Having considered the evidence uncovered during the investigation against the applicable law and related prescripts, I make the following findings:

**a) Did the Bojanala Municipality improperly renege on an agreement to participate in APC’s fish farming project and to pay 50% towards a project feasibility study and did its conduct constitute a misrepresentation and a violation of the Municipal Finance Management Act (MFMA)?**

(aa) The allegation that Bojanala Municipality improperly reneged on an agreement to participate in APC’s fish farming project and to pay 40% towards a project feasibility study is substantiated by evidence.

(bb) By the Municipality’s own admission, the Municipality’s officials informed APC that his project proposal had been accepted, redirected the project to a different pilot site than one proposed by him (Jericho), committed the Municipality in writing, including to the Development Bank, to pay 40% of R1.7m fees towards a feasibility required for the Municipality’s chosen pilot site (Molatedi) and asked the Complainant to prepare a Memorandum of Understanding (MOU) to formalise the agreement.

(cc) There was no wrongdoing on the part of the Complainant in preparing the draft MOU framing the project as a Public Private Partnership (PPP), following at the request of and wrongful classification of the relationship by the Municipality’s officials. The wrongdoer was the Municipality in failing to acquaint itself with the appropriate procurement regulatory framework and appropriate vehicle for the project before making a resolute commitment to the Complainant.

(dd) The fact that the MOU had not yet been signed when the Municipal Manager eventually refused to sign it and advised that the project would
be subjected to a tender process, does not mean there was no agreement.

(ee) Reaching an agreement in the manner it was done by the Municipality, however, was unlawful as the procedural requirements stipulated by local government laws and internal policies for such agreements had not been met. It further created a lot of uncertainties before the Municipality canned the arrangement with him, and for that reason the Complainant is justified in alleging that the Municipality “stringed him along.”

(ff) I am unable to fully accept the Municipality’s defence that there was no agreement and that if there was such an agreement it was improperly entered into and was accordingly unlawful and invalid. The only valid part of this defence is the argument that the agreement was entered into unlawfully. This is supported by evidence showing that the Municipal officials acted in violation of section 217 of the Constitution, section 2 (d) (i) and (ii) of the Preferential Procurement Policy Framework Act No. 5 of 2000, section 112 of the MFMA and clause 10 of the Municipal Supply Chain Management Regulations, 2005 (the Regulations) that:

1. It failed to ensure proper demand management as required by the MFMA and Treasury Regulations, starting with proper planning and budgeting for the aquaculture project in its IDP before engaging the Complainant.

2. It failed to follow a procurement process that is open, fair and competitive or alternatively, abiding by applicable deviation requirements, which in this case would have been those regulating unsolicited bids as provided for in section 113(2) of the MFMA, section 21A of the Municipal Systems Act, Regulation 37(2) of the Regulations.
3. It failed to ensure that decisions were taken properly by lawfully mandated structures such as the Municipal Manager and Council before being communicated or executed and that such decisions were recorded and communicated in the prescribed manner.

4. There were many violations of Treasury Regulations which if they had been adhered to would have saved time and obviated the uncertainties that have led to the dispute over the aborted project. Amongst key administrative failures, was the failure of Municipal officials to conduct due diligence on the viability of the project and the capacity, including financial functionality of the preferred service provider as required by Regulation 10 of the Municipal Supply Chain Management Regulations, 2005 (the Regulations), before making commitments such as the letter telling the DBSA that APC was communicating on its behalf and that the aquaculture project belonged to it.

   (gg) However, I find no impediment in law that prevented the Municipality from entering into a partnership with the Complainant using either an unsolicited bid or a donation and adhering to their own requirements. Failure to do so is entirely its own fault.

   (hh) The Municipality’s entering into an unregulated and uncertain relationship with the Complainant and then unceremoniously jumping ship is at odds with the principles of good administration as envisaged in section(s) 33 and 195 of the Constitution and thus constitutes improper conduct and maladministration.

**b) Did Bojanala Municipality improperly renege on a commitment to pay 50% toward a project feasibility study by APC on the fish farming project targeting Molatedi after the study had already been undertaken?**
(aa) There is no question that the Municipality’s officials committed the Municipality verbally and in writing to pay 40% of the feasibility study fees and that it was its idea that the pilot site be moved to Molatedi, which required a feasibility study. However, such commitment was made unlawfully as the persons who did so had no authority to do so and did so without following prescribed supply chain procedures.

(bb) What I am unable to find incontrovertible evidence of is that the Municipality increased its share from 40% to 50% as alleged and that it authorised the Complainant to commence with the feasibility study even though no contract had been signed.

(cc) Communication between the Complainant and the Municipality, particularly through Mr Mike Mokgatsi, including the draft MOU, however, gives a strong indication of the Municipality’s officials being aware that the pre-feasibility study had commenced and acquiescence in the execution of same despite the MOU still outstanding.

(dd) Although the Municipality’s conduct leaves a lot to be desired, I have not found evidence to support the allegation in the Complainant’s affidavit that the Municipality lost interest when the feasibility study discounted its preferred Molatedi and the Complainant’s failure to bow down to pressure to go with this area despite of its water supplies and market access being not viable.

(ee) While I consider the Complainant’s conduct as a business person unduly risky in beginning to execute a contractual project without written agreements, it is the Municipality’s conduct, including “stringing him along”, that I consider to be the cause of or exacerbating factor that led
to the uncertain business environment APC found itself in resulting in an unauthorised study being conducted.

c) Did Bojanala Municipality unduly cause the Bojanala Pilot Project on Aquaculture to be moved from Jericho in the area of the Madibeng Local Municipality to Molatedi in the area of the Moses Kotane Local Municipality?

(aa) The Municipality has not denied that it was its idea that the pilot site for fish farming be Molatedi.

(bb) While the complainant is adamant that the story about Jericho being not viable due to water contamination is suspect, the correspondence between him and others, including Mr Swanepoel who is the author of the Jericho Feasibility study and Prof Kruger who is said to have microbes that can address the contamination, shows that the Complainant accepted that Jericho water was contaminated. There is further no evidence linking the Bojanala Municipality to the allegation of water contamination,

(cc) I am further unable, despite the Complainant’s many submissions, including a letter and statements from the Chief Joy Mamogale of Jericho, that trickled from the Complainant into my office until early this week, that there isn’t and the Municipality knew there was no water problem in Jericho and that the relocation of the pilot site from Jericho to Molatedi was due to improper motives.

(dd) I am further persuaded by the Municipality’s explanation that Molatedi was preferred because its IDP identified it as a very poor community (poverty node), which together with Morelete Local Municipality were to be given for poverty alleviating projects. The selection of Molatedi would
therefore, have been in line with the priorities, objectives indicators and targets contained in the Municipality's IDP. The IDP in question corroborates this. The allegation of dishonesty on the part of the Municipality in choosing Molatedi as its preferred site is, according, not substantiated.

d) Was the Complainant improperly prejudiced by the conduct of Bojanala Municipality?

(aa) The Municipality accepted my finding of prejudice in the provisional report and proposed remedial action without reservations in its response to the provisional report and notice issued in terms of section 7(9) of the Public Protector Act. For completeness, I have decided to include my considerations and determination on the question of prejudice suffered by the Complainant.

(bb) It simply cannot be argued that the Complainant was not prejudiced by the Municipality's improper conduct and bad administration.

(cc) The evidence, which has not been disputed by the Municipality, shows that being “strung along” was not only a major inconvenience to the Complainant but also caused him to lose a lot of business time and money going up and down following up on whatever was suggested by the Municipality as the next course of action in pursuit of the project. Project planning on its own is costly, which is why project budgets include fees for project scoping and planning.

(dd) I have noted that apart from “stringing him along” for months, the Municipality undoubtedly caused the Complaint to spend lots of time and money creating documents in pursuit of whatever procurement vehicle it
favoured at any given time from a PPP then an Unsolicited Bid to announcing that the process would be taken on tender.

(ee) What I am unable to determine though is the amount that would constitute a fair amount to place the Complainant as close as possible to where he would have been had the Municipality acted properly. “I am also unable, in good conscience, to lay the entire blame for the project’s failure at the door of the Municipality. In other words, I am not convinced that the Complainant’s own hands are clean, having advised the Municipality, among other things, that he was the sole UN approved agent for aquaculture under OMOP, that he was implementing a similar project in Marble Hall and that the DBSA had agreed to fund the Project”.

e) Did targeted beneficiaries also suffer improper prejudice as the result of the Municipality’s conduct?

(aa) While the investigation has not asked the beneficiary community about the impact of the non-implementation of the poverty busting project, although the Complainant alluded to the Jericho Traditional Leader’s disappointment. After raising hopes, it is not unreasonable to assume that the morale of the community was probably impacted negatively. It is also worth noting that this was the second time a poverty combatting project was announced in Bojanala Municipality and ended up not taking off.

(bb) It is also not unreasonable to conclude that had the project been properly researched and an appropriate pilot site selected, the project may have created a few jobs while contributing to food security within whatever community that would have been selected in the Bojanala Municipality.
(cc) The Municipality's poor handling of this poverty combatting project accordingly failed to meet the standard set for the Municipality and approved in terms of the Municipal structures Act imposing the duty to establish and act in accordance with a clear framework for leveraging and marshalling its resources or other commitments towards such a project in line with strategic priorities, linked plans and budgets in the IDP.

(dd) The municipality's conduct clearly fell short of the requirements of section 152 and 153 of the Constitution imposing a duty to facilitate development.

(ee) The Municipality failed to discharge its duties and responsibilities in terms of sections 25 to 36 of the Systems Act, section 15 of the MFMA with due consideration to its strategic focus areas and the interests and priorities of the wider population that it serves.

(ff) The conduct of the Municipality and its officials that were involved, accordingly constitutes improper conduct and maladministration.

(xiii) The appropriate remedial action I am taking in pursuit of section 182(1)(c) of the Constitution, and the Batho Pele principle of redress is the following:

(a) **The Municipal Manager**

**Complainant**

(aa) **Is to give the compliant Complainant a written apology** for the manner in which he has been treated, particularly being subjected to
various fruitless procurement processes for months, being made to understand his project proposal had been accepted and having it cancelled after investing time and money in it for months.

**(bb)** Acting with the Municipal Council and with the Complainant’s concurrence, is to ensure that the Complainant’s Company APC is paid an amount that is not less than R100 000, 00 as consolatory pay and to cover expenses incurred in pursuit of the prefeasibility study and project scoping, loss of income while pursuing the project and inconvenience.

**Community**

**(aa)** Assess the aquaculture project and consider reviving it, with a lawfully selected partner, as a poverty combating and food securing rural development initiative through consultation with the communities in Bojanala as part of IDP consultations, with input of experts sought.

**(b)** The Municipal Manager with the help of the Speaker and Council

*Supply Chain Management System*

**(aa)** Is to investigate the actions of the officials involved to determine if disciplinary or other steps should be taken in respect of the possible breaches of the MFMA and relevant legislation or codes of conduct, and to avoid a repetition in future;

**(bb)** Ensure that Standard Operational Protocols are developed and implemented to regulate all agreements to ensure that everything is in writing, unambiguous and correct;
(cc) Ensure that guidelines are set for itemised quotes and invoices from suppliers

(dd) Ensure that all Managers and employees involved in procurement of goods and services are properly trained in Supply Chain Management Policies, the Municipal Finance Management Act and other Legislative Prescripts relating to all procurement processes.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER PREJUDICE SUFFERED BY AQUACULTURE PROJECT CONSULTANTS (APC) AS A RESULT OF ALLEGED IMPROPER CONDUCT BY OFFICIALS OF BOJANALA DISTRICT MUNICIPALITY

1. INTRODUCTION

1.1 “Fish Farming Paralysis” is my report as 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, 23 of 1994 (the Public Protector Act) following a complaint of maladministration and prejudice lodged by Mr Mmmeli Hendrick Mdluli (the Complainant) against the Bojanala District Municipality(Municipality) in 2010.

1.2 The report is submitted to the Executive Mayor and the Municipal Manager of Municipality.

1.3 A copy of the report is also submitted to the Complainant, in terms of section 8(1) of the Public Protector Act.

1.4 The report deals with the outcomes of an investigation into alleged improper prejudice suffered by the Complainant and his company, Aquaculture Project Consultants (APC) as a result of alleged improper conduct or maladministration by officials of the Bojanala District Municipality relating to an aquafarming project involving the breeding and harvesting of tilapia fish; a related feasibility study allegedly conducted by APC; and refusal to pay by the Municipality.
2 THE COMPLAINT

2.1 Mr Mmeli Hendrick Mdluli (the Complainant), an emerging entrepreneur, is the Managing Director of Integrated Fish Farming and Irrigation S.A. (Pty) Ltd T/A Aquaculture Project Consultants (APC). He lodged a complaint on 18 February 2010 alleging that the Municipal Manager and officials of the Municipality acted improperly and caused him prejudice in the manner it dealt with his proposal for the establishment of an Integrated Fish Farming or aquaculture project within the boundaries of the Municipality.

2.2 The Complainant alleged that APC was selected by the United Nations Development Program (“UNDP”), in collaboration with the Small Enterprises Development Agency (“SEDA”), to conduct a pilot project involving the commercial harvesting and farming of fish (aquaculture) within poor communities in South Africa. As part of the project, APC was obliged to find communities within which to undertake the pilot project and the he duly identified selected municipalities with which it intended partnering in conducting the pilot project. He approached the Municipality in 2009 as a potential partner in the fish farming project and met with officials thereof. He further alleged that the Municipality supported a proposal he presented but proposed a change to the pilot site from Jericho in Madibeng Municipality to Molatedi in Moses Kotane Municipality resulting in a need for a feasibility study.

2.3 The Complainant further alleged that the Municipality undertook to fund 40% (forty percent) of the costs of the feasibility study and the drafting of a business plan. The Jericho site neither needed a feasibility study nor a business plan, he advised. He further alleged that the Municipality later increased the amount to 50%. After spending approximately ten (10) months working on the project, and submitting an invoice to the Municipality for the
amount of R850 000.00, the Municipality denied the existence of any commitment or partnership and refused payment of the said amount.

2.4 He further alleged that the Municipality strung him along subjecting him from one fruitless procurement process to another, staring with accepting his unsolicited bid without going to tender then asking him to prepare an MOU framing the deal as a PPP and later asking him to change the documents and recast the relationship as an unsolicited bid and finally refusing to sign the MOU and advising that it has decided to take the aquaculture project to an open tender process, a process that never materialised.

2.5 In a subsequent supporting affidavit submitted by the Complainant in 2011 he reiterated his request to the Public Protector to investigate the Municipality in respect of the following issues:

   a) “Whether Bojanala District Municipality followed the prescribed Municipalities Finance Management Act (MFMA) when making agreements with our company.”

   b) “Whether the Unsolicited Bid document downloaded by Mr. Mokgatsi and faxed to my company does not constitute misconduct and impropriety on the part of Bojanala. To investigate the source of that document and give an opinion as to why the document was sent to us to begin with instead of the MFMA considering that the sender, Mokgatsi, is an experienced Manager who sits in the tender committee of Bojanala (at the time).”

   c) “Whether the pattern of not taking phone calls and replying to official emails demonstrated by Mr. Mike Mokgatsi and Ms Lesego Khutsoane the Director for Local Economic Development, does not constitute impropriety, misconduct and violation of our right to a professional
2.6 In his response to the Provisional Report, the Complainant, further emphasised his grievance regarding the Municipality’s intervention to shift the pilot site from Jericho, which needed no feasibility study or Business Plan to Molatedi, which needed both. He accused the Municipality of misrepresenting facts about Jericho water being unsuitable for the pilot study due to contamination whereas the feasibility study report on Jericho made no mention of a water contamination problem and no other study did so. He reiterated an allegation made in his founding affidavit of 2010, that the conduct of the Municipality constituted misrepresentations that materially affected the location of the proposed project and the need for a feasibility study, as well as on the availability of funding, thus causing him to suffer prejudice.

