"Stringed Along"

Report on an investigation into allegations of maladministration by the National Empowerment Fund which allegedly resulted in prejudice to Ms N.

Report No: 5 of 2014/15

PUBLIC PROTECTOR
SOUTH AFRICA

Accountability • Integrity • Responsiveness
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Executive Summary

"Every decision I take as a magistrate has a negative effect on one person's life and a positive effect on someone else's."

Regional Court Magistrate Doreen de Waal.¹

(i) “Stringed Along” is my report as the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa and section 8(1) of the Public Protector Act, 1994.

(ii) The report relates to an investigation into a complaint lodged by Ms N Ngwenya (‘the Complainant’) trading as Best Care Medical Supplies CC (‘Best Care’) on 21 May 2012, alleging undue delay, maladministration and contravention of legislative mandate by the National Empowerment Fund (‘the NEF’), which resides under the Department of Trade and Industry (‘the DTI’), regarding how the Fund handled her application for funding. Best Care Medical Supplies CC’s main business is to import and supply medical consumables to Free State Province; KwaZulu-Natal Province; Gauteng Department of Health, and the Department of Defence. Best Care has been in business for the past 16 (sixteen) years and has worked with 3M Health Care distributing the medical products for them until 2009, when both Best Care and 3M were involved in litigations as a result of the changed price structure. The litigation had since been settled out of court in January 2012.

(iii) It was during that time that Best Care was trying to introduce new products into the market and was not therefore making any income, which resulted in Best Care approaching the NEF for funding.

¹Destiny Magazine October 2014 issue
(iv) In the main, the complaint was that:

1) The NEF unduly delayed considering and evaluating the Complainant’s application for funding, which has allegedly contributed to the funding problems faced by Best Care;

2) The NEF informed the Complainant by letter dated 10 August 2012 that subject to certain conditions, the Fund Management Investment Committee (FMIC) of the NEF has granted final approval to invest R5, 000,000.00 (five million rand) in Best Care. The last paragraph further indicated that the letter should not be construed as a final offer of finance from the NEF, nor should it be considered to commit the NEF to this transaction. The offer to provide funding will finally be binding upon satisfactory fulfillment of the suspensive conditions as listed in the final agreement.

3) The NEF later advised the Complainant in a letter dated 7 September 2012 that her application for funding was subsequently declined due to the legal compliance aspect of the funding criteria of the NEF, as relates to the definition of a Black Person in the Broad-Based Black Economic Empowerment Act, 2003 and the Code of Good Practice. The NEF received confirmation that the Complainant obtained citizenship through naturalisation on 15 July 1999 and thus the transaction did not meet the mandate of the NEF.

4) Though previously a Zimbabwean national, the Complainant is of African descent and attached to her application for funding, were copies of her Identity Document and Certificate of Naturalisation (which document clearly shows that she acquired her citizenship by naturalisation on 15 July 1999). The NEF was in a position to and should have, at the very moment of handing in her application forms
and addenda documents, which included a copy of her identity
document and certificate of naturalisation, advised her there and
then that she does not meet the NEF's requirements;

(v) On analysis of the complaint, the following issues were considered and investigated:

(a) Whether or not the NEF unduly delayed considering and evaluating the
Complainant's application for funding;

(b) Whether the NEF approved the Complainant's application for funding
and later retracted it;

(c) Whether the Complainant was improperly prejudiced by the conduct of
the NEF; and

(d) Whether what happened to the Complainant points to possible
systemic deficiencies within the NEF

(vi) The investigation process commenced with an attempt to mediate with a
view to assisting the parties to resolve the dispute by mutual agreement.
When the mediation failed, a formal investigation was conducted through
meetings and interviews with the Complainant and relevant officials of the
NEF, relevant documents and analysis and application of all relevant laws,
policies and related prescripts, followed.

(vii) Key laws and policies taken into account to help me determine if there had
been maladministration by the NEF and prejudice to the Complainant were
principally those imposing administrative standards that should have been
upheld by the NEF and its officials when managing the entire application
process, including the triaging phase.
(viii) Having considered the evidence uncovered during the investigation against the relevant legal and regulatory framework, I make the following findings:

1. Regarding whether the NEF has unduly delayed to consider and evaluate the Complainant’s application for funding, I find that:

   a) The Complainant first applied to the NEF for funding on 19 April 2010 and the application was declined due to the on-going litigation against Best Care. The Complainant re-applied to the NEF for funding on 7 November 2011 and the application was also declined on the basis of the perceived risks associated with the then on-going litigation between Best Care and 3M and the negative financial report obtained from Experian.

   b) The dispute between Best Care and 3M was amicably settled out of court on 10 February 2012 and ten days later, on 20 February 2012, the Complainant revived her 2011 application for funding. The NEF declined this application on 24 May 2012 based on the NEF’s inability to obtain cession of proceeds and Best Care’s unfavourable financial position vis-à-vis Standard Bank; and the NEF’s inability to corroborate Best Care’s long term sustainability.

   c) In considering all these applications starting from 19 April 2010 to 24 May 2012 no mention was made of the fact that the Complainant was not a black person as defined in the Broad-Based Black Economic Empowerment Act and it could not be established if the NEF had prior to August 2012, considered and evaluated the Complainant’s identity to
d) The Complainant had to wait for a period of twenty-eight months (April 2010 to 6 August 2012) before the NEF established that the Complainant was not a ‘Black person’ as envisaged in the Black Economic Empowerment Act and the Codes of Good Practice, and therefore ineligible to be assisted by the NEF. This constitutes undue delay and amounts to maladministration as envisaged in section 6 of the Public Protector Act.

2. Regarding whether the NEF approved the Complainant’s application for funding and later retracted it.

a) The allegation that the NEF did approve the Complainant’s application and later retracted the approval is substantiated. The NEF approved the application and proceeded to open the joint bank account with her company at the First National Bank. The NEF advised the Complainant by letter dated 10 August 2012 that subject to certain conditions the FMIC of the NEF has granted final approval to invest R5,000,000.00 in Best Care. The last paragraph of the letter indicated that it should not be construed as a final offer of finance from NEF, nor should it be considered to commit NEF to this transaction. The offer to provide funding will finally be binding upon satisfactory fulfillment of the suspensive conditions as listed in the final agreement. The approval of the application was subject to suspensive conditions which the NEF says included verification of her Identity Document. The actual wording was
that the FMIC approved the application subject to, but not limited to, the following conditions:

i. the approved funding will be utilized to purchase stock and the profits made from sales after servicing the NEF’s loan will be used to finance the operations;

ii. the disbursement of funds will be on the drawdown basis subject to the presentation of valid orders.

iii. NEF will approve each order subject to its profitability of which the GP margin should be below should not be below 35%;

iv. NEF will pay the suppliers directly through a Letter of Credit account which you will be required to set it up with a new bank;

v. You will be required to open a separate account with another bank, other than Standard Bank, and NEF must be listed as joint signatory by all relevant parties.

b) Section 195 of the Constitution provides that public administration, including actions of the NEF, should have a high standard of professional ethics in the handling of its operations, while section 195(g) of the Constitution requires of the NEF to ensure that the applicants for funding are provided with timely, accessible and accurate information.

c) These aforementioned provisions expect of every sphere of government, organs of state and public enterprises, including the NEF, to advance the aspirations of the Constitutional
values and people first, in their discharge of their responsibilities and mandate.

d) Section 237 of the Constitution states that, "all constitutional obligations must be performed diligently and without delay". The importance of this section is that the NEF must put rights promised by the Constitution first. This includes the right to administrative action that is lawful, reasonable and procedurally fair as entrenched in section 33 of the Constitution.

e) I am unable to find that the suspensive conditions included verification of an Identity Document, which is something that should have been done upfront at the triaging phase without wasting anyone's time and resources, including the resources of the NEF and those of the Complainant.

f) Despite having several chances to deal with the obvious preliminary issue of the Identity Document verification, the NEF declined the Complainant's application for funding on 24 May 2012.

g) The Complainant should never have signed a Revolving Credit Facility Agreement with the NEF in terms of which the NEF as the Lender agreed to make the Facility available to the Complainant subject to the fulfillment of certain suspensive conditions;

h) The allegation that the NEF approved the application and later retracted it is therefore substantiated. The NEF’s conduct in approving the application and later retracting the approval constitutes maladministration as envisaged in section 6
of the Public Protector Act, and improper conduct as envisaged in section 182 of the Constitution.

3. Whether the Complainant was improperly prejudiced by the conduct of the NEF

(a) The Complainant was prejudiced. When government does not do what it is supposed to do or does what is not supposed to do, service fails and people suffer. The only question to be asked and answered is whether the Complainant participated in her own downfall. In other words did she come with “clean hands”?

(b) My respectful view is that had the Complainant read the application form properly and correctly completed it where it says

“We the applicants as detailed below declare that the information provided in the document is a true reflection of the facts, and I fully consent to a background verification of such information. Please find attached herewith certified copies of the identity documents. I hereby warrant that I am a black person (BEE) in terms of the following definition “Black people” are African, Coloured and Indian natural persons who are citizens of the Republic of South Africa by birth or by descent as well as natural person who acquired citizenship by naturalisation prior to 27 April 1994”, she would have been spared the NEF’s maladministration and told upfront that she did not qualify and accordingly not incurred credit on the strength of imminent funding from the NEF.

(c) However, it cannot be said that she did not suffer prejudice due to the NEF’s maladministration. As I indicated earlier, the Identity Document issue should have been picked up on the day of
application or a few days thereafter. I'm even more shocked that the NEF has submitted that it processed her application without her submitting an identity document hence the inability to pick up the date of naturalisation.

4. Whether what happened to the Complainant points to possible systemic deficiencies within the NEF

a) The manner in which the application of the Complainant was handled suggests a possible systemic deficiency in the NEF’s processing of applications.

b) I cannot understand how any entity, private or public, could process anyone's application and further enter into a credit facility with that person without ever checking their Identity Document. While the investigation only checked 22 applications and found a few deficiencies, I cannot say for sure there is a systemic problem; there is a need to audit the entire system.

(ix) The remedial action taken as envisaged by Section 182(1)(c) of the Constitution is that:

(a) The CEO of the NEF must, within fourteen (14) days of this report, tender a written apology on behalf of the NEF to the Complainant for the inconvenience she suffered as a result of the delay to discover the Complainant’s identity;

(b) The CEO must, within thirty (30) days of this report, submit to the Public Protector a copy of the said written apology to the Complainant;
(c) The CEO must ensure that the NEF must, before the end of its current financial year, revise its due diligence procedures and practices to remedy such deficiencies as identified herein.

(d) The CEO of the NEF must within thirty (30) days of this report consult with the Complainant in the determination of what the United Kingdom Parliamentary and Health Services Ombudsman calls "sorry money" which money is given to a person as consolation for mishaps caused and experienced.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION BY THE NATIONAL EMPOWERMENT FUND WHICH ALLEGEDLY RESULTED IN PREJUDICE TO MS N

1. INTRODUCTION

1.1 "Stringed Along" is my report as the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa of 1996 as amended (the Constitution) and section 8(1) of the Public Protector Act No. 23 of 1994 (the Public Protector Act).

