



Annexure D

The Local Government Municipal Finance Act, 2003 and the Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings 2014”

(“the MFMA and the MFMA Regulations”).

This must this read with the MFMA Circular No. 68 and 76 and particularly Annexure A (the diagram which sets out the process to implement Financial Misconduct Regulations) which is attached hereto for ease of reference due to its importance.

Some important sections of the MFMA to take note of:

1. In terms of Section 65 of the Local Government: Municipal Finance Management Act, 56 of 2003 (the MFMA), the accounting officer is responsible for the management of the expenditure of the Municipality.
2. In terms of Section 67 of the MFMA, there are strict requirements that must be met before funds of the Municipality are transferred to organisations or bodies outside any sphere of government.
3. Section 171 of the MFMA distinguishes between financial misconduct by different officials e.g. the accounting officer; the chief financial officer; a senior manager of other official and requires the Municipality to investigate allegations of financial misconduct and if the investigate warrants such a step to institute disciplinary proceedings.
4. Sections 171 and 172 of the MFMA, financial misconduct means any act of financial misconduct referred to subsection(a), section 171 of the Act, committed by an official of the Municipality; or subsection (b) section 172 of the Act committed by an official of a Municipality Entity (which does not apply to the municipality).
5. In terms of section 173 of the MFMA if a financial offence is committed by any person in terms of section 173 of the Act, such offence must be reported to the SAPS.
6. In terms of section 174 of the MFMA a person is liable on conviction of an offence in terms of section 173 to imprisonment for a period not exceeding five years or to an appropriate fine determined in terms of applicable legislation.



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7. The MFMA defines financial misconduct. In simple terms, if one contravenes the MFMA, that is financial misconduct.
8. One must distinguish between financial misconduct and irregular expenditure.

Some important paragraphs in the MFMA regulations:

9. In terms of paragraph 3 (1)(a) of the MFMA regulations, any person must report an allegation of **financial misconduct against the accounting officer, senior manager, or the chief financial officer** of a Municipality, to the Municipal Council of the Municipality, Provincial Treasury and National Treasury.
10. In terms of paragraph 3 (1)(b) of the MFMA regulations, any person must report an allegation of **financial misconduct against an official of the Municipality, other than its accounting officer**, to that accounting officer.
11. In terms of paragraph 4 (1) of the MFMA regulations a Municipal Council **must establish a disciplinary board** to investigate allegations of financial misconduct in the Municipality and to monitor the institution of disciplinary proceedings against an alleged transgressor.
12. In terms of paragraph 4 (2) of the MFMA regulations, a disciplinary board is an independent advisory body that assists the Council with the investigation of allegations of financial misconduct and to provide recommendations on further steps that need to be taken regarding disciplinary proceedings.
13. In terms of paragraph 3 of the MFMA regulations a disciplinary board must consist of a maximum of five members appointed on a part-time basis by the Council for a period not exceeding three years, in accordance with a process as determined by the Municipal Council.
14. In terms of paragraph 4 (6)(e) a disciplinary board may consist of any other person as may be determined by the Municipal Council. Council need to give direction if they wish to appoint additional members to the aforesaid disciplinary board. There are procedures provided for this in section 6 (7) and 6 (8). One may coopt a senior manager in another unit (who does not have a conflict to interest) or if a municipality does not have enough capacity



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one may approach a disciplinary board established by a district municipality or equivalent provincial or national structure.

The MFMA Circular No. 76 and Annexure A:

15. This must read with the MFMA Circular No. 76 and Annexure A thereto (the diagram which sets out the process to implement financial Misconduct Regulations) which is attached hereto for ease of reference due to its importance.
16. The attached diagram (Annexure A) sets out very clearly the process that must be followed against officials and/or political officer bearers.