2.7 The Complainant concluded that:

“If Bojanala Municipality did not misrepresent the facts and Jericho’s bona fides of the findings of the Concomp Feasibility Report, APC would have proceeded to implement the project in Jericho based on their 6 000 tons annual harvest ... and not require another feasibility study to be done in another place as has been proven there was nothing wrong with the water in Jericho.

2.8 The Complainant alleged that the Municipality misrepresented itself by stating that it “had funding for aquaculture “… and thus inducing APC and Mdluli to enter agreements....” with it. He alleged that, at the start of the relationship, the Municipality informed APC that it had a specific project and budget on aquaculture in its IDP. He stated that it has subsequently been established that no funds were ever allocated and approved for aquaculture at all. “This
means once again Bojanala Municipality misrepresented itself to their (Complaint’s) detriment as the 2009/2010 IDP of Bojanala Municipality has no aquaculture in it”, he alleged.

3 POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The Public Protector is an independent constitutional body established under section 181(1)(b) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

3.2 Section 182 of the Constitution provides that:

“(1) The Public Protector has the power, as regulated by legislation,-
(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

(b) to report on that conduct; and
(c) to take appropriate remedial action.

(2) The Public Protector has additional powers prescribed by legislation.”

3.3 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector has additional power to resolve disputes involving conduct in state affairs through conciliation, mediation, negotiation or any other mechanism he or she deems appropriate.

3.4 The Municipality is an organ of state and its conduct and the conduct of its officials constitute conduct in state affairs, as a result this matter falls within the ambit of the Public Protector’s mandate.
3.5 The power and jurisdiction of the Public Protector were not disputed by any of the parties.

4. THE INVESTIGATION

4.1 Methodology

a) The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act.

b) 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.

c) The process involved sourcing and analysing documents, correspondence, interviews and examination of regulatory instruments, including constitutional provisions, legislation, regulations, policies, relevant court decisions and applicable previous Public Protector decisions or Touchstones.

4.2 Approach to the investigation

4.3.1 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 maladministration?
d) In the event of maladministration what would it take to remedy the wrong or to place the Complainant as close as possible to where they would have been but for the maladministration or improper conduct?

4.3.2 I resolved the question regarding what happened through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. The factual enquiry principally focused on whether or not the Municipality had entered into an agreement with the Complainant to conduct a feasibility study, draft a business plan and be involved in the implementation of a pilot project pertaining to the commercial harvesting and farming of fish in its area of jurisdiction, or made incorrect or false statements to the Complainant or other third parties in the course of its engagement with the Complainant.

4.3.4 The enquiry regarding what should have happened, focused on the law or rules that regulate the standards that should have been met by the municipality to prevent maladministration and prejudice.

4.3.5 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration. Where a Complainant has suffered prejudice the idea is to place him or her as close as possible to where they would have been had the state institution complied with the regulatory framework setting the applicable standards for good administration.

4.3 On analysis of the complaint and available information, the following were issues considered and investigated:
4.3.1 Did the Bojanala Municipality improperly renege on an agreement to support, APC’s fish farming project, including the payment of 50% of a project feasibility study?

4.3.2 Did Bojanala Municipality improperly renege on a commitment to pay 50% (R850,000) towards a project feasibility study by APC on the fish farming project targeting Molatedi after the study had already been undertaken?

4.3.3 Did Bojanala Municipality unduly cause Bojanala Pilot Project on Aquaculture to be moved from Jericho in Madibeng Municipality to Molatedi in Moses Kotane Municipality?

4.3.4 Was the Complainant, APC, improperly prejudiced by the conduct of Bojanala Platinum District Municipality?

4.3.5 If the Complainant was prejudiced, what would it take to place him and his company as close as possible to where he would be but for the improper conduct or maladministration?

4.3.6 Did the community also suffer any improper prejudice as a result of improper conduct or maladministration by the Municipality?

4.4.1 **Key sources of information**

4.5.1 **Documents:**

(a) A partially dated and unsigned “founding affidavit” giving full particulars of the complaint and chronology of events

(b) Supporting documents provided by the Complainant such as a Draft MOU, a Pre-Feasibility Study Report and a Feasibility Study Report and
a “chronology of events” submitted by the Complainant from February 2010 and onwards;
(c) Letter from the Municipal Manager to the DBSA dated 12 April 2009;
(d) Letter from a Municipal Official to the Complainant dated 29 April 2009;
(e) Letter from the Complainant to a Municipal Official dated 6 July 2009;
(f) Letter from a Municipal Official to the DBSA dated 29 July 2009;
(g) Letter from the Complainant to a Municipal Official dated 28 August 2009;
(h) Document submitted to the Complainant by the Municipality on 15 September 2009;
(i) Letter from the Complainant to a Municipal Official dated 14 October 2009;
(j) Email from the Municipal Legal Section to the Complainant dated 23 November 2009;
(k) Letter from the Attorneys of the Complainant to the Mayor dated 29 November 2009;
(l) Letter from the Attorneys of the Complainant to the Mayor dated 8 December 2009;
(m) Letter from the Municipal Manager to the Attorneys of the Complainant dated 11 December 2009;
(n) Letter from the Municipality to the Public Protector dated 12 July 2011;
(o) Telephonic interviews between the Public Protector and Municipal Officials;
(p) Affidavit by the Chief of Jericho
(q) Letter from National Department of Agriculture and Fisheries Confirming Bojanala Committed to Pay for feasibility studies;
(r) Complainant’s response to the Provisional Report
(s) Bojanala’s Response to the Provisional Report; and
(t) Other information submitted by the Complainant, including e-mails and attachments, submitted between 29 September and 02 December 2014,
mostly correspondence between APC and others, and among them, a new itemised invoice submitted on 02 December 2014.

4.5.2 Interviews

(a) Meeting with Mr Mokgatsi and Ms Khutsoane on 13 January 2011 regarding issues raised by the Complainant; and

(b) Meeting with the Complainant and his Attorney on 22 June 2011 to clarify issues raised by him.

(c) Telephone discussion between the Public Protector and the Complainant on 26 September 2014.

4.5.3 Legal and Regulatory Framework:

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

(b) Local Government: Municipal Systems Act no. 32 of 2000;

(c) Local Government: Municipal Finance Management Act no. 56 of 2003;

(d) Municipal Supply Chain Management Regulations, Notice No 868 of 2005;

(e) Municipal Public-Private Partnerships Regulations, Government Gazette No 27431, Regulation 309;


(g) Public Protector act 23 of 1994;

(h) The Preferential Procurement Policy Framework Act no. 5 of 2000 and Regulations;


(j) Northern Metropolitan Local Council v Company Unique Finance; and

(k) Previous decisions of the Public Protector Touchstones or previous decision and other relevant decisions of Ombudsman offices.
| (m)  | Bojanala Platinum District IDP for 2009/10; and                                               |
| (n)  | The Copyright Act, 1978                                                                       |

5. **STANDARD THAT SHOULD HAVE BEEN COMPLIED WITH**

5.1 **Complainant's Right to Proper Conduct and Good Administration**

5.1.1 **The Constitution of the Republic of South Africa of 1996**

5.1.1.1 When dealing with people, the Municipality, like all other organs of state, has a duty to eschew improper conduct as envisaged in section 182 of the Constitution or maladministration in various manifestations as envisaged in section 6 of the Public Protector Act. The proscription of improper conduct and maladministration or bad administration can be viewed as concomitantly giving the people the right to *proper conduct* and *good administration*. In determining the content of proper conduct, the Public Protector considers lawfulness, justice and general acceptability of conduct in the light of the founding values of South Africa as enshrined in the Constitution.

5.1.1.2 The Municipality also had a duty, in its dealings with the Complainant, to ensure that its decisions and actions meet the test of just administrative action as envisaged in section 33 of the Constitution which states that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

5.1.1.3 The Municipality's conduct further needs to be tested against the principles of good administration outlined in section 195(1) of the Constitution, which state, among others, that "services must be provided impartially, fairly, equitably and without bias"; and that "public administration must be accountable".

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Among other things, the Municipality’s conduct should have complied with the specific requirement of section 195, that:

(1) Public administration must be governed by democratic values and principles enshrined in the Constitution, including:
   (a) A high standard of professional ethics must be promoted and maintained;
   (b) ...
   (c) Public administration must be development oriented;
   (d) Services must be provided impartially, fairly and equitably and without bias;
   (e) People’s needs must be responded to;...
   (f) Transparency must be fostered by providing the public with timely, accessible and accurate information”

5.1.1.4 The Municipality’s conduct should have further complied with the dictates of the Batho Pele principles, including the right to be treated fairly.

5.2. The municipality’s duty to facilitate development

5.2.1 The Municipality’s conduct in dealing with the Complainant’s project proposal for a rural development project seeking to combat poverty while creating employment and possibly contributing to food security, should have complied with duties imposed by the provisions of section 152 and 153 of the Constitution which provide the following:

“152. Objects of Local Government-(1) The objects of local government are-
   (a) To ensure the provision of services to communities in a sustainable manner;
   (b) To promote social and economic development....
153. Developmental duties of municipalities- A municipality must-
   (a) Structure and manage its administration and budgeting and planning 
       processes to give priority to the basic needs of the community, and to 
       promote the social and economic development of the community;...

5.3. Compliance with Procurement Management Prescripts

In engaging the services of APC or the Complainant as a service provider 
(consultant), the Municipality was duty bound to comply the provisions of 
section 217 of the Constitution relating to procurement by organs of state in 
all the spheres of government. In terms of this provision, organs of state 
(including municipalities) that contract for goods or services must do so in 
accordance with a system which is fair, equitable, transparent, competitive 
and cost effective.

5.3.1 Local Government: Municipal Systems Act no. 32 of 2000

5.3.1.1 In its engagement of the Complainant, the Municipality was further required to 
   comply with the Local Government: Municipal Systems Act no. 32 of 2000 
   (the Systems Act).

5.3.1.2 In terms of section 80 to 84 of the Systems Act, a municipality must, if it 
   decides to provide a municipal service through a service delivery agreement 
   with any institution or entity, other than a municipal entity or another 
   municipality, or a national or provincial organ of state, follow a competitive 
   bidding process provided for in Part 3 of Chapter 8: Municipal Services, 
   before entering into such an agreement with any such institution, entity or 
   person.
5.3.1.3 The Municipality is obliged to select the service provider through a selection process which is competitive, fair, transparent, equitable and cost-effective and allow all prospective service providers to have equal and simultaneous access to information relevant to the bidding process.

5.3.1.4 Any negotiation and agreement with a prospective service provider, on the final terms and conditions of the service delivery agreement, must be done on the basis of the bidding documents that were provided to all the bidders, and any agreement with the selected service provider must be concluded on the terms and conditions specified in the bidding documents, as modified or supplemented in the negotiations.¹

5.4 Legal requirements that the Municipality would have had to comply with in terms of the original proposal that the engagement between the Complainant and the Municipality be formalised as a PPP, or if the Municipality wanted to make use of the services offered by the Complainant in terms of an unsolicited bid.

5.4.1 Local Government: Municipal Finance Management Act no. 56 of 2003

5.4.1.1 Insofar as the original memorandum of understanding proposed a PPP agreement between the Municipality and the Complainant, it must be established if the Municipality complied or was in the process of complying with the conditions and process for public-private partnerships as determined in section 120 of the MFMA:

(a) Section 120 provides that before a public-private partnership is concluded, the Municipality must conduct a feasibility study that explains

¹ Section 84(1) of the Systems Act.
the strategic and operational benefits of the public-private partnership for the Municipality in terms of its objectives.

(b) The section provides further that once a feasibility study is completed, the Accounting Officer must submit a report to and other relevant documents to the council for a decision in principle on whether the Municipality should continue with the proposed public-private partnership.

5.4.2 Municipal Supply Chain Management Regulations, Notice Number 868 of 2005 dated 30 May 2005

5.4.2.1 Regulation 37(2) confirms the requirements of section 113 of the MFMA by providing that if a municipality or municipal entity decides to consider an unsolicited bid, it may do so only if the product or service offered in terms of the bid is a demonstrably or proven unique innovative concept, that will be exceptionally beneficial to or have exceptional cost advantages for, the municipality or municipal entity, the person who made the bid is the sole provider of the product or service; and the reason for not going the normal bidding processes are found to be sound by the accounting Officer.

5.4.2.2 At local government level, organs of state may however, dispense with official procurement processes, and these include public tender procedures, and procure goods or services “through any convenient process, which may include direct negotiations”. This may, however, only be done in case of an emergency; if the goods or services are only available from a single provider; or in any other exceptional case where it is impractical or impossible to follow official procurement procedures. The reasons for any deviations must be recorded and reported to the next meeting of the council, or board of directors.

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2 MSCM reg 36(1)(a).
3 MSCM reg 36(1)(a)(i), 36(1)(a)(ii) and 36(1)(a)(v).
in the case of a municipal entity, and include as a note to the annual financial statements.

5.4.3 **Municipal Public-Private Partnership Regulations Government Gazette No.27431, R309 dated 1 April 2005**

5.4.3.1 The Municipal Public –Private Partnership regulations would have applied had the Municipality persisted along the PPP rules. Since that route was abandoned by the Municipality, and I believe rightly so, I will not elaborate on the compliance requirements for a valid PPP.

5.5 **The law and prescripts applicable to Local Government expenditure in respect of, or funding for local development projects (municipal grants, loans and funding sources) that do not qualify as PPP’s.**

5.5.1 The Municipality’s financial commitments to the Complainant had to comply with legal provisions relating to budgeting and financial controls. For example, in terms of section 15 of the Local Government Municipal Finance Management Act 56 of 2003 (MFMA) -

> “A municipality may, except where otherwise provided in this Act, incur expenditure only—
> (a) in terms of an approved budget; and
> (b) within the limits of the amounts appropriated for the different votes in an approved budget.”

5.5.2 Section 11 of the MFMA provides that only the accounting officer or the chief financial officer of a municipality, or any other senior financial official of the municipality acting on the written authority of the accounting officer, may withdraw money or authorise the withdrawal of money from any of the municipality's bank accounts.
5.5.3 The provisions of section 25 to 36 of the Municipal Systems Act 32 of 2000, also formed part of the regulatory framework that should have been complied with.