1.2 The report is submitted in terms of section 182(1)(b) of the Constitution and section 8(1) of the Public Protector Act to the following parties:

1.2.1 Ms P Mthethwa (Chief Executive Officer: National Empowerment Fund), which entity shall hereinafter be referred to as 'the NEF';

1.2.2 Ms Z Ntlangula (the NEF’s Acting Chairperson); and

1.2.3 Honourable Dr Rob Davies: The Minister of the Department of Trade and Industry for noting and monitoring of the remedial action.

1.3 A copy of the report is also provided to Ms Ngwenya ('the Complainant') in terms of section 8(1) of the Public Protector Act.

1.4 The report relates to an investigation into the allegations of undue delay to consider and evaluate the Complainant’s application for funding, maladministration and contravention by the NEF of its legislative mandate which conduct allegedly resulted in prejudice to the Complainant.
2. **THE COMPLAINT**

2.1. The complaint was lodged by Ms Naomi Ngwenya on behalf of her company Best Care Medical Supplies CC on 21 May 2012 with the following allegations:

"a) We [Best Care] are a woman Black owned Company and we are importing and supplying medical consumables to KZN, Free State and South African Defence Force and Gauteng Department of Health and our products have penetrated the Netcare Group. We have been in business for the past 14 years and we have up to 2009 been working with 3M Health Care distributing the medical products for them and we are making a turnover of about R52 million per annum.

b) In 2009 April, 3M decided to change their price structure and there were disagreements that led to litigation that only got settled out of court this Jan 2012. So during that time we have been trying to introduce our new products in the market and we were not making any income. We since then approached the NEF for funding and they declined us based on the litigation, which we found that it was unacceptable. So we then this year after settlement of the matter approached them in Nov 2011 for funding and they had concerned[sic] again of the litigation, so by God's grace all was sorted out in Jan 2012 and we gave them confirmation that the matter is settled. And from Jan 2012 up to now we still awaiting results whether we getting funding or not. Only yesterday I called them late and they told me that the application was not successful because they couldn't get cession of proceeds from the Provinces I have contracts with and that since I have an overdraft they are afraid that Standard bank will take the money."
c) We have written a letter to Ms Philisiwe Buthelezi and we got an answer email from Nhlanhla that the application was declined. We want to know what kind of business they fund because they keep coming with petty excuses all the time.

d) The duration they take to give answers to customers, unprofessionalism, not communicating, we approached them when we could sustain ourself and they give us hope that the application is in progress.

e) They are not funding small business and the President is promising small business, but they are giving us excuses every time and the delay and the team working with my application didn’t understand. Healthcare Industry, they kept asking for the same information.

f) We would like you to thoroughly investigate why we are deprived of funding, and these institutions are there to help create jobs and promote women black owned companies and more so we have proved what we can do. We appealing that we got funding because our company can’t operate. We currently have confirmed orders, contracts and we are servicing hospitals. We would lose out on our contracts, our staff hasn’t been paid, bonds and our office expenses."

2.2. The Complainant further submitted a letter dated 25 May 2012 indicating that after waiting in anticipation, the result was that the application was declined due to the following reasons:

2.2.1. The cession of proceeds could not be obtained and the possibility of a joint bank facility was investigated. It was discovered that Best Care overdraft facility was being reduced by R150 000.00 per quarter indicating that the bank was in the process of reducing the facility as Best Care’s conduct and/or financial position had deteriorated. This was
confirmed by the negative reports received through Experian. The above findings are major financial risk and without cession of proceeds NEF is unable to assist the business.

2.2.2. The financial analysis revealed that the business would break even at approximately R600 000.00 per month, taking into consideration once off orders amounting to R4m without being able to establish the possibility of repeat orders therefore the long term sustainability of the business could not be corroborated.

2.2.3. The cash flow risk could not be mitigated as the payment cycle is affected by stock delivery and placement of orders, given the fact that government has delays in processing payment and the orders are not consistent.

2.3. As the investigation progressed, the Complainant further submitted that the NEF informed her by a letter dated 10 August 2012 that her application for funding was approved and that the funding was later unjustifiably retracted in a letter dated 07 September 2012. The letter indicated that the NEF has discovered that the Complainant did not qualify as a BEE applicant in terms of the definition of BEE as per the Black Economic Empowerment Act, 2003 and read in conjunction with the Codes of Good Practice on BBBEE.

3. **POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR TO INVESTIGATE THE COMPLAINT**

3.1. The Public Protector is an independent constitutional institution established in terms of section 181(1)(a) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.
3.2. Section 182(1) of the Constitution provides that the Public Protector has the power 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, to report on that conduct and take appropriate remedial action. Section 182(2) directs that the Public Protector has additional powers prescribed in 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 and to resolve the disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.4. The NEF is a trust established in terms of section 2 of the National Empowerment Fund Act No. 105 of 1998. It is listed as a national public entity in schedule 3 of the Public Finance Management Act No. 29 of 1999 (the PFMA) and its conduct amounts to conduct in state affairs, as a result the matter falls within the ambit of the Public Protector’s mandate.

3.5. The jurisdiction of the Public Protector was not disputed by any of the parties.

4. THE INVESTIGATION

4.1. Methodology

4.1.1. The investigation was conducted in terms of Section 182 of the Constitution and Section 6 and 7 of the Public Protector Act, 1994.
4.1.2. The Public Protector Act confers on Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration. Section 6 of the Public Protector Act gives the Public Protector the authority to resolve a matter without conducting an investigation and resolve a complaint through appropriate dispute resolution (ADR) measures such as conciliation, mediation and negotiation.

4.1.3. The complaint was initially classified as an early resolution matter capable of resolution by way of a conciliation process or mediation in line with Section 6(4) (b) of the Public Protector Act, 1994. However, after several attempts to conciliate the matter, it was escalated into an investigation.

4.2. Approach to the investigation

4.2.1. Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:

i. What happened?
ii. What should have happened?
iii. Is there a discrepancy in what happened and what should have happened, and does that deviation amount to maladministration?
iv. 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?

4.2.2. The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and
independently sourced during the investigation. In this particular case, the factual enquiry principally focused on the following:

a) Whether or not the NEF unduly delayed considering and evaluating the Complainant’s application for funding;

b) Whether the NEF approved the Complainant’s application for funding and later retracted it;

c) Whether the Complainant was improperly prejudiced by the conduct of the NEF; and

d) Whether what happened to the Complainant points to possible systemic deficiencies within the NEF.

4.2.3. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the organ of state to prevent maladministration and prejudice.

4.2.4. 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 organ of state complied with the regulatory framework setting the applicable standards for good administration.

4.3. On analysis of the complaint, the following issues were identified, considered and investigated:

4.3.1. Whether or not there has been any undue delay by the NEF to consider and evaluate the Complainant’s application for funding, if so, whether such conduct amounts to maladministration as envisaged in the Public Protector Act;
4.3.2. Whether the NEF awarded the Complainant a grant and later retracted it, if so, whether such conduct amounts to maladministration;

4.3.3. Whether the Complainant was prejudiced by the conduct of the NEF, if so whether it is possible to place her as close as possible to where she would have been but for the NEF's maladministration;

4.3.4. Whether what happened to the Complainant points to possible systemic deficiencies within the NEF that may lead to approval of funding to non-deserving beneficiaries and thereby prejudicing applicants

4.4. Key sources of information

4.4.1. Correspondence

4.4.1.1. Detailed complaint from the Complainant with supporting documents such as correspondence and letters;

4.4.1.2. Written correspondence from the Fund;

4.4.1.3. Written correspondence between Deputy Public Protector, Adv. Kevin Malunga and Ms Philisiwe Mthethwa;

4.4.1.4. Written correspondence between Deputy Public Protector Malunga and the Complainant;

4.4.1.5. Written correspondence between Deputy Public Protector Malunga and Mr Lionel October, the Director-General: Department of Trade and Industry;
4.4.2. Meetings and Interviews

4.4.2.1. Pre-conciliation meeting between the Complainant and the Public Protector, Adv. TN Madonsela held on 10 January 2013;

4.4.2.2. Pre-conciliation meeting held on 16 January 2013 between Deputy Public Protector, Advocate Malunga and representatives from the NEF led by Mr Dayimani (the NEF’s General Legal Counsel) and representatives of the DTI led by Ms Nomonde Mesatywa (Chief Director: BEE Unit);

4.4.2.3. Pre-conciliation meeting held on 16 January 2013 between Deputy Public Protector, Advocate Malunga and the Complainant;

4.4.2.4. A follow up meeting held on 27 March 2013 between Deputy Public Protector, Advocate Malunga and the Complainant; and

4.4.2.5. A follow up meeting held on 21 June 2013 between Deputy Public Protector Advocate Malunga and the Complainant.

4.4.3. Review of applications received by the NEF in November 2011

4.4.3.1. A meeting held on 12 May 2014 between the NEF and the Investigation team; and

4.4.3.2. A follow up visit to the NEF on 13 June 2014 to review the applications received by the NEF during the month of November 2011
4.4.4. Legislation and other prescripts

4.4.4.1. The relevant provisions of the following legislation and other prescripts were considered and, where appropriate, applied:

4.4.4.1.1 The Constitution of the Republic of South Africa of 1996 as amended;
4.4.4.1.2 The Public Protector Act No. 23 of 1994;
4.4.4.1.3 The National Empowerment Fund Act No. 105 of 1998;
4.4.4.1.4 The Broad-Based Black Economic Act No. 53 of 2003;
4.4.4.1.5 The Public Finance Management Act No. 1 of 1999;

4.4.5. Attempted conciliation

4.4.5.1. Following the unsuccessful attempt by Deputy Public Protector Advocate Malunga to conciliate between the parties when it became evident that an agreement between the parties could not be reached, a full investigation was pursued;

4.4.5.2. On 16 January 2013, Deputy Public Protector, Advocate Malunga directed the NEF to-

4.4.5.3. Effect some changes to its application procedures including attaching a checklist to the application form;

4.4.5.4. Institute a document management process that reduces the timelines [whilst awaiting the processing of applications for funding]; and

4.4.5.5. Assist the Complainant to secure a loan with one of the NEF’s sister organisations such as the Industrial Development Corporation (IDC), which organisations do not have similar restrictions.
4.4.6. Provisional Report

4.4.6.1. At the conclusion of the investigation, a provisional report was sent to the NEF, the Complainant and the Director-General of the Department of Trade and Industry.

4.4.6.2. An invitation was made to the parties to review the provisional report and forward comments on facts and any other matters. Such comments were assessed, summarized and, where appropriate integrated in factual and maladministration findings.

5. APPLICABLE LAW AND RELATED PRESCRIPTS

5.1. General

5.1.1. The Constitution Act 108 of 1996 and the Public Protector Act

5.1.1.1. Section 182 of the Constitution gives the Public Protector the power to investigate improper conduct in all state affairs or the public administration. It is reasonable to infer that section 182 prohibits improper conduct while requiring proper conduct from those who act on behalf of the state or “state actors”.

5.1.1.2. In the same token the Public Protector Act’s recognition of the Public Protector’s power to investigate maladministration and improper prejudice must have as a corollary requirement that the conduct of state actors should be the opposite of maladministration and prejudice. What is clear is that maladministration refers to the manner in which state actors should not conduct themselves while improper prejudice relates to how they should not treat the public or those affected by the conduct in question. If maladministration is prohibited, it must follow that good
administration is prescribed. In the same token, fair and just treatment of those impacted by administrative decisions of state actors must be expected as the opposite of improper prejudice.

