# THE LEGAL FRAMEWORK FOR COMBATING CORRUPTION IN LOCAL GOVERNMENT IN THE WESTERN CAPE

**FINAL RESEARCH REPORT FOR THE**

**WESTERN CAPE DEPARTMENT OF LOCAL GOVERNMENT & THE HANNS SEIDEL FOUNDATION**

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# 1 INTRODUCTION

## 1.1 This report

This report was compiled by the Dullah Omar Institute, under a Service Level Agreement (SLA) between it and the Western Cape Department of Local Government and the Hanns Seidel Foundation. This SLA comprises two phases, the first of which pertains to –

1. an analysis of the legal framework for combating corruption in local government in the Western Cape;
2. a database of instruments and laws dealing with corruption in local government; and
3. an analysis of the role of law enforcement agencies in combating corruption in local government.

What follows is a combination of the above items 1 and 3, while item 2 is contained in a separate document that accompanies this report as an Annexure.

## 1.2 Corruption in Western Cape municipalities

Corruption in South Africa is an issue of grave concern which affects the future stability and prosperity of the country. In October 2019, President Cyril Rhamaphosa announced that South Africa has lost close to R1 trillion to corruption. The abuse of public office or/and resources for private again is widespread in both state and non-state sectors. Transparency International's Corruption Perceptions Index paints a gloomy picture. For the past five years it ranked South Africa 44, 43, and 43 out of 180 countries in 2019, 2018 and 2017, respectively. In 2016, South Africa was ranked 45 out of 176 countries and in 2015, 44 out of 167 countries. Despite the end of the Zuma-administration in 2017, there has not been any significant improvement in tackling corruption.

The Office of the Auditor General (AG), the Public Protector, and the media, among other actors, have over the years exposed the extent of corruption in the public sector. The establishment of several commissions of inquiry to investigate allegations of corruption and maladministration in the public sector bears testimony to the fact that corruption is one of the biggest challenges facing South Africa.

The sphere of government that is at the coalface of service delivery – local government – is also buckling under the effects of corruption. Corruption, fraud and maladministration

manifest in this sphere in many different ways, limiting the ability of municipalities to realise their primary objective of providing services to communities in a sustainable manner.

In local government, as is the case at provincial and national levels of government, corrupt acts are undertaken not only by politicians (councillors) but also public servants (municipal staff). Sometimes councillors and municipal officials are in cahoots to divert public resources while in other cases they work with private actors. A 2019 Report of Corruption Watch indicates that 6,6 percent of reports of corruption it received related to municipalities (Corruption Watch 2019, 18). The report further reveals that corruption is most prevalent in procurement while bribery in areas such as licensing, the property and employment sectors, comes second. Thus, significant public resources, which could have made a difference in people's lives, continue to be lost to corruption.

The Western Cape province has a relatively good record of financial management in its municipalities compared to other provinces, according to the AG's audits reports. However, they have not been immune to corruption despite this record. Several of its municipalities, such as George, Bitou, Theewaterskloof, Kannaland, Beaufort West, and Oudtshoorn have seen allegations and confirmed cases of corruption and related ills. The provincial government and the Directorate for Priority Crime Investigation (Hawks) have undertaken various investigations in these municipalities aimed at bringing culprits to book. However, few individuals have been prosecuted in the province (and nationwide) while convictions are even fewer.

The key question is: why is corruption in local government a growing concern in the Western Cape when there is a relatively sound institutional, legislative and policy framework designed to fight corruption? The legislative framework is supposed to reduce opportunities for corruption and, when it occurs, ensures that is detected, investigated and prosecuted with the overall objective of ensuring that culprits are brought to book and stolen resources are recovered. Is the failure to contain corruption due to the weaknesses of this framework with regards to the prevention, detecting, investigation, prosecution and imposition of sanctions? Could it also be attributed to implementation challenges that hinder the fight against corruption? To answer these critical questions, an understanding of this framework and how it is implemented in practice is required to establish possible weak links in the fight against corruption.

The report proceeds with, first, our overall understanding of corruption and strategy to combat it. Second, we examine the definition of financial misconduct and corruption. Third, we analyse the mechanisms for detecting and reporting such behaviour. Fourth, we outline how corruption is investigated and prosecuted as well as the imposition of sanctions for corrupt acts. The review ends by giving an overview of measures that have been put in place to prevent corruption or at least, reduce opportunities for corruption.