5.5.4 Section 25 of the Systems Act provides as follows:

**Adoption of integrated development plans**

25. (1) **Each municipal council must, within a prescribed period after the start of its elected term, adopt a single, inclusive and strategic plan for the development of the municipality which—**

(a) **links, integrates and co-ordinates plans and takes into account proposals for the development of the municipality:**

(b) **aligns the resources and capacity of the municipality with the implementation of the plan:**

(c) **forms the policy framework and general basis on which annual budgets must be based; ….”**

5.5.5 Section 26 of the Systems Act prescribes the core components of integrated development plans which include, among other things, “the municipal council’s vision for the long term development of the municipality with special emphasis on the municipality’s most critical development and internal transformation needs” and “the council’s development priorities and objectives for its elected term, including its local economic development aims ….”

5.5.6 Although this is not an issue. It is worth noting that the Municipality’s approach to the Development Bank of South Africa (DBSA) was enabled by a regulatory framework that allows municipalities to approach the DBSA for additional funding over and above its allocated budget for the purpose of project finance, capacity building grants and feasibility studies grants in order to
6. EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

6.1 The Complainant’s submission

6.1.1 The Complainant submission was that:

6.1.1.1 His company was selected in 2007 by the United Nations Development Program (UNDP) in collaboration with the Small Enterprises Development Agency (SEDA) to conduct a pilot project relating to the commercial harvesting and farming of fish within poor communities in South Africa.

6.1.1.2 The pilot project was intended to be a precursor to the roll out of the full national scale project to which both UNDP and SEDA would commit funding after a feasibility study was undertaken in order to determine the feasibility of the Project and the extent of funding.

6.1.1.3 During early 2009 he was involved in consultations and negotiations with the Sekhukhune District municipality in Limpopo Province pertaining to the facilitation or implementation of a aquaculture project in that region. He subsequently expanded the search for potential partners or stakeholders and learnt about or encountered a feasibility study (the Jericho Feasibility study/business plan) that was commissioned by the Municipality in 2007 in respect
of an aquaculture development programme at Jericho within the Madibeng Local Municipality in the North West Province.

6.1.1.4 He had noted in the Jericho Feasibility study/ business plan that the “problem with Jericho had been contamination of water from upstream”. He approached Mr J Kruger, a specialist service provider to the Community Development Programme regarding a possible solution for the contamination problem. He stated that Mr Kruger’s company specialises in effective microbes that restores water to its natural state by breaking down all solids such as sewerage and fats. Mr Kruger responded in February 2009 that the product “could be a solution to the water problem in Jericho”.

6.1.1.5 He met and interacted with Mr C Last of the North West Provincial Department of Agriculture to discuss the Jericho aquaculture project. Mr Last reportedly concurred with him that

“… there was no need for another feasibility study and business plan as that was already conducted in Jericho and was state property implying that we use that information to implement the UNDP funded project”

6.1.1.6 Mr Last allegedly provided him with copies of the Jericho Feasibility study/ business plan and relevant documents. The Complainant submitted these documents, together with Mr Kruger’s response to the UNDP and SEDA in terms of their arrangement, who subsequently expressed an interest to visit the Jericho site.

6.1.1.7 He approached the tribal authority at Jericho in February 2009 and the Chief had given him a directive that land was available and his community welcomed the aquaculture project funding. The Chief reportedly went further to state that APC needed to contact the Municipality who had paid for the feasibility study and business plan in order to ensure that they are involved in the process.
6.1.1.8 He subsequently scheduled a meeting with officials of the Madibeng Local Municipality, the Municipality as well as the Provincial Department of Local Economic Development (the LED) to discuss the Jericho project. The meeting was attended on 20 February 2009 by officials of the Madibeng Local Municipality and the LED, who “raised the issue of contaminated water in a number of dams in Madibeng including Vaalkop, Hartbeespoortdam, Roodekopiesdam and the river in Jericho.” The Complainant introduced Mr Kruger’s product as a solution to the water problems to motivate that there was “no reason why the project could not go ahead at Jericho or in any of the dams in Northwest”. According to the Complainant Madibeng did not show any interest.

6.1.1.9 After the meeting with the Madibeng officials, while he was in the process of identifying a suitable community, he was contacted by Mr Mike Mokgatsi, the Local Economic Development Manager of the Municipality. The Complainant made a presentation to him and his colleagues, “who were persuaded by the viability of the project”. He stated that no sooner had he finished presenting the aquaculture concept “than was Bojanala discussing implementation...” and suggested that they jointly visited the Molatedi dam at the Botlwako Boo Kgosi Tribal Authority situated at the border with Botswana near Madikwe.

“Bojanala was keen to have the project pitched to the Botlwako Boo Kgosi Tribal Authority for their buy in before the LED could commit to the project”

6.1.1.10 During the meeting with the officials of the Municipality he “introduced” the requirement by the UNDP that a feasibility report was a pre-requisite and he was informed that the Municipality had funds for the project. The Complainant stated that after the presentation the Municipality agreed to enter into a partnership with his company to conduct pre-feasibility study activities, feasibility study activities and post-feasibility study activities amounting to R1, 7 million. According to him the Municipality undertook to fund 40% of those activities and that the other 60% was to come from the Development Bank of
Southern Africa. The Complainant alleged that he was informed at then that the IDP of the Municipality had a budget of R750 000.00 for research on aquaculture. He also alleged that the Municipality later agreed to increase its contribution for the feasibility project to 505 which amounted to R850 000.00 (Eight hundred and fifty thousand).

6.1.1.11 A formal presentation took place in Molatedi in March 2009 and the Botlwako Boo Kgosi Tribal Authority welcomed the aquaculture concept as a project ("tool") that could create employment and fight poverty in the area. The Complainant states that from his side –

“Molatedi was discarded as an ideal Central Farm (CF) because of it being off route and its inaccessibility to the major roads and its distance from the markets and infrastructure in spite of its relative warmth and clean water. Too many factors counted against Molatedi as a central farm at pre-feasibility study”.

He suspected that certain officials might have had a vested interest in Molatedi and it projects-

“… to take the project there even in the face of evidence that Jericho was suited for aquaculture... This is evidenced by Bojanala .... earlier handpicking of Molatedi dam out of all the many dams that exist in Bojanala that we could have jointly identified in order to focus our feasibility studies on a number of dams before agreeing on a final selection”.

6.1.1.12 He notified the UNDP and SEDA of Bojanala’s interest to develop aquaculture in their district and by April 2009 the Municipality was incorporated as an OMOP programme, which meant that the district would benefit from all the resources’ and support from both the UNDP and SEDA.
6.1.1.13 While Municipality was still in “internal discussions regarding availability of funds” the Complainant started to engage the Development Bank of Southern Africa (DBSA) and in particular their Development Fund Department in March 2009. According the Complainant the Development Fund explained to him that they would be keen to fund up to 60% of the feasibility study cost. The costs were calculated and amounted to one million seven hundred thousand rand (R 1 700 000.00). The costs included conducting feasibility study at one central farm on an extensive basis, the five local municipalities as satellite farms or out-growers, the design of the central farm, production of a bankable Business plan, the Marketing Plan, and the administration of this project by APC - starting with pre-feasibility study and buy-in from other stake holders.

6.1.1.14 DBSA advised him that they had a funding facility that could be accessed for this purpose but that only the Municipality could apply rather than APC as a private organisation. Furthermore, APC would have had to find another party to fund the difference. The Complainant stated that “the Municipality jumped onto this opportunity and committed to fund 40% (forty percent) of the total value of the requested funds.” The Municipality agreed to these conditions and proceeded to write a letter to the DBSA committing themselves to funding 40% of the R1.7 million, which translated to an amount of R680,000.00 (eight hundred and eighty thousand rand). He stressed that APC did not coerce the Municipality to make this commitment as “it is one they freely and voluntary made add to their desire to move the project from Jericho which did not require any funds.”

6.1.1.15 The Complainant reiterated that the Municipality had “by March 2009 then entered into a Partnership (PPP) with APC regarding aquaculture. The details of that partnership had been detailed in a Memorandum of Understanding that was submitted to the Municipality in April and May 2009. The MOU could
not be signed because the LED had wanted their legal department to peruse its clauses.” He stated that because it was generally in principle accepted and agreed that the partnership would benefit the Bojanala communities the letter to the DBSA, as signed by the Municipality Manager, expressly stated that the Municipality sought to submit an application for capacity building funds for a feasibility study of integrated fish farming and irrigation also known as “aquaculture”.

6.1.1.16 Had a meeting Mr Mokgatsi a few days after submission of application to the DBSA to discuss the way forward as it was a source of concern to him that other OMOP projects were steps ahead of the aquaculture project, a concern shared by APC’s partners being the UNOP and SEDA. In an effort to bring up the Bojanala project “up to speed” it was agreed that APC should begin with pre-feasibility activities and that an MOU needed to be drawn up and signed by the two parties. The activity schedule and Payment schedule was also discussed and the agreement was that all this needed to be furnished to Mokgatsi “so everyone knew what the implementing agency was”.

6.1.1.17 As APC was bringing funding to the Municipality and its communities, Mr Mokgatsi allegedly indicated that it would make it easier to motivate this project as an unsolicited bid and that there would be no need to put this project on tender. The Complainant allegedly presented Mr Mokgatsi with confirmatory letters from UNDP and he confirmed that those letters would be used as backup to motivate and support for an unsolicited bid or closed tender and submitted to National Treasury.

6.1.1.18 Months went by without any response from the Municipality on the proposed MOU. On 15 September 2009, the Complainant allegedly received policy document from Mr Mokgatsi on unsolicited bids but the document that was
reflecting South African policy and prescripts and instead was presumable, downloaded from the Internet and referred to the USA treasury policies.

6.1.1.19 While the signature of the MOU was delayed, he was nevertheless, required by the Municipality to continue conducting the pre-feasibility activities and further development thereof. According to the Complainant he was by Mr Mokgatsi that the Municipal Manager had determined that the project be put to a public tender process despite him having worked months on the project. He stated that Mr Mokgatsi “conceded” that both he and the Municipal Manager had erred in not initially putting the project out to tender and requested him to -

“...nevertheless proceed with the work it was conducting as (the Complainant) would be assured of winning the tender. Mokgatsi advised that the tender would be advertised for “transparency” sake in order to rectify the mistake which had been made by the Municipality. He further added that the tender specifications would be written in such a manner so as to favour (the Complainant) and that he is the one who was tasked with drawing up the tender document.”

6.1.1.20 He received a telephone call from Mr Mokgatsi on the 14th October 2009 “to break the news that the Municipal Manager had decided to take the project to tender”. According to the Complainant he asked Mr Mokgatsi what they needed to do in the meantime since the Municipal Manager had decided to place the project on tender. Mr Mokgatsi reportedly responded and said that the Complainant should continue with project activities and provide him with regular updates.
6.1.1.21 He had completed the following pre-feasibility activities in accordance with the project activity schedule contained in the proposed agreement, at the time when the dispute arose:

a) Data collection on site conditions;

b) Communications on the appropriate time to bring an Israeli technical team to inspect the sites and mutually devise the detailed visit plan and meetings;

c) Site inspections of the infrastructure and water sources and available installations, as well as soil and water analysis and land survey by experts from Advanced Irrigation Systems (AIS) and APC;

d) Review of available infrastructure (roads, electricity, services, lodging, etc.);

e) Evaluation of environmental aspects and sources of pollution;

h) Evaluation of domestic and foreign marketing routes and targets;

i) Meetings with contractors, authorities, associates, interested governmental departments and other groups;

j) Preparation of Project Production and Development Plan;

k) Preparation of a Financial Business Plan; and

l) Preparation and submission of a Fundraising Business Plan and a pre-feasibility report.

6.1.1.22 When he submitted an invoice to the Municipality for the payment of the of an amount of R850 000, 00 for the work done, he was reportedly advised by the Municipality on 23 November 2009, that due to the fact “that there were no documents proving any agreement or relationship between the Municipality and APC”, the invoice of the Complainant could not be paid. He was further advised that the project would most probably be put on tender and that “APC would be welcome to include their bid, should the opportunity arise.”
6.1.2 Complainant’s statements in respect of the alleged misrepresentation by the Municipality on the suitability of Jericho as a location for the implementation of an aquaculture pilot project.

6.1.2.1 According to the Complainant, Mr. Frans Swanepoel, of Concorp (Pty) was commissioned by the Municipality to conduct an aquaculture feasibility study in 2007 in Jericho.

6.1.2.2 The Complainant stated that a copy of the Jericho feasibility report and Business plan were given to him by Mr. Casey Last in 2009 on account of the document being a property of Bojanala Municipality.

6.1.2.3 Correspondence dated subsequently submitted it to SEDA and UNDP for funding in early 2009. In the course of scouting for alternate community the Complainant had also met with Madibeng Local Municipality LED to discuss why the Swanepoel project in Jericho could not take off. According to the Complainant he saw no need in “re-inventing the wheel especially if a successful feasibility study had been done there and a business plan drawn”.

6.1.2.4 The Complainant stated that the findings of Concorp contained in the Jericho feasibility report were conclusive and indicated that aquaculture was viable in Jericho. Contrary to the allegations by the Municipality, no evidence existed that Concorp noted the sewage contamination of surface water at Jericho. Instead Concorp made reference to usage of underground water sourced through boreholes. The proposed solution would make the site viable. After allegations of water unsuitability by Bojanala in 2009 in this vein APC also explored and proposed the use of world class water decontamination technology. Despite of all these alternatives to stay the project in Jericho, “Bojanala uprooted the project to a destination of their choice” being Molatedi.
The Complainant argued that he did not buy into the reasons for moving to Molatedi, such reasons being contaminated water at Jericho. His displeasure was also due to the fact that for Molatedi, he needed a new feasibility study and business plan whereas these already existed for Jericho. He further indicated that he had tried to persuade the Municipality to accept a water treatment mechanism from a certain Professor Kruger to save the Jericho site but this was rejected.

He advised that he held several interviews with Mr Swanepoel of Concorp, which endorsed the use of boreholes as a reliable source and Concorp’s first choice with Toloane River used as a supplementary and secondary source when needed. Water sourced from the river would have needed to be treated for health and HACCP compliance purposes whether allegedly contaminated or not. This proposed solution would have made the project at the Jericho site feasible and viable. Furthermore to ensure clean water from Toloane River, the Complainant sought another solution to the alleged sewage contamination problem. APC sought a water purification product sourced from an expert reputable local company.

The complainant further submitted that if it was true that the river water was contaminated with sewage effluent, “then the burden of ensuring that the sewage spillage was stopped rested with the District Municipality of Bojanala and its local Municipalities whom it seems could not act dutifully and attend to the alleged contamination of Toloane’s waters”. He consulted with Dr Backson Sibanda, a United Nations Development Programme (UNDP) Regional Evaluation Advisor and “renowned environmentalist”, as well as with Dr Mthokozisi Ncube a water specialist at Johannesburg Water Pty Ltd, who confirmed that both the District Municipality and the Local Municipality of Madibeng had a duty and a bona fide obligation to take corrective action as far as the alleged spillage of sewage into the river system was concerned.
6.1.2.8 The complainant concluded that there is no evidence that water in Jericho was or is contaminated. According to him, the Municipality failed to adduce such proof even to this investigation during the early stages.