5.1.1.3. The manner in which the NEF took certain decisions around this matter raises questions of just administrative action as envisaged in section 33 of the Constitution. Section 33 states that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Courts have interpreted lawful, reasonable and procedurally fair administrative action, to include the duty on an administrator to supply timely and accurate information.

5.1.1.4. The conduct further needs to be tested against the principles of public administration as envisaged by section 195 of the Constitution, whose provisions include the requirement that services must be provided impartially, fairly, equitably and without bias; and public administration must be accountable. Section 195 of the Constitution further provides that:

"(1) public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

a) A high standard of professional ethics must be promoted and maintained;

... 

g) Transparency must be fostered by providing the public with timely, accessible, and accurate information;"

5.1.1.5. Section 237 of the Constitution provides that "all constitutional obligations must be performed diligently and without delay". This requires the organs
of state, including NEF to ensure, when making decisions, that the rights of their customers that are enshrined in the Constitution are given priority. One of the key rights that have been borne in mind by the NEF is the right to just administrative action.

5.2. Regarding whether the NEF has unduly delayed to consider and evaluate the Complainant’s application for funding

5.2.1. The NEF discharges its mandate in accordance with the provisions of the National Empowerment Act and Broad-Based Black Economic Empowerment Act, 2003. Section 2 of the National Empowerment Fund Act, 1998 provides that a trust called the NEF is established to facilitate the redressing of economic inequality which resulted from the past unfair discrimination against historically disadvantaged persons by promoting and supporting business ventures pioneered and run by "historically disadvantaged persons". Historically disadvantaged persons is defined thus at section 1(f) as-

"...those persons or categories of persons, who prior to the new democratic dispensation marked by the adoption and coming into force of the Constitution of the Republic of South Africa, were disadvantaged by unfair discrimination on the basis of their race and includes juristic persons or associations owned and controlled by such persons."

5.2.2. Section 1 of the Broad-Based Black Economic Empowerment Act, 2003 defines Broad-Based Black Economic Empowerment as the “economic empowerment of all black people including women, workers, youth, people with disabilities and people living in rural areas through diverse but integrated socio-economic strategies”. (Emphasis added)
5.2.3. The term "Black people" is further defined in part 2 of the Broad-Based Black Economic Empowerment Act Codes of Good Practice:\textsuperscript{2} "as including only natural persons who are citizens of the Republic of South Africa by birth or descent; or are citizens of the Republic of South Africa by naturalisation:

(a) occurring before the commencement date of the Republic of South Africa Act, 1993; or

(b) occurring after the commencement date of the Republic of South Africa Act, 1993, but who, without the Apartheid policy would have qualified for naturalisation before then."

5.2.4. Section 51 of the Public Finance Management Act, provides that the Accounting authority must ensure that the public entity (The NEF) has and maintains an effective, efficient and transparent systems of financial and risk management and internal control. The Accounting authority must also take effective and appropriate steps to prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity.

5.2.5. Section 66 of the PFMA further provides that: "an institution to which this Act applies may not borrow money or issue a guarantee, indemnity or security, or enter into any other transaction that binds or may bind that institution or the Revenue Fund to any future financial commitment, unless such borrowing, guarantee, indemnity, security or other transaction—

(a) is authorised by this Act; and

\textsuperscript{2} 27 April 1994 (Act No. 200 of 1993)
(b) in the case of public entities, is also authorised by other legislation not in conflict with this Act."

5.2.6. The practical effect of the above provisions of the Public Finance Management Act is that the NEF, before entering into any transaction wherein public funds are involved, the NEF must undertake what is termed 'due diligence' in order to safeguard the interests of the State against irregular, unauthorised or fruitless and wasteful expenditure and also ensure that the transaction in question is authorised by legislation in this case the National Empowerment Act and Broad-Based Black Economic Empowerment Act.

5.2.7. In terms of section 51 of the Public Finance Management Act, an accounting authority for a public entity must ensure that that public entity has and maintains an effective, efficient and transparent systems of financial and risk management and internal control. The accounting authority must also take effective and appropriate steps to prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity.

5.2.8. Broadly speaking, due diligence is a legal construct entailing a duty of care or prudence expected from a reasonable person entrusted with a particular responsibility. In practical terms, it is an audit tool designed to prevent irregular, unauthorised or fruitless and wasteful expenditure. It entails the process of establishing the truth, accuracy, or validity of something before entering into a transaction in order to get value for money or prevent losses etc.

5.2.9. Understood as postulated above, in that event, the practical application of a due diligence exercise by the NEF would conceivably consist of
three distinct stages: the ‘quantitative’ evaluation stage; the ‘qualitative’ evaluation stage; and the authentication stage.

5.3. Regarding whether the NEF approved the Complainant’s application for funding and later retracted

5.3.1. Section 195 of the Constitution provides that public administration including the NEF should have a high standard of professional ethics in the handling of its operations, while section 195(g) of the Constitution requires of the NEF to ensure that the applicants for funding are provided with timely, accessible and accurate information.

5.3.2. These afore going provisions expect of every sphere of government, organs of state and public entities, including the NEF to advance the aspirations of the constitutional values and people first, in the discharge of their responsibilities and mandate.

5.3.3. Section 237 of the Constitution states that, "all constitutional obligations must be performed diligently and without delay". The importance of this section is that the NEF must put rights promised by the Constitution first. This includes the right to administrative action that is lawful, reasonable and procedurally fair as entrenched in section 33.

5.4. Whether the Complainant was improperly prejudiced by the conduct of the NEF

5.4.1. In order to determine whether the conduct of the NEF was improper, constituting maladministration and prejudicial to the Complainant, some yard stick had to be used to determine the standard that should have been met for the conduct to qualify, so to speak, as proper conduct devoid of maladministration and improper prejudice. This is a factual
enquiry that looks at harm that the Complainant suffered that can be
legitimately attributed to the acts or omissions of the NEF.

5.5. Remedying maladministration

5.5.1. Section 182(1)(c) of the Constitution gives the Public Protector the power
to take appropriate remedial action. Appropriateness is a situational
enquiry informed by the impact of the maladministration on the
Complainant and the circumstances under which the maladministration
(if any) occurred. As in the adjudication of delictual claims by the courts,
the conduct of the Complainant must also be considered and if it can be
established that the Complainant played a role in inviting misfortune or
failed to mitigate her loss, some responsibility must be apportioned to her
as well. We refer to this as the "Clean hands principle" in terms of which
appropriate remedial action must come with clean hands.

5.5.2. The Batho Pele principle of Redress is also instructive with regard to the
duty of the NEF and/or any other organ of state to offer redress if
standards that customers are entitled to are not met in a significant way.
The principle entails that if the promised standard of service is not
delivered, an apology, a full explanation and a speedy effective remedy
must be offered.

5.5.3. Sometimes the circumstances do not allow a remedy that amounts to
compensation. In such circumstances, consideration is often given to
consolatory or ex gratia payment. The United Kingdom Parliamentary
and Health Service Ombudsman often refers to this as "sorry money".

5.5.4. I find the considerations made by the Bermuda Ombudsman in a case
involving the conduct of the Bermuda Human Rights Commission
noteworthy for the purposes of this case. The case involved a grievance
against the Human Rights Commission regarding procedural errors and a delay in the Commission’s handling of a complaint. The Ombudsman concluded that there was no remedy that could restore the Complainant’s legal rights or put her in the position she would have been had there been no maladministration, the Ombudsman recommended a without prejudice apology and a consolatory ex gratia payment. She made a point though to highlight that a consolatory payment is not compensation.

5.6. **Whether what happened to the Complainant points to possible systemic deficiencies within the NEF that may lead to approval of funding to non-deserving beneficiaries and thereby prejudicing applicants**

5.6.1. As stated above, the Constitution and the Public Protector Act mandates the Public Protector to investigate improper conduct in all state affairs or the public administration. Inherent in this legislative mandate, is the power to also determine if the individual complaints points to possible systemic deficiencies that warrants a systemic investigation. A systemic investigation goes beyond the issue raised in an individual complaint and looks at the underlying root causes of the individual complaint.

5.6.2. In order to determine if this complaint points to possible systemic deficiencies, the investigation team reviewed applications received during the same month as the Complainant’s last application (i.e. November 2011).

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3 Conducting Administrative Oversight and Ombudsman Investigation: G Jones (Canada) 1st edition 2009
6. EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

6.1. Matters not in dispute

6.1.1. The Complainant applied for funding from the NEF on three different dates and the NEF considered and evaluated the application and provided written reasons for non-approval to the Complainant as follows:

<table>
<thead>
<tr>
<th>Date application received</th>
<th>Amount requested</th>
<th>Approved/ not approved</th>
<th>Reason for non-approval</th>
</tr>
</thead>
<tbody>
<tr>
<td>19 April 2010</td>
<td>R6,000,000.00</td>
<td>Declined on 9 July 2010</td>
<td>Due to pending litigation.</td>
</tr>
<tr>
<td>7 November 2011</td>
<td>R4, 439, 275.00</td>
<td></td>
<td>Due to same pending litigation which had not been resolved to the satisfaction of the NEF.</td>
</tr>
<tr>
<td>20 February 2012 Second application re-opened</td>
<td>R3, 000, 000.00 (amount changed by complainant)</td>
<td>Declined on 24 May 2012</td>
<td>24 May 2012 Application declined because cession of proceeds could not be obtained and due to negative financial reports obtained through Experian.</td>
</tr>
<tr>
<td>02 July 2012 DTI intervened and second application reconsidered</td>
<td>R5,000,000.00 Changed after due diligence</td>
<td>Approved conditionally on 10 August 2012</td>
<td>Approved subject to suspensive conditions.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Declined on 07 September 2012</td>
<td>Declined due to Complainant not being a black person as defined in BBBEE Act and therefore ineligible for funding.</td>
</tr>
</tbody>
</table>
6.1.2. The Complainant had signed the following declaration in the application form:

"I/We the applicants as detailed below declares that the information provided in this document is a true and a correct reflection of the facts, and I/We fully consent to the background verification of such information. Please find attached herewith certified copy/copies of identity documents. I/We hereby warrant that I/We am a black person (BEE) in terms of the following definition:

'Black people' are, African, Coloured and Indian natural persons who are citizens of the Republic of South Africa by birth or descent as well as natural persons who acquired citizenship by naturalisation prior to 27 April 1994;..."

6.1.3. The NEF advised the Complainant by letter dated 10 August 2012 that subject to certain conditions the FMIC of the NEF has granted final approval to invest R5, 000,000.00 in Best Care. The last paragraph of the letter indicated that: "...it should not be construed as a final offer of finance from NEF, nor should it be considered to commit NEF to this transaction. The offer to provide funding will finally be binding upon satisfactory fulfillment of the suspensive conditions as listed in the final agreement."

6.1.4. A joint business cheque account was opened at First National Bank Cartswald Branch under the name Best Care Medical Supplies on 14 August 2012.

6.1.5. The Complainant's Identity Document specifically indicated on the first page that country of birth is Zimbabwe.
6.1.6. The Complainant’s Certificate of Naturalisation indicates that she acquired her citizenship by naturalisation on 15 July 1999.