The Disciplinary Board:

17. We also enclose **the terms of reference and reporting procedures: Annexure G.**
18. We are in possession of minutes of a briefing meeting with the disciplinary board chairperson dated 30th August 2019 and 2nd October 2019. These have been included for ease of reference to show the functioning of the Disciplinary Board so far.
19. The composition of the board was discussed and its role. The role of the Municipal Manager, after the disciplinary board has made recommendations to council was also discussed. The terms of reference of the board was on the agenda. It was resolved, *inter alia*, to refer MPAC cases to the Board.
20. It is a fairly new addition in Local Government. According to the Chairperson of the audit committee, he thinks the Bitou Municipality might be one of the first municipalities where the Disciplinary Board has actually started to function.
21. The members are:
 - 21.1. Mr. J Roux (Chairperson and member of audit committee);
 - 21.2. Mr. G Groenewald (Acting Director Corporate Services);
 - 21.3. Ms. H Bester (Chief Audit Executive);
 - 21.4. Mr. L Loliwe (Acting Manager Legal Services); and
 - 21.5. The Municipal Manager.

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Summary: Enforcing proper financial management through disciplinary and criminal proceedings: N Steytler and J de Visser say the following in Local Government Law of South Africa (November 2019, Issue 12):

22. The MFMA seeks to secure compliance with the numerous duties and functions it details by creating both acts of misconduct, dealt with in disciplinary proceedings, and offences, to be prosecuted in criminal proceedings. As part of the duties of an accounting officer, the municipal manager must take all reasonable steps to ensure that disciplinary proceedings and, if need be, criminal proceedings, are instituted against officials who have allegedly committed an act of financial misconduct or an offence (S 62(1)(e) MFMA).
23. The CFO also commits an act of misconduct when he or she deliberately or negligently fails to carry out any delegated duty, (In terms of ss 79 of 81(1)(e) MFMA) or contravenes or fails to comply with a condition of a delegated power or duty (S 171(2)(a) and (b) MFMA). A CFO may not make, permit or instruct another municipal official to make unauthorised, irregular, or fruitless and wasteful expenditure, or provide incorrect or misleading information to the municipal manager for any written reports the manager must compile. Any of these acts constitute acts of misconduct (S 171(2)(c) and (d) MFMA). Similar acts of misconduct are created for senior managers and other officials exercising management responsibilities (S 171(3) MFMA).
24. Once allegations of misconduct have been made against a municipal manager or any of the financial officers, the municipality must investigate the matter (S 171(4)(a) MFMA). This duty does not arise where these allegations are frivolous, vexatious, speculative or obviously unfounded (S 171(4)(a) MFMA). If allegations are made against an official other than the municipal manager, the latter must oversee the investigation. If the municipal manager is accused, the mayor bears the responsibility of overseeing the investigation.
25. If the investigation reveals a prime facie case, the Municipality must institute disciplinary proceedings against the responsible officer in accordance with the municipality's usual systems and procedures (S 171(4)(b) MFMA).

Summary: criminal proceedings: N Steytler and J de Visser say the following in Local Government Law of South Africa (November 2019, Issue 12): (as far as the MFMA is concerned – must be read with our Annexure A):

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26. Certain acts committed by Councillors, municipal managers, CFOs, senior managers and other officials are deemed to be criminal. The seriousness of these offences is apparent from the fact that any offence in terms of section 173 of the MFMA carries a prison sentence of up to five years, or an appropriate fine (S 174 MFMA the fines are determined in terms of applicable legislation).

The Municipal Manager as “accounting officer”:

27. A wide array of conduct is subject to criminal sanction. The first set of conduct comprises both deliberate and grossly negligent acts which do not comply with listed sections of the MFMA. These sections relate to the fiduciary duty of the municipal manager to the council and the general management of the municipality.
28. The failure to disclose to the council and mayor all material facts available to or reasonably discoverable by the municipal manager, and which may in any way influence their decisions or actions, constitutes an offence (S 61(2)(b) MFMA). A further offence is the municipal manager's failure to take all reasonable steps to ensure, among other things, “that the resources of the municipality are used effectively, efficiently and economically” while executing his or her financial administration duties (S 62(1)(a) MFMA referred to by s 173(1)(a)(i) MFMA). Not only is the criminal conduct premised on the vague standard of “failing to take all reasonable steps”, but the “effective, efficient and economic” elements are equally obtuse.
29. The other offences refer to the failure to establish systems for asset and liability management, (S 63(2)(a) and (c) MFMA) revenue management, (S 64(2)(a) and (d) MFMA) expenditure control, (S 65(2)(a)(b)(c)(d) and (i) MFMA) and supply chain management (S 111 MFMA). A more concrete offence is the failure to “take all reasonable steps” to prevent unauthorised, irregular, or fruitless and wasteful expenditure, (S 173(1)(a)(iii) MFMA). Similarly, the failure to take all reasonable steps to prevent corrupt practices in the managing of assets or receipt of money, or in implementing the supply chain management policy, is also criminalised (S 173(1)(a)(iv) MFMA).
30. Three elements of these offences require closer inspection. Firstly, the *actus reus* can either be an act or an omission. An ‘act’ consists of a direct contravention of a provision, while an ‘omission’ consists of the failure to comply with a positive duty imposed by statute. In proving the *actus reus*,