## 2 UNDERSTANDING OF, AND STRATEGY TO COMBAT, CORRUPTION

Like the commission of any crime, an act of corruption requires three elements: motive, opportunity and means. There is a motivation for committing the crime of diverting public money into private pockets. With such a motive present, the opportunity to commit corruption must be present. Finally, with motivation and opportunity present, the means of committing the act must also be added to the mix. Only by tackling the opportunities, the means and motivations head-on will progress be made in clamping down on corruption (Steytler 2020, ch 20).

The motives for corruption range from individual pathologies to larger governmental and societal inducements if not incentives. A popular way to explain corrupt behaviour is the bad apple excuse; corruption is the result of the personal pathologies of a few individuals. But this does not explain the pervasiveness of corruption. Some state officials engage in corruption activities out of some kind of familial or group duty; they use a public position in order to advance their family or friends. A compelling driving force comes from the wellspring of 'entitlement': individuals or groups in control of the state labour under a strong perception that they, due to past events, are entitled to the largesse of the state, or what income they can generate through the state. The state is thus regarded as a legitimate means to accumulate private wealth. These motives identified usually do not operate in isolation (except for cases of extreme pathologies) but collectively produce an elite political culture that does not frown on corruption but sees using the state for personal advancement as legitimate.

The second element necessary for the crime of corruption is the opportunity to commit it: does the legal, policy and social context allow or enable the acting out of motives? There are two aspects to opportunity: first, there are the state-created opportunities, the exploitation

of which allows for the private pocketing of public money, while the second are weak state institutions, processes and social norms that should restrain the exploitation of those very opportunities.

Relating to the first aspect, in an effort to ensure that any form of abuse of office for any sort of self-benefit is criminalised, the definition of corruption is often broadly framed. The wider the definition of corruption becomes, the more unclear the outer boundaries of the crime appear. While there is clear society condemnation of theft and fraud, the attitude towards corruption may become less certain the more loose and wide the definition. With regard to the second aspect, the institutions and procedures that may facilitate access to information about the secretive nature of corruption, are often weak. An exception is the Auditor-General who appears as one of the few 'institutions of constraint' that has been able on a regular basis to uncover illicit activities.

The social environment can be a powerful factor in either enabling or preventing corruption. It enables corruption when illegal corrupt activities are not seen socially as reprehensible or bad. If corruption is regarded as a fact of life, politicians may not be much interested to act vigorously in reducing corruption. Conversely, societal views opposed to corruption may exercise effective restraint. Thus, where state institutions of restraint do not function adequately and social contexts do not induce shame for acts of corruption, the opportunities for corruption are endless.

Corruption, embezzlement, fraud and other ways of pocketing state resources for personal gain require the means to do so. Corruption politicians and officials require professionals (lawyers and accountants) and other lackeys to do the numbers, prepare tender documents, draft contracts, falsify documents, and deliver brown envelopes, etc. As important as getting the 'right' corrupt persons in the right places to facilitate corruption, is silencing those that perform their anti-corruption mandate diligently.

On the basis of some understanding of the three components of corruption – motive, opportunity, and means – a holistic approach can be devised to combat the scourge. Although law reform aimed at making the definition, detection, prosecution and conviction of corruption clearer and more predictable, it is a necessary but not sufficient intervention strategy. The underlying premise of law reform is that of rational choice; it is not smart to commit an act of corruption because of the inevitability of detection, conviction, serving time,

and the loss of status and loot. As law must be animated by people, equal if not more attention should be given to change the human side.

Clamping down on the means of committing corruption is to focus on appointments and avoid family or crony appointments. Appointments must be objective: norms and standards for employment in local government are required.

The most difficult strategy is undermining the motives for corruption; it is no longer acceptable social behaviour. Measures to effect such a social change include educational efforts, and the mobilisation of social forces against corruption. Such mobilisation must strengthen the political will to implement existing anti-corruption measures (and where necessary reform them).

In this Report the focus is on strategies aimed at reducing the opportunities for committing corruption.

