
PUBLIC PROTECTOR
SOUTH AFRICA

REPORT NO 23 OF 2018/19


"Allegations of failure by the Rustenburg Local Municipality to award a tender and failure to respond to a request for reasons."

REPORT ON AN INVESTIGATION INTO THE ALLEGED FAILURE BY THE RUSTENBURG LOCAL MUNICIPALITY TO AWARD TENDER NO RLM/MMM0033/2015 TO MOTSOGAPELE PROJECT CO-OPERATIVE LIMITED AND TO RESPOND TO MR DANIEL PENYENYE'S LETTER REQUESTING REASONS FOR NOT AWARDING THE TENDER TO THE CO-OPERATIVE
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Executive Summary

(i) This is my report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(2A)(a) of the Public Protector Act, 1994 (the Public Protector Act).

(ii) The report communicates my findings and appropriate remedial action taken in terms of section 182(1)(b) of the Constitution, following an investigation into allegations of prejudice suffered by Mr Daniel Penyenye caused by the unlawful disqualification of his co-operative from participating in a tender process, as well as failure to provide reasons for not awarding a tender to Motsogapele Projects Co-operative Limited by the Rustenburg Local Municipality (the Municipality).

(iii) The complaint was brought by Mr Daniel Penyenye (the Complainant) who is an adult male person from Rustenburg, North West Province.

(iv) In essence, the Complainant alleged that during August 2015, the Municipality advertised a tender for the maintenance of parks around Rustenburg. His co-operative, Motsogapele Projects Cooperative Limited, submitted a bid for the tender.

(v) Although his co-operative quoted lower, the tender was awarded to a co-operative that quoted higher than his bid.

(vi) During December 2015, he delivered a letter to the Municipality requesting reasons for not awarding the tender to his co-operative. However, the Municipality failed to respond.
(vii) Upon conducting a preliminary investigation, I was informed by the Municipality that the Complainant's co-operative was disqualified for failing to meet the required minimum number in terms of its membership.

(viii) On analysis of the complaint, the following issues were identified and investigated:

(a) Whether the Municipality improperly disqualified Motsogapele Projects Co-operative Limited when it awarded tender no RLMMM0033/2015;

(b) Whether the Municipality failed to respond to the Complainant's request for reasons not to award the tender to Motsogapele Projects Co-operative Limited; and

(c) Whether Motsogapele Projects Co-operative Limited and the Complainant suffered any prejudice as a result of the conduct of the Municipality.

(ix) The investigation process was conducted through correspondence between my office and the Municipality, including analysis of the applicable legislative framework and prescripts.

(a) Key laws and prescripts taken into account to help me to determine if there had been improper conduct on the part of the Municipality and prejudice to the Complainant and the Co-operative, were mainly those imposing administrative standards that should have been complied with by the Municipality.

(b) Section 26(1) of the Co-operatives Act 14 of 2005 (the Co-operatives Act) provides that if the membership of a co-operative is reduced to a less number than required and remains so for a period of six months, such a co-operative is deemed to have been deregistered.
(c) Section 33(1) and (2) of the Constitution of the Republic of South Africa, 1996 (the Constitution) provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair and that everyone whose rights have been adversely affected by an administrative action has a right to be given written reasons.

(d) Section 217(1) of the Constitution provides that "when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective".

(e) Section 5(1) of the Promotion of Administrative Justice Act 3 of 2000, (PAJA) provides that "any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action".

(f) Section 5(2) of the PAJA provides that "the administrator to whom the request is made must, within 90 days after receiving the request, give that person adequate reasons in writing for the administrative action".

(g) Section 5(4) of PAJA provides that "an administrator may depart from the requirement to furnish adequate reasons if it is reasonable and justifiable in the circumstances, and must forthwith inform the person making the request of such departure".
(x) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I make the following findings:

(xi) Regarding whether the Municipality improperly disqualified Motsogapele Projects Co-operative Limited when it awarded tender no RLMMMM00033/2015:

(a) The allegation that the Municipality improperly disqualified the co-operative is substantiated.

(b) Section 26(1) of the Co-operatives Act provides that a co-operative with a reduced membership can only be deemed to be deregistered if it remains so for a period of six months.

(c) When the tender was awarded, although Motsogapele Projects Co-operative Limited had a reduced membership, a period of six months had not yet lapsed. The tender was awarded on 04 December 2015 and six months would have lapsed on 03 January 2016.