6.1.7. After the NEF declined the Complainant’s application for funding on 24 May 2012, the Complainant escalated the matter to the DTI and the NEF agreed to re-open the Complainant’s application after the meeting with the DTI;

6.1.8. The Complainant signed a Revolving Credit Facility Agreement with the NEF in terms of which the NEF as the Lender agreed to make the Facility available to the Complainant subject to the fulfillment of certain suspensive conditions;

6.1.9. The NEF in a letter dated 7 September 2012 advised the Complainant that her application for funding was subsequently declined due to the legal compliance aspect of the funding criteria of the NEF as relates to the definition of a Black Person in the Broad-Based Black Economic Empowerment Act and the Code of Good Practice. The NEF obtained confirmation that Complainant’s citizenship and thus the transaction did not meet the mandate of the NEF.

6.2. The factual dispute to be resolved through investigation is centered around the complainant’s allegation that she was improperly prejudiced by the NEF’s delay to consider and evaluate her application for funding. The dispute further revolves around the Complainant’s allegation that the NEF had approved her application for funding and confirmed this by letter dated 10 August 2012, and that approval was later unjustifiably retracted by the NEF on the ground that she is not a Black person in terms of the Black Economic Empowerment Act.
6.3. The Complainant’s case

6.3.1. The Complainant, who holds a 100% interest in Best Care presented her case through the original complaint, meetings held with myself, Deputy Public Protector, Advocate Malunga and the investigation team and documents submitted seeking to prove the alleged undue delay and prejudice allegedly suffered as a result of the conduct of the NEF.

6.4. Regarding the alleged undue delay by the NEF to consider and evaluate the Complainant’s application for funding

6.4.1. The Complainant first applied for funding to the NEF on 19 April 2010 and the NEF declined her application on 9 July 2010 on the basis that Best Care was, from 2009 up to that date, involved in litigation with a concern named and styled 3M;

6.4.2. On 7 November 2011, when it became evident to her that an out of court settlement would be reached between her and 3M, she reapplied to the NEF for funding. Yet again, citing Best Care’s unresolved litigation with 3M, the Fund declined that application. An out of court settlement was reached with 3M on 10 February 2012 and she advised the NEF of same.

6.4.3. Ten days later on 20 February 2012 she renewed her application for funding made on 7 November 2011 and the NEF telephonically advised her on 20 May 2012 that her application for funding was unsuccessful because first, the NEF could not get a cession of proceeds from the provincial departments with which Best Care had concluded contracts; and, second, on the basis of the Fund’s apprehension that Standard Bank, the commercial bank with whom the Complainant had an overdraft facility, ‘will take the money’;
6.4.4. The NEF confirmed the telephonic discussion in a letter dated 24 May 2012 and cited the following reasons to decline the Complainant’s application for funding:

6.4.4.1. The cession of proceeds could not be obtained and the possibility of a joint bank facility was investigated. It was discovered that Best Care overdraft facility was being reduced by R150, 000.00 (one hundred and fifty thousand rand) per quarter indicating that the bank was in the process of reducing the facility as Best Care’s Conduct and/or financial position has deteriorated. This was further confirmed by the negative bank reports received through Experian. The above findings are major financial risk and without cession of proceeds NEF is unable to assist the business;

6.4.4.2. The financial analysis revealed that the business would break even at approximately R600, 000.00 (six hundred thousand rand) per month, taking into consideration once off orders amounting to R4m without being able to establish the possibility of repeat orders therefore the long term sustainability of the business could not be corroborated; and

6.4.4.3. The cash flow risk could not be mitigated as the payment cycle is affected by stock delivery and placement of orders.

6.4.5. Attached to her application for funding, were copies of her identity document and Certificate of Naturalisation (which document clearly shows that she acquired her citizenship by naturalisation on 15 July 1997). The Fund was in a position to and should have, at the very moment of her handing in her application forms, advised her there and then that she does not meet the Fund’s requirements.
6.5. **Regarding the allegation that the NEF awarded the Complainant a grant and later retracted it**

6.5.1. After receiving the letter dated 24 May 2012, the Complainant escalated the matter to the DTI and the parties met the DTI on 2 July 2012, during which meeting the NEF allegedly requested officials of the DTI to assist the NEF to secure the cession of proceeds of contracts that the Complainant had with other government departments. The Complainant also agreed to open a bank account with another bank;

6.5.2. On 01 August 2012, the Complainant signed the NEF Revolving Credit Facility Agreement that in her view was confirmation that an amount of R5, 000,000.00 will be advanced to Best Care as a revolving credit facility.

6.5.3. In a letter dated 10 August 2012, the NEF advised the Complainant that—

"...subject to certain conditions the Fund Management Investment Committee (FMIC) of the NEF has granted final approval to invest R5, 000,000.00 in Best Care…"

"This letter should not be construed as a final offer of finance from NEF, nor should it be considered to commit NEF to this transaction. The offer to provide funding will finally be binding upon satisfactory fulfillment of the suspensive conditions as listed in the final agreement;"

6.5.4. On 14 August 2012 a joint business cheque account was opened at First National Bank Carlswold Branch under the name Best Care Medical Supplies, the Complainant signed as the authorised representative of Best Care and Miss Phuthanang Cenea Segoati, the Appointed Post
Investment Fund Manager signed as the authorised representative of the NEF.

6.5.5. In a letter dated **07 September 2012** the Fund advised the Complainant that-

"Subsequent to the approval of your application by the FMIC of the National Empowerment Fund, we discovered that you do not qualify as a BEE applicant as per the Black Economic Empowerment Act, 2003 (Act No. 53 of 2003) and read in conjunction with Codes of Good Practice on BBBEE.

In terms of the BEE Act and the Codes of Good Practice, "Black people" are African, Coloured and Indian natural persons who are citizens of the Republic of South Africa by birth or by descent as well as natural persons who acquired citizenship by naturalization prior to 27 April 1994.

We obtained confirmation that your South African citizenship was issued during July 1999. For this reason the transaction does not meet the mandate of the National Empowerment Fund and has been declined as a result".

6.5.6. In fact, by the time the Complainant was notified of the rejection of her application, the parties had already begun executing their contract in terms of the approval of her application on 10 August 2012 in that the parties had opened a joint bank account.

6.6. Regarding the alleged improper prejudice suffered by the Complainant

6.3.4.1 The Complainant accuses the NEF of incompetence in that
6.3.4.1.1 Though previously a Zimbabwean national, she is of African descent and attached to her application for funding, were copies of her identity document and Certificate of Naturalisation (which document clearly shows that she acquired her citizenship by naturalisation on 15 July 1999). The NEF was in a position to and should have, at the very moment of handing in her application forms and addenda documents which included a copy of her identity documents and certificate of naturalisation, advised her there and then that she does not meet the NEF's requirements;

6.3.4.1.2 The NEF's own website says nothing about the fact that only Black people as defined in the Black Economic Empowerment Act qualify for funding; and

6.3.4.1.3 In any event, nowhere in her application form and at no stage during her dealings with the NEF, did she claim that she is a Black person as defined in the Black Economic Empowerment Act, all she did was to apply for funding for her business; and

6.3.4.2 The NEF, certainly relative to her application, has contravened its mandate.

6.3.4.3 The NEF did not assist her to source funding from any of its sister organisations despite Deputy Public Protector Advocate Malunga’s direction to that effect. She sought and obtained R3, 5 million funding on her own, without the NEF’s assistance, from the Small Enterprise Finance Agency (SEFA). That amount did not help alleviate the challenges faced by Best Care since it was just a 'bridging finance'. The loan has such stringent requirements that limit Best Care’s access to monies paid by its customers. The agreement between SEFA and Best Care was rendered flawed by SEFA.
6.3.4.4 The NEF’s negligence has caused so much financial distress to Best Care so much that Standard Bank has filed for its liquidation.

6.3.4.5 Best Care sincerely thinks that that the NEF should pay damages for the stress they have caused, since they created expectations to the extent of even confirming their intentions to Standard Bank that they would fund Best Care.

6.6.1. In response to the provisional report:

6.6.1.1. The Complainant acknowledged that she had indicated on the application form and in particular, the middle of page 1 and at the top of page 2 thereof, that the BEE participation in Bestcare Medical Suppliers is 100%. However, she believes that this oversight is mitigated by the fact that the declaration and consent section on the application form was left unmarked due to the fact that it did not cater for Bestcare as the latter is a Level 4 BEE Contributor;

6.6.1.2. Damages suffered by Best Care were quantified as follows:

<table>
<thead>
<tr>
<th>Salaries</th>
<th>1 033 888.52</th>
</tr>
</thead>
<tbody>
<tr>
<td>Attorney Fees</td>
<td>237 932.78</td>
</tr>
<tr>
<td>Cars</td>
<td>255 000.00</td>
</tr>
<tr>
<td>Toyota Dyna</td>
<td>65 000.00</td>
</tr>
<tr>
<td>Toyota Condor</td>
<td>60 000.00</td>
</tr>
<tr>
<td>VW Jetta</td>
<td>75 000.00</td>
</tr>
<tr>
<td>Toyota Run X</td>
<td>55 000.00</td>
</tr>
<tr>
<td>Interest SEFA</td>
<td>399 823.82</td>
</tr>
<tr>
<td>Standard Bank</td>
<td>1 505 152.58</td>
</tr>
<tr>
<td>Home loans</td>
<td>1 230 152.58</td>
</tr>
<tr>
<td>Overdraft</td>
<td>275 000.00</td>
</tr>
<tr>
<td>Business Lost FSH</td>
<td>2 322 817.69</td>
</tr>
<tr>
<td>Cancelled orders</td>
<td>1 276 567.69</td>
</tr>
<tr>
<td>511094</td>
<td>688 958.30</td>
</tr>
<tr>
<td>511121</td>
<td>354 448.00</td>
</tr>
<tr>
<td>511014</td>
<td>233 161.39</td>
</tr>
</tbody>
</table>
6.7. The NEF’s case

6.7.1. Regarding the alleged undue delay by the NEF to consider and evaluate the Complainant’s application for funding

6.7.1.1. The NEF in a letter dated 6 July 2012 submitted that the assertion that it unduly delayed transacting with the Complainant or that it contravened its mandate was untrue. The NEF contended that it was committed to assisting the Complainant but would only do so in a prudent and diligent manner. It further contended that when funding transactions it is obliged to consider the sustainability of the client’s business and to also ensure that the business, if conducted properly, will be able to refund the NEF so that it can reuse such funds to fund other people.

6.7.1.2. The NEF confirmed that the Complainant applied for funding in the year 2010. The NEF accordingly conducted a due diligence investigation into the Complainant’s business and the following material facts were discovered:

6.7.1.2.1. There was litigation pending against the Complainant’s business in which a major supplier, 3M South Africa (Proprietary) Limited (3M) claimed from the Complainant’s business an amount of R10, 3 million for goods sold and delivered.