# 3 DEFINING CORRUPTION

## 3.1 Introduction

The purpose of this section is to provide an outline of how the law defines corruption at municipal level. This section discusses definitions of corruption as: (1) staff misconduct, (2) councillor misconduct, and (3) a criminal offence.

## 3.2 Corruption as staff misconduct

The law regulating corruption as misconduct by municipal staff members is very dense. There are national laws regulating the municipal service, emanating from at least three different departments, namely CoGTA, the National Treasury and the Department of Public Service and Administration. There is little, if any provincial legislation defining corruption but many municipal policies further elaborate on the national concepts and definitions.

The distinction between senior managers (i.e. Municipal Manager and section 56 managers) and other municipal staff, is very important:

- The employment status as well as the disciplinary regime of senior managers are governed by a dedicated regime of regulations, promulgated under the Municipal Systems Act and the MFMA.

- The regime for other staff members is negotiated under the auspices of the Local Government Bargaining Council, resulting in collective agreements.

*3.2.1. National laws regulating municipal public service*

3.2.1.1 Code of Conduct for Municipal Staff Members

All municipal staff members are subject to the Code of Conduct for Municipal Staff Members (Schedule 1 Municipal Systems Act). The Code contains precise definitions of corruption in the context of a municipality. It prohibits staff members from -

- using their position, privileges or confidential information for private gain (item 4(1)(a));
- taking a decision on behalf of the municipality on a matter where the staff member, his or her spouse, partner or business associate has an interest (item 4(1)(b));
- being a party to or a beneficiary under a contract with any municipality (item 4(3));
- doing outside work without the consent of the council (item 4(2)(c);
- unduly (attempting to) influence any structure or functionary in the municipality to obtain a personal benefit;
- doing business with a councillor without the consent of the council;
- using or benefiting from any municipal property or asset to which that staff member has no right
- requesting, soliciting or accepting a reward, gift or favour in return for (1) influencing the municipality, (2) disclosing confidential information or (3) using that staffmembers powers in a particular way.

3.1.1.2 Disciplinary Regulations for Senior Managers

The Disciplinary Regulations for Senior Managers, applicable only to senior managers, under the Municipal Systems Act do not contain a definition of corruption. However, they do distinguish “less serious” from “serious” misconduct (see para 6.11 below for the relevance of this). In doing so, the Regulations add further detail to what is considered corruption. “Less serious” corrupt activities are -

- private work without council consent; and
- wrongful use of council property.

“Serious misconduct” includes the following offenses:

- bribery, financial misconduct, fraud and corruption;
- abuse of position to benefit a political party;
- accepting compensation from the public or another staff member for performing his or her duties (without council consent);
- any contravention of the Code of Conduct for Municipal Staff Members;
- giving false statements or evidence; and
- falsifying records or any other documentation.

Section 171 of the Municipal Finance Management Act defines financial misconduct of the Municipal Manager (MM), Chief Finance Officer (CFO) and other municipal officials. Financial misconduct covers a wider array of conduct and clearly extends beyond corruption. However, the manner in which the MFMA defines financial misconduct sheds further light on the definition of corruption in a municipal context. It lists aspects such as -

- deliberately failing to comply with the MFMA;
- deliberately permitting irregular, fruitless and wasteful expenditure;
- instructing another official to incur irregular, fruitless and wasteful expenditure; and
- deliberately misleading the council, the mayor or an organ of state in documents submitted to them

3.1.1.3 Regulations for Appointment &and Conditions of Service of Senior Managers

Schedule 2 of the Regulations for Appointment and Conditions of Service of Senior Managers also sheds light on the understanding of corruption in local government. This Schedule sets out the time periods that must expire before a person may be re-employed in a municipality (see para 7.1.2 below where this is discussed as a type of sanction).

In setting out these time periods, it mostly uses categories of misconduct that were already mentioned above under paragraph 3.1.1.1 and 3.1.1.2. Examples are financial misconduct contemplated in section 171 MFMA, using one's position or confidential information for private gain or to improperly benefit another person, soliciting or accepting gifts or favours that may influence the performance of duties etc.