(xii) Regarding whether the Municipality failed to respond to the Complainant’s request for reasons not to award the tender to Motsogapele Projects Co-operative Limited:

(a) The allegation that the Municipality failed to respond to the Complainant’s request for reasons not to award the tender to the Co-operative is substantiated.

(b) The Complainant delivered a letter to the office of the Municipal Manager on 18 December 2015 requesting reasons for not awarding the tender to his co-operative. The letter was received by Mrs Nkgopoleng Nkele who was the secretary in the office of the Municipal Manager.
(c) Another similar letter dated 02 March 2016 was sent to the Municipal Manager by the Complainant’s attorney Mr W A Wessels. There is no evidence from the Municipality indicating that it responded to the two letters.

(d) The conduct of the Municipality contravened the provisions of section 33(2) of the Constitution and Section 5(2) of the PAJA which requires that everyone who has been adversely affected by an administrative decision has a right to be provided with written reasons within the prescribed period.

(e) No reasonable and justifiable reasons were provided to the Complainant, as required by section 5(4) of PAJA, for departure from furnishing the reasons.

(xiii) Regarding whether Motsogapele Projects Co-operative Limited and the Complainant suffered prejudice as a result of the Municipality’s conduct in the circumstances:

(a) The allegation that Complainant and the Co-operative suffered prejudice as a result of the Municipality’s conduct is substantiated.

(b) The Co-operative suffered prejudice because it was denied the opportunity to progress to the next procurement stage when the Municipality improperly disqualified it. However, there was no guarantee that the Co-operative would have been a successful bidder had it progressed to the next stage.

(f) The Complainant paid an amount of R500-00 when he instructed W A Wessels Attorneys to assist him in obtaining the reasons from the Municipality for not awarding the tender to his co-operative. The Complainant also incurred an amount of R1000.00 for purchasing the tender document.
(g) The disqualification of the Complainant was in violation of section 217 of the Constitution and resulted in the Complainant not being able to compete in the procurement process and therefore was unfairly prejudiced.

(xiv) The appropriate remedial action I am taking in pursuit of section 182(1)(c) of the Constitution, with the view of placing the Complainant as close as possible to where he would have been had the improper conduct or maladministration not occurred, is the following:

(a) The Municipal Manager must, within 60 working days from the date of the report, take disciplinary action against the following officials:

1. Ms P Motsepe;
2. Mr P Malatsi;
3. Mr D Dube;
4. Mr T Mothuloe;
5. Ms O Makgale;
6. Mr O Kgosiemang;
7. Mr P Motsepe;
8. Ms S Molefe;
9. Mr D Matshego;
10. Mr S Kotsedi;
11. Mr P Seeco;
12. Mr A Kgoate; and

(b) The Municipal Manager must, within 30 working days from the date of the report, ensure that the Municipal Supply Chain Management officials are trained on the provisions of the Co-operatives Act to avoid a repeat of a similar incident.
(c) The Municipal Manager must, within 30 working days from the date of the report, ensure that the Complainant is reimbursed in the amount of R1500.00 with interest, calculated in terms of the Prescribed Rate of Interest Act 55 of 1975, from the date on which the reasons should have been furnished to the Complainant.

(d) It is recommended that the Municipal Manager must, within 30 working days of this report, submit a copy to the Municipal Speaker for tabling at the Municipal Council to consider an ex gratia payment to the Complainant for prejudice suffered as a result of improper disqualification of the Co-operative.

(e) The Municipal Manager must, within 30 working days from the date of the report, send a letter of apology to the Complainant.
REPORT ON AN INVESTIGATION INTO THE ALLEGED FAILURE BY THE
RUSTENBURG LOCAL MUNICIPALITY TO AWARD TENDER NO
RLM/MMM0033/2015 TO MOTSOGAPELE PROJECT CO-OPERATIVE LIMITED AND
TO RESPOND TO MR DANIEL PENYENYE’S LETTER REQUESTING REASONS FOR
NOT AWARDING THE TENDER TO THE CO-OPERATIVE

1. INTRODUCTION

1.1. This is my report issued in terms of section 182(1)(b) of the Constitution of the
Republic of South Africa, 1996 (the Constitution), and section 82A(a) of the Public
Protector Act, 1994 (the Public Protector Act).