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there must be evidence that, for example, a municipality did not have or maintain “a management, accounting and information system that accounts for the assets and liabilities of the municipality” (S 63(2)(a) MFMA). This is an objective assessment. The second element of the offence is the establishment of a causal link between any action or omission by the municipal manager and the objective state of affairs. It must be shown that the officer either acted contrary to a provision or failed to take all reasonable steps required by a provision. Once the *actus reus* elements have been established, the *mens rea* must be proved; the action or omission must either have been deliberate or the result of gross negligence (see ch 10 para 10.2 on the definition of gross negligence).

31. Given the high premium placed on the supervisory roles of the Auditor-General, the National Treasury and the province, it is not surprising that the deliberate misleading or withholding of information from them, has been criminalised. The municipal manager may not deliberately mislead or withhold information from the Auditor-General on any municipal bank account or on money received or spent (S 173(1)(b) MFMA). Likewise, the municipal manager may not deliberately provide false or misleading information in any document which must be submitted to the Auditor-General, the National Treasury, or any other organ of state, or made public (S 173(1)(c) MFMA).

Senior managers and other officials:

32. Senior managers and other finance officials exercising delegated authority (in terms of s 79 MFMA) are also subject to criminal sanctions if they deliberately or in a grossly negligent way contravene or fail to comply with a condition of the delegation (S 173(3) MFMA). It is also a criminal act when any official (or any other person that acts on behalf of the municipality) deliberately or in a grossly negligent way “impedes an accounting officer from complying” with a provision of the MFMA (S 173(5)(a) MFMA). The MFMA further stipulates that officials (the municipal manager and other persons acting on behalf of the municipality will also be include) are guilty of an offence if they:
 - 32.1. deliberately or in a grossly negligent way give incorrect, untrue or misleading information material to an investment decision relating to borrowing by the municipality (S 173(5)(b) MFMA).



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- 32.2. illegally withdraw money from a municipal bank account (S 173(5)(c) with reference to s 11 MFMA),
 - 32.3. fail to disclose material information when the municipality borrows money (S 173(5)(d) with reference to s 49 MFMA),
 - 32.4. interfere in the supply chain management system (S 173(5)(e) with reference to ss 115(2) and 118 MFMA),
 - 32.5. change the Auditor-General's audit report or the financial statements after the audit has been done (S 173(5)(e) with reference to s 126(5) MFMA).
33. Finally, it is an offence to deliberately and in a grossly negligent way provide false or misleading information for any document that will be submitted to the council, the mayor, the municipal manager, the Auditor-General, the National Treasury or the public (S 173(5)(f) MFMA).

Further regulation of disciplinary and criminal proceedings

34. The MFMA makes specific provision for the Minister of Finance, acting with the concurrence of the Minister for local government, to provide through regulations further detail on the content of financial misconduct, as well as the sanctioning procedures for disciplinary and criminal proceedings (S 175(1) MFMA).

Civil liability of office-bearers and officials

35. The MFMA exempts municipalities, their political structures, office-bearers or officials from civil liability for any loss or damage resulting from the exercise of any power or the performance of any function in terms of the Act, provided it was done in good faith (S 176(1) MFMA).
36. Without limiting liability in terms of the common law or other legislation, a municipality may in terms of section 176(2) of the MFMA recover from the persons listed above, any loss or damage suffered by it because of their deliberate or negligent unlawful actions when performing a function of office.
37. *Heyneke v Umblatuze Municipality* [2010] JOL 25625(LC), is a salutary example of how section 176(2) of the MFMA can effectively be used where