However, there are a number of nuances that are added. For example, it refers to "offenses involving dishonesty and negligence". Furthermore, it refers specifically to the offense of "[c]olluding to or acceding to an influence of any councillor not to enforce an obligation in

terms of this law and who has been found guilty of an offence and convicted to a fine or to imprisonment for a period not exceeding one year". Aside from the unclear wording (it is not clear who must have been found guilty), it is clear that "colluding to or acceding to the influence of a councillor" to violate the law is regarded as corruption.

3.1.1.4 Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings

The Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings under the MFMA do not contain any further definition or guidance on the question as to what constitutes financial misconduct. It focuses on reporting and investigation of financial misconduct (see further below in paras 5 and 6 below).

3.1.1.5 Public Administration Management Act

The Public Administration Management Act was signed into law in 2014. Initially aimed at integrating the three spheres into one public service, it now determines a framework for greater collaboration. What is relevant for this section on the definitions of corruption, is that the Act envisages the national Minister to promulgate minimum standards for the public service. It suggests that these will apply across the three spheres of government, including local government. Some of these minimum standards may impact the definition of corruption in local government. For example, the Minister may promulgate minimum standards dealing with matters such as: integrity, ethics and discipline, the disclosure of financial interests, the disclosure of information relating to both pending and concluded disciplinary action (where the employee was found guilty). No such standards have been proclaimed as yet.

Furthermore, the Act prohibits public servants from doing business with the state or to be a director of a public or private company that is doing business with the state (s 8(2)*(a)-(b)*). The purpose of this profession is to ensure that public servants remain loyal to carry out their public office functions in the best interest of the public. The section also avoids any conflicts of interest which may arise by acting in two different capacities. In order to monitor compliance with this section, and to sanction public servants who are in breach with it, the National Treasury established the Central Supplier Database (CSD). The CSD is regarded as the source of key supplier information for organs of state. The purpose of the CSD is to vet prospective suppliers by checking whether those suppliers meet all the requirements as set out in legislation and regulations. In particular, the database should determine whether

anyone connected to the prospective suppliers are in the service of the state and check any details of directorships and membership in any of these businesses (*National Treasury SCM Instruction No 4A of 2016/2017 Central Supplier Database,* 3.1.3 (a) and (c)*).* Where it is found that an employee of the state was conducting business with the state or held directorships in that business, he or she is guilty of an offence and is liable to a fine or imprisonment for a period not exceeding five years or both (s 8(3)(a)). In addition, breaching s 8 of the Act constitutes serious misconduct which may result in the employee being fired (s 8(3)(b)).

Moreover, like the Code of Conduct for Staff and Councillors (see below at para 3.3), the Public Administration Management Act also contains a disclosure provision. Section 9 of the Act obligates public officials to disclose all his or her financial interests, as well as any financial interests of his or her spouse or a person living with the employee as if they were married to each other, to the relevant head of the institution. Disclosures should also be made in respect of all of the following:

- shares and other financial interests in an entity;
- sponsorships;
- gifts above the prescribed value, other than gifts received from a family member;
- benefits; and
- immovable property

An employee who fails to make a disclosure when he or she is warranted to do so by virtue of section 9 of the Act, commits misconduct and thus public sector corruption.

### *3.2.2 Municipal Anti-Corruption policies*

Municipal Anti-Corruption Policies will often define or give examples of corruption. The aim of those definitions is not to set out 'prosecutable' offenses. Those exist in terms of national legislation, to which municipal anti-corruption policies generally defer. However, they are meant to illustrate, provide context and localise corruption.

For example, the Cape Winelands District Municipality Anti-Corruption Policy mentions and defines bribery, embezzlement, fraud, extortion, abuse of power, conflict of interest, abuse

of privileged information, favouritism and nepotism as manifestations of corruption.[1] It then provides a general definition of corruption as: "any conduct or behaviour in relation to persons entrusted with responsibilities in public office which violated their duties as public officials and which is aimed at obtaining undue gratification of any kind for themselves or for others".

Stellenbosch Municipality defines corruption as "[a]ny conduct or behaviour where a person accepts, agrees or offers any gratification for him/her or another person where the purpose is to act dishonestly or illegally. Such behaviour also includes the misuse of material or information, abuse [of] a position of authority or a breach of trust or violation of duty". It defines financial misconduct with refers to section 171 of the MFMA (see above).