1.2. The report is submitted in terms of section 8(3) of the Public Protector Act to the
following officials:

1.2.1 The Member of the Executive Council (MEC) for Local Government and Human
Settlements, Honourable FG Gaolaolwe;

1.2.2 The Administrator of the North West Provincial Government, Mr S Mpanza;

1.2.3 The Head of Department of Local Government and Human Settlements, Mr E
Motoko (HOD);

1.2.4 The Executive Mayor of the Rustenburg Local Municipality, Councillor Mpho
Khunou;

1.2.5 The Speaker of the Rustenburg Local Municipality, Councillor Shila Mabale-Huma;
and

1.2.6 The Municipal Manager of the Rustenburg Local Municipality, Ms Nqobile Sithole.
1.3. A copy of the report is also provided to Mr Daniel Penyenye to inform him about the outcome of the investigation.

1.4. The report relates to an investigation into the alleged failure by the Rustenburg Local Municipality (Municipality) to award tender no RLM/MMM0033/2015 to Motsogapele Projects Co-operative Limited and its failure to respond to a request by the Complainant for reasons for not awarding the tender to the Co-operative.

2. THE COMPLAINT

2.1. The complaint was lodged by Mr Daniel Penyenye (Complainant) on behalf of his Co-operative, Motsogapele Projects Co-operative Limited (Co-operative). The complaint was received by my office on 08 April 2016.

2.1.1 He is an adult male person of house no 887 Pilane Street, Tlhabane near Rustenburg in the North West Province and also the Director of the Co-operative;

2.1.2 On 07 August 2015, the Municipality advertised tender number RLM/MM0033/2015 in the Sowetan newspaper for the maintenance and management of parks around Rustenburg. The Co-operative bid for the tender and the Complainant paid an amount of R1000.00 to purchase the tender document;

2.1.3 Although the Co-operative quoted the lowest price of R2 571 720.00, the tender was awarded to a co-operative which quoted higher at R3 742 455.80;

2.1.4 The Co-operative also has the relevant experience in the job as it previously maintained parks for the Municipality during 2014;

2.1.5 The Municipality did not inform him of the outcome of the tender process and he only heard about the outcome from other people;
2.1.6 On 18 December 2015, he delivered a letter to the office of the Municipal Manager requesting reasons for the tender not being awarded to the Co-operative. However, the Municipality failed to respond; and

2.1.7 During March 2016, he instructed private attorneys, WA Wessels Attorneys, to obtain reasons from the Municipality and he paid them an amount of R500.00 for consultation. The attorneys addressed a letter dated 02 March 2016 to the then Acting Municipal Manager, Mr V Makona (former Acting Municipal Manager), requesting reasons why the tender was not awarded to the Co-operative, but no response was received.

3 POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The Public Protector is an independent constitutional body established under section 182(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 as regulated by national legislation:

(a) To investigate any conduct in state affairs, or in the Public Administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
(b) To 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;
(c) To report on that conduct; and
(d) To take appropriate remedial action.”

3.3 Section 182(2) of the Constitution directs that the Public Protector has additional powers and functions prescribed by legislation.
3.4 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector is also given the power to resolve disputes through mediation, conciliation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.5 In the *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others* [1] the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect. The Constitutional Court further held that: "When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences".[2]

3.6 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (paragraph 65).

3.7 An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced (paragraph 67).

3.8 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint (paragraph 68).

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[1] [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].
[2] *Supra* at para [73].
3.9 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow (paragraph 69).

3.10 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to (paragraph 70).

3.11 The Public Protector's power to take appropriate remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of investigation and the type of findings made (paragraph 71).

3.12 Implicit in the words "take action" is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And "action" presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence, (paragraph 71(a)).

3.13 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (paragraph 71(d)).

3.14 "Appropriate" means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case (paragraph 71(e)).
3.15 In the matter of the President of the Republic of South Africa v Office of the Public Protector and Others, Case no 91139/2016 (13 December 2017), the Court held as follows:

(a) The Public Protector, in appropriate circumstances, has the power to direct the President to appoint a commission of enquiry and to direct the manner of its implementation. Any contrary interpretation will be unconstitutional as it will render the power to take remedial action meaningless or ineffective (paragraphs 85 and 152).

(b) There is nothing in the Public Protector Act that prohibits the Public Protector from instructing another entity to conduct further investigation, as she is empowered by section 6(4)(c)(ii) of the Public Protector Act (paragraph 91 and 92).

(c) Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers (paragraph 100 and 101).

(i) Conduct an investigation.