6.7.1.2.2. The Complainant’s business on the other hand had a counterclaim against 3M for R18 million (eighteen million rand) for damages suffered as a result of unlawful termination of a contract. The business
therefore had a contingent liability of R10.3 million (ten million and three hundred thousand rand);

6.7.1.2.3. A stress test of the financial position of the business by the NEF investment team revealed that the business would not be automatically viable if it were to be funded in its current state. This was due to *inter alia* the fact that the business had confirmed orders for R2.6 million (two million and six hundred thousand rand) whilst it was applying for R4.4 million (four million and four hundred thousand rand), the overhead structure of the business posed liquidity risk and this was exacerbated by the fact that the Complainant had high financial commitments;

6.7.1.2.4. For the NEF to fund the Complainant’s business despite the position in which it was in at that time would have been contrary to the provisions of the Public Finance Management Act. The business was commercially and technically insolvent and it would have been reckless to provide funding which would not have assisted in taking the business out of that situation but, would have resulted in the opposite outcome. The Complainant was therefore informed that the NEF was not able to proceed with her application at that point until such time that the legal matter was resolved;

6.7.1.2.5. On 10 February 2012, the Complainant’s business and 3M reached an out of court settlement regarding their legal dispute which was made an order of court. Thereafter, the Complainant submitted Best Care’s revised financial statements to the Fund on 20 February 2012;

6.7.1.2.6. The NEF also discovered that Best Care had an arrangement with Standard Bank whereby it had reached an agreement to reduce its business overdraft facility through monthly installments. Standard Bank advised the NEF that should the latter finance Best Care through a Standard Bank operated account, in that event, it would have access
to such account and could retain any monies paid into that account; and

6.7.1.2.7. Accordingly a joint bank account posed further financial risk to the NEF and based on these aforementioned “challenges”, the NEF declined the application.

6.7.2. **In response to the provisional report, the NEF submitted that:**

6.7.2.1.1. With regard to the issue of undue delay, the Fund denies that there was any undue delay on their part in that the applications were received on different dates and for different amounts. Accordingly, each application constituted a new application which the NEF had to consider in its own right. In fact, the funding amount differed in these separate applications.

6.7.2.1.2. The NEF submitted that the provisional report is incorrect when it refers to the Complainant’s application as if it was one single continuous application and when it conlates the period between the initial application and the last application. Furthermore the period between 10 August 2012 (the period which complainant was informed of the conditional approval of the funding) and 7 September 2012 (when she was informed that the application was finally declined) did not constitute undue delay nor was it unreasonable.

6.7.2.1.3. The Complainant did not submit her identity document and Certificate of Naturalisation together with the completed and signed funding application form. Subsequent to the submission of her first loan application, the Complainant submitted a copy of her identification document, but she never submitted a copy of her Naturalisation Certificate. Furthermore that, the Complainant made a declaration in
the middle of Page 1 and the top of Page 2 of the Application Form, that “the BEE participation in Best Care Medical was 100%”;

6.7.2.1.4. It is improbable that the Complainant was confused about BEE as envisaged on the application form because same was expressly and clearly defined as referring to natural persons who acquired citizenship by naturalisation prior to 27 April 1994. Furthermore, had the Complainant been upfront about her true BEE status, the Fund would have immediately informed her that the funding was declined on that ground.

6.7.2.1.5. The Complainant misrepresented her BEE status on the Application Form and the NEF initially relied on the correctness of the declarations made in this regard. Furthermore, the timing of establishing the true BEE status of the Complainant is irrelevant due to the said misrepresentation. In the light of the above, the NEF denies that the discovery of the true position was delayed or took unreasonable time. If a delay occurred, it was because of the Complainant’s own misrepresentation.

6.8. Regarding the allegation that the NEF awarded the Complainant a grant and later retracted it

6.8.1. The NEF acknowledged that it had in a letter dated 10 August 2012, subject to certain conditions, advised the Complainant that the Fund Management Investment Committee (FMIC) of the NEF has granted final approval to invest R5, 000,000.00 in Best Care…”

6.8.2. However the last paragraph of the letter indicated that “this letter should not be construed as a final offer of finance from NEF, nor should it be considered to commit NEF to this transaction. The offer to provide
funding will finally be binding upon satisfactory fulfillment of the suspensive conditions as listed in the final agreement”.

6.8.3. It is standard practice in all funding institutions to approve transactions subject to suspensive conditions and it therefore follows that if any of the suspensive conditions is not fulfilled, the approval falls away.

6.8.4. The NEF in a letter dated 7 September 2012 advised the Complainant that her application for funding was subsequently declined due to the legal compliance aspect of the funding criteria of the NEF as relates to the definition of a Black Person in the Broad-Based Black Economic Empowerment Act and the Code of Good Practice. The NEF obtained confirmation that Complainant’s citizenship and thus the transaction did not meet the mandate of the NEF.

6.9. In response to the provisional report, the NEF submitted that:

6.9.1. The FMIC granted the funding conditional upon the fulfillment of, but not limited to, certain listed conditions, based on and in reliance on the correctness of inter alia the following declaration that the Complainant made in the application form:

"I/We the applicants as detailed below declares that the information provided in this document is a true and a correct reflection of the facts, and I/We fully consent to the background verification of such information. Please find attached herewith certified copy/copies of identity documents. I/We hereby warrant that I/We am a black person (BEE) in terms of the following definition:

"Black people" are, African, Coloured and Indian natural persons who are citizens of the Republic of South Africa by birth or descent as well as
natural persons who acquired citizenship by naturalisation prior to 27 April 1994:

6.10. Regarding the alleged improper prejudice suffered by the Complainant

6.10.1. The NEF denied that its conduct constituted maladministration in terms of section 6(4) (a) (i) of the Public Protector Act, 1994. If the Complainant had been upfront about her true BEE status, the NEF would have immediately informed her that the funding was declined on that ground and there would not have been any necessity to lodge a complaint with the Public Protector.

6.10.2. The NEF submitted that it did not act unlawfully nor did it act in a manner that constituted maladministration and if Complainant suffered any prejudice, it was because of the Complainant’s own misrepresentation.

6.10.3. As regards Deputy Public Protector’s observation that the NEF was negligent in not conducting due diligence, on the applicant’s file, the NEF disagrees with this observation as the Complainant knew that she did not meet the BEE qualification criterion.

6.10.4. As proposed by Deputy Public Protector, the NEF referred the Complainant’s matter to the Small Enterprise Finance Agency Ltd (SEFA). SEFA has previously declined that transaction. All the Fund can do is to request SEFA to relook at it.

6.10.5. The NEF furthermore submitted that in their view, the misrepresentation by the Complainant may constitute a reportable offence under the Prevention and Combatting of Corrupt Activities Act, 2004 and is obtaining legal advice on its obligations under the Act.
6.11. Whether what happened to the Complainant points to possible systemic deficiencies within the NEF that may lead to approval of funding to non-deserving beneficiaries and thereby prejudicing applicants

6.11.1. The NEF further denies that its conduct in this matter has revealed or exposed any deficiencies in its procedures and practices, and does not agree that it should revise its due diligence procedures and practices.

6.11.2. The NEF was further called to clarify its business processes relative to the processing of applications. A meeting was held between the representatives of the Public Protector and the NEF on 12 May 2014 and for the purpose of obtaining clarity of the processes.

6.11.3. The NEF reported that the nature of their mandate is to assist the previously disadvantaged group of people and as reflected in their enabling legislation. The NEF receives approximately four thousand (4000) applications for funding per annum and most of the applications do not entail all the required information as reflected on the application form. Nonetheless the applicants still proceed to sign the application forms confirming that the submitted application is compliant. The outstanding documents vary from identification documents, proper business plans, proof of residence and etc.

6.11.4. With regard to the issue of identification, despite the submission of identification documents, the NEF is still required to perform the verification of identity through the Department of Home Affairs (DHA). The process takes between three to six months for it to be finalised. Depending on the urgency of the application, and to avoid delays, the NEF continue to assess the merits of the application whilst they continue to receive the outstanding documents from the applications. The process
may continue up to the due diligence stage, as was the case with Ms Ngwenya's application. Whilst the process continues, and specifically on the matters that require verification from the DHA, the NEF prima facie relies on the confirmation by the applicant that the information submitted is true and correct. However, the NEF will not disburse any funding to the applicants until such time that all the required documentation has been received. Until the disbursement stage, no legal contract exists between the applicant and the NEF.

6.11.5. The Complainant's application was one of those that were assessed despite having not submitted all the required information. Due to the urgency of the application, the NEF proceeded to assess the merits whilst awaiting verification from the DHA. The reason why the issue of the identification was not pursued during the initial applications for funding was because on the initial assessments, it became apparent that on merits assessment, the Complainant did not qualify due to the commercial viability of the business. Throughout the process of the final application, and up to the due diligence stage, the Complainant continued to confirm that the information that she submitted to the NEF was true and correct.

6.11.6. The NEF further submitted a copy of the verification of identity from the Department of Home Affairs. This was issued on 23 August 2012. The NEF confirmed that it was subsequent to receipt of the confirmation of identity that the Complainant's application was declined on 7 September 2012.

6.11.7. It was agreed that the Public Protector investigation can independently review the applications received during the same month as the Complainant's application for funding (November 2011). The files were reviewed by the investigation team on 13 June 2014 and the outcome of this review is discussed hereunder.
6.12. Review of the applications received in November 2011

6.12.1. On 13 June 2014, the investigation team independently reviewed the applications received in November 2011. The purpose of the independence review was to confirm the NEF’s submission that as part of executing its mandate of promoting and facilitating black economic empowerment, they go an extra mile and assist applicants to comply with the requirements for funding.

6.12.2. In terms of the NEF information brochure, application for funding comprises of submission of the application form, business plan with 5 year projections, certified identity copy/copies, and proof of residence and company registration documents. Where relevant, supplier agreements, lease agreements, contracts, franchise agreements, sale of business agreement etc. must be supplied.