6.1.3 Complainant’s statement on his consultation with National Treasury regarding the nature of the partnership with the Municipality

6.1.3.1 The Complainant advised that he consulted with National Treasury on the required processes and procedures and was initially advised that the Municipality “violated the unsolicited bid requirement procurement process when they entered into a Public Private Partnership (PPP) with APC in March 2009”. The Complainant stated that it was “probable that the Municipal Manager signed the DBSA documents at a reception area on his way out believing that Mokgatsi had followed all the processes in formulating the PPP. Through his ignorance Mokgatsi bound Bojanala Municipality to a PPP with APC... “.

6.1.3.2 The Complainant stated that in October 2009 he met with National Treasury “seeking to understand the procurement prescripts and other legislation following the invitation to staged tender”. The Municipality was invited to attend this meeting at Treasury but they declined to attend.

6.1.3.3 He said he was advised by Mr Strover Maganedisa, the Senior Manager for the PPP unit at National Treasury, that “there is no way that this project would have qualified as a Public Private Partnership [PPP], citing that it lacked all ingredients of a PPP”. Mr Maganedisa suggested it would have been procured as an unsolicited bid with financial benefits to the Municipality through funding brought by the UNDP and SEDA.
6.1.3.4 The complainant stated that he –

“… must hasten to include that during our time with Bojanala, we moved from a PPP project status as seen from the first letters to an Unsolicited Bid as seen from the downloaded information from the US government, to a tenderable project in October 2009. Then in 2011 … they returned the project status to a PPP again. This clearly proves confusion on their part.

6.1.4 Complainant’s statements regarding the alleged prejudice suffered by him

6.1.4.1 With a view to redressing maladministration if proven, the complainant was asked to advise on the impact of the alleged maladministration and on ideal action that the Municipality could be asked to place him as close as possible to where he would have been but for the alleged maladministration.

6.1.4.2 The Complainant resubmitted the invoice that was originally submitted to the Municipality claiming an amount of R1,7 million. He also provided draft particulars of a claim apparently compiled for litigation purposes, which indicated that the damages that he had suffered as a result of the failure by the Municipality to proceed with the project, were in excess of R34 million.

6.1.4.3 The Complainant was not happy with aspects of the provisional report, particularly my findings regarding prejudice and the amount I proposed as consolatory pay or “sorry money” for his trouble. He was requested then as had been done before the provisional report, to provide a break down or supporting documents to formulate an idea of the costs and additional expenditure that he/APC incurred in preparation of the project. The information requested included an itemised invoice for the feasibility study as the one submitted was not itemised and it was accordingly impossible to
determine what informed the amounts behind the original R850, 000 and the subsequent R850, 000. Unfortunately that information was never provided.

6.1.4.4 He further submitted that the amount does not covered the pain and suffering caused by the Municipality as a result of the failure of the fish farming project and his associated financial losses, including the loss of potential income that he would have been able to generate if the project was completely implemented and were running on full capacity, delivering 6000 tons of fish per annum.

6.1.4.5 A copy of the Complainant’s invoice that the Municipality refused to pay is included below:
6.1.4.6 He has since further submitted that he lost his house as a direct result of the municipality's failure to pay and its misrepresentation on the contamination in Jericho, which caused him to have to incur costs for a feasibility study. He has submitted a R1,5 million claim for the loss of his house and an amount of R600 000 for pain and suffering.
6.1.4.7 He described the background to the circumstances leading to the sale of his house, as follows:

“In 2008 when my company was selected by the UNDP to undertake an aquaculture project I spoke to ABSA bank portfolio Manager one Natasha Marr informing her that I had landed a fish farming business deal with both UNDP and SEDA. I informed the bank that as a result of this I would drop all other economic activities to focus on this project alone. In that conversation I requested the bank if it could be possible for me to hold back my mortgage repayments for a few months as I worked on the deal personally financing it myself and would thus make payments once the transaction had matured.”

(The) Municipality knew that I had not been paying for my house whilst developing the project which they had promised to pay for. This has now been proven to have been misrepresentation as no funds existed for them to conduct same. Thus the burden of my loss now vests squarely with the party that misrepresented facts.

The answer to whether the Municipality was responsible for the loss of my house and the following pain and suffering that followed one needs to look at the misrepresentation when moving the project from Jericho. My answer is YES Bojanala Municipality is responsible for the loss of my house.

Had they not misrepresented themselves that water was contaminated in Jericho, project would have proceeded there and my house would have been paid for. Had they not misrepresented themselves that they had funding for another feasibility study I would not have agreed to partner with Bojanala if I had known what I now know. Had we known what we know now that they had no aquaculture in their IDP I would not have agreed to proceed to even to start working on another feasibility study. I gave the bank assurance that I would pay for all arrears once done with feasibility studies. This was a business transaction and I indeed was expecting payment. No law prohibits one to a fair payment after economic activity”.
6.1.4.8 On 02 December 2014, the complainant submitted a new invoice on which he billed for things such as furniture. This was in response to a discretional notice advising him that I still did not have information indicating, among other things, how the amount of R850,000,00 in the feasibility study invoice was arrived at.

6.1.5 Correspondence by and to the Complainant

6.1.5.1 **26 August 2008**: Letter addressed to the Complainant by the UNDP: Africa Sub-Regional Office for Eastern and Southern Africa in response to an earlier submission from the Complainant to the UNDP on the establishment of commercial aquaculture (fish farming) facilities within municipality as a job creation and poverty alleviation initiative. The UNDP stated that it welcomed the proposal and advised that it could be supported in terms of a project that it was operating under TECHNONET Africa, and that the project resources were handled by the Special Unit for South-South Cooperation (SU-SSC) within the UNDP. The Complainant was furthermore advised that it was necessary for him to work with the country institutions in South Africa, including SEDA.

6.1.5.2 **23 January 2009**: Communication from the Complainant to Mr Dan Cohen on a “SA- Mathla Integrated Fish Farms Rapid Evaluation Program”, stating as follows:

*Based on our concept and what you outlined as services you offer and subject to the approval of costs involved by our funding partners, we are willing to partner with you as our service provider.*

*I consulted with Mr Nokwazi Moyo (project co-ordinator) at TECHNONET Africa, United Nations Development Programme (UNDP) who are the promoters of this project, and was of the opinion that your services could be utilized in this project so there is need to work towards the rules of*
engagement. We need to look at having a joint presentation to potential funders and other cooperating partners as one of priority area of focus. We would like to also have an indication of your budget estimates broken down per service offered. Among the services, would like a skills transfer to be included as part of the package.

6.1.5.3 **17 February 2009.** Communication from the Complainant to the North West Department of Agriculture and the Municipality confirming a meeting at the offices of the Madibeng Municipality on 20 February 2009.

“I wish to confirm the meeting for the, 20th Feb 2009 at your Madibeng Offices. I also wish to ask you to extend invitations to any other relevant stakeholders. The contents of our business plan will inform you as to whom the UNDP and funding partners will be making a visit to our site within a week as they are presently visiting all projects earmarked for Piloting. We have identified Jericho as a possible site.”

6.1.5.4 **8 February 2009:** Correspondence from the Complainant to Mr J Kruger (specialist) and copied to SEDA, in relation to the water at Jericho:

“Please kindly provide me with information and assurance as to the effectiveness of your water "purification" chemical as discussed with you last year.

Our fish production site seems to be contaminated with sewage water and therefore Water Affairs seems to be saying the project may be affected.

*Do you think your chemical may be a solution?*

6.1.5.5 **19 February 2009:** E-mail from the Complainant to SEDA, confirming it should have by then received the following from him:
“1. Madibeng Municipality Business Plan (Hard Copy dropped with Garly)

2. NGO Business Plan

3. NGO Co Profile

4. PowerPoint presentation of Established fish farms from our Israelis partners APT

5. APT other information”.

6.1.5.6 **23 February 2009**: E-mail correspondence from the UNDP to the Complainant advising him that Ms Kelebogile Molopyane, (SEDA Specialist: Tourism and Cultural Industries) would like to visit his project “**earmarked as one of the pilot schemes for One Municipality One Product (OMOP) initiative in South Africa**” on 27 February 2009. In a follow-up e-mail dated 24 February 2009 the UNDP, *inter alia* advised the Complainant as follows:

“4. *Inherent in that is for you to indicate who your partners/associates are;*

5. *You also need to show your current capacity and needs that will ensure that you reach your goals;*

6. *It is also important to show how the community will benefit from these efforts;...*”

6.1.5.7 **1 March 2009**: Correspondence from Mr Dan Cohen from Aquaculture Israel, confirming their availability to perform the pre-project activities and preparation of the feasibility study at a cost of about US$50,000, including international travel for 2, and local expenses and hotel, but excluding the costs of an Environmental Impact Assessment (EIA) and local transportation.

6.1.5.8 **12 March 2009**: communication from the Complainant to the UNDP advising that he had a meeting with the Municipality on 11 March 2009. The LED
Section was presented by the Chief Director and all other LED Managers. They have Aqua Culture in their IDP and want to implement it in their next financial year beginning July 2009. They are proposing that we set up a working committee asap. My question is there a problem running with two projects at this stage? Would you want (as UNDP) to accept them as an OMOP driven programme?

6.1.5.9 16 March 2009: Correspondence from the Complainant to SEDA, enquiring when he could expect an approval letter for the “feasibility study fund” from SEDA and stating that he received a commitment from Marble Hall District Municipality and was meeting with the Limpopo Provincial Department of Agriculture.

6.1.5.10 16 March 2009: Response from SEDA advising the Complainant as follows:
“I have forwarded everything to our Senior Manager as indicated. Will follow up with her and let you know. I am travelling with her.

Please note that there are a few processes to be followed before we can get the approval”.

6.1.5.11 17 March 2009: Communication from the Complainant to the UNDP, stating as follows:
“... they (the Municipality) are asking me to help facilitate the process leading up to their setting up of the Fish farming Project. I am in the process of setting up a Community Trust which in turn will set up a PTY LTD in which I will be Company Director and also appointed General Manager with regard to the process of implementation. Please kindly facilitate a meeting that will kick start the process between the Municipality and Community reps soon.

Bojanala Municipality has had fish farming in their IDP for a while now and now they want us to take the lead in implementation thereof.”
6.1.5.12 **21 March 2009**: Communication from the Complainant to Mr Dan Cohen of Aquaculture Israel, advising him as follows:

“The UNDP funds in this regard are sourced through a government agency SEDA of DTI.

We are thinking of going the route of applying for a loan to do feasibility as per our understanding with you immediately. To this effect we will be approaching the Development bank of South Africa (DBSA) and Industrial development Corporation (IDC) in the course of the week.

Help us with your company profile as our preferred International technical Partners as well as any info that may assist us to get fast approval”

6.1.5.13 **21 March 2009**: Correspondence from the Complainant to the UNDP advising as follows:

We write and act on behalf of the Batlokwa Boo Kgosi Tribal Community Trust … to invite you to include our project the Molatedi Fresh Water Projects in your current list of pilot projects...

Fresh Water Fish Farming SA (the Complainant) have been mandated by the said community and are working very closely with the Bojanala District Municipality’s Local Economic development Department to help in setting up an Integrated Fish Farming and Irrigation Concept. The District and Local Municipality have Aqua Culture and Irrigation in their IDP and they are ready to engage in the project formulation and implementation thereof effectively immediately in their new financial year…”

6.1.5.14 **12 April 2009**: A copy of a letter from the Municipal Manager addressed to the Manager: Development Fund Unit, of the DBSA dated 12 April 2009 that inter alia reads as follows:

“The Bojanala District Municipality herewith submits an application for capacity building funds for feasibility study of integrated Fish farming and irrigation also known as Aquaculture”
“Consistent with national strategic goals to empower rural communities and encourage export orientated industries, Aquaculture Project Consultants SA has entered into a partnership with the Bojanala District Municipality to implement an Integrated Fish Farming and Irrigation project”

“Total costs of feasibility study is R1 700 000.00 or one million seven hundred thousand rand. Bojanala Municipality has committed six hundred and eighty thousand rand (R680 000.00) (sic) for this exercise but is making an application from DBSA Development fund/grant to the value of 60% of the total cost” (Emphasis added)

6.1.5.15 **15 Apr 2009:** Communication from the Complainant to the UNDP stating that the initiative to assist the Municipality is undertaken by his company Aquaculture Project Consultants S.A. He advised that APC was in the process of submitting an application for funding of the feasibility study through DBSA which application had to be handed in on Friday, 17 April 2009 for adjudication by 29 April 2009.

6.1.5.16 **29 April 2009:** Letter from the Municipality responding to the Complainant as follows:

“… With regard to the required funds to conduct a commercial feasibility study with respect to the proposed Integrated Fish Farming and Irrigation (IFFI), the Bojanala District Municipality has submitted an application on 20th April 2009 to DBSA for 60% of Capacity Building Funds/Development Funds (translating to R1, 000 020.00, One million and twenty rand) which is payable as grants by the Development Bank of South Africa to Municipalities.”

The Bojanala District Municipality writes to inform you of its commitment to avail its 40% (R680 000.00) to add to the 60% of DBSA R1 000 020.00 that makes a total cost of the feasibility Study funds (R 1 700 00.00). As
Bojanala District Municipality we will be ready to provide 40% starting from the month of July 2009 which is the commencement month of our financial activities.

**6.1.5.17 16 May 2009:** Document titled “Pre-Feasibility and Post Feasibility Study Activity Implementation and Memorandum of Understanding for Bojanala District Municipality, stating *inter alia*, as follows:

“The Aquaculture Project Consultants intends to conduct a feasibility Study in the Greater Bojanala District Municipality for the purposes of implementing an Integrated Fish Farming and Irrigation (IFFI) project in the aforementioned area under the auspices of a One Municipality One Product (OMOP) program.”

The feasibility study will include the development “… of Private-Public-Participation schemes involving IFFI and Satellite Farming concept, to ensure private sector and farming sector viability cooperation.”

“The project will be established in Buffelspoortdam and or Molatedi Dam in the Bojanala District Municipality and the Local Municipality of Moses Kotane or Rustenburg Municipality in the Northwest Province in South Africa, where 1000 ha has been allocated. The specific site and water source for the project will be selected with the scope of this proposed Pre-Project Activities (PPA).”

“APC will deploy a team of the consultants to implement the pre-feasibility activities which constitute the first phase of the Feasibility exercise. The team will consist of a project director, project manager (implementation) and the Project Manager (Consultant).”

“AND WHEREAS APC is a non-governmental organisation that cherishes the vision of equipping and empowering marginalised communities by initiating and managing social–economic projects and activities that have the impact of improving the lives of ordinary people.”
AND WHEREAS APC is an official One Municipality One Product (“OMOP”) implementing Agency under the auspices of the United National Development Programme (“UNDP”) and the Government with specific focus on aquaculture production and related programs”

“AND WHEREAS the APC and BMPD (the Municipality) wish to enter into a Private-public Partnership and so cooperate with each other in the development of aquaculture and related industries within the geographic and functional jurisdiction of the BPMD” (emphasis added)

“NOW THEREFORE the parties agree as follows:…”

6.1.5.18 21 May 2009: Communication from the Complainant to the Municipality enquiring about the status of the MOU. He further stated that he was finalising the activity schedule of the project plan for the period May 2009 to January 2010. He also advised that;

“We are already working on other prefeasibility study activities such that when we commence with the site analysis and all other historic data is gathered processed and finalised before July. For purpose of progress we will incorporate Buffelspoortdam in Marikana. Lonmin is keen to provide 1000 hectare plus just across the N4, but water will gravitate from the dam. I believed i mentioned to you last time. The water usage will be free. That is our 2nd option should DWAF (Water Affairs) decline usage of Molatedi dam.