(ii) Report on that conduct; and

(iii) To take remedial action.

(d) The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or prima facie findings (paragraph 104).

(e) The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court (paragraph 105).
(f) The fact that there is no firm findings on the wrong doing, does not prohibit the Public Protector from taking remedial action. The Public Protector's observations constitute prima facie findings that point to serious misconduct (paragraphs 107 and 108).

(g) Prima facie evidence which point to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action (paragraph 112)."

3.16 The Municipality is an organ of state and its conduct amounts to conduct in state affairs, as a result of this, the matter falls squarely within the ambit of the Public Protector's mandate.

3.17 My jurisdiction in this matter 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(1)(a) of the Constitution and sections 6 and 7 of the Public Protector Act.

4.1.2 The process commenced with a preliminary investigation which included interviews and meetings with the Complainant, correspondence with the Municipality; analysis of relevant documentation; research and the consideration and application of the relevant laws, regulatory framework and jurisprudence.

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:
a) What happened?

b) What should have happened?

c) Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration?

d) In the event of maladministration what would it take to remedy the wrong or to place the Complainant as close as possible to where he or she 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 whether or not the Municipality acted improperly in its failure to award the tender to the Complainant’s Co-operative.

4.2.3 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration or improper conduct. Where a complainant has suffered improper prejudice, the idea is to place him or her as close as possible to where he or she would have been had the Municipality complied with the regulatory framework setting the applicable standards for good administration.

4.3 On analysis of the complaint, the following issues were identified to inform and focus the investigation:

4.3.1 Whether the Municipality improperly disqualified Motsogapele Projects Co-operative Limited when it awarded tender no RLM.MM0033/2015;
4.3.2 Whether the Municipality failed to respond to the Complainant's request for reasons for not awarding the tender to Motsogapele Projects Co-operative Limited; and

4.3.3 Whether Motsogapele Projects Co-operative Limited and the Complainant suffered any prejudice as a result of the Municipality's conduct in the circumstances.

4.4 Key sources of information

4.4.1 Meetings and consultations with the Complainant and the Municipality

(a) A meeting between my investigation team and Mr Masombuka on 05 October 2016
(b) A meeting between my team and the Municipality on 23 August 2016

4.4.2 Correspondence between my office and the Municipality

(a) A copy of a letter from my office to the Municipality dated 15 April 2016
(b) A copy of the letter from my office to the Municipality dated 05 May 2016
(c) A copy of the letter from my office to the Municipality dated 01 June 2016
(d) Copy of an email from my office to the Municipality dated 19 September 2016
(e) A copy of the letter from the Municipality to my office dated 16 September 2016
(f) A copy of the letter from my office to the Department dated 02 October 2017
(g) A copy of the letter from my office to the Municipality dated 12 March 2018
(h) Copy of a letter from my office to the Municipality dated 04 July 2018

4.5 Legislation and other prescripts

(a) The Constitution
(b) The Public Protector Act
(c) The Co-operatives Act 14 of 2005 (Co-operatives Act)
(d) The Local Government: Municipal Systems Act 32 of 2000 (MSA)
(e) The Rustenburg Local Municipality Supply Chain Management Policy.

5 THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS

5.1 Regarding whether the Municipality improperly disqualified Motsogapele Projects Co-operative Limited when it awarded tender no RLM/MM0033/2015:

Common cause issues

5.1.1 During August 2015 the Municipality advertised in the Sowetan newspaper, a tender to maintain parks around Rustenburg. The Complainant, on behalf of the Co-operative, submitted a bid for the said tender on 24 August 2015.

5.1.2 The tender was not awarded to the Co-operative, but to three other co-operatives, namely, Kopano Games Co-operative Limited for the maintenance of Rustenburg Visitors Information Centre; Kopano Games Co-operative for the maintenance of Rustenburg Civic Centre; and Maile Fresh Produce Co-operative for the maintenance of Tlhabane Park in December 2015.

5.1.3 At the time of the submission of the bid, the Co-operative had three members only.

5.1.4 According to the records of the Municipal’s Bid Evaluation Committee (BEC), a Technical Evaluation Report was prepared by a Project Management Unit (PMU), which is a unit within the Directorate Technical and Infrastructure Services. The PMU evaluated all the bids for responsiveness and adjudication.
5.1.5 According to the PMU report, the PMU met on 18 September 2015 and consisted of the following officials:

(a) Mr P Motsepe – Director
(b) Ms O Makgale – Official; and
(c) Mr O Kgosiemang – Official

5.1.6 According to the PMU report, 13 companies were considered and 10, including the Co-operative, were found to be non-responsive and disqualified. The reason for the disqualification of the Co-operative was that: “the company is no longer a Co-operative as it is remaining with 3 members. Co-operatives must have a minimum of 5 members.”