#### *3.2.3 Local Government Bargaining Council Agreement*

Under the auspices of the South African Local Government Bargaining Council, the Disciplinary Procedure Collective Agreement was adopted. It sets out rules for disciplinary matters pertaining to staff other than senior managers (see section 2 of the Agreement).

As it deals mostly with procedure, it contains little in the way of definitions of corruption. However, there are aspects of the Agreement that further guide the definition of corruption in local government. For example, it expects staff members to conduct themselves with honesty and integrity (Annexure A, 1.2.5). Furthermore, it prohibits employees from accepting other employment outside of the normal working hours without the prior consent of the Department or Municipal Manager or his [or her] authorised representative, which permission shall not be unreasonably withheld (Annexure A, 1.2.8). The Collective Agreement is more lenient than the Code of Conduct for Staff Members which requires council approval. This goes to show that there are inconsistencies in the legal framework for tackling corruption.

### 3.3 Corruption as councillor misconduct

The second category of possible perpetrators of corruption in local government is councillors. The conduct of councillors is, in the main, regulated by the Code of Conduct for Councillors

[1] This list of examples of corruption appears in a number of municipal policies in the Western Cape. See, for example, item 13 of the Cederberg Fraud and Corruption Prevention Policy.

(Schedule 1 of the Municipal Systems Act). However, their conduct can also fall foul of the MFMA and then constitute misconduct that qualifies as corruption. A councillor's conduct can also constitute a criminal offense (see para 3.4 below).

### *3.3.1 Code of Conduct for Councillors*

This Code sets out a range of actions that constitute misconduct under the Code. Certain, but not all, types of misconduct under the Code constitute corruption.

Actions or conduct that constitute corruption under the Code of Conduct for Councillors can be distinguished from corruption as it applies under the Prevention of Combating of Corrupt Activities Act (PCCAA). As will be seen below, corruption under the PCCAA is limited to conduct that meets the criteria as set out in the PCCAA whereas corruption under the Code may fall outside the scope of that criteria but nonetheless constitute public sector corruption. This does not mean that misconduct under the Code can never qualify as a criminal offence under the PCCAA. On the contrary, there may be certain instances where the alleged misconduct constitutes corruption under both the Code (as misconduct) and the PCCAA (as a criminal offence). Thus, a councillor may be guilty of misconduct under the Code and at the same time, he or she may be found to have committed a criminal offence under the PCCAA.

Therefore, in order for misconduct to qualify as corruption under the Code, it is not necessary for the alleged conduct to satisfy the criteria as envisaged in the PCCAA. Instead, the misconduct in question constitutes corruption in that it involves some sort of corrupt activity such as the misuse of public office, roles or resources for private benefit.

The Code functions as a preventative mechanism by setting out the appropriate standards of behaviour of councillors that should be maintained when they exercise their functions. Failure to abide by the terms of the Code amounts to misconduct and some of that misconduct constitutes corruption. While the Code does not make mention of the term corruption per se, it does contain precise definitions of conduct that would constitute corruption. The most important provisions are those that obliges councillors to, *inter alia*-

- disclose any direct or indirect personal or private interests that he or she, or any spouse, partner or business associate of him or her may have in a matter that is before the council or a committee and where such a matter is before council or the committee, to withdraw

from such proceedings unless the council or committee opine otherwise (Item 5(1)(a) and (b)); and

- declare any of the financial interests listed in Item 7(1) within 60 days of his or her election or appointment (Item 7(1)).

Item 5 read with Item 6 of the Code seeks to prevent councillors from being part of decision-making from which they, or someone else they know may gain. Failure to comply with these provisions amounts to misconduct, and therefore also to corruption, as it involves a councillor who has exercised his or her position not to promote the public interest but rather for private gain.

Item 7(1) is meant to enable municipalities to ascertain when a matter before the council may amount to a conflict of interest for a councillor. By declaring their interests councillors are prevented from misusing their office to influence decisions in matters where they (or people associated with them) may gain.

Item 7(1) read with Item 7(4) makes it clear that the municipal council enjoys a discretion in deciding which of the declarations of interest should be made public. In exercising that decision, the council must weigh the need for confidentiality and the public interest for disclosure.

Questions:

- What is the practice, in the municipality, of disclosures by councillors?
- Are councillors sanctioned for failing to disclose?
- How does the municipality