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Executive Summary

(i) "Unpaid services" is a report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, and section 8(1) of the Public Protector's Act, 1994.

(ii) The report communicates the Public Protector's findings and directives on remedial action following an investigation into a complaint lodged by Mr D L Mogotsi (the Complainant) on 25 February 2011, alleging undue delay by the Ngwathe Local Municipality (the Municipality) with regard to paying him as a service provider for the services rendered to the Municipality.

(iii) The Public Protector considered and investigated the following issues:

(a) The Municipal Manager alleged failure to pay the Complainant without due cause and whether such failure violated section 64 and 65 of the MFMA which required him to maintain an effective and accountable accounting system and to pay all debtors within 30 days of receiving an invoice or statement and whether the alleged failure constituted maladministration;

(b) The Municipal Manager's alleged failure to attend to the verification of the Complainant's invoice for more than four years and whether such failure constitutes an undue delay and non-compliance with section 64 and 65 of the MFMA and section 195 of the Constitution, which requires public administration to maintain a high standard of professional ethics; and

(c) The Municipal Manager's failure to co-operate with the Public Protector for the duration of this investigation as obliged to do in terms of section 181(3) of the Constitution and possibly being in violation of said provision.
(d) Whether the municipality’s conduct was improper amounting to maladministration and if so whether the Complainant was prejudiced by such improper conduct or maladministration.

(iv) The investigation was conducted by way of correspondence and the perusal of documents received. Applicable legislation, relevant case law, Treasury regulations, policies and internal prescripts of the municipality were also considered and applied.

(v) The Public Protector makes the following findings:

(a) The Municipal Manager failed to comply with section 64 and 65 of the MFMA which required him to maintain an effective and accountable accounting system and to pay all debtors within 30 days of receiving an invoice or statement and this conduct was improper and constitutes maladministration.

(b) The Municipal Manager did not attend to the verification of the invoice for more than four years and this constituted an undue delay and non-compliance with section 64 and 65 of the MFMA and section 195 of the Constitution which requires public administration to maintain a high standard of professional ethics.

(c) The Municipal Manager failed to co-operate with the Public Protector for the duration of this investigation as obliged to do in terms of section 181(3) of the Constitution and thus violated this provision. This conduct was improper and constitutes maladministration.

(d) The Complainant was prejudiced by the acts of maladministration referred to above as he did not receive any payment for the services he rendered to the Municipality and incurred various expenses during his delivery on the contract and in the process of trying to get his payment for approximately the last 4 years.
(vi) Appropriate remedial action to be taken in terms of section 182(1)(c) of the Constitution section 6(4)(c)(ii) of the Public Protector Act; is that the Executive Mayor of the Municipality must take urgent steps to ensure that:

(a) A letter of apology is submitted to the Complainant for the prejudice suffered within one month of the date of this report.

(b) The Complainant is paid the full outstanding amount as per the invoice submitted to the Municipality on 17 June 2008 within one month of the date of this report, together with interest which must be calculated on the amount payable in accordance with the Prescribed Rate of Interest Act and calculated from the date of submission of the oversight certificate dated 17 June 2008 to date.

(c) An internal investigation is conducted in terms of section 171 of the MFMA for financial misconduct by the Municipal Manager and that the possibility of instituting disciplinary action against him must be considered, if such steps are warranted after the investigation.
REPORT ON AN INVESTIGATION INTO THE UNDUE DELAY BY THE NGWATHE LOCAL MUNICIPALITY TO PAY A SERVICE PROVIDER

1. INTRODUCTION

1.1. "Unpaid Services" is a report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and Section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).

1.2. The report is submitted in terms of section 182(1)(b) of the Constitution of the Republic of South Africa Act, 1996 (Constitution) and section 8(1) of the Public Protector Act, 1994 (Public Protector Act) to the:

1.2.1. The Speaker of the Fezile Dabi District Municipality, Mr SI Mbalo;

1.2.2. The Mayor of the Ngwathe Local Municipality, Mr Moeketsi Mofhodi;

1.2.3. The Municipal Manager of the Ngwathe Local Municipality, Mr Norman Selai;

1.2.4. The Member of the Executive Council (MEC) for Co-operative Governance and Traditional Affairs, Free State Provincial Government, Ms SM Mlamleli; and