5.1.7 The Technical Evaluation Report was submitted to the BEC. The BEC met on 25 November 2015 to consider the report. The meeting of the BEC was attended by the following BEC officials:

(a) Ms P Motsepe – Acting Chairperson;
(b) Mr P Malatsi – member.
(c) Mr D Dube - member; and
(d) Mr T Mothuloe - member.

5.1.8 According to the BEC minutes, the Technical Evaluation Report was endorsed and a recommendation to award the tender was made as follows:

(a) Rustenburg Visitors Information Centre be awarded to Kopano Games Co-operative;
(b) Rustenburg Civic Centre be awarded to Jumbo Five Investment Co-operative;
(c) Tlhabane Park be awarded to Maile Fresh Produce Co-operative;
(d) Kloofspruit Park be awarded to Kopano Games Co-operative; and
(e) Paul Bodenstein Park be awarded to Jumbo Five Investment Co-operative.
5.1.9 The BEC submitted its report with recommendation to the Bid Adjudication Committee (BAC). The BAC met on 01 December 2015 and consisted of the following officials:

(a) Ms S Molefe – Chairperson;
(b) Mr D Matshego – member;
(c) Mr S Kotsedi – member;
(d) Mr J Pieters – member;
(e) Mr P Seeco – member; and
(f) Ms A Kgoathe – member.

5.1.10 The minutes of the BAC show that after consideration of the BEC’s recommendations, the BAC recommended to then Acting Municipal Manager that the tender be awarded as follows:

(a) Rustenburg Visitors Information Centre - Kopano Games Co-operative;
(b) Rustenburg Civic Centre - Kopano Games Co-operative;
(c) Tlhabane Park - Kopano Games Co-operative;
(d) Kloofspruit Park - Kopano Games Co-operative; and
(e) Paul Bodenstein Park - Maile Fresh Produce Co-operative.

*Issues in dispute*

5.1.11 On submission of the bid, the Complainant stated in an undated covering letter to the Municipality that the Co-operative’s Board had dismissed 2 of its members with effect from 03 July 2015. The Complainant argued that the Co-operative was still a properly registered entity when the tender was awarded in December 2015.

5.1.12 In terms of the Certificate of Confirmation that was issued by the Commissioner of Companies to the Co-operative, it had five members as at 13 June 2013.
My investigation team raised the matter with the Municipality as per a letter dated 15 April 2016. In its response, the Municipality through a letter dated 19 September 2016 from the former Municipal Manager indicated that the Co-operative was disqualified because it did not conform to the requirements of a primary Co-operative in that it had only three members whilst the law required it to have a minimum of five members.

Application of the relevant laws

Section 217(1) of the Constitution required the Municipality to conduct its procurement process in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

According to section 6 of the Co-operatives Act, before a Close Co-operative could be registered, it should have at least a minimum number of 5 people.

Section 6(1)(a) under part 1 of Chapter 2 of the Co-operatives Act provides that:

"An application to register a Co-operative must be made by a minimum of five members in case of a primary Co-operative."

This implies that any primary co-operative, including the Co-operative, must have 5 members in order to be registered, hence it was registered as such in 2013.

Section 26(1) of the Co-operatives Act provides as follows:

"If membership of a co-operative is reduced to a less number than required and remains so for a period of six months, such a co-operative is deemed to be deregistered."
5.1.19 According to this section, a co-operative will only cease to become a co-operative if it has a reduced membership for a period of up to 6 months. In this case, the Co-operative's membership was reduced with effect from 03 July 2015, and the tender was awarded in December 2015. Therefore, by the time the tender was awarded, the Co-operative still qualified to be a legal entity in that the period of 6 months had not yet lapsed.

5.1.20 In line with section 217 of the Constitution, the Municipality's Supply Chain Management Policy regulates the Municipality's procurement processes. Regulation 12.11(5) of the Municipality's Supply Chain Management Policy provides that "a responsible agent, if applicable must carry out preliminary evaluation of all bids and submit a draft bid evaluation report to the BEC for consideration".