6.12.3. The investigation team reviewed a sample of twenty-two (22) applications received in November 2011 and the team made the following observations:

6.12.3.1. 1 (5%) out of the 22 applicants did not submit a Business plan and was requested to provide it;

6.12.3.2. 9 (43%) out of the 22 applicants did not submit certified copies of identity documents and were requested to provide it;

6.12.3.3. 2 (9%) out of the 22 applicants did not submit certified copies of identity documents and were requested to provide it;
6.12.3.4. 4 (19%) out of the 22 applicants did not attach financial information; and

6.12.3.5. 5 (24%) out the 22 applicants did not attach proof of residence;

6.12.4. The details of the applications reviewed are contained in the table hereunder:
<table>
<thead>
<tr>
<th>No</th>
<th>NEF Ref no</th>
<th>Date Received</th>
<th>Business Plan</th>
<th>Certified I.D copy</th>
<th>Financial Analysis</th>
<th>Proof of residence</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>111104850</td>
<td>22-Nov-11</td>
<td>Attached</td>
<td>Not attached</td>
<td>Not attached</td>
<td>Not attached</td>
<td>03 January 2012: additional information requested from applicant.</td>
</tr>
<tr>
<td>2</td>
<td>111104851</td>
<td>22-Nov-11</td>
<td>Attached</td>
<td>Not attached</td>
<td>Attached</td>
<td>Not attached</td>
<td>20 June 2012: application withdrawn as additional information requested not submitted.</td>
</tr>
<tr>
<td>3</td>
<td>111104783</td>
<td>02-Nov-11</td>
<td>Attached</td>
<td>Attached</td>
<td>Attached</td>
<td>Attached</td>
<td>10 January 2012: Application declined as it did not meet commercial viability and did not qualify in terms of NEF's eligibility criteria.</td>
</tr>
<tr>
<td>5</td>
<td>111104852</td>
<td>22-Nov-11</td>
<td>Attached</td>
<td>Not attached</td>
<td>Not attached</td>
<td>Attached</td>
<td>11 January 2012: additional information requested from applicant.</td>
</tr>
<tr>
<td>6</td>
<td>111104874</td>
<td>29-Nov-11</td>
<td>Attached</td>
<td>Attached</td>
<td>Attached</td>
<td>Attached</td>
<td>11 January 2012: application declined as it did not meet viability.</td>
</tr>
<tr>
<td>7</td>
<td>111104876</td>
<td>29-Nov-11</td>
<td>Attached</td>
<td>Not attached</td>
<td>Attached</td>
<td>Not attached</td>
<td>21 December 2011: application declined as it did not meet viability.</td>
</tr>
<tr>
<td>8</td>
<td>111104875</td>
<td>29-Nov-11</td>
<td>Attached</td>
<td>Not attached</td>
<td>Attached</td>
<td>Not attached</td>
<td>04 January: Additional information requested from applicant.</td>
</tr>
<tr>
<td>9</td>
<td>111104882</td>
<td>29-Nov-11</td>
<td>Attached</td>
<td>Attached</td>
<td>Not attached</td>
<td>Not attached</td>
<td>12 January 2012: declined due to market opportunity for new entrant not demonstrated.</td>
</tr>
<tr>
<td>10</td>
<td>111104789</td>
<td>07-Nov-11</td>
<td>Attached</td>
<td>Not attached</td>
<td>Attached</td>
<td>Not attached</td>
<td>09 December 2011: additional information requested; 09 Jan 2012: declined because funding amount exceeds.</td>
</tr>
<tr>
<td>11</td>
<td>111104890</td>
<td>29-Nov-11</td>
<td>Attached</td>
<td>Attached</td>
<td>Attached</td>
<td>Attached</td>
<td>16 January 2012: additional information requested; applicant failed to provide same.</td>
</tr>
<tr>
<td>No</td>
<td>NEF Ref no</td>
<td>Date Received</td>
<td>Business Plan</td>
<td>Certified I.D copy</td>
<td>Financial Analysis</td>
<td>Proof of residence</td>
<td>Comments</td>
</tr>
<tr>
<td>----</td>
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<td>-------------------</td>
<td>-------------------</td>
<td>----------</td>
</tr>
<tr>
<td>12</td>
<td>111104854</td>
<td>16-Nov-11</td>
<td>Attached</td>
<td>Not certified</td>
<td>Attached</td>
<td>Not Attached</td>
<td>14 December 2011-minimum requirements not met.</td>
</tr>
<tr>
<td>13</td>
<td>111104877</td>
<td>05-Nov-11</td>
<td>Attached</td>
<td>Attached</td>
<td>Attached</td>
<td>Not Attached</td>
<td>21 December 2011- application declined as it did not meet viability; re-opened; 22 March 2012-application declined on same basis.</td>
</tr>
<tr>
<td>14</td>
<td>111104889</td>
<td>23-Nov-11</td>
<td>Attached</td>
<td>Attached</td>
<td>Attached</td>
<td>Not Attached</td>
<td>10 February 2012- application declined as business plan lacks critical information.</td>
</tr>
<tr>
<td>15</td>
<td>111104892</td>
<td>28-Nov-11</td>
<td>Attached</td>
<td>Attached</td>
<td>Attached</td>
<td>Not Attached</td>
<td>22 January 2012-declined due to market opportunity for new entrant not demonstrated.</td>
</tr>
<tr>
<td>16</td>
<td>111104871</td>
<td>25-Nov-11</td>
<td>Attached</td>
<td>Not Attached</td>
<td>Attached</td>
<td>Not Attached</td>
<td>No basis to justify serviceability of frequent amount given the fact that the business is not in a position to demonstrate access to targeted market.</td>
</tr>
<tr>
<td>17</td>
<td>111104867</td>
<td>No date stamp</td>
<td>Attached</td>
<td>Attached</td>
<td>Attached</td>
<td>Attached</td>
<td>Commercial viability could not be assessed due to the applicant inability to provide information requested.</td>
</tr>
<tr>
<td>18</td>
<td>111104881</td>
<td>29-Nov-11</td>
<td>Attached</td>
<td>Attached</td>
<td>Attached</td>
<td>Not Attached</td>
<td>Commercial viability is not justifiable based on information provided.</td>
</tr>
<tr>
<td>19</td>
<td>111104781</td>
<td>02-Nov-11</td>
<td>Attached</td>
<td>Not Attached</td>
<td>Attached</td>
<td>Not Attached</td>
<td>Requested information not provided.</td>
</tr>
<tr>
<td>20</td>
<td>111104860</td>
<td>Nov-12</td>
<td>Attached</td>
<td>Attached</td>
<td>Attached</td>
<td>Not Attached</td>
<td>Commercial viability cannot be assessed as Applicant did not provide critical information.</td>
</tr>
<tr>
<td>21</td>
<td>111104888</td>
<td>28-Nov-12</td>
<td>Not Attached</td>
<td>Attached</td>
<td>Attached</td>
<td>Not Attached</td>
<td>Information requested not provided.</td>
</tr>
<tr>
<td>22</td>
<td>111104891</td>
<td>28-Nov-11</td>
<td>Attached</td>
<td>Not certified</td>
<td>Attached</td>
<td>Not Attached</td>
<td>Not commercially viable.</td>
</tr>
</tbody>
</table>
6.13. Evaluation of the evidence obtained from the parties.

6.13.1. Regarding the alleged undue delay by the NEF to consider and evaluate the Complainant’s application for funding

6.13.1.1. The Complainant has contended that she submitted copies of her identity document and Certificate of naturalisation together with her application form starting from 2010 and at no stage until 07 September 2012 did the NEF indicate that she was not a black person and was therefore ineligible for funding. The NEF on the other hand has contended that the Complainant failed to submit copies of her identity document and Certificate of naturalisation with the application form.

6.13.1.2. The application form that was completed by the Complainant on 07 November 2011 does not have a checklist that could be used to ascertain whether or not the copy of her identity document and Certificate of naturalisation was attached to the application. However paragraph one on the first page of the NEF application form stipulates that the form must be completed in full with all the required information.

6.13.1.3. One of the required documents in terms of the declaration and consent paragraph in the middle of page 2 of the application form is that the applicant should attach a copy or copies of identification documents. Paragraph one of page 1 further states that incomplete applications shall not be accepted. Should the Complainant not have attached the copies of her identity document and Certificate of naturalisation as contended by the NEF, then the latter should not have accepted and processed the Complainant’s application for funding.
6.13.1.4. The evidence has shown that since receiving the Complainant's first application on 19 April 2010, Complainant was informed only informed on 07 September 2012 that she was not a black person as envisaged in the Black Economic Empowerment Act. It took the NEF twenty-eight (28) months to discover that the Complainant was a naturalised South African of Zimbabwean origin who was not a black person as envisaged in the Black Economic Empowerment Act and therefore ineligible to be assisted by the NEF. The question to be answer is whether 28 months is a reasonable time to be informed that you have lodged your application at the wrong institution. To answer this question, we have to look at the standard set out in Section 33 and section 195 of the Constitution, particularly Section 195(1)(g).

6.13.1.5. The Complainant's identity document specifically indicates that country of birth is Zimbabwe and the Certificate of Naturalisation indicates that she acquired her citizenship by naturalisation on 15 July 1999. Due to the Complainant not being a black person as defined in the Black Economic Empowerment Act, the Complainant's application was fatally defective and accordingly invalid from the outset. This means the NEF had no authority to adjudicate its merits from April 2010 up to September 2012. There was no point therefore in doing all that the NEF did in pursuit of the application. The question I had to answer was whether in proceeding with the merits of the application, and coming back to the first hurdle after 28 months complied with just administration action as envisaged by Section 33, good administration as envisaged in section 195 and the requirement that constitutional rights be given priority and performed with due diligence as envisaged in Section 237 of the Constitution.
6.13.2. **Regarding the allegation that the NEF approved the Complainant’s application for funding and later unjustifiably retracted it**

6.13.2.1. The NEF submitted that the FMIC granted the funding conditional upon the fulfillment of, but not limited to, certain listed conditions, based on and in reliance on the correctness of *inter alia* the declaration that the Complainant made in the application form that the information provided in this document is a true and a correct reflection of the facts, and that she warrants that she is a black person as defined in the application form. It was therefore clear from the two documents that funding was approved subject to certain suspensive conditions that *inter alia* included verification of her identity documents. The letter further indicated that the above conditions including the standard suspensive conditions will be incorporated into the final agreements.

6.13.2.2. **A suspensive condition is defined as an agreement between the parties that the performance of obligations under the contract or the contract as a whole will not be enforceable until a particular condition relating to a future event has been fulfilled or has failed.** Having analysed the evidence relied upon by the NEF, I am of the view that the suspensive conditions as listed in the letter dated 10 August 2012 or any other document could not have included verification of an identity document, which is something that should have been done upfront at the stage of accepting the application form.

6.13.2.3. Even if I were to accept that the verification of the identity document was part of the unlisted suspensive conditions, the question still has to be asked whether it was proper or reasonable to have left the important issue of the verification of an identity document which is

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something that determines whether or not the NEF should be considering the application to suspensive conditions attached to a conditional grant already approved. I do not think so. It is my considered view that this hurdle should have been crossed upfront because in failing to do so, the NEF adjudicated something it had no authority to adjudicate, being the adjudication of the merits of the Complainant’s application. It can be argued that any amount spent by the NEF in adjudicating the Complainant’s application on its merits, resulting in two decisions to decline and conditionally approve one, constitutes fruitless and wasteful expenditure as envisaged in the PFMA.

6.13.3. Whether the Complainant was improperly prejudiced by the conduct of the NEF

6.13.3.1. The Complainant has submitted that as a result of the conduct of the NEF, Best Care suffered damages in the amount of R 5 754 615.39 (five million, seven hundred and fifty-four thousand, six hundred and fifteen rand and thirty-nine cents). In the main this amount consists of:

a) Business lost to Free State Department of Health in the amount of R2 322 817.69 (two million three hundred and twenty two thousand, eight hundred and seventeen rand and sixty-nine cents);

b) Standard Bank (Home loans and Overdraft) in the amount of R1 505 152.58 (one million, five hundred and five thousand, one hundred and fifty-two rand and fifty-eight cents);

c) Cancelled orders in the amount of R1 276 567.69 (one million, two hundred and seventy-six thousand, five hundred and sixty-seven rand and sixty-nine cents);
d) Salaries in the amount of R1 033 888.52 (one million, thirty-three thousand, eight hundred and eighty-eight rand and fifty-two cents);

e) Interest SEFA in the amount of R399 823.82 (three hundred and ninety-nine thousand, eight hundred and twenty-three rand and eighty-two cents); and

f) Attorney's fees in the amount of R237 932.78 (two hundred and thirty-seven thousand, nine-hundred and thirty-two rand and seventy-eight cents).

6.13.3.2. The NEF's submission is that the Complainant did not suffer any prejudice and that if she did; it was not due to its maladministration but rather due to her own misrepresentation of her BEE status.