6.1.5.19 26 May 2009: Communication from Mr Mike Mokgatsi of the Municipality to the Complainant, advising as follows:

“…yes we are busy attending the MOU and thanks for the information on Buffelspoort. The best date for the meeting of local municipalities will be on the second week”.

6.1.5.20 8 June 2009: Correspondence addressed by the Complainant to SEDA, the UNDP and the Municipality to confirm his submission of -
a) The “Scope of Feasibility Studies and Situational Analysis” together with an application to the DBSA for 60% of funding. Bojanala and Sekhukhune District Municipalities who have committed 40% payable in July 2009.

b) The Project Activity Time Schedule for the preliminary feasibility (already on course), Main Feasibility Activity and Post Activities.

c) Memorandum of Understanding with the Municipalities;

d) The total cost of this exercise up to feasibility Report for Bojanala Municipality is R1.7mil (this is expanded to include all 5 local Municipalities as Satellite Fish Growers) and 1x Central Farm to be determined between Molatedi Dam and Marikana Buffelspoortdam donated for this purpose with free water usage and other specifics by Lonmin.

The Complainant concluded that: “Our Time Line is our Guide and we ask you to cooperate with us fully for this OMOP Program to make sense.”

6.1.5.21 6 July 2009 Complainant informed Ms Khutsoane of the Municipality, inter alia, that although funding of another project of the APC was rejected by the DBSA, the current funding application remained pending and that the DBSA would be approached in order to satisfy their scepticism with regard to the feasibility of the project.

6.1.5.22 24 July 2009 letter from SEDA to the Complainant advising him as follows:

“…we will not be able to fund the feasibility study for the project as our main client is the cooperatives and community based projects and not the consultants. However we expressed an interest in assisting you to form cooperatives as well as to capacitate them to be able to successfully operate the various clusters of the project. We will also be willing to link you with various sponsors where possible.

We will await to hear from you when the feasibility study is completed and you are ready to form the cooperatives.”
6.1.5.23  **27 July 2009:** A letter signed by the Acting Director: Economic Development, Tourism and Agriculture, on behalf of the Municipal Manager of the Municipality, was sent as a follow up to the DBSA which *inter alia* stated that: “We wish to endorse the fact that Aquaculture Project Consultants (SA) is our strategic implementing agency driving this program... We confirm that any communication by APC to your office was on behalf of Bojanala District Municipality”. (Emphasis added)

6.1.5.24  **28 August 2009:** A letter addressed to Mr Mokgatsi of the Municipality by the Complainant, stating that although the DBSA did not approve the application for funding, he suggested that the proposed tasks be completed, as submitted to the Municipality. The letter further stated that the Complainant requested the Municipality to pay him R850 000.00 in order to complete the feasibility study as projected in the Scope and Activity Schedule.

6.1.5.25  **14 October 2009:** A letter forwarded to Mr Mokgatsi by the Complainant stating, *inter alia*, that the MOU remains unsigned (after alleged approval by the Legal Section) as well as the fact that the Appointment Letter has not yet been received. In the letter, the Complainant indicated his dissatisfaction with the manner in which the matter was handled and that the possibility of a tender process should have been communicated sooner.

6.1.5.26  **23 November 2009:** An e-mail sent to the Complainant on, by Adv Jurie Vorster, the Legal Advisor to the Municipality, stating that the invoice of the Complainant could not be paid due to *inter alia*, the fact that there were no documents proving any agreement or relationship between the Municipality and APC.

6.1.5.27  **29 November 2009:** Correspondence addressed by the Complainant’s legal representatives, Messrs Van Den Berg & Meintjes Attorneys to the Mayor
requesting an intervention and providing him with the background of the complaint.

6.1.5.28 8 December 2009: Another letter directed by the Attorneys to the Mayor stating, *inter alia* an ultimatum that if a response was not received by 15th December 2009, legal proceedings would be instituted.

6.1.5.29 11 December 2009: A letter in which the Municipal Manager responded to the Complainant’s Attorneys’ letter dated 8 December 2009 advising that the Complainant was not appointed by the Municipality and that proceeding with legal action would be at own risk and account.

6.1.6 The Complainant’s claim for damages:

6.1.6.1 The interaction with the Complainant in order to quantify damages suffered, indicated that an amount of R850 000.00 was claimed from the Municipality, the estimation of R 1 700 000.00 was submitted to the Public Protector as well as particulars of claim indicating an amount of R34 million as damages.

6.2 The Municipality’s response

6.2.1 Information received from Bojanala District Municipality

6.2.1.1 The Municipality advised, in correspondence dated 7 September 2010 and 12 July 2011, *inter alia* that:

(a) The Complainant was introduced to the Municipality by Mr C Last, a manager in the North West Provincial Department Agriculture, Conservation, Environment and Rural Development as a potential funder for a fish farming project. At a meeting between him and the Municipality, the Complainant allegedly indicated that his company was
selected by the UNDP in collaboration with SEDA to conduct a pilot project on the harvesting and farming of fish in the poor communities in South Africa and that “no money required” from the Municipality because the project was 100% funded by the UNDP.

(b) According to the Municipality the Complainant advised that his company was the only “one with a mandate of this kind by the UNDP” and that the same kind of project was being implemented by his company in the Sekhukhune District Municipality in the Limpopo Province. He further advised that his company had a working relationship with a company called Advanced Fish Farming and Irrigation in Chavimochic, Peru which was based in Israel.

(c) Subsequent to the presentation by the Complainant “it was jointly agreed that this will address the challenge of establishing a fish farming project in the rural areas”. The Complainant allegedly reiterated that the project would be 100% funded by the UNDP and that the only challenge within the proposed project would have been to identify a rural community with access to water and land. The Municipality stated that the municipal officials who attended the meeting “all agreed that the Molatedi Dam would be appropriate because it has a big provincial dam and open land adjacent to the dam and the community of Molatedi Village would benefit from such a project”

(d) The Complainant was reportedly advised of the Municipality’s preference of Molatedi as a pilot site, but the procedure required it to approach the Tribal Authority and the Modes Kotane Local Municipality to determine whether there would be an interest in the project. A presentation was subsequently made to the Tribal Authority and the Complainant reportedly advised it that his company was the only one selected by the UNDP to be the implementing agent of this project.
After the Tribal Authority confirmed its interest in the project, the Complainant allegedly requested it to write a letter on behalf of the community to confirm that it has agreed that the Complainant would be its implementing agency for this project.

(e) The Municipality further alleged that the Complainant visited its offices on a daily basis to pressurise it “to continue with the project with e-mails, letters and day and night cell phone calls”. According to the Municipality it was explained to the Complainant that the parties would have had to sign a MOU in order to establish a partnership. The Complainant reportedly volunteered to approach his legal representatives to develop a draft MOU “that will be discussed and based on agreement will be signed by both parties.”

(f) It was further alleged that the Complainant was informed that only the Municipal Manager had the authority to appoint companies after going through the required tender processes. The Complainant reportedly enquired whether his company would be “automatically appointed” since it was the only company with a UNDP mandate to implement this project in South Africa. The conditions for an unsolicited bid were reportedly discussed and it was agreed that the Municipal Supply Chain Office would verify the situation with National Treasury. It stated that

“It was agreed at the meeting that APC (the Complainant) cannot be appointed automatically without following a bidding process unless the Municipal Manager is convinced that there is no competitor in the country that provides this same service”.

(g) The Municipality stated that the Complainant subsequently approached its offices with a draft MOU and was informed that it would be submitted to the Municipality’s Legal Department “to go through it”. According to the Municipality the draft MOU was submitted to its Legal Services “who
(h) The acting Municipal Manager Mr Innocent Sirovha alleged that during the process before the MOU was signed, the Complainant indicated that the UNDP and SEDA proposed that a highly technical and comprehensive feasibility study should be conducted. Mr Sirovha alleged that the Complainant had advised that only experts from Peru, Israel would be able to conduct the study and would have to travel to and stay in South Africa to complete the study. That in turn would initiate the process of the release of the R182 million funding from the UNDP and SEDA.

(i) Mr Sirovha submitted that it had been sceptical regarding the high cost of the proposed feasibility study because it normally obtained feasibility studies at a cost of between R200 000, 00 to R300 000,00. The Complainant reportedly convinced the Municipality that the study was very intensive and highly technical.

(j) The matter was considered by the Municipal Manager who signed the letter committing to 40% of the funding after obtaining confirmation from the relevant officials that-

i) It had R680 000, 00 in its budget (40 % of the commitment to the DBSA);

ii) the fish farming project was in its prioritised projects; and

iii) the project was within its IDP and strategies.

a) The Municipality stated that “while waiting for the DBSA to release the 60% funds”, the Complainant continued to contact other financial institutions and National and Provincial Departments to support the project. The Complainant reportedly, also applied for
funding from the Municipality for a trip to Namibia for an aquaculture conference, which was not approved because there was no formal relationship between the parties.

b) The Complainant allegedly followed up with the DBSA and the Municipality was later “telephonically informed that the DBSA cannot fund this project because it is not feasible and is not their priority”

c) It was further alleged that a few weeks thereafter the Complainant reportedly advised the Municipality that his partners in Israel requested him to continue with the project, but the Municipality advised him that the DBSA mentioned that the study was not feasible, that the costs would be high and that the Complainant did not have access to the level of the technology required for this project. The Complainant reportedly tried to convince the Municipality that the project was feasible and because the DBSA had done a feasibility study 5 years back, a new study was required.

(k) The Municipality further stated that the Complainant approached with an invoice of R680 000.00 for incurred costs of the feasibility study. The Complainant apparently alleged that his company was verbally appointed by Mr Mike Mokgatsi. The Municipality further indicated that the Complainant was urged to produce the appointment letter of his company, which he was unable to do. Instead, he subsequently submitted a feasibility study that he had apparently conducted in respect of Molatedi village, which was apparently “nothing but a thin document downloaded from the internet.”

(l) In response to specific allegations by the Complainant the Municipality stated that:
i) “Mr Mike Mokgatsi of our offices was never in pains (sic) to persuade Mr Mdluli to implement this project in BPDM (the Municipality). We had our own BPDM process of planning to implement fish farming project for our communities”.

ii) “APC (the Complainant) alleges …that it was requested by the BPDM (to) do the pre-feasibility study, there was no way BPDM can request a service form a private Company without appointing them to do so”.

iii) “APC says upon completion of the study he approached BPDM to pay and we agreed. How did we agree? We have a procurement policy that we follow, how can we agree to pay and later talk about tendering process?”

iv) It is alleged that there was talk of the tendering process for transparency sake, but what was said in terms of the tendering process was ‘there is no way a Company can be appointed without following the normal supply chain process’ and based on the conditions that APC is claiming to be the only Company in South Africa with the skill, technology and knowledge of implementing this type of a project, and appointed by the UNDP, put it in an advantaged position than other potential bidders. When APC declined to participate in the tender process, it was realised that it could be one of the fly-by-night Companies”;

v) “Mr Mdluli alleged that a process of un-solicited bids was opened, and that he was sent a down loaded (sic) document. What happened was that … BPDM Supply Chain was requested to look for more information with Treasury and advice the Municipal Manager. In the meantime the Department also looked at for more information in the (Internet). Treasury advised us that this type of arrangement should follow PPP procedure and not un-solicited (sic) process”.

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6.2.1.2 In subsequent telephonic interviews with Mr Mokgatsi, he confirmed that the presentation by the Complainant was overwhelming and that they were induced and convinced to approach the DBSA to request funding on a 40:60 ratio. The information the Complainant supplied was that the same instance was done in a project in Marble Hall where the DBSA was approached for funding on the same ratio.

6.3. **Agreed and common cause facts:**

6.3.1 It is common cause that the Complainant’s company APC approached the Municipality with a proposal on a pilot rural development project targeting job creation and poverty reduction through commercial harvesting and farming of tilapia fish.

6.3.2 This was done after the Complainant had secured conditional support for his business idea from UNDP and SEDA within a project seeking to support development initiatives in poor communities, the condition being that he should find a beneficiary community and assist people in such communities to constitute themselves as cooperatives around a project.

6.3.3 It is further common cause that the pilot site in the Complainant’s project proposal and presentation to the Municipality was Jericho District in Bojanala and that the Municipality swayed the project to the Molatedi area. Also common cause is the fact that the Municipality advised APC and others that it was committed to the fish harvesting and farming project as it was in line with its aquaculture project in its Integrated Development Plan.

6.3.4 It is also common cause that the municipality advised the Complainant and others that it was partnering in the project going to the extent of asking APC to prepare a Memorandum of Understanding (MOU) and further communicating to third parties that it was a party to the project and was
committed to funding 40% of the cost of a feasibility study with the Development Bank expected to fund the rest.

6.3.5 It is further common cause that the DBSA subsequently declined to support the project stating that aquaculture was not viable in the sites it had been explored in and that the Complainant’s Sekhukhune project, which he had advised Bojanala he was implementing, was also not approved and, accordingly, never took off.

6.3.6 The Municipality’s Integrated Development Plan (IDP) for the period in question further shows that the Municipality had within its plan, intentions to support commercial activities as part of rural development, job creation and poverty alleviation. However, the IDP did not specify aquaculture or fish farming as part of its development plans despite having persistently communicated that its IDP, specifically included aquaculture as part of anti-poverty interventions.

6.3.7 It is further common cause that after about 8 months of engagement and communication to the effect that it was on board on the project, the Municipality advised the Complainant that it would not participate in it and would put its own “planned” aquaculture project on tender.

6.3.8 The factual dispute was whether or not the Municipality:

6.3.8.1 committed to and later reneged on a valid agreement to implement the aquaculture project
6.3.8.2 undertook to fund 50% the cost of the feasibility study instead of 40%;
6.3.8.3 greed that APC should commence with the feasibility study or is liable for its cost as it acquiesced in it being conducted or agreed to paid for it when advised it had been undertaken and concluded
6.4 Independent Evidence Obtained

6.4.1 Background to the development and implementation of the OMOP initiative in South Africa.

6.4.1.1 One Municipality One Project (OMOP) is a UNDP sponsored adaptation of a concept initially named "One Village One Product" (OVOP) and whose objective is to identify and implement rural development projects aimed at fighting extreme poverty. The program involves zoning of production, processing and marketing of goods and services as a means of alleviating poverty by producing something that can be sustainably traded.\(^4\)

6.4.2 The DTI

6.4.2.1 The DIT advised that it was not involved with the Fish Farming Project in the North West Province in 2008, but rather SEDA.

6.4.2.2 Both DTI and SEDA confirmed that the OMOP initiative operated primarily on the basis of the DTI's Co-operative Incentive Scheme (CIS) where financial and non-financial support were disbursed to registered primary co-operatives (a primary co-operative consists of five or more members who are Historically Disadvantaged Individuals).

6.4.3 SEDA

6.4.3.1 Ms Zandile Ndaba, who coordinates the engagement between the Complainant and SEDA, advised as follows:

\(^4\) Background documents submitted by the Complainant, DTI and the Municipality
“This is a project that was presented to us by the UNDP around 2007/8 … We had one visit to the municipality and did not adopt or participate in the project as it did not qualify within our mandate in the way that it was presented.”