5.1.21 Regulation 12.11(6) of the Supply Chain Management Policy provides that "any evaluation of a bid must consider all the bids received and note all the details of every bid in the report in terms of:

(a) ..................
(b) ..................
(c) ..................
(d) Whose bid is not in compliance with the specifications of the bid or does not meet the pre-qualification criteria."

5.1.22 In this case, the responsible agent referred to in Regulation 12.11(5) of the Supply Chain Management Policy is the Project Management Unit (PMU) which evaluated all the bids in terms of responsiveness and compliance and thereafter submitted its draft report to the BEC.

5.1.23 The PMU, in its preliminary evaluation of all the bids, reported that the Co-operative did not meet the pre-qualification criteria in that it did not comply with the
provisions of the Co-operatives Act in terms of its membership and then recommended that it be disqualified. The PMU submitted its draft report to the BEC for consideration.

5.1.24 Regulation 12.11(iv) of the Municipal's Supply Chain Management Policy provides that:

"The Bid Evaluation Policy must evaluate bids in accordance with:

(a) .................
(b) .................
(c) .................
(d) Check for responsiveness and compliance with prescribed formalities and requirements as set out in the bid document and submit a report with recommendations to the Bid Adjudication Committee regarding the awarding of the tender."

Conclusion

5.1.25 Based on the evidence gathered, it can be concluded that when the bids were evaluated and adjudicated, the Co-operative was still a legal entity and therefore in compliance with the Co-operatives Act and therefore the Municipality did not act in line with the applicable legal prescripts.
5.2 Regarding whether the Municipality failed to respond to the Complainant's request for reasons not to award the tender to Motsogapele Projects Co-operative Limited:

*Common cause issues*

5.2.1 It is common cause that on 18 December 2015, the Complainant submitted a letter to the office of the Municipal Manager requesting reasons for disqualifying the Co-operative.

5.2.2 The Municipality did not respond to the Complainant's letter.

*Issues in dispute*

5.2.3 The only issue in dispute is whether the Municipality received letters from the Complainant and his attorneys.

5.2.4 In a meeting held on 05 October 2016 between my investigation team and Mr J Masombuka, the Manager in the Municipality's Supply Chain Management Unit, he indicated that the Municipality probably did not respond to the letter by the Complainant as it was not delivered to the relevant unit, namely, Supply Chain Management, which was responsible for the tender.

5.2.5 Evidence in my possession shows that the letter was delivered to and received by Mrs Nkgopoleng Nkele, secretary in the office of the Municipal Manager, on 18 December 2015. She indicated that she signed and stamped the letter and passed it on to the former Acting Municipal Manager on the same date.

5.2.6 A similar letter dated 02 March 2016 was sent by the Complainant's attorneys for the attention of the former Acting Municipal Manager. There was no evidence from the Municipality indicating that it ever responded to any of the letters.
Application of the relevant laws

5.2.7 Section 33(1) of the Constitution provides as follows: "everyone has a right to an administrative action that is lawful, reasonable and procedurally fair."

5.2.8 In terms of this section, the Complainant must be subjected to administrative action which is fair and lawful by the Municipality.

5.2.9 Section 33(2) of the Constitution provides that: "everyone whose rights have been adversely affected by an administrative action has a right to be given written reasons."

5.2.10 This section implies that after the Municipality had taken a decision not to award the tender to the Co-operative it should have provided unsuccessful bidders with reasons why their bids were not successful.

5.2.11 Section 195 of the Constitution provides as follows:

"Public Administration must be governed by the democratic values and principles enshrined in the Constitution including the following:

a) ............
b) ............
c) ............
d) ............
e) ............
f) Public administration must be accountable.
g) ............
h) Transparency must be fostered by providing the public with timely, accessible and accurate information."
5.2.12 This section requires public administration to be governed by the values and principles which are enshrined in the Constitution and one such value is accountability. In other words, public officials must be accountable to the people on the work that they do.

5.2.13 The Municipality was expected to be accountable to bidders and provide them with information in terms of how the selection process was handled. It must also be transparent and give reasons for its decision.

5.2.14 Section 5(1) of the Promotion of Administrative Justice Act, 2000 (PAJA) provides that “any person whose rights have been materially and adversely affected by an administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person become aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action”.

5.2.15 In this case, the Municipality was expected to inform the Complainant of the outcome of the tender process.

5.2.16 Section 5(2) of PAJA provides that: “An administrator, to whom a request is made, must within 90 days after the request is made, provide adequate reasons in writing to the requester.”