6.13.3.3. It is true that the Complainant did sign a declaration in the application form which says the following:

"I/We the applicants as detailed below declares that the information provided in this document is a true and a correct reflection of the facts, and I/We fully consent to the background verification of such information. Please find attached herewith certified copy/copies of identity documents. I/We hereby warrant that I/We am a black person (BEE) in terms of the following definition:

"Black people" are, African, Coloured and Indian natural persons who are citizens of the Republic of South Africa by birth or descent as well as natural persons who acquired citizenship by naturalisation prior to 27 April 1994;"

6.13.3.4. Whilst it is true that the Complainant signed the declaration as a Black person or representing that she qualifies as a BEE beneficiary, her subsequent communication to the Public Protector amongst others,
including her complaint to the Public Protector dated 21 May 2012 suggests that she did not realize that she does not qualify as a BEE beneficiary, which I must add, was not an issue then.

6.13.3.5. Furthermore, the NEF’s submission indicates that no attempt was made to even confirm who she was on the first application as the NEF say it did not receive her identity document and naturalization certificate. Nowhere in its submission does the NEF say it requested these documents, as its application form states that an incomplete application will not be considered (an incomplete application includes attachments that are mandatory in the application form such as an identity document). There is no denying that had the NEF dealt with the first hurdle of determining the Complainant’s status upfront, having noted that her identity document indicated that her place of birth was Zimbabwe, her application would never have been substantively considered. With her application not being substantively considered, she would not have gone up and down trying to comply with the substantive requirement the NEF kept requiring of her which led to two rejections of her application over a period of twenty-five (25) months.

6.13.3.6. There is no evidence of the NEF having a conversation with her during the 25 months, advising her that the NEF only deals with persons who are citizens who were naturalized before 27 April 1994.

6.13.3.7. Although it is difficult to attribute the loss of the Complainant to the conduct of the NEF, it cannot be denied that she incurred costs in trying to comply with the requirements of the NEF as outlined in the rejection letters starting from the year 2010. It further cannot be denied that she has suffered emotional loss, pain and suffering. The other difficulty I have is the apportionment of responsibilities, given the fact that both parties did things that they should not have done or failed to
do things they should have done. Having said so though, the legal framework which will be discussed below places specific responsibilities on the NEF regarding ensuring good administration to prevent prejudice to those it provides services to.

6.13.3.8. Clearly the Complainant took measures that she would not have taken had the NEF informed her upfront that she does not qualify for funding.

6.13.4. Whether what happened to the Complainant points to possible systemic deficiencies within the NEF that may lead to approval of funding to non-deserving beneficiaries and thereby prejudicing applicants

6.13.4.1. As stated above, the Constitution and the Public Protector Act empower the Public Protector to investigate improper conduct in all state affairs or the public administration. Inherent in this legislative mandate, is the power to also determine if the individual complaints point to possible systemic deficiencies that warrant a systemic investigation. A systemic investigation goes beyond the issue raised in an individual complaint and looks at the underlying root causes of the individual complaint.

7. MEASURING CONDUCT AGAINST THE RULES

7.1. Regarding the alleged undue delay by the NEF to consider and evaluate the Complainant’s application for funding

7.1.1. The question that needs to be answered is whether there has been undue delay by the NEF to consider and evaluate the Complainant’s

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5 Conducting Administrative Oversight and Ombudsman Investigation: G Jones (Canada) 1st edition 2009
application for funding. Secondly whether the NEF delayed to discover the true identity of the Complainant.

7.1.2. The Complainant first applied to the NEF for funding on 19 April 2010 and the application was declined due to the on-going litigation against Best Care. The Complainant reapplied to the NEF for funding on 7 November 2011 and the application was also declined on the basis of the perceived risks associated with the then on-going litigation between Best Care and 3M and the negative financial report obtained from Experian.

7.1.3. The dispute between Best Care and 3M was amicably settled out of court on 10 February 2012 and ten (10) days later, on 20 February 2012, the Complainant revived her 2011 application for funding. The NEF declined this application on 24 May 2012 based on the NEF’s inability to obtain cession of proceeds and Best Care’s unfavourable financial position vis-à-vis Standard Bank; and the NEF’s inability to corroborate Best Care’s long term sustainability.

7.1.4. In considering all these applications starting from 19 April 2010 to 24 May 2012 no mention was made of the fact that the Complainant was not a black person as defined in the Broad-Based Black Economic Empowerment Act. It could not be established if the NEF had prior to August 2012, considered and evaluated the Complainant’s identity to determine if the Complainant was a black person and qualified to be considered for funding even though the Complainant’s identity clearly stated that the place of birth was Zimbabwe and it was possible that she acquired citizenship by naturalisation.

7.1.5. It is my considered view that in noting that the Complainant’s identity revealed that the place of birth was Zimbabwe, the NEF should have been alerted to the possibility that the Complainant had acquired
citizenship by naturalisation and the need to verify if that naturalisation took place before 27 April 1994.

7.1.6. The NEF in their submission indicated that the Complainant did not attach copies of the identity document and certificate of naturalisation. Paragraph one on the first page of the NEF application form stipulates that the form must be completed in full with all the required information. As indicated, one of the required documents in the application form is that the Applicant should attach a copy or copies of identification documents. Paragraph one of Page 1 further states that incomplete applications shall not be accepted. If the Complainant did not submit a certified copy of her identity document as indicated by the NEF, then the NEF accepted and processed an application that was incomplete. As a result, it failed to determine within reasonable time that the Complainant was not a Black person as defined in the Black Economic Empowerment Act and therefore was ineligible to apply for funding from the NEF.

7.1.7. In terms of section 51 of the Public Finance Management Act, an accounting authority of a public entity must ensure that public entity has and maintains an effective, efficient and transparent systems of financial and risk management and internal control. The accounting authority must also take effective and appropriate steps to prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity.

7.1.8. The practical effect of this section is that the NEF must, before entering into any transaction wherein public funds are involved, undertake what is termed ‘due diligence’ in order to safeguard the interests of the State against irregular, unauthorised or fruitless and wasteful expenditure. Due diligence exercise by the NEF would conceivably consist of three distinct
stages: the 'quantitative' evaluation stage; the 'qualitative' evaluation stage; and the authentication stage.

7.1.9. With regards undertaking the quantitative assessment stage of due diligence as envisaged above, the NEF would have had to compare the documents handed in by applicants for funding against a particular set checklist; whether the application forms have been correctly completed and signed; and determine at face value, there and then at the point when applicants submit their application forms and annexures thereto or within a reasonable time period thereafter, whether the applicants qualify to even be considered for funding. The due diligence process would only proceed to the qualitative evaluation stage only if the quantitative assessment stage is determined in the affirmative.

7.1.10. The NEF did not perform the quantitative evaluation of the documents submitted by the Complainant and as a result, it failed to determine within reasonable time that the Complainant was not a Black person as defined in the Black Economic Empowerment Act and therefore was ineligible to apply for funding from the NEF.

7.1.11. The Complainant had to wait for a period of twenty-eight months (April 2010 to 6 August 2012) before the NEF established that the Complainant was not a 'Black person' as envisaged in the Black Economic Empowerment Act and the Codes of Good Practice, and therefore ineligible to be assisted by the NEF. This constitutes undue delay and amounts to maladministration as envisaged in section 6 of the Public Protector Act.

7.2. Regarding the allegation that the NEF approved the Complainant's application for funding and later unjustifiably retracted it
7.2.1. The question that must be answered is whether the NEF approved the Complainant’s application for funding and later unjustifiably retracted it. The letter in question advised the Complainant that the FMIC of the NEF has granted final approval to invest R 5 000 000 in Best Care subject to, but not limited to, the following conditions:

"a) the approved funding will be utilized to purchase stock and the profits made from sales after servicing the NEF’s loan will be used to finance the operations;

b) the disbursement of funds will be on the drawdown basis subject to the presentation of valid orders.

c) NEF will approve each order subject to its profitability of which the GP margin should be below should not be below 35%;

d) NEF will pay the suppliers directly through a Letter of Credit account which you will be required to set it up with a new bank;

e) You will be required to open a separate account with another bank, other than Standard Bank, and NEF must be listed as joint signatory by all relevant parties."

7.2.2. The letter further indicated that the above conditions including the standard suspensive conditions will be incorporated into the final agreements.

7.2.3. Section 195 of the Constitution provides that public administration including the NEF should have a high standard of professional ethics in the handling of its operations, while section 195(1)(g) of the Constitution requires of the NEF to ensure that the applicants for funding are provided with timely, accessible and accurate information.
7.2.4. These afore going provisions expect of every sphere of government, organs of state and public enterprises, including the NEF to advance the aspirations of the Constitutional values and people first, in their discharge of their responsibilities and mandate.

7.2.5. Section 237 of the Constitution states that, "all constitutional obligations must be performed diligently and without delay". The importance of this section is that the NEF must put rights promised by the Constitution first. This includes the right to administrative action that is lawful, reasonable and procedurally fair as entrenched in section 33.

7.2.6. I am unable to find that the suspensive conditions included verification of an identity document, which is something that should have been done upfront at the triaging phase without wasting anyone's time and resources, including the resources of the NEF and those of the Complainant.

7.2.7. Despite having several chances to deal with the obvious preliminary issue of the identity document verification, the NEF declined the Complainant’s application for funding on 24 May 2012 and the Complainant escalated the matter to the DTI and the NEF agreed to reopen the Complainant’s application after the meeting with the DTI;

7.2.8. The Complainant should never have signed a Revolving Credit Facility Agreement with the NEF, in terms of which the NEF as the Lender agreed to make the Facility available to the Complainant subject to the fulfillment of certain suspensive conditions;

7.2.9. The allegation that the NEF approved the application and later retracted it is therefore substantiated. The NEF’s conduct in approving the application and later retracting the approval constitutes
maladministration as envisaged in section 6 of the Public Protector Act, and improper conduct as envisaged in section 182 of the Constitution.

7.3. Regarding the alleged improper prejudice suffered by the Complainant

7.3.1. The mandate\(^6\) of the NEF is to facilitate the redressing of economic inequality which resulted from the past unfair discrimination against historically disadvantaged persons. Generally speaking, historically disadvantaged people in South Africa are Black people as defined in the Black Economic Empowerment Act. In terms of that Act (the Codes of Good Practice), Black people are African, Coloured and Indian natural persons, who are citizens of the Republic of South Africa by birth or by descent as well as naturalised persons who acquired citizenship by naturalisation prior to 27 April 1994.

7.3.2. Taking the sequence of events up to when the Complainant’s application was finally rejected, despite the provisions of the law as stated above, would the NEF not condone the Complainant’s non-compliance with the NEF Act and condone her application. A response to that question is in the negative. Firstly, as pointed out\(^7\) by the DTI and the NEF, in terms of the provisions of the Public Finance Management Act if that were to happen, such actions would be in breach of the law. Secondly, in terms of the provisions of the Public Finance Management Act, were that to happen and public funds were to be paid over to Best Care or the Complainant, despite the provisions of the law, such expenditure would amount to irregular or unauthorised expenditure. In effect, read in

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\(^6\) Section 3 of the National Empowerment Fund Act.