6.4.4 The UNDP

6.4.4.1 Mr Nokwazi Moyo, National Project Manager - Sustainable Development, United Nations Industrial Development Organization, advised *inter alia* as follows:

The task of the OMOP project was to pioneer scanning for high potential products in the Local Municipality setting that could be elevated to higher end markets, e.g., export. The benefit from that would be better priced products and better returns to the proprietors at Local Municipality level. In this case however, the owner of the project was the DTI and UNDP was the Technical Advisor. It was therefore up to the owner of the project to select what Local Municipalities would be in the sample as sites for the pilot study whose first step was to scan for potential and qualifying products.

6.4.4.2 UNDP advised that the nature of the relationship between the SMME and Local Municipality would vary from situation to situation, but would have been accepted by SEDA for there to be any delivery of the TECHNONET-Africa product(s). (Own emphasis)

6.5. Evaluation of the Evidence

6.5.1 General Observations
6.5.1.1 The Municipality never denied that its officials initially agreed to partner the Complainant’s APC in the aborted aqua farming project, agreed to Molatedi being the pilot site, that a feasibility study should precede the pilot and that the municipality would incur part of the feasibility study costs while the project implementation funds were to come from sources that the Complainant claimed had committed to fund the project.

6.5.1.2 It is common cause that the Complainant’s company, APC, approached the Municipality with a proposal involving a pilot rural development project targeting job creation and poverty reduction through commercial harvesting and farming of tilapia fish. It is also common cause that the Complainant claimed to be the sole agent chosen by the UN to facilitate the implementation of aquafarming in government approved rural areas as part of the OMOP programme aimed at poverty alleviation in pursuit of rural development and that he was already implementing a similar project in another province.

6.5.1.3 It is further common cause that the pilot site in the Complainant’s project proposal and presentation to the Municipality was Jericho District in Bojanala and that the Municipality swayed the location of the project to Molatedi in the same Municipality. Also common cause is the fact that the Municipality advised APC and others that it was committed to the fish harvesting and farming project as it was in line with its aquaculture project articulated in its Integrated Development Plan (IDP).

6.5.1.4 It is also common cause that the municipality advised the Complainant and others that it was partnering in the project going to the extent of asking APC to prepare a MOU and further communicating to third parties that it was a party to the project and was committed to funding 40% of the cost of its feasibility study with the Development Bank expected to fund the rest.
6.5.1.5 The Municipality’s IDP for the period in question further shows that the Municipality had within its plan, intentions to support commercial activities as part of rural development, job creation and poverty alleviation. However, the IDP did not specify aquaculture or fish farming per se as part of its development plans despite having persistently communicated that its IDP, specifically included aquaculture as party of anti-poverty interventions.

6.5.1.6 It is further common cause that after about 8 months of engagement and communication to the effect that it was on board on the project, the Municipality advised the Complainant that it would not participate in it and would put its own “planned” aquaculture project on tender. It is also common cause that such aquaculture project was never put out on a tender.

6.5.1.7 The investigation principally focussed on determining the nature of the Municipality’s commitment to the Complainant’s project, circumstances of its withdrawal and responsibility if any to the Complainant. The investigation also dealt with the reasons behind and the propriety of changing the project pilot site from the Jericho area to Molatedi.

6.5.2 On the Allegation that the Municipality reneged on an agreement to support APCs Fish Farming Project, including the payment of 50% of the cost of a related feasibility study after the study had been done.

6.5.2.1 If the aquaculture project had been dealt with in compliance with section 217 of the Constitution, the Preferential Procurement Policy Framework Act, Broad Based Black Economic Empowerment Act, Municipal Finances Management Act, Municipal Systems act and Treasury Regulations and institutional policies and related prescripts, the scenario that unfolded would have involved:
(i) The Municipality having a project or Programme in its IDP that covers aquafarming or broadly captured an anti-poverty project, which would have followed a needs assessment.

(ii) The project would have been budgeted for, with the area already selected in the IDP

(iii) Bids would have been sought from potential service providers, through a competitive process.

(iv) Bids would have been assessed by appropriate committees (Bid Bid Evaluation Committee and Bid Evaluation Committee, etc) , which would have included a due diligence exercise

(v) Preferred bid(s) would have been submitted to the Municipal Manager for approval and if above a specified amount, to the council for approval.

(vi) In the event of APC approaching the Municipality before it issued any bids, then Municipality would have assessed its bid with a view to evaluating if it matched the needs captured in the IDP and if there was a match, the Unsolicited bid mechanism would have been explored or alter naively a donation, with the help of its legal services and/or the Provincial Treasury.

(vii) Any undertaking to pay for anything and commencement of execution would have followed proper approval and signing of the agreement and Project Implementation Plan (PIP) by appropriate authorities.

(viii) Payment itself would only be done after quality assurance has been done by competent authorities to confirm that the procured service has been delivered in the quality agreed in the agreement.

6.5.2.2 In the case in point, the Municipality's officials ignored the rules and made undertakings in the early stages of the engagement, going to the point of representing to third parties such as the DBSA that the acuaculture project being implemented by APC belonged to the Municipality and APC was its
agent. They accepted the complainant’s claim that he needed to be paid for the feasibility study without assess

6.5.3  On the allegation that Bojanala unduly caused the aqua project to be moved from Jericho in Madibeng Municipality to Molatedi in Moses Kotane Municipality

6.5.3.1 The first point in contention relates to the alleged misrepresentation of the Municipality that the water in Jericho was contaminated and that it was therefore not suitable as a potential location for the establishment of an aquaculture project.

6.5.3.2 While the Complainant insists that he found it peculiar that the Municipality had identified Molatedi as the preferred location for the project and raised a concern as to whether this decision was influenced by ulterior motives, no statement has been presented attributing the alleged misrepresentation about Jericho water contamination to any specific Municipal official.

6.5.3.3 In fact, according to his affidavit when he lodged the complaint to my office and his correspondence with various role players around the commencement of the project, the Complainant was aware of concerns relating to the quality of the water prior to his meeting with the Madibeng Municipality and therefore sought assistance from Mr. Kruger to present a possible solution to both SEDA as well as the officials present at the meeting of 20 February 2009 at the Madibeng Municipality. In addition, he stated clearly that Madibeng was not in favour of the establishment of the project at a number of potential locations, including Jericho, as a result of concerns about contamination.

6.5.3.4 It would have been of assistance if the parties were able to provide the agenda for their first meeting, to determine what issues were discussed, what was the circumstances that motivated certain resolutions arising from the meeting and to what extent did it focus exclusively and specifically at the
establishment of the pilot project in the Jericho area. Unfortunately there is no agenda, minutes or resolutions of this meeting that could shed further light on this issue.

6.5.3.5 However, the quality of the water at Jericho and its suitability for aquaculture was not the only issue that stood between the Complainant and the implementation of the project at Jericho. He stated categorically that he preferred to establish the project at Jericho because there would not have been a need for a further feasibility study in view of the existing Jericho Feasibility study/ business plan, which he was entitled to use since it was in the “public domain”. It was common cause that he already submitted the Jericho Feasibility study/ business plan to SEDA early in 2009 for the purpose

6.5.3.6 In addition, at that point in time, the engagement was at a very early stage and from the evidence it is clear that the parties did not have a common understanding and consensus on the road ahead, including the role, rights and obligations of the Municipality in terms of either the IDP route, or the OMOP/ Technonet route as well as the interests, role and entitlements of the Complainant in the project, and the value and benefits to the community.

6.5.3.7 On assessment of the available evidence there is nothing that could support or substantiate a conclusion that the selection by the Municipality of Molatedi above Jericho, was not a bona fide decision.

6.5.4 On the allegation that the Complainant, APC, was improperly prejudiced by the conduct of Bojanala Platinum District Municipality

6.5.4.1 At the onset, the Municipality did not determine the appropriate legal framework for the formalisation of its relationship with the Complainant. There is no indication that until, October 2009, it was not susceptible for an engagement with the Complainant on the basis of the PPP proposed in the draft MOU.
6.5.4.2 The fact remains that the project did not qualify as a PPP, and National treasury clearly indicated that the Municipality could not disburse funds to the Complainant as a private enterprise from its budget in the form of a sponsorship or incentive.

6.5.4.3 The parties only sought alternative mechanisms to formalise their relationship after they realised or were informed that the engagement would not qualify as a PPP as envisaged in the draft MOU. If the Municipality sought to engage the Complainant on the implementation of the project as part of its development projects and programmes for 2009, the Municipality (and not the complainant, SEDA or Technonet/ UNDP) would have been the custodian of the project on behalf of and for the benefit of the Community where the pilot project was going to be established. The role of the Complainant would then have been limited to that of project administrator or consultant, and the financial benefit that he would have derived from the project would have been remuneration for services rendered (in accordance with the relevant prescripts and policies mentioned hereunder).

6.5.4.4 However, it is clear that the Complainant did not see himself as a service provider to the Municipality and states that the aquaculture project was not a project of the Municipality but was in his “line of command in so far as this project was formulated was UNDP and SEDA jointly.”

6.5.4.5 At the same time, however, the evidence obtained in this regard shows that the Complainant was in fact not operating within the SEDA/ UNDP framework which called for the formulation of and registration of community cooperatives and engagement with the DTI and SEDA on the disbursement of funds from National Treasury. At the time when the Municipality was seeking to formalise the relationship between the parties through proper procurement
procedures, both SEDA nor UNDP had in fact confirmed that the project as well as aquaculture in general was eventually not included in the OMOP/Technonet initiative. The two institutions also expressed doubt whether the Complainant would have been able access any funding from the National Treasury, if he proceeded without waiting for the outcome of the DTI pilot studies, which would have informed the way forward for the implementation of the OMOP initiatives.

6.5.4.6 National Treasury, in fact confirmed after its meeting with the Complainant in October 2009 that “this is a private sectors initiative and they (private sector) must pay for the feasibility study”

6.5.4.7 In the end the relationship between the Complainant and the Municipality could not have been concretised as a PPP and the Municipality only sought to engage in a procurement process eight (8) months after it has started to engage the Complainant on the matter.

6.5.4.8 It had to be asked if the Municipality treated the complainant in a professional manner as required by section 195 of the Constitution, section 133 and the Batho Pele Principles. The key question in this regard was whether on the evidence before me I could, with good conscience conclude that the Municipality treated the Complainant in a professional and fair manner, providing information that is timely, accessible and accurate.

6.5.4.9 In this regard the evidence reveals the following:

a) The Complainant and the Municipality met in February 2009;
b) The Complainant made a presentation to the Municipality on the establishment of an aquaculture project which required their involvement;

c) The project was linked to a cooperation agreement between South Africa and the UNDP, called “OMOP” in terms of which UNDP/Technonet funding could be accessed through the DTI and SEDA.

d) It was agreed that a feasibility study was required for the establishment of the project and for the purpose of accessing UNDP/Technonet funding and that the study would be conducted by the Complainant;

e) SEDA, the DTI or the UNDP were unable to fund the feasibility study and the Complainant had to obtain funding from another source;

f) The Complainant sought to pursue the relationship with the Municipality on the basis of a PPP, as proposed in a draft MOU submitted to the Municipality in May 2009.

g) The Municipality was informed and was aware of the fact that the Complainant had commenced with some activities relating to the project during the period February to October 2009, prior to and after the submission of the draft MOU.

h) During this period the Municipality was in possession of the draft MOU which proposed the validation of the relationship between the parties as a PPP and advised that the MOU was being and even approved by the Legal Section and that only the signature of the Municipal manager was outstanding.

i) The Municipality did not communicate to the Complainant any reservations that it might have had in respect of the proposed PPP, as well as any procurement requirements that had to be followed before it could formally engage the Complainant as a consultant or service provider (“implementation agent”) on the project.
j) The Municipality led the Complainant to believe that there was basis for a working relationship between the parties on the aquaculture project for eight (8) months after their initial engagement, before it raised the issue of compliance with relevant procurement requirements in October 2009,

k) Even then, the Municipality did not provide the Complainant with accurate information on its procurement policy and prescripts;

l) The Municipality facilitated the initial engagement with the Molatedi Community, without consulting with the Moses Kotane Local Municipality and subsequently discarded the project without any indication as to how it was going to pursue the objectives of community upliftment and development that it had identified and prioritised for the purpose of the engagement with the Complainant.

6.5.5 Evaluation of evidence on Issue 7: Did the Complainant and the intended beneficiaries of the project suffer any prejudice as a result of the conduct of the Municipality?

6.5.5.1 The evidence on prejudice claimed by the Complainant can be divided into the following categories:

a) Distress

b) Non-payment of the invoice;

c) Actual Financial Loss or Costs;

6.5.5.2 Distress

a) The Complainant stated that he suffered prejudice and “untold damages” in his business and personal and family lives as a result of this conduct by Bojanala. “Our reputation, integrity and credibility have suffered irreparable damage by the non-delivery of this project. It will
take years before the offices that had committed to fund our projects look at us favourably again.”

b) It should not be in dispute that the Complainant has indeed suffered an injustice at the hand of the Municipality as a result of uncertainty and undue delays in the communication of accurate and timely information to the Complainant on the issue of his appointment, and its commitments in terms of its own projects and the availability of funding.

6.5.5.3 Non-payment of the invoice

a) The distinction between whether a public statements by officials of the Municipality constituted a mandatory obligation, thereby establishing a right on the part of the Complainant, or simply an indicator of intended performance - expressing an aspiration on the part of the Municipality - is an important one which is dealt with in terms of the appropriate legal framework.

b) The invoice submitted by the Complainant states that the amount of R850 000, 00 was owed to him for the following work and costs:

i) Pre Feasibility related Studies May to August 2009

ii) Project Management and Coordination Fees

iii) Feasibility Study Central Farm

iv) International and SA Consultants

v) Administration

vi) Motor Vehicle Hire

vii) Accommodation

viii) Research and procurement of data

d) Unfortunately, the evidence that the Complainant has in fact performed the work or incurred the expenditures for which he invoiced the Municipality, is rather scanty for verification purposes. The invoice submitted by the Complainant was not detailed and not supported by documentary evidence such as timesheets to
substantiate the amounts charged by the Complainant. In addition, the invoice did not have supporting detail or documentation for disbursements claimed by the Complainant. In the absence of a written agreement, it is unclear how the Municipality would have been able to certify the invoices for payment without verifying that the services rendered complied with a valid service level agreement’s targets (as required by the Auditor- General5).