5.2.17 Section 5(4) of PAJA provides that “an administrator may depart from the requirement to furnish adequate reasons if it is reasonable and justifiable in the circumstances, and must forthwith inform the person making the request of such departure”.

5.2.18 No reasonable and justifiable reasons were furnished to the Complainant for departure from the requirement to furnish adequate reasons.
5.2.19 In this case, the former Acting Municipal Manager, after receiving a request from the Complainant on 18 December 2015, had 90 days to provide the reasons and if there were grounds to depart from the requirement to furnish adequate reasons, the Municipality was required to furnish adequate reasons.

5.2.20 The only time the Municipality furnished reasons for its administrative action was in September 2016 when it was responding to my office.

Conclusion

5.2.21 Based on the evidence gathered, it can be concluded that the Municipality has violated section 33 of the Constitution and section 5 of PAJA for its failure to provide reasons to the Complainant.

5.3 Regarding whether Motsogapele Projects Co-operative Limited and the Complainant suffered prejudice as a result of the Municipality’s conduct in the circumstances:

Issues in dispute

5.3.1 The Complainant argued that the Co-operative has been improperly disqualified from the procurement process and such conduct had caused it to suffer prejudice in that it was denied an opportunity to proceed to the next stage of the procurement process, which may have resulted in it being awarded the tender.

5.3.2 He further indicated that the Co-operative suffered prejudice because had it been a successful bidder, it could have benefited financially.

5.3.3 The Complainant reported that he paid R1000.00 to purchase the tender document from the Municipality in order to bid for this tender. He further indicated that he instructed WA Wessels Attorneys to assist him to obtain reasons from the
Municipality for not awarding the tender to the Co-operative. He claimed to have incurred legal costs amounting to R500.00 when he instructed the Attorneys.

5.3.4 The Complainant's tender price was an amount of R2 571 720.00 and had the Municipality not improperly disqualified the Co-operative, it may have been appointed and earned an income.

Application of the relevant laws

5.3.5 Section 33 of the Constitution provides that: "everyone whose rights have been adversely affected by an administrative action has a right to be given written reasons".

5.3.6 Similarly, section 62 of the MSA provides that: "a person whose rights are affected by the decision of a political structure, political office bearer, staff member of a Municipality in terms of a power or duty delegated or sub-delegated by a delegating authority may appeal against that decision by giving written notice of the appeal and the reasons, within 21 days of the date of such notification."

5.3.7 According to this section, the Complainant would have been entitled to appeal the decision of the Municipality within 21 days had the Municipality provided him with written reasons.

5.3.8 The tender contract was only for a period of 12 months, effective from January 2016 until December 2016. Therefore by the time the Municipality furnished my office with reasons, the contract had already been implemented.

5.3.9 If the Complainant had decided to appeal the decision of the Municipality, his appeal would have only been based on the process that was followed by the Municipality when awarding the tender, by stating that the Co-operative was
unlawfully excluded. However, there is no guarantee that at the end, the Co-operative would have been successful in getting the tender, since there is no evidence to prove that the Co-operatives that were given the tender, did not deserve it. There is also no evidence that the Co-operative would not have been successful if it went through the evaluation stage.

5.3.10 On 31 May 2018, I signed a notice in terms of section 7(9) of the Public Protector Act wherein I gave the implicated Municipal officials the preliminary outcome of my investigation. In the said notice, I indicated to the officials that based on the evidence I have, I was likely to make an adverse finding against them and requested to be provided with any evidence if they had, which evidence would rebut what I had.

5.3.11 The notices were personally delivered at the Municipal premises on 04 July 2018 and were received by Mrs Lebogang Sekoboane, secretary to the Municipal Manager, but to date the implicated officials have failed to respond. Therefore this final report is without further inputs from them.

6 FINDINGS

Having regard to the evidence, the regulatory framework determining the standard which the Municipality should have complied with, and the impact on the Complainant, I make the following adverse findings against the Municipality:

6.1 Regarding whether the Municipality improperly disqualified Motsogapele Projects Co-operative Limited when awarding tender no RLM/MM0033/2015:

6.1.1 The allegation that the Municipality improperly disqualified the Co-operative when awarding tender number RLM/MM 0033/2015 is substantiated.
6.1.2 Although the Co-operative had a reduced membership at the time of awarding the tender, the period of 6 months had not yet lapsed for it to be deemed deregistered. The tender was awarded on 04 December 2015 and 6 months would have lapsed on 03 January 2016.