1.2.5. Head of the Free State Department of Co-Operative Governance and Traditional Affairs, Mr K Ralikontsane.

1.3. A copy is provided in terms of section 8(3) of the Public Protector Act to the:

1.3.1. Speaker of the National Assembly, Mr MV Sisulu;

1.3.2. Chairperson of the Justice and Constitutional Development Portfolio Committee, Mr LT Landers;
1.3.3 Premier of the Free State Province, Mr A Magashule; and

1.3.3 Complainant.

1.4 It relates to an investigation by the Public Protector into allegations of improper prejudice suffered by the Complainant as result of the alleged undue delay by the Ngwathe Local Municipality (the Municipality) to pay a service provider for services rendered.

2. THE COMPLAINT

2.1 A complaint was lodged by Mr D L Mogotsi with the Public Protector on 25 February 2011 by the Complainant.

2.2 The Complainant alleged that he completed the electrification of 226 stands in Phiritona Extension 8, Heilbron, in accordance with his service provider agreement with the Municipality and duly submitted an invoice on 7 January 2008 to the Engineering Firm which was tasked with overseeing the project. The Engineering Firm submitted a certificate, dated 17 June 2008, to confirm the work done by the Complainant on 7 January 2008, to the Municipality.

2.3 The Complainant did not receive confirmation from the Municipality on the payment of his invoice and after numerous attempts to obtain clarity on the delay in payment, he eventually received a letter, from the Municipality, dated 25 January 2011, which indicated that his claim was being verified and the process would be finalised during February 2011. He did not receive any payment during February 2011.

2.4 He then lodged his complaint with the Public Protector on 25 February 2011.
3. **POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR**

3.1 The Public Protector was established in terms of Chapter 9 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 empowered 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 complaint relates to the conduct of the Municipality which amounts to conduct in the public administration and which therefore falls within the jurisdiction and powers of the Public Protector to investigate.

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

4. **ISSUES TO BE CONSIDERED BY THE PUBLIC PROTECTOR**

4.1 The following were issues considered by the Public Protector:

4.1.1 The Municipal Manager’s failure to comply with section 64 and 65 of the MFMA which required him to maintain an effective and accountable accounting system and to pay all debtors within 30 days of receiving an
invoice or statement and whether the alleged failure constituted maladministration.

4.1.2 The Municipal Manager’s failure to attend to the verification of the invoice for more than four years and whether this constituted an undue delay and non-compliance with section 64 and 65 of the MFMA and section 195 of the Constitution which requires public administration to maintain a high standard of professional ethics.

4.1.3 The Municipal Manager’s failure to co-operate with the Public Protector for the duration of this investigation as obliged to do in terms of section 181(3) of the Constitution and possibly being in violation of said provision.

4.1.4 Whether the Complainant was prejudiced by the potential acts of maladministration referred to above.

5. THE INVESTIGATION

5.1 The scope

5.1.1 The investigation considered the reason for which the Municipality delayed to pay the Complainant for services that were rendered to the Municipality.

5.1.2 The objectives of the investigation were to determine whether the delay in payment was as a result of maladministration and if so, whether the Complainant suffered any prejudice as a result of the maladministration.

5.2 Documents, correspondence and information requested, received and analysed

5.2.1 Detailed complaint from Complainant with supporting documents such as correspondence and letters;
5.2.2 Written and telephone correspondence with the Municipal Manager, Mr N Selai;

5.2.3 Written and telephone correspondence with Mr P Morse, Acting Municipal Manager;

5.3 Legislation and other prescripts

5.3.1 Sections 33, 195 and 181 of the Constitution of the Republic of South Africa, 1996 (the Constitution);

5.3.2 Sections 1 and 3 of the Promotion of Administrative Justice Act, No. 3 of 2000 (PAJA);

5.3.3 Sections 105 and 155 of the Local Government: Municipal Systems Act, No. 32 of 2000 (the Systems Act);

5.3.4 The Municipal Finance Management Act, No. 56 of 2003 (the MFMA);

5.3.5 Section 1 of the Prescribed Rate of Interest Act 7 of 1997; and

5.3.6 Applicable jurisprudence.

6. EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

6.1 The complainant submitted that on 17 June 2008, he submitted copies of his invoice for the work done on 7 January 2008, together with the certificate of work done, from the Engineering Firm that managed the project.