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the unlawful conduct of councillors results in financial loss for the municipality. In the instant case the majority of councillors placed the municipal manager on involuntary “special leave”, an act that was unlawful in terms of the employee’s contract, and the relevant legislation and municipal policy. The Court found that the councillors acted with ulterior motive in order to discipline the manager and probably to dismiss him (At para 130). The municipality incurred cost for the salary of the manager during the lengthy “special leave” as well as the legal costs to content the illegality of their decision. The Court held that those responsible for these actions should be held responsible. Because the councilors’ ulterior motive was underpinned by bad faith, the Court came to the conclusion that “[bad faith and unlawfulness are grounds to entitle a municipality to recover any loss or damage it suffers from political office bearers and officials” (At para 135)]. With regard to the cost order against the municipality, the Court thus ordered the municipality to establish, *inter alia*, which councilors and officials were responsible for the decision, the extent of each person’s responsibility for the “special leave” resolution, the amount that the municipality must recover from each person, and the reasons for electing not to recover from any person (At para 136).

Personal liability of office-bearers and officials for costs of litigation

38. A *further* disciplinary measure for office-bearers and officials is to hold them personally liable for the costs of litigation where, one, they behaved in flagrant violation of the MFMA, and two, when such behaviour is challenged in court, they seek to defend the indefensible. In *Mogale City Municipality v Fidelity Security Services (Pty) Ltd and Others*, the Supreme Court of Appeal described a tender process, which broke every rule in the book, as “a farcical endeavour” ([2014] ZASCA 172 (19 November 2014) para 21). The Court, in setting aside the tender award, warned the municipality that if there was a repetition of the same conduct, it would not only award the tender itself, but it may “also result in identifiable officials responsible for that situation being ordered to pay the cost personally” (*Fidelity Security Services*, para 21). The very purpose of such an order is that it “might have a sobering effect on truant public office bearers” (*Fidelity Security Services*, para 21, quoting with approval *Gauteng Gambling Board and Another v MEC for Economic Development, Gauteng 2013 (5) SA 24 (SCA) para 54*. See also ch 3 para 3.3.5)



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Summary: The different role-players: N Steytler and J de Visser say the following in Local Government Law of South Africa (November 2019, Issue 12): (as far as the MFMA is concerned):

The Mayor:

39. As elected political leader of the Municipality, the Mayor carries the responsibility for ensuring good governance in the area of financial management and must perform all related functions assigned by the MFMA or delegated by the Municipal Council. (S 52(e) MFMA).
40. Overall, the Mayor “must provide general political guidance over the fiscal and financial affairs of the municipality” (S 52(a) MFMA). This role includes monitoring and overseeing, though not directly interfering with, the exercise of legal responsibilities in terms of the MFMA by the municipal manager and the chief financial officer (CFO) (S 52(b) MFMA).
41. The Mayor must also “take all reasonable steps to ensure that the Municipality performs its constitutional and statutory functions within the limits of the municipality’s budget” (S 52(c) MFMA). Where a Municipality has an executive committee in terms of section 43 of the Structures Act (See ch 3 para 5.2), the Mayor exercises the powers and functions assigned by the MFMA in consultation with that committee (S 58 MFMA).

The Municipal Manager:

42. The Municipal Manager is the accounting officer of the Municipality for the purposes of the MFMA and must thus exercise all the functions and powers assigned to the accounting officer by the Act (S 60(a) MFMA).
43. The Municipal Manager must, in general, provide guidance and advice on compliance with the MFMA to the council and any of its committees, Councillors and elected office-bearers, municipal officials and any municipal entity under the sole or shared control of the municipality (S 60(b) MFMA).
44. In discharging these duties, the Municipal Manager has a fiduciary duty to the Municipality. The MFMA requires the Municipal Manager to “act with fidelity, honesty, integrity and in the best interest of the Municipality in managing its financial affairs” (S 61(1)(a) MFMA). In discharging this fiduciary duty, the Municipal Manager must disclose to the Council and the Mayor all



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material facts available to the former (or which are reasonably discoverable) and which may, in any way, influence the decisions or actions of either the Council or Mayor (S 61(1)(b) MFMA).