6.1.3 In terms of section 26(1) of the Co-operatives Act, a co-operative with a reduced membership will only be deemed to be deregistered after six months, if it remains as such.

6.1.4 The Municipality’s PMU officials who disqualified the Co-operative during the preliminary technical evaluation stage as well as the BEC and BAC officials during the bid evaluation as well as the adjudication stages acted improperly since the disqualification was premature and in contravention of section 26(1) of the Co-operatives Act.

6.1.5 The Acting Municipal Manager, Mr Makona, also simply approved the recommendations of the BAC without satisfying himself that the procurement process that was followed, complied with the Co-operatives Act.

6.1.6 The conduct of the Municipality therefore constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in 6(4)(a)(i) of the Public Protector Act.

6.2 Regarding whether the Municipality failed to respond to the Complainant’s request for reasons for not awarding the tender to Motsogapele Projects Co-operative Limited:

6.2.1 The allegation that the Municipality failed to respond to the Complainant’s request for reasons not to award the tender to the Co-operative is substantiated.
Evidence showed that the letter requesting reasons was delivered to the office of the Municipal Manager on 18 December 2015 and received by Mrs Ngqopoleng. Another letter dated 02 March 2016 was sent by the Complainant’s attorney for the attention of the former Acting Municipal Manager. There was no evidence from the Municipality indicating that it ever responded to any of the letters.

The conduct of the Municipality contravened the provisions of sections 33 and 195 of the Constitution, section 5(2) of the PAJA and section 62 of the MSA.

In the circumstances, the conduct also constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

Regarding whether Motsogapele Projects Co-operative Limited and the Complainant suffered prejudice as a result of the Municipality’s conduct in the circumstances:

The allegation that the Complainant and the Co-operative suffered prejudice as a result of the Municipal’s conduct is substantiated.

The Co-operative suffered prejudice because it was denied the opportunity to progress to the next procurement stage when the Municipality improperly disqualified it. However, there was no evidence that the Co-operative would have been a successful bidder had it progressed to the next stage.

The Complainant paid an amount of R500.00 when he instructed WA Wessels Attorneys to assist him obtain reasons from the Municipality for not awarding the tender to the Co-operative. The Complainant also incurred an amount of R1000.00 for purchasing the tender document.
7 REMEDIAL ACTION

7.1 The appropriate remedial action I am taking in pursuit of section 182(1)(c) of the Constitution, with a view of placing the Complainant and the Co-operative as close as possible to where they would have been had the maladministration not occurred, is the following:

7.1.1 The Municipal Manager must, within 60 working days of publication of this report, take disciplinary action against the following officials:

1. Ms P Motsepe;
2. Mr P Malatsi;
3. Mr D Dube;
4. Mr T Mothuloe;
5. Ms O Makgale;
6. Mr O Kgosiemang;
7. Mr P Motsepe;
8. Ms S Molefe;
9. Mr D Matshego;
10. Mr S Kotsedi;
11. Mr P Seeco;
12. Mr A Kgqate; and

7.1.2 The Municipal Manager must, within 30 working days from the date of the report, ensure that the Municipal Supply Chain Management officials are trained on the provisions of the Co-operatives Act to avoid a repeat of a similar incident.

7.1.3 The Municipal Manager must, within 30 working days from the date of the report, ensure that the Complainant is reimbursed in the amount of R1500.00 with interest,
calculated in terms of the Prescribed Rate of Interest Act 55 of 1975, from the date on which the reasons should have been furnished to the Complainant.

7.1.4 It is recommended that the Municipal Manager must, within 30 working days of this report, submit a copy to the Municipal Speaker for tabling at the Municipal Council to consider an ex gratia payment to the Complainant for prejudice suffered as a result of improper disqualification of the Co-operative.

7.1.5 The Municipal Manager must, within 30 working days from the date of the report, send a letter of apology to the Complainant.

8. **MONITORING**

8.1 The Municipal Manager must provide my office with an action plan within 21 working days from date of the report regarding implementation of the above remedial action.

8.2 My office will monitor implementation of the remedial action.

8.3 The submission of the implementation plan and the implementation of my remedial action shall, in the absence of a court order directing otherwise, be complied with within the period prescribed in my report.

ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 07/11/2018