6.2 The Municipality received the certification that the work was done on 17 June 2008. On 25 January 2011, three and a half years later, it informed the
Complainant that a verification process was being conducted into his invoice and that such process will be completed in February 2011.

6.3 In a letter dated, 11 April 2011, the Public Protector submitted an enquiry regarding the Complainants allegations to the then Municipal Manager, Mr Selai, which was however, not responded to.

6.4 After several attempts at telephone and emails enquiries, the Public Protector was informed, on 18 August 2011, that Mr Selai was suspended and then resigned and that Mr Moroe was the Acting Municipal Manager.

6.5 A letter was thereafter addressed to Mr Moroe, requesting an explanation as to the reasons for the delay to pay the amount owed to the Complainant. The acknowledgement of receipt was only received on 18 November 2011.

6.6 Despite numerous requests and follow up letters thereafter, the Municipality has, to date, not furnished an adequate response as to the reasons for the delay in the payment to the Complainant neither have they communicated any such information to the Complainant.

6.7 The Public Protector issued a Provisional Report in accordance with section 7(9) of the Public Protector Act on 24 August 2012. The Provisional Report was distributed on the basis of confidentiality to provide the recipients therein an opportunity to respond to its contents.

7. EVALUATION OF THE EVIDENCE OBTAINED DURING THE INVESTIGATION

7.1 The documents submitted to the Public Protector confirm that the Complainant was duly appointed by the Municipality to complete the project of the electrification of Phiritona in Heilbron.

7.2 The documents presented by the complainant, including the certificate from the engineering firm appointed by the municipality to oversee his work and
the letter from the municipality confirming that the amount to be paid by him was still being verified, supports the Complainant’s contention that he executed a project for the Municipality. The certificate he presented from an Engineering Firm appointed by the Municipality to oversee the work, further corroborates his assertion that he duly completed his assignment.

7.3 The Municipality received the confirmation from the Engineering Firm and the invoice of the Complainant as evidenced by its letter of 25 January 2011.

7.4 The Complainant has not been paid for the services rendered to the Municipality.

7.5 The Municipality did not dispute its failure to pay the Complainant for the services provided for the duration of the Public Protector’s investigation and no responses were received from any recipient of the Provisional Report.

8. LEGAL AND REGULATORY FRAMEWORK


8.1.1 The objects of local government are described in section 152 of the Constitution and sub-section (1)(a) requires local government to be an accountable government.

8.1.2 Section 195 of the Constitution requires public administration to promote and maintain a high standard of professional ethics and services to be provided impartially, fairly, equitably and without bias. It further requires public administration to be accountable and transparent.

8.1.3 In terms of section 181(1) of the Constitution, 1996, the Office of the Public Protector is an institution that strengthens constitutional democracy in the
Republic of South Africa. Other organs of state, through legislative and other measures, must assist the Public Protector in terms of section 181(3).

8.2 The Municipal Finance Management Act, No. 56 of 2003

8.2.1 Section 64 and 65 of the MFMA requires the Municipal Manager to take reasonable steps to ensure that the Municipality has and maintains a management, accounting and information system which accounts for debtors and has and maintains an effective system of expenditure control, including procedures for the approval, authorisation, withdrawal and payment of funds.

8.2.2 Section 65 of the MFMA further requires the Municipal Manager to ensure “that all money owing by the municipality be paid within 30 days of receiving the relevant invoice or statement, unless prescribed otherwise for certain categories of expenditure.”

8.2.3 In terms of section 171 of the MFMA “the Municipal Manager of a municipality commits an act of financial misconduct if that Municipal Manager deliberately or negligently—

(a) contravenes a provision of this Act;
(b) fails to comply with a duty imposed by a provision of this Act on the Municipal Manager of a municipality;...

8.2.4 In terms of section 171(4) of the MFMA financial misconduct must be investigated by the municipality and if steps are warranted after investigation, disciplinary proceedings must be instituted.

8.2.5 On the facts before me, the conduct of the Municipal Manager in not effecting payment for services rendered is a matter to be investigated in terms of section 171 of the MFMA.
8.3 **Prescribed Rate of Interest Act 7 of 1997**

8.3.1 Section 1 of Prescribed Rate of Interest Act prescribed that:

“(1) If a debt bears interest and the rate at which the interest is to be calculated is not governed by any other law or by an agreement or a trade custom or in any other manner, such interest shall be calculated at the rate prescribed under subsection (2) as at the time when such interest begins to run, unless a court of law, on the ground of special circumstances relating to that debt, orders otherwise.”