6.5.4 Loss of the Complainant’s house

a) The Complainant claims that as a result of maladministration (misrepresentation) by the Municipality, he could not pursue the establishment of an aquaculture project at Jericho (on the basis of the Jericho Feasibility study/ business plan) and was obliged incur extra expenditure to conduct another feasibility study in respect of the Molatedi dam.

b) It is also clear from the Complainant submission that he stopped paying the mortgage on his house to focus all his economic activities on this project, and in anticipation of a speedy implementation of the aquaculture project specifically at Jericho.

c) While the legal issues around this matter are being dealt with hereunder in the next chapter, it suffices to state that the Complainant did not have the rights and entitlements to the Jericho Feasibility study/ business plan which he might have thought. Consequently, any impression that the Complainant might have had that he need not incur any expenses for a feasibility study for the establishment of an aquaculture project within the boundaries of the Municipality, was perhaps over-optimistic.

d) In addition, his arrangement with the Bank was primarily based on the fact that he expected to generate a fairly substantial amount of income

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5 Auditor-General South Africa | Performance Audit Report 2012-13 Performance audit on the use of consultants, contractors and agencies/outsourced services at selected National Departments
within a relatively short period that would have enabled him to resume and sustain his financial obligations. The Complainant submitted a comprehensive and detailed statement on the potential income that he would have been able to derive from the establishment of the project and a potential production of 6000 tonnes of fish within a period of 5 years, amounting to several (hundred) millions of Rands.

e) I have a big concern over the estimation of the amount of income that the Complainant expected to derive from the establishment of an aquaculture project, in view of the scepticism about the feasibility and financial viability expressed by the DBSA and other witnesses referred to in this report. However, I am of the view that the Complainant is expressly seeking a private law remedy of damages based on delictual and contractual liability, for which the Public Protector (as explained to the Complainant at the onset of the investigation) is in the circumstances of this particular matter, is not an appropriate forum.

f) In addition, as indicated above, the claim is based on the Complainant’s loss of potential income, and both parties have seemingly forgot about the actual intended beneficiaries of the project, namely the Molatedi community and the impact that the failure of this project might have had on issues such as poverty alleviation and the loss of job opportunities in the area.

6.5.5.5 Possible loss of entitlement to payment from the UNDP/ Technonet:

a) The deliberations between the parties focussed primarily on the funding and costs of a feasibility study as a precondition to access funding from the UNDP/ Technonet for the actual implementation of the project.

b) It seems that the Complainant is seeking to hold the Municipality primarily and exclusively responsible for the fact that the project did not materialise because he has lost in whole or in part an entitlement to a grant, subsidy, or other payment from the UNDP/ Technonet for the
implementation of the project as a result of the conduct of the Municipality.

c) Other jurisdictions such as the Scottish Ombudsman have dealt with instances of prejudice in the form of loss of entitlement to a payment, for example, because of misleading advice by the public sector organisation about closing dates, and requirements and other rules resulting in a situation that an application was not submitted in time or was incomplete. However, in the circumstances at hand it is difficult to find a causal (factual) link between the actions of the Municipality and the decisions of SEDA and the UNDP on the rejection of his application for funding for this project:

   i) The process advised by both SEDA and the UNDP for the accessing of fund envisaged firstly that the Complainant engaged the appropriate provincial and National Structures, including SEDA, the DTI and National Treasury. The Complainant seemed to have focussed on SEDA and the local authorities;

   ii) SEDA confirmed that its support on this project was primarily aimed at establishing and registering a community co-operative as the owner and main beneficiary of the project. It stated clearly that its main client was “the cooperatives and community based projects”, and that it would assist the Complainant to formulate and capacitate the co-operatives to be able to successfully operate the various clusters of the project. There is no evidence that the Complainant assisted the Molatedi Community to establish a co-operative for this project.

   iii) In terms of the co-operative strategy of the DTI, SEDA would render business support and promotion of cooperative enterprises through non-financial support, and funding would
have been disbursed from the UNDP/ Technonet via DTI and National Treasury, directly to the owner and beneficiaries of the Project, with all the attention on the upliftment and the empowerment of the community. It is therefore not clear from the communications between the Complainant, SEDA and the UNDP that the Complainant or his company would have been directly entitled to funding, or whether any personal financial benefits that he sought to gain from the project would have had to take the form of remuneration from the successful community co-operative for the work done in terms of facilitating the access to funding.

iv) Lastly, the UNDP advised the Complainant, and myself that the DTI was the owner of the OMOP project and the UNDP was the Technical Advisor. It was up to the DTI to select what Local Municipalities would be in the sample as sites for a pilot study aimed at scanning for potential and qualifying products. In addition, SMMEs were selected by SEDA to benefit from the capacity building initiatives of the UNDP that extended beyond the OMOP project, including entrepreneur development and development in the area of marketing and procurement. Despite the earlier indications by the UNDP that aquaculture was going to be included in the OMOP initiative (apparently for consideration), aquaculture, the Complainant’s project or the Municipality was not selected as part of the pilot study conducted by the DTI. The UNDP made it clear that there was very little chance of the Complainant accessing any funding from the DTI and National Treasury until a workshop was held at the end of 2009, and a revised OMOP framework was adopted. It should also be noted that the UNDP, SEDA and National Treasury emphasised that the DTI was reviewing the mechanisms that
providing funding and support for such cooperatives in terms of the OMOP/ Technonet programme, and that it might not have not been possible to disburse public funds to a private enterprise in terms of the OMOP/ Technonet project, as project was aimed at supporting cooperative enterprises with the community as the registered owners and beneficiaries. It is common cause that no cooperatives have been registered for the purpose of the project at hand, and that the.

6.5.5.6 Reimbursement of costs

a) According to the correspondence between the Complainant and Mr Dan Cohen of Aquaculture Israel, the Complainant acknowledged that he did not have the necessary skill and expertise to conduct such a feasibility study (Communication dated 14 January 2009 – “We do not have the necessary expertise in the field of fish farming and processing. We would like assistance with preplanning and training as well as the setting up of the plant”). The Complainant stated on a number of occasions in his correspondence with Mr Cohen that intention was that he would outsourced at least part of the work to Aquaculture Israel – for which an amount of $50 000 was quoted. There is no evidence that the project reached the stage where the Complaint did in fact incur the quoted expenditure for the procurement and utilisation of Mr Cohen’s services.

b) Estimations based on market related prices such as the prices of between R50 000, 00 and R150 000, 00 suggested by Mr Rouhani, might not be an accurate reflection of the value of the work done in by the Complainant in this matter, but do raise question marks as to the high costs estimated for in the matter at hand.
7. MEASURING CONDUCT AGAINST THE RULES

7.1 General Observations

7.1.1 As an organ of state funded from the Public Revenue Fund a municipality is obliged in terms of the MFMA and the Constitution to ensure effective financial management of the funds allocated to it from National Treasury, as well as own revenue generated and collected through the provision of services.

7.1.2 Any expenditure envisaged by the Municipality by virtue of its association and engagement with the Complainant had to comply with the provisions of the Constitution and the MFMA relating to the effective allocation, collection and the efficient utilising of public funds.

7.1.3 Sections 25 to 36 of the Systems Act go into great detail on the responsibilities and obligations of municipalities to develop and adopt IDP’s, in consultation with the relevant communities, which would inter alia, promote sustainable economic growth, facilitate job creation and alleviate poverty in partnership with various stakeholders.

7.1.4 The IDP’s also seek to inform the strategies of the Municipality in terms of service delivery, priority areas for LED programmes as well as the allocation of appropriate resources including budgets, linked to specific budgets.

7.1.5 The IDP therefore provide the blueprint for the Municipality to ensure that its expenditure is aligned to its strategic objectives and priorities.

7.1.6 It was therefore expected that the Municipality would identify and consider any capital expenditure projects in terms of the approved strategic focus areas and approved budget allocations.
7.1.7 In the matter at hand there is very little indication that the Municipality considered and supported the establishment of the proposed aquaculture project in its area of jurisdiction after due consideration of its impact on the existing projects, programmes, priorities and budget allocation. In fact, the lack of a proper framework to facilitate the engagement with the Complainant, creates the impression of very little planning before the parties started to deal with details such as pre-and post-feasibility activities and applications for funding.

7.1.8 From a governance perspective, the manner in which the project was initiated did not give proper attention to issues such as transparency, accountability and making sure that action and decisions were properly authorised.

7.2 Regarding whether or not the Municipality Unduly reneged

7.2.1 The enquiry in this regard is intended to focus on the question whether or not that was in fact a meeting of the minds between the parties on the essential aspects of the project, and not necessarily whether this constituted any legally enforceable or binding agreement.

7.2.2 The biggest concern in this regard is the apparent lack of clarity between the parties on their respective roles and obligations within the parameters prescribed by the law.

7.2.3 The relationship could not be properly constituted for the purpose of proper budget and expenditure control as the parties saw fit. If the Complaint sought access to public funds from the Municipality, he had to conform to the prescribed procedures, relating to the format of the engagement and the relevant requirements to ensure that any expenditure from public revenue is not regarded as irregular, unauthorised or amounts to fruitless and wasteful expenditure.
7.2.4 We must acknowledge that the relationship between the municipality was rather fluid. However, it is clear that an agreement was reached between APC and the Municipality’s officials that the Municipality was to partner with APC in the project by availing land and a community for piloting fish farming and related aspects of aquafarming as part of its poverty alleviation activities in pursuit of its IDP. The letter to DBSA confirms that much though of course there is a question of the writer having done so illegally as there was no council resolution or concluded proper procurement process when the letter was written. What are we to make of the decisions that were made and the impact on the complainant? A related question is who is to blame for the fact that an undefined relationship was developed leading to the complainant spending his time and resources in pursuit of a fluid arrangement? The answer lies in the standard that should have been upheld by the Municipality in terms of section 33 of the Constitution imposing the obligation to ensure just administrative action and section 195 on principles of good administration to be upheld in public sector decision making and related actions. It cannot be said that the Municipality met these standards.

7.2.5 The Municipality’s conduct, including an endorsement of the Complainant’s application for funding as an implementing agency for the Municipality for a PPP for the project under discussion, constituted a misrepresentation of the de facto as well as de jure position. No PPP had been approved by the Provincial Treasury, there was no Council Resolution to this effect, and there was no appointment process or decision or any communication addressed to the Complainant.

7.2.6 Any financial commitment by the Municipality towards the project was dependent on the project either qualifying as a PPP (which was not possible), or the procurement of the services of the Complaint in terms of its supply chain management policy as well as compliance with the other mandatory prescripts in the Regulations, the Municipal Systems Act, and the MFMA.
7.2.7 It is of concern that the Municipality requested funds from the DBSA and has committed themselves to 40% of the total cost of a feasibility study without themselves establishing from the DBSA as to whether or not the DBSA policy is that funding for projects of this nature would be provided on a ratio of 40:60 percent.

7.2.8 Regarding the Municipality allegedly unduly swaying the Complainant to take the project to Molatedi instead of his preferred Jericho, the evidence, particularly the IDP shows that the Municipality they would have had the prerogative to select the appropriate community that should have befitted from the Project and it chose on of two communities already identified in its IDP as poverty nodes to be given priority in anti-poverty projects.

7.2.9 I have also noted that contrary to the complainant’s argument in response to my provisional report, his own original project proposal and original affidavit lodging the complaint to my office, he was aware of concerns around the contamination of the Jericho water prior to his engagement with Madibeng and later on the Municipality. It is also a known fact that most of the water in rivers and dams within the North West tends to be in a way polluted.

7.2.10 His main contention is however, that the Municipality maintained the presentation to him that the water was contaminated while it was in fact incorrect, and they were aware of it. This would have amounted to negotiations in bad faith or conduct constituting misrepresentations to the Complainant.

7.2.11 The primary question is how the decision by the Municipality to select Molatedi as the preferred site for the establishment of the project, constituted an infringement of the Complainants rights and entitlements. In addition, the Complainant contends that the inaccurate information allegedly provided by the Municipality on the contamination of the water in Jericho, caused him to act to his detriment by having to incur expenditure for another feasibility study
which he would not have had to expend if Jericho had in fact been selected. The Complainant’s allegation and claim that the Municipality should therefore liable for the additional costs that he had to incur because of the exclusion of Jericho as an appropriate site, is based on his assertion that the Jericho Feasibility study/ business plan was a public document and that he was entitled to utilise it to his own benefit.

7.2.12 In my understanding of the framework for the accessing of funds via the OMOP/ Technonet programme, it was not intended to serve as grant to government institutions for the kind of PPP that the parties had anticipated at the time of their initial engagement.

7.2.13 Community Disadvantage:

7.2.13.1 I am also concerned that although according to the Municipality’s submission, the project was part of the programmes and projects envisaged in terms of its IDP, nothing further was done to deliver the planned service. I am further concerned that both accounts show that it was not the first time a project earmarked for combatting poverty in this Municipality did not take off after the community had been informed about it. Such conduct does not bode well for building trust between government and communities and in a climate where service protests are a norm rather than an aberration, I would expect leaders in municipalities not to make promises without undertaking due diligence first to ensure such promises have a real chance of being kept.

7.2.13.2 The evidence primarily shows that there was a delay between the initial engagement and an attempt by the Municipality to validate any (purported) relationship with the Complainant, which flouts both the common-law rule against unreasonable delay as well as the democratic values and principles enshrined in section 195 of the Constitution.
7.2.13.3 As the custodian of public funds, any financial commitment by the Municipality towards the project was dependent on the proper procurement of the service of the Complainant, and the conclusion of agreement setting out the obligations and liabilities of the Municipality and the Complainant/APC, as well as compliance with the other mandatory prescripts in the Regulations, the Municipal Systems Act, and the MFMA.

7.2.13.4 The actions by the Municipal employees to engage third party funders for funding of the project as a PPP project without having complied with the abovementioned prescripts, are irregular and improper and constitute maladministration. Correspondence indicating that the Municipality has resolved to commit to 40% (or 50%) of the funding required for the project was inaccurate as no such a decision had been taken by the Accounting Officer or was approved by resolution of Council or approved by the relevant Treasury.

7.2.13.5 In so far as the Complainant seeks to hold the Municipality liable for the funding of the project on the basis of ostensible authority arising from the misrepresentation, the Public Protector is guided by principles developed by the courts (as discussed above). In this regard it is important to note that the decisions conveyed by the Municipality to the DBSA that it had committed funds to the project and appointed the Complainant as implementing agent for the project in question, especially with the view to induce the disbursements of funds to it for the project, was inaccurate, misleading and unauthorised (ultra vires).

7.2.13.6 Even if the Complainant sought to enforce these decisions by reliance on the principle of ostensible authority, the Courts have found that such reliance
would be "forbidden if the result is not permitted by law." Stripped of all pretensions, the representations relied upon by the Complainant in this case, is conduct on the part of the Municipal Manager and officials which points to a waiver or deviation of the prescribed statutory processes to establish an irregular PPP and to appoint a Private Partner, Implementing Agency, or Transaction Advisor through a procurement process, and consequently, the incurrence of irregular and unauthorised expenditure.

7.2.13.7 This does not, however, imply that the municipal officials involved do not need to be accountable for their decisions and actions that are clearly in violation of the elements of good governance contained in the Constitution, including the requirements that administrative action should be lawful, reasonable and procedurally fair, that public procurement must be fair, equitable, transparent competitive and cost effective, and that public services must be rendered impartially, fairly, equitable, without bias and in a manner that promotes professional ethics.

7.2.13.8 The public interests in ensuring that public procurement, is lawful and complies with the constitutional standards of fairness, equitability, transparency, competitiveness and cost effectiveness, would outweigh the reasonableness of the Complainant relying on the misrepresentations made by the Municipality to third party funders, knowing that it was not the truth.

7.3 Did the Complainant suffer any prejudice as a result of the conduct of the Municipality, and what would it take to bring the Complainant as close as possible to the position where he would have been if the maladministration had not occurred?