45. The Municipal Manager must, within the means available to the Municipality, seek to prevent any prejudice to the Municipality's financial interests. (S 61(1)(c) MFMA.) Moreover, a Municipal Manager may not act in a manner that is inconsistent with his or her duties as an accounting officer (S 61(2)(b) MFMA). In particular, the Manager may not use the positions, privileges, or the access to confidential information for personal gain or to improperly benefit another person (S 61(2)(b) MFMA).
46. The MFMA tasks the Municipal Manager with the responsibility of managing the financial administration of the Municipality. This entails that the Municipal Manager must take all reasonable steps to ensure, first of all, that the municipality's resources are used effectively, efficiently and economically (S 62(1)(a) MFMA). To this end, full and proper books of the Municipality's financial affairs must be kept in accordance with prescribed norms and standards (S62(1)(b) MFMA). The Municipal Manager is also responsible for the Municipality's communication strategy; he or she must place documents relevant to financial management on the website within five days of their tabling in the council or the date on which they must be made public, whichever occurs first. (S 75(1) and (2) MFMA.)
47. The Municipal Manager must discharge these onerous duties without obstruction from the council or its office-bearers (For Code of Conduct for Councilors see Ch3 para 4). The MFMA provides that should any political structure or office-bearer take action against a Municipal Manager solely because of his or her compliance with a provision of the MFMA, it would constitute an unfair labour practice for the purpose of the Labour Relations Act (Act 66 of 1995 (s 76 MFMA)). In the event that the Municipal Manager is unable to comply with the responsibilities detailed in the MFMA, he or she must promptly report such inability, together with reasons, to the mayor and the provincial treasury (S 74(2) MFMA).

Senior management:

48. Financial administration and co-ordination are effected by the municipal manager, assisted by the other top management personnel of the Municipality (S77(2) MFMA), namely the Chief Financial Officer (CFO), all senior managers who are responsible for managing the various votes and



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any other senior officials designated by the Municipal Manager (S 77(1) MFMA).

49. The senior managers and officials exercising a range of financial management responsibilities must take all reasonable steps to ensure effective, efficient and diligent management of their respective areas in the financial system (S 78(1) MFMA). They carry out this function under the direction of the municipal manager (S 78(2) MFMA).
50. The Municipal Manager must develop an appropriate system of delegation "that will both maximise administrative and operational efficiency and produce adequate checks and balances in the Municipality's financial administration" (S 79(1)(a) MFMA), in order to ensure the proper application of the provisions of the MFMA. This allows him or her to delegate any of the powers or duties that the MFMA assigns to him or her, or any power of duty reasonably necessary to assist in complying with his or her statutory duties (S 79(1)(b) MFMA, to the top management. However, the Municipal Manager is not permitted to delegate any of his or her powers or duties to any political or office-bearer (S 79(2) MFMA).
51. The delegation, which must be in writing, is subject to any limitation or conditions the Municipal Manager may impose (S 79(3)(a) and (b) MFMA). The delegation may be directed to either a specific individual or a holder of a specific post (S 79(3)(c) MFMA). If the recipient of a delegation is a member of the top management, he or she may be authorised to sub-delegate the power or duty to an official or holder of a post in his or her area of responsibility (S 79(3)(d) MFMA).
52. The delegation of a power or duty does not relieve the Municipal Manager of the responsibility for the exercise of that power or duty (S 79(3)(e) MFMA). He must thus regularly review the delegations and, if necessary, amend or withdraw them (S 79(1)(c) MFMA). Moreover, he or she may confirm, vary or revoke any decision taken by an official exercising a delegated power or duty, with the proviso that any such variation or revocation does not detract from any rights that may have accrued as a result of the decision (S 79(4) MFMA).

Councillors:

53. The MFMA has created a water-tight separation between the functions of the financial administrators and the role of the Councillors. Thus, Councillors



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may not interfere with the financial management of the municipality or any municipal entity (See Code of Conduct for Councillors, ch 3 para 4.9 and ch 10 para 3.4.3). The MFMA has gone so far as to criminalise any such interference and impose considerable penalties; any offence in terms of section 173(4) and (5) carries a prison sentence of up to five years or an appropriate fine (S 174 MFMA. The fines are determined in terms of applicable legislation.)