8.3.2 In terms of Section 1(2) of this Act the Minister of Justice and Constitutional Development prescribes the interest rate from time to time by publication in the Government Gazette. The current rate as prescribed by the Minister in 1993 is 15.5%.

8.3.3 In *Dali en Andere v Regering van die Republiek van Suid-Afrika en Andere*¹ the court found that where the amount demanded is a liquidated amount, interest runs from the date that the amount is due, owing and payable.

9. **ANALYSIS AND CONCLUSION**

9.1. The Complainant’s allegation of non-payment is considered to be substantiated by the evidence.

9.2. An assessment of the documents received from the Complainant indicates that the Municipality appointed his company as a service provider, and that the Complainant proceeded to finalise the work that he was contracted to finalise and that all required invoices and certificates were submitted within the stipulated time frame.

9.3. The Municipality was provided with an opportunity to respond to the allegations made but failed to do so. It was also requested to provide an

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¹ [2001] 12 BPLR 2790 (T).
explanation as to the reasons for which the Complainant was not paid and it failed to do so.

9.4. The Municipality to date (except for an acknowledgement of receipt of a letter during November 2011) has not responded to any enquiries of the Public Protector regarding the reasons for the delay or the reasons for non-payment to the Complainant as it was obliged to do in terms of section 181(3) of the Constitution.

9.5. Section 65 of the MFMA requires the Municipality to pay for the services rendered by a service provider within 30 days. The Complainant rendered a service in January 2008; however, four years later he has still not received payment in this regard.

9.6. The Municipality cannot be seen to have acted in an accountable and transparent manner as required by section 152 and 195 of the Constitution.

10. FINDINGS

The Public Protector makes the following findings:

10.1. The Municipal Manager failed to comply with section 64 and 65 of the MFMA which required him to maintain an effective and accountable accounting system and to pay all debtors within 30 days of receiving an invoice or statement and this conduct is improper and constitutes maladministration.

10.2. The Municipal Manager did not attend to the verification of the invoice for more than four years and this constituted an undue delay and non-compliance with section 64 and 65 of the MFMA and section 195 of the Constitution which requires public administration to maintain a high standard of professional ethics.
10.3. The Municipal Manager failed to co-operate with the Public Protector for the duration of this investigation as obliged to do in terms of section 181(3) of the Constitution and thus violated this provision.

10.4. The Complainant was prejudiced by the acts of maladministration referred to above as he did not receive any payment for the services he rendered to the Municipality and the expenses he incurred in delivering the said service and in the process of trying to secure his payment from the municipality for approximately the last 4 years.

11. REMEDIAL ACTION

The appropriate remedial action to be taken in accordance with section 182(1)(c) of the Constitution is that the Executive Mayor of the Municipality must take urgent steps to ensure that:

11.1. A letter of apology is submitted to the Complainant for the prejudice suffered within one month of the date of this report.

11.2. The Complainant is paid the full outstanding amount as per the invoice submitted to the Municipality on 17 June 2008 within one month of the date of this report, together with interest which must be calculated on the amount payable in accordance with the Prescribed Rate of Interest Act and calculated from the date of submission of the oversight certificate dated 17 June 2008 to date.

11.3. An investigation is conducted in terms of section 171 of the MFMA for financial misconduct by the Municipal Manager and that the possibility of instituting disciplinary action against him must be considered, if such steps are warranted after the investigation.
12. MONITORING

The Public Protector will:

12.1. Require an implementation plan from the Executive Mayor on the manner in which he intends to implement the remedial action referred to in paragraph 10 above within 30 days from the date of this report;

12.2. Require a progress report on the implementation one month from the date of submission of the implementation plan; and

12.3. Monitor the progress made in this regard over regular intervals.

[Signature]

ADV T N MADONSELA
PUBLIC PROTECTOR OF
THE REPUBLIC OF SOUTH AFRICA

Date: 24/04/2013

Assisted by: Adv. E Cilliers, Mr. MM Mashinini and Adv. MC Mokoena