\(^7\) During a meeting between the DTI, NEF and Deputy Public Protector on January 16, 2013
conjunction with the Public Finance Act, the BEE Act is inflexible in its application.

7.3.3. Based on the above provisions, the Complainant's application was defective and accordingly void ab initio and should not have been accepted. A determination of whether the Complainant was at the right institution was the first hurdle that should have been crossed. I do not think that it is unreasonable to expect that those hurdles that are immutable and automatically exclude a person from jurisdiction of the NEF, should be identified and dealt with upfront in order not to give an applicant false hope or an expectation that the NEF has the power to assist them.

7.3.4. Prejudice is whether someone suffered any harm as a result of maladministration; in this particular case the question should whether or not the Complainant incurred any financial or emotional loss as a result of the maladministration.

7.3.5. The Complainant was prejudiced. When government does not do what it is supposed to do or does what is not supposed to do, service fails and people suffer. The only question to be asked and answered is whether the Complainant participated in her own downfall. In other words did she come with “clean hands”?

7.3.6. My respectful view is that had the Complainant read the application form properly and correctly filled it where it says: “We the applicants as detailed below declare that the information provided in the document is a true reflection of the facts, and I fully consent to a background verification of such information. Please find attached herewith certified copies of the identity documents. I hereby warrant that I am a black person (BEE) in terms of the following definition “Black people” are African, Coloured and Indian natural persons who are citizens of the Republic of South Africa
by birth or by descent as well as natural person who acquired citizenship by naturalisation prior to 27 April 1994", she would have been spared the NEF’s maladministration and told upfront that she did not qualify and accordingly not incurred credit on the strength of imminent funding from the NEF.

7.3.7. However, it cannot be said that she did not suffer prejudice due to the NEF’s maladministration. As I indicated earlier, the identity document issue should have been picked up on the day of application or a few days thereafter. I’m even more shocked that the NEF has submitted that it processed her application without her submitting an identity document hence the inability to pick up the date of naturalization.

7.4. Whether what happened to the Complainant points to systemic deficiencies within the NEF that may lead to approval of funding to non-deserving beneficiaries and thereby prejudicing other applicants.

7.4.1. The NEF has submitted that the bulk of the applications that their office receives consist of incomplete applications. The non-processing of such applications until all the information required has been submitted, would result in undue delays and unnecessary backlogs in processing applications. The NEF is further of the view that the institution would be failing in its mandate if they were to hold the applications in abeyance and not assist its clientele until all the required information has been submitted, as the latter would defeat the purpose of the establishment of the institution.

7.4.2. The review process that the investigation team conducted on 13 June 2014, and from a sample of applications that were received and processed by the NEF in November 2011 (same month which the
Complainant’s last application was received) confirmed that the applicants do sign the application forms confirming that they have submitted the outstanding documentation despite the fact that some information is outstanding. Whilst the NEF awaits that information, and in order to curb delays in processing applications, it continues to process the applications \textit{prima facie} relying on the contents of the application form, up to the stage where, on receipt of the outstanding information, the funds get disbursed to the applicant.

7.4.3. One of the required documents in terms of the declaration and consent paragraph in the middle of Page 2 of the application form is that the Applicant should attach a copy or copies of identification documents. Paragraph one of Page 1 further states that incomplete applications shall not be accepted. The sample of cases reviewed shows that this was not complied with. The question that arises is whether the NEF complied with its own processes as stipulated in the application form stipulating that incomplete application forms will not be accepted. By its own evidence the NEF says that in the first application it never received an ID Copy and the Naturalisation Certification. It is not clear why they proceeded with the application. Had they done so, would the disaster that subsequently ensued would not have been averted. The evidence suggests that this might be a systemic problem.

8. FINDINGS

Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I make the following findings:

8.1 Regarding whether the NEF has unduly delayed to consider and evaluate the Complainant’s application for funding, I find that:
8.1.1. The Complainant first applied to the NEF for funding on 19 April 2010 and the application was declined due to the on-going litigation against Best Care. The Complainant reapplied to the NEF for funding on 7 November 2011 and the application was also declined on the basis of the perceived risks associated with the then on-going litigation between Best Care and 3M and the negative financial report obtained from Experian.

8.1.2. The dispute between Best Care and 3M was amicably settled out of court on 10 February 2012 and ten days later, on 20 February 2012, the Complainant revived her 2011 application for funding. The NEF declined this application on 24 May 2012 based on the NEF’s inability to obtain cession of proceeds and Best Care’s unfavourable financial position vis-à-vis Standard Bank; and the NEF’s inability to corroborate Best Care’s long term sustainability.

8.1.3. In considering all these applications starting from 19 April 2010 to 24 May 2012 no mention was made of the fact that the Complainant was not a black person as defined in the Broad-Based Black Economic Empowerment Act and it could not be established if the NEF had prior to August 2012 considered and evaluated the Complainant’s identity to determine if the Complainant was a black person and qualified to be considered for funding.

8.1.4. The Complainant had to wait for a period of twenty-eight months (April 2010 to 6 August 2012) before the NEF established that the Complainant was not a ‘Black person’ as envisaged in the Black Economic Empowerment Act and the Codes of Good Practice, and therefore ineligible to be assisted by the NEF. This constitutes undue delay and amounts to maladministration as envisaged in section 6 of the Public Protector Act.
8.2 Regarding whether the NEF approved the Complainant's application for funding and later retracted it.

8.2.1 The allegation that the NEF did approve the Complainant's application and later retracted the approval is substantiated proceeded to open the joint bank account with the First National Bank. The NEF advised the Complainant by letter dated 10 August 2012 that **subject to certain conditions** the FMIC the NEF has granted final approval to invest R5,000,000.00 in Best Care. **The last paragraph of the letter indicated that it should not be construed as a final offer of finance from NEF, nor should it be considered to commit NEF to this transaction. The offer to provide funding will finally be binding upon satisfactory fulfillment of the suspensive conditions as listed in the final agreement.** The approval of the application was subject to a suspensive condition which the NEF says included verification of her identity document. The actual wording was that the FMIC approved the application subject to, but not limited to, the following conditions:

"a) the approved funding will be utilized to purchase stock and the profits made from sales after servicing the NEF's loan will be used to finance the operations;
b) the disbursement of funds will be on the drawdown basis subject to the presentation of valid orders.
c) NEF will approve each order subject to its profitability of which the GP margin should be below should not be below 35%;
d) NEF will pay the suppliers directly through a Letter of Credit account which you will be required to set it up with a new bank;
e) You will be required to open a separate account with another bank, other than Standard Bank, and NEF must be listed as joint signatory by all relevant parties."
8.2.2 Section 195 of the Constitution provides that public administration including the NEF should have a high standard of professional ethics in the handling of its operations, while section 195(g) of the Constitution requires of the NEF to ensure that the applicants for funding are provided with timely, accessible and accurate information.

8.2.3 These afore going provisions expect of every sphere of government, organs of state and public enterprises, including the NEF to advance the aspirations of the Constitutional values and people first, in their discharge of their responsibilities and mandate.

8.2.4 Section 237 of the Constitution states that, "all constitutional obligations must be performed diligently and without delay". The importance of this section is that the NEF must put rights promised by the Constitution first. This includes the right to administrative action that is lawful, reasonable and procedurally fair as entrenched in section 33.

8.2.5 I am unable to find that the suspensive condition included verification of an identity document, which is something that should have been done upfront at the triaging phase without wasting anyone's time and resources, including the resources of the NEF and those of the Complainant.

8.2.6 Despite having several chances to deal with the obvious preliminary issue of the identity document verification, the NEF declined the Complainant's application for funding on 24 May 2012 and the Complainant escalated the matter to the DTI and the NEF agreed to re-open the Complainant's application after the meeting with the DTI;

8.2.7 The Complainant should never have signed a Revolving Credit Facility Agreement with the NEF in terms of which the NEF as the Lender agreed
to make the Facility available to the Complainant subject to the fulfillment of certain suspensive conditions;

8.2.8 The allegation that the NEF approved the application and later retracted it is therefore substantiated. The NEF’s conduct in approving the application and later retracting the approval constitutes maladministration as envisaged in section 6 of the Public Protector Act, and improper conduct as envisaged in section 182 of the Constitution.

8.3 Whether the Complainant was improperly prejudiced by the conduct of the NEF

8.3.1 The complainant was prejudiced. When government does not do what it is supposed to do or does what is not supposed to do, service fails and people suffer. The only question to be asked and answered is whether the complainant participated in her own downfall. In other words did she come with “clean hands”?

8.3.2 My respectful view is that had the Complainant read the application form properly and correctly filled it where it says “We the applicants as detailed below declare that the information provided in the document is a true reflection of the facts, and I fully consent to a background verification of such information. Please find attached herewith certified copies of the identity documents. I hereby warrant that I am a black person (BEE) in terms of the following definition “Black people” are African, Coloured and Indian natural persons who are citizens of the Republic of South Africa by birth or by descent as well as natural person who acquired citizenship by naturalisation prior to 27 April 1994”, she would have been spared from the NEF’s maladministration and told upfront that she did not
qualify and accordingly not incurred credit on the strength of imminent funding from the NEF.

8.3.3 However, it cannot be said that she did not suffer prejudice due to the NEF’s maladministration. As I indicated earlier, the identity document issue should have been picked up on the day of application or a few days thereafter. I’m even more shocked that the NEF has submitted that it processed her application without her submitting an identity document hence the inability to pick up the date of naturalisation.

8.4 Whether what happened to the Complainant points to possible systemic deficiencies within the NEF

8.4.1 The manner in which the application of the Complainant was handled suggests a possible systemic deficiency in the NEF’s processing of applications.

8.4.2 I cannot understand how any entity, private or public, could process anyone’s application and further enter into a credit facility with that person without ever checking their identity document. While the investigation only checked 22 applications and found a few deficiencies, I cannot say for sure there is a systemic problem; there is a need to audit the entire system.
9. **REMEDIAL ACTION**

9.1. The remedial action taken as envisaged by Section 182(1)(c) of the Constitution is that:

9.1.1. The CEO of the NEF must, within fourteen days of this report, tender a written apology on behalf of the NEF to the Complainant for the inconvenience she suffered as a result of the delay to discover the Complainant’s identity;

9.1.2. The CEO must, within thirty days of this report, submit to the Public Protector a copy of the said written apology to the Complainant;

9.1.3. The CEO must ensure that the NEF must, before the end of its current financial year, revise its due diligence procedures and practices to remedy such deficiencies as identified herein.

9.1.4. The CEO of the NEF must within 30 days of this report consult with the Complainant in the determination of what the United Kingdom Parliamentary and Health Services Ombudsman calls “sorry money” which money is given to a person as consolation for mishaps caused and experienced.

10. **MONITORING**

10.1. The CEO of the NEF must within sixty days of the release of this report, submit to the Public Protector a progress report in respect of the remedial action referred to in paragraph 9 above.

10.2. The NEF must within ninety days henceforth, submit to the Public Protector, a plan of action relating to the implementation of the remedial action referred to in paragraph 9 above.
10.3. The Public Protector will monitor the progress made in implementing the remedial action over regular intervals.

ADV THOLOTHALO MADONSELA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

DATE: 01/10/2014

Assisted by Ms Zingisa Zenani- Senior Investigator
Supervised by Ms Ponatshego Mogaladi- Executive Manager