54. A Councillor commits an offence if he or she deliberately influences or attempts to influence the Municipal Manager or any financial official to contravene or fail to comply with a provision of the MFMA (S 173(4)(a) MFMA). A prosecution would have to prove that the Councillor knew that his or her conduct would lead to an official's non-compliance with a provision of the MFMA, and that doing so constituted an offence. Less precise is the offence of "interfering with the financial management responsibilities or functions" assigned in terms of the MFMA to the municipal manager (or which have been delegated to the CFO) (S 173(4)(b) MFMA). It is also an offence for a Councillor to interfere in the financial management responsibilities of the accounting officer of an entity under the sole or shared control of the municipality (S 173(4)(c) MFMA). Interference' may be interpreted as taking part or intervening in a matter without invitation and/or in the absence of necessity.
55. It is also an offence if a Councillor "deliberately or in a grossly negligent way impedes an accounting officer from complying" with a provision of the MFMA (S 173(4)(c) MFMA).

Budget and Treasury Office:

56. The MFMA requires every Municipality to establish a budget and treasury office (S 80(1) MFMA). The office comprises the chief financial officer (CFO) as designated by the municipal manager, officials allocated to the office, and any other persons contracted by the municipality for work in the office (S 80(2) MFMA). The CFO is in charge of the office and must advise both the municipal manager on the exercise of his or her responsibilities in terms of the MFMA (S 81(1)(a) and (b) MFMA), and the senior managers with respect to their delegated responsibilities (S 81(1)(d) MFMA).

Competent personnel:

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57. The National Treasury may prescribe financial management competency levels for accounting officers, senior managers, chief financial officers and other financial officials (S 83(1) MFMA). These competency levels are not only relevant at the appointment stage; municipalities must also provide resources or opportunities for the training of officials to meet the required competency levels (S 83(2) MFMA). In the latter case, the National Treasury or provincial treasury may assist municipalities in the training of officials (S 83(3) MFMA).
58. The Municipal Regulations on Minimum Competency Levels (Local Government: Municipal Finance Management Act: Municipal Regulations on Minimum Competence Levels, R493, GG 29967 of 15 June 2007 (referred to as Minimum Competency Levels Regulations), effective from 1 July 2007 (reg 19)), issued in terms of section 83(1) of the MFMA, provide a framework for ensuring that by 1 January 2013 municipal manager, CFOs, senior management and other financial officer will have required skills commensurate with their financial responsibilities. The Regulations reiterate the general principle that the manager as accounting officer “must generally have the skills, experience and capacity to assume and fulfil the responsibilities and exercise the functions and powers” assigned by the MFMA to this position (Reg 2(1) Minimum Competency Levels Regulations.) This principle is coupled with the warning that the manager must note that the failure to comply with the specific financial responsibilities, functions and powers may constitute financial misconduct (Reg 2(3) Minimum Competency Levels Regulations. On financial misconduct, see par 8.1).
59. The Regulations then comprehensively set out the minimum competency levels required in terms of higher education qualification, work experience, and core managerial and occupational competencies (Reg 3 Minimum Competency Levels Regulations).

Summary: Approach to financial management: N Steytler and J de Visser say the following in Local Government Law of South Africa (November 2019, Issue 12):

Self-reliance:

60. The underlying premise of the MFMA, which reflects the general constitutional approach to municipalities in respect of the promotion of local self-government, is that municipalities must look after themselves. In Chapter 13 of the Act, which covers the resolution of financial problems, it is



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clearly stated that “[t]he primary responsibility to avoid, identify and resolve financial problems in a municipality rests with the municipality itself” (S 135(1) MFMA). Given the responsibility to meet its financial commitments (S 135(2) MFMA), the municipality must, when encountering a serious problem (or anticipating one), in meeting its financial commitments, immediately seek solutions (S 135(3)(a) MFMA).