7.3.1 i) Loss of Complainant’s house

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6 Nyandeni Local Municipality v MEC for Local Government and Traditional Affairs and Another (CA68/09) [2009] ZAECMHC 28, 2010 (4) SA 261 (ECM)
The Complainant presented information that the value of the house was estimated at R1,5 million.

ii) Loss of entitlement and potential income

The Municipality was reportedly informed that the disbursement from the UNDP/ Tenchnonet would have been in the region of R182 million. In his initial presentations on the value of the project, the Complainant estimated that it was approximately R170 million. In his response to the Public Protector's provisional report, the Complainant stated that the figure of plus minus R170 000 000.00 is calculated based on the costs of building an aquaculture project infrastructure that had the capacity to produce 6 000 tonnes.

As indicated under the evaluation of the evidence, his expectation of the total production means that it would have been equivalent to the entire marine and freshwater aquaculture production of the country as a whole. The quantification of this amount is to say the least highly speculative in view of this as well as other scepticism expressed about the viability of the project and the high costs. In conclusion it suffices to state that this amount is not readily quantifiable

a) Losses that the Complainant would not otherwise have suffered had the Municipality followed proper procurement processes and appointed his company for the project in question.

i) In terms of the OMOP framework that was envisaged for the disbursement of any funds the beneficiaries of this project, the Complainant would have had to facilitate the registration of a community co-operative, which was going to be the owner of the project. The Complainant maintains that the intention was all along to establish the project in terms of the OMOP framework.
i) If the Complainant was duly appointed as a consultant or implementing agent for the Municipality the income that he would have been able to derive from such appointment, would have been in the form of remuneration for services rendered. Again, the Complainant would not have been the owner of the project, as it would have been intended for poverty alleviation and job creation for the Community.

ii) In terms of the observation by National treasury, it would not have been possible to disburse public funds in the manner proposed by the Complainant as he was in essence seeking funding for a private enterprise.

iii) In essence it is therefore difficult to establish what exactly the position of the Complainant would have been in terms of his personal benefits, if agreement with the Municipality or the UNDP/ Technonet had materialised as anticipated.

b) The establishment of a sufficient link between the maladministration found and the losses claimed:

i) The evidence suggests that there is no causal link between the maladministration of the Complainant and the loss of his house, the loss of entitlement to payment from the UNDP/ Technonet, as well as the possible loss of income from the project.

ii) I am under the impression that the Complainant overestimated the benefits that he would have derived in his personal or business capacity from the establishment of the project.

iii) While it is understandable that he viewed his role as valuable and critical to the success of the project as initiator and facilitator, the primary objective of the processes in which he was engaged, was aimed at supporting the community (of
Molatedi) with access to the requisite funding, as well as guidance, training and other assistance, with the view putting the in charge of the project as an autonomous self-help organisation controlled by their members.

iv) At the same time the fact that the Complainant was not able to establish a fish farming project at Jericho was as much due to the situation that the Jericho feasibility report and business plan was not legally at his disposal as anticipated, as it is because the DTI did not select aquaculture in general, or the Municipality for actual inclusion in the OMOP initiative.

8. FINDINGS

8.1 Did the Bojanala Municipality improperly renege on an agreement to participate in APC’s fish farming project and to pay 50% towards a project feasibility study and did its conduct constitute a misrepresentation and a violation of the Municipal Finance Management Act (MFMA)?

8.1.1 The allegation that Bojanala Municipality improperly reneged on an agreement between the MM and the complainant to participate in APC’s fish farming project and to pay 40% towards a project feasibility study is substantiated by evidence.

8.1.2 By the Municipality’s own admission, the Municipality’s officials informed APC that his project proposal had been accepted, redirected the project to a different pilot site than one proposed by him (Jericho), committed the Municipality in writing, including to the Development Bank, to pay 40% of R1.7m fees towards a feasibility required for the Municipality’s chosen pilot site (Molatedi) and asked the Complainant to prepare a Memorandum of Understanding (MOU) to formalise the agreement.
8.1.3 There was no wrongdoing on the part of the complainant in preparing the draft MOU framing the project as a Public Private Partnership (PPP), following at the request of and following wrongful classification of the relationship by the Municipality’s officials. The wrongdoer was the Municipality in failing to acquaint itself with the appropriate procurement regulatory framework and appropriate vehicle for the project before making a resolute commitment to the Complainant.

8.1.4 The fact that the MOU had not yet been signed when the Municipal Manager eventually refused to sign it and advised that the project would be subjected to a tender process, does not mean there was no agreement.

8.1.5 Reaching an agreement in the manner it was done by the Municipality, however, was unlawful as the procedural requirements stipulated by local government laws and internal policies for such agreements had not been met. It further created a lot of uncertainties before the Municipality canned the arrangement with him, and for that reason the Complainant is justified in alleging that the Municipality “stringed him along.”

8.1.6 I am unable to fully accept the Municipality’s defence that there was no agreement and that if there was such an agreement it was improperly entered into and was accordingly unlawful and invalid. The only valid part of this defence is the argument that the agreement was entered into unlawfully. This is supported by evidence showing that the Municipal officials acted in violation of section 217 of the Constitution, Section 2(d)(i) and (ii) of the Preferential Procurement Policy Framework Act No 5 of 2000, Section112.of the MFMA and Regulation 10 of the Municipal Supply Chain Management Regulations, 2005 (the Regulations)that:
8.1.6.1 It failed to ensure proper demand management as required by the MFMA and Treasury Regulations, starting with proper planning and budgeting for the aquaculture project in its IDP before engaging the Complainant.

8.1.6.2 It failed to follow a procurement process that is open, fair and competitive or alternatively, abiding by applicable deviation requirements, which in this case would have been those regulating unsolicited bids as provided for in section 113(2) of the MFMA, section 21A of the Municipal Systems Act, Regulation 37(2) of the Regulations.

8.1.6.3 It failed to ensure that decisions were taken properly by lawfully mandated structures such as the Municipal Manager and Council before being communicated or executed and that such decisions were recorded and communicated in the prescribed manner.

8.1.6.4 There were many violations of Treasury Regulations which if they had been adhered to would have saved time and obviated the uncertainties that have led to the dispute over the aborted project. Among key administrative failures, was the failure of Municipal officials to conduct due diligence on the viability of the project and the capacity, including financial functionality of the preferred service provider as required by Regulation 10 of the Municipal Supply Chain Management Regulations, 2005 (the Regulations), before making commitments such as the letter telling the DBSA that APC was communicating on its behalf and that the aquaculture project belonged to it.

8.1.7 However, I find no impediment in law that prevented the Municipality from entering into a partnership with the Complainant using either an unsolicited bid or a donation and adhering to the requirements of either. Failure to do so is entirely its own fault.

8.1.8 The Municipality’s entering into an unregulated and uncertain relationship with the Complainant and then unceremoniously jumping ship is at odds with
the principles of good administration I section 195 of the Constitution and fair conduct as envisaged in section 33 of the Constitution and thus constitutes improper conduct and maladministration.

8.2 Did Bojanala Municipality improperly renege on a commitment to pay 50% toward a project feasibility study by APC on the fish farming project targeting Molatedi after the study had already been undertaken?

8.2.1 There is no question that the Municipality's officials committed the Municipality verbally and in writing to pay 40% of the feasibility study fees and that it was its idea that the pilot site be moved to Molatedi, which required a feasibility study. However, such commitment was made unlawfully as the persons who did so had no authority to do so and did so without following prescribed supply chain procedures.

8.2.2 What I am unable to find incontrovertible evidence of is that the Municipality increased its share from 40% to 50% as alleged and that it authorised the Complainant to commence with the feasibility study even though no contract had been signed.

8.2.3 Communication between the Complainant and the Municipality, particularly through Mr Mike Mokgatsi, including the draft MOU, however, gives a strong indication of the Municipality's officials being aware that the pre-feasibility study had commenced and acquiescence in the execution of same despite the MOU still outstanding.

8.2.4 Although the Municipality's conduct leaves a lot to be desired, I have not found evidence to support the allegation in the Complainant's affidavit that the Municipality lost interest when the feasibility study discounted its preferred Molatedi and the Complainant's failure to bow down to pressure to go with this area despite of its water supplies and market access being not viable.
8.2.5 While I consider the Complainant’s conduct as a business person unduly risky in beginning to execute a contractual project without written agreements, it is the Municipality’s conduct, including “stringing him along”, that I consider to be the cause of or exacerbating factor that led to the uncertain business environment APC found itself in resulting in an unauthorised study being conducted.

8.3 Did Bojanala Municipality unduly cause the Bojanala Pilot Project on Aquaculture to be moved from Jericho in the area of the Madibeng Local Municipality to Molatedi in the area of the Moses Kotane Local Municipality.

8.3.1 The Municipality has not denied that it was its idea that the pilot site for fish farming be Molatedi.

8.3.2 While the complainant is adamant that the story about Jericho being not viable due to water contamination is suspect, the correspondence between him and others, including Mr Swanepoel who is the author of the Jericho Feasibility study and Prof Kruger who is said to have microbes that can address the contamination, shows that the Complainant accepted that Jericho water was contaminated. There is further no evidence linking the Bojanala Municipality to the allegation of water contamination.

8.3.3 I am further unable, despite the Complainant's many submissions, including a letter and statements from the Chief Joy Mamogale of Jericho, that trickled from the Complainant into my office until early this week, that there isn’t and the Municipality knew there was no water problem in Jericho and that the relocation of the pilot site from Jericho to Molatedi was due to improper motives.
8.3.4 I am further persuaded by the Municipality’s explanation that Molatedi was preferred because its IDP identified it as a very poor community (poverty node), which together with Moretele Local Municipality were to be given for poverty alleviating projects. The selection of Molatedi would therefore, have been in line with the priorities, objectives indicators and targets contained in the Municipality’s IDP. The IDP in question corroborates this. The allegation of dishonesty on the part of the Municipality in choosing Molatedi as its preferred site is, accordingly, not substantiated.

8.4 Was the Complainant improperly prejudiced by the conduct of Bojanala Municipality?

8.4.1 The Municipality accepted my finding of prejudice in the provisional report and proposed remedial action without reservations in its response to the provisional report and notice issued in terms of section 7(9) of the Public Protector Act. For completeness, I have decided to include my considerations and determination on the question of prejudice suffered by the Complainant.

8.4.2 It simply cannot be argued that the Complainant was not prejudiced by the Municipality’s improper conduct and bad administration.

8.4.3 The evidence, which has not been disputed by the Municipality, shows that being “strung along” was not only a major inconvenience to the Complainant but also caused him to lose a lot of business time and money going up and down following up on whatever was suggested by the Municipality as the next course of action in pursuit of the project. Project planning on its own is costly, which is why project budgets include fees for project scoping and planning.

8.4.4 I have noted that apart from “stringing him along” for months, the Municipality undoubtedly caused the Complaint to spend lots of time and money creating documents in pursuit of whatever procurement vehicle it favoured at any
given time from a PPP then an Unsolicited Bid to announcing that the process would be taken on tender.

8.4.5 What I am unable to determine though is the amount that would constitute a fair amount to place the Complainant as close as possible to where he would have been had the Municipality acted properly. “I am also unable, in good conscience, to lay the entire blame for the project’s failure at the door of the Municipality. In other words, I am not convinced that the Complainant’s own hands are clean, having advised the Municipality, among other things, that he was the sole UN approved agent for aquaculture under OMOP, that he was implementing a similar project in Marble Hall and that the DBSA had agreed to fund the Project”.

8.5 Did targeted beneficiaries also suffer improper prejudice as the result of the Municipality's conduct?

8.5.1 While the investigation has not asked the beneficiary community about the impact of the non-implementation of the poverty busting project, although the Complainant alluded to the Jericho Traditional Leader’s disappointment. After raising hopes, it is not unreasonable to assume that the morale of the community was probably impacted negatively. It is also worth noting that this was the second time a poverty combatting project was announced in Bojanala Municipality and ended up not taking off.

8.5.2 It is also not unreasonable to conclude that had the project been properly researched and an appropriate pilot site selected, the project may have created a few jobs while contributing to food security within whatever community that would have been selected in the Bojana Municipality.

8.5.3 The Municipality’s poor handling of this poverty combatting project accordingly failed to meet the standard set for the Municipality and approved
in terms of the Municipal structures Act imposing the duty to establish and act in accordance with a clear framework for leveraging and marshalling its resources or other commitments towards such a project in line with strategic priorities, linked plans and budgets in the IDP.

8.5.4 The Municipality’s conduct clearly fell short of the requirements of section 152 and 153 of the Constitution imposing a duty to facilitate development.

8.5.5 The Municipality failed to discharge its duties and responsibilities in terms of sections 25 to 36 of the Systems Act, section 15 of the MFMA with due consideration to its strategic focus areas and the interests and priorities of the wider population that it serves.

8.5.6 The conduct of the Municipality and its officials that were involved, accordingly constitutes improper conduct and maladministration.

9. **REMEDIAL ACTION**

The appropriate remedial action I am taking in pursuit of section 182(1)(c) of the Constitution, and the *Batho Pele* principle of *redress* is the following:

9.1 **The Municipal Manager**

*Complainant*

9.1.1 *Is to give the compliant Complainant a written apology* for the manner in which he has been treated, particularly being subjected to various fruitless procurement processes for months, being made to understand his project proposal had been accepted and having it cancelled after investing time and money in it for months.
9.1.2 **Acting with the Municipal Council and with the Complainant’s concurrence**, is to ensure that the Complainant’s Company APC is paid an amount that is not less than R100 000, 00 as consolatory pay and to cover expenses incurred in pursuit of the prefeasibility study and project scoping, loss of income while pursuing the project and inconvenience.

**Community**

9.1.3 **Assess the aquaculture project and consider reviving** it, with a lawfully selected partner, as a poverty combating and food securing rural development initiative through consultation with the communities in Bojanala as part of IDP consultations, with input of experts sought.

9.2 **The Municipal Manager with the help of the Speaker and Council**

**Supply Chain Management System**

9.2.1 **Is to investigate the actions of the officials involved** to determine if disciplinary or other steps should be taken in respect of the possible breaches of the MFMA and relevant legislation or codes of conduct, and to avoid a repetition in future;

9.2.2 **Ensure that Standard Operational Protocols** are developed and implemented to regulate all agreements to ensure that everything is in writing, unambiguous and correct;

9.2.3 **Ensure that guidelines are set** for itemised quotes and invoices from suppliers

9.2.4 **Ensure that all Managers and employees involved in procurement** of goods and services are properly trained in Supply Chain Management
Policies, the Municipal Finance Management Act and other Legislative Prescripts relating to all procurement processes.

10. MONITORING

10.1 The Municipal Manager of the Bojanala District Municipality is required to submit action plans in respect of the relevant remedial action referred to in paragraph 9 above to the Public Protector within 30 days from the date of this report.

10.2 The Municipal Manager of the Bojanala District Municipality is to submit quarterly reports, as from the date of this report, to the Public Protector on the progress made with the implementation of the relevant remedial action referred to in paragraph 9 above.

ADV THULI N MADONSELA
PUBLIC PROTECTOR OF THE REPUBLIC OF SOUTH AFRICA
DATE: 18/12/2014