



Annexure A

Criminal Prosecution

DUTY TO REPORT CORRUPTION IN TERMS OF THE PREVENTION AND COMBATTING OF CORRUPT ACTIVITIES ACT 12 OF 2004

1. The main piece of legislation dealing with acts of corruption is The Prevention and Combatting of Corrupt Activities Act 12 of 2004 (Hereinafter referred to as "PRECCA")
2. Section 34(1) reads as follows, any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any other person has committed:

"34(1)(a) an offence under part 1,2,3, or 4, or section 20 or 21 (in so far as it relates to the aforementioned offences of Chapter 2; or

34(1)(b) the offence of theft, fraud, extortion, forgery or uttering a forged document,

involving an amount of R 100 000 or more, must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to any police official."

3. Section 34 of PRECCA places a duty on certain persons to report certain offences.
4. Section 34(4)(b) of PRECCA, says that in the case of a Municipality, the Municipal Manager appointed in terms of section 82 of the Local Government: Municipal Structures Act, 1998 (Act 117 of 1998) is the person responsible to report the case to the SAPS.
5. Our advice to the Municipal Manager is that he has a responsibility to report these alleged instances of corruption. The threshold for reporting contained in PRECCA, is very low in that even a suspicion creates a duty to report:

"who knows or ought reasonably to have known or suspected that any other person has committed...."



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6. The *South African Police Service Amendment Act 10 of 2012*, states that reporting should be made to the Directorate for Priority Crime Investigation (DPCI) in terms of Section 34(1) of the Act.
7. The National Head of the DPCI approved guidelines in respect of reporting matters in respect of Section 34 of the Act. Kindly find attached marked annexure/schedule "**CP1**".
8. PRECCA provides for an obligation to report to the South African Police Services, acts of corruption and dishonesty. Failure to do so can result in a jail sentence of up to 10 years.
9. In addition to the requirement to report to a police official in terms of Section 34(1) of PRECCA, Treasury Regulations 12.5.1 issued in terms of the Public Finance Management Act 1 of 1999 (PFMA) further requires that when it appears to officials of departments and constitutional institutions of the State that a State Institution has suffered losses or damages through criminal acts or possible criminal acts or omissions, the matter must be reported in writing to the accounting officer of the institution as well as the South African Police Service. Failure to comply with the provisions of Treasury Regulation 12.5.1 will constitute grounds for financial misconduct.
10. Kindly find attached marked "**CP2**" the circular from National Treasury dated 6 September 2011.

DUTY TO REPORT ALLEGED FINANCIAL OFFENCES IN TERMS OF THE MUNICIPAL FINANCE MANAGEMENT ACT 56 OF 2003 AND REGULATIONS THEREWITH

11. The obligation placed on the Municipal Manager and/or any other official within the Municipality is further cemented by the Municipal Finance Management Act 56 of 2003 (**Hereinafter referred to as "MFMA"**) and the regulations therewith.
12. In terms of section 10 of the regulations:
 10. (1) *Where a financial offence has been committed by any person referred to in section 173 of the Act, the accounting officer or, if the accounting officer is involved, the municipal council or board of directors of the municipal entity, as the case may be, must report the alleged financial offence to the South African Police Service.*

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(2) If there is a likelihood of further financial loss for a municipality or municipal entity as a result of a financial offence, the accounting officer, council or board of directors must report the matter without delay to the South African Police Service and not await the completion of any investigation referred to in regulations 5 and 6 related to the financial offence.

(3) Where a financial offence is successfully prosecuted, the judgment must be reported to the National Treasury, together with full details of the convicted person, the name of the municipality where the offence was committed and the sanction that was imposed

13. Our advice to the Municipal Manager is that he has a responsibility to report these alleged instances of financial misconduct to the SAPS in terms of section 10 of the regulations.

Definition of Corruption

14. PRECCA creates a general offence of corruption that is broadly defined. It also criminalises certain specified corrupt activities and applies to both the public and private sector.
15. Chapter 2 of the Act defines corruption as:

"...any person who directly or indirectly gives or accepts or offers to give or accept any gratification amounting to an unauthorised or improper inducement to act or not to act in a particular manner is guilty of the offence of corruption"

16. A person is guilty of an offence in terms of PRECCA, if he or she directly or indirectly accepts or offers to accept a gratification (as defined) from another person or gives or agrees to give a gratification to any other person for his benefit, or that of another.
17. The giving or acceptance must be done in order to induce the other party to act in an improper manner, in the performance of that individual's duties. The underlying principle is that guilt will be determined by intention.
18. It is our advice that many of the allegations contained in the forensic report fall well within the ambit of section 4 of PRECCA.

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19. It was confirmed by the Minister of Local Government in his letter to the Speaker dated 5th December 2019, that he had lodged criminal charges. He does not specify which cases were reported.

The way forward:

20. We suggest that Council request us to make sure by finding out from the Minister which cases have been reported and what charges have been laid.
 21. We suggest that the Municipal Manager file a "Section 34" report in terms of PRECCA with the SAPS, which will encapsulate the allegations relating to corruption in terms of PRECCA and alleged financial offences in terms of the MFMA.
 22. It is worth noting that in terms of the MFMA regulations, Council are expected to report financial allegations, if the Municipal Manager is not able to do so.
 23. Further, Section 34 of PRECCA creates a wide definition of persons in positions of authority with a duty to report corruption as defined by the Act. This may result in a duty to report corruption being placed on persons in positions of authority within the Municipality, other than the Municipal Manager.
 24. There are previous reports prepared by the team that submitted the forensic report that is before us now. Apparently, there is a report dated 20th July 2018 and others. The question is which report was given to the SAPS to proceed with charges? As it our client is in possession of more than one report.
 25. However, the responsibility remains on all the persons identified herein to follow the statutory requirements.
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