Supervision:

61. The second underlying premise of the MFMA is that local government is not alone: a comprehensive supervisory system has been built around municipalities. Thus, once a serious financial problem is encountered or anticipated, the municipality must notify its two main financial management supervisors: the MEC for local government and the MEC for finance (S 135(3)(b) MFMA). The two provincial departments reporting to these MECs are expected to assist the municipality through a range of support measures and, if need be, to intervene. The assistance of the National Treasury may also be called upon.
62. A municipality may request the National Treasury’s Municipal Financial Recovery Service to assist it in identifying the causes of, and potential solutions to, these problems (S 158(d) MFMA). This support must be effected in coordination with other provincial and national efforts. Finally, the need for solidarity and mutual assistance among municipalities is stressed in the MFMA. In the event of serious financial problems, the municipality must also notify organised local government in the relevant province (S 135(3)(c) MFMA).

National Treasury’s regulatory function:

63. The National Treasury plays a prominent, if not dominant, role in the regulation of municipal finances. Apart from the detailed provisions of the MFMA, the Minister of Finance may make regulations or guidelines applicable to municipalities and entities on a wide range of issues (S 168(1) MFMA). In issuing such instruments, the Minister must act with the concurrence of the Minister responsible for local government (S 168(1) MFMA). All references to matters that may be “prescribed” refer to regulations made in terms of section 168 of the MFMA (S 1(1) “prescribe” MFMA). In general, regulations or guidelines may be made on “any matter that may facilitate the enforcement and administration of the Act” (S 168(1)(p) MFMA).

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Unauthorised expenditure:

64. The MFMA contains a number of provisions that seek to enforce the binding nature of the budget. Key among the provisions are the enforcement mechanisms in section 32 relating to unauthorised expenditure (In terms of s 32(8) of the MFMA). "Unauthorised expenditure" is defined in the MFMA as any expenditure not incurred in accordance with the budget and the votes within a budget (S 1(1) "unauthorised expenditure" read with s 15 MFMA).
65. This includes: overspending (S 1(1) "overspending" MFMA) on the total amount of the budget; overspending on a vote; expenditure unrelated to a vote; and expenditure for a purpose other than the approved purpose (S 1(1) "unauthorised expenditure" MFMA).
66. The enforcement mechanisms are *post hoc* in nature. Both political office-bearers and officials become personally liable for unauthorised expenditure (the same rules apply to irregular and fruitless and wasteful expenditure (s 32(1) MFMA)), the municipality must seek to recover such expenditure from them (this liability does not limit the liability of the person in terms of the common law or other legislation (s 32(1) MFMA)).
67. A political office-bearer (s 1(1) "political office-bearer" MFMA) becomes liable for such expenditure if he or she instructs a municipal official to incur the expenditure knowingly or after having been advised by the municipal manager that the expenditure is likely to be unauthorised (S 32(1) MFMA).
68. A municipal manager incurs liability for deliberate or negligent unauthorised expenditure (S 32(1)(b) MFMA). However, he or she may escape liability if he or she informs the council, the mayor or the executive committee in writing that a decision has been taken that, if implemented is likely to result in unauthorised expenditure (S 32(3) MFMA).
69. The municipality must recover such expenditure from the liable person unless the unauthorised expenditure has been authorised in an adjustments budget, or the amount is irrecoverable and has been written off (S 32(2)(a) MFMA).
70. Apart from any attempt at recovering the expenditure, the council may institute disciplinary proceedings against the responsible person for a breach of the MFMA. In such proceedings, the fact that an unauthorised



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expenditure is written off as being irrecoverable is no excuse for liability (S 32(5) MFMA).

71. The municipal manager is also under a duty to report any unauthorised expenditure to the mayor, the MEC for local government and the Auditor-General. The manager must report any unauthorised expenditure promptly in writing to these institutions, detailing the responsible person (or persons) under investigation and the steps that have been taken to recover or rectify the expenditure and to prevent it from recurring (S 32(4) MFMA). Complying with this reporting duty must follow promptly after the corrective steps have been taken.

Internal auditing:

72. The municipality's financial affairs should be audited internally by the internal audit unit and the audit committee, as well as externally by the Auditor-General.

Internal audit unit:

73. Each municipality must have an internal audit unit (S 165(1) MFMA). Its function is to prepare a risk-based audit plan and an internal audit programme for each financial year (S 165(2)(a) MFMA). The unit must also advise the municipal manager and report to the audit committee on the implementation of the internal audit plan, as well as such matters as internal audits, internal controls, and accounting procedures and practices (S 165(2)(b) MFMA). The municipal manager may also assign further duties to the unit (S 165(2)(c)).

Audit committee:

74. Every municipality must also have an audit committee (S 166(1)). A single audit committee may be established for the district municipality and the local municipalities in that district, or for a municipality and the entities under its sole control (S 166(6) MFMA) that serves as an independent advisory body. It is independent because the majority of its members must come from outside the municipality. Its main function is to advise the council on the proper financial management of the municipality.
75. The council appoints the committee, a function which may not be delegated. The committee must consist of at least three persons, the



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majority of whom may not be municipal employees and no councillor may serve on the committee (S 166(4)(a) MFMA). The council must appoint one of the outside members as chairperson (S 166(5) MFMA). Members must have appropriate experience for the task at hand. The object is clearly an external, objective review of the municipality's finances.

76. The committee has four functions. Firstly, it must advise the municipality, both the council (and its office-bearers) and the relevant officials, on all matters relating to the financial management of the municipality (S 166(2)(a) MFMA). Secondly, it must review the annual financial statements to provide the council with an authoritative and credible view of:

76.1. The municipality's financial position;

76.2. The municipality's efficiency and effectiveness; and

76.3. Its overall level of compliance with the MFMA, the annual DORA; and other applicable legislation (S 166(2)(b) MFMA).

77. Thirdly, if the Auditor-General has raised issues in the audit report, the committee must respond to the council in respect of these issues (S 166(2)(c) MFMA). Finally, it must investigate the municipality's financial affairs at the request of the council (S 166(2)(d) MFMA).

78. In performing its tasks, the committee must meet at least four times a year (or more if required) (S 166 (4)(b) MFMA). It has access to the financial records and other relevant information of the municipality. The committee must liaise with the internal audit unit and the person auditing on behalf of the Auditor-General (S 166(3) MFMA).

Duty to audit:

79. The municipal manager must prepare the annual financial statements and submit them to the Auditor-General for auditing within two months after the end of the financial year (S 126(1)(a) MFMA). In the event that the municipality must prepare consolidated statements, the municipal manager has another month's grace to submit these additions (S 126(1)(b) MFMA). From receipt of the statements, the Auditor-General has three months to audit them and submit an audit report to the municipal manager (S 126(3) MFMA). Should the Auditor-General fail to meet the deadline, it must promptly submit a report outlining the reasons for the delay to the municipality, the provincial legislature and Parliament (S 126(4) MFMA). Once the Auditor-General may alter it or the related financial statements (S



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126(5) MFMA. It is also a criminal offence to contravene this section (s 173(5)(e) MFMA)).

Addressing auditing issues:

80. On receipt of the audit report, the municipality must address any issues raised by the Auditor-General, with the duty to ensure compliance resting on the mayor (S 131(1) MFMA). The provinces must monitor compliance with this duty. The MEC for local government must thus assess all annual financial statements of the municipalities, the Auditor-General's audit reports and any municipal response to such reports.

The effects of financial misconduct and poor consequence management:

81. Karel van der Molen points out that the effect of financial misconduct and poor consequence management practices results in:
- 81.1. Loss of monies;
 - 81.2. No funds for other essential services;
 - 81.3. Loss of confidence in a Municipality;
 - 81.4. Loss of confidence in other State institutions;
 - 81.5. Irregular and unauthorised expenditure; and
 - 81.6. Poor Auditor-General reports.

Basic values and principles governing public administration: The Constitution of the Republic of South Africa:

82. According to Karel van der Molen:
- Public administration must be governed by the democratic values and principles enshrined in the Constitution including the following principles:
 - A high standard of professional ethics must be promoted and maintained;
 - Efficient, economic and effective use of resources must be promoted;
 - Public administration must be development-orientated;
 - Services must be provided impartially, fairly, equitably and without bias;
 - People's needs must be responded to, and the public must be encouraged to participate in policy making;
 - Public administration must be accountable;



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- Transparency must be fostered by providing the public with timely, accessible and accurate information;
 - Good human resource management and career development practices, to maximise human potential must be cultivated; and
 - Public administration must be broadly representative of the South African People, with employment and personnel management practices based on ability, objectivity, fairness, and the need to address the imbalances of the past to achieve broad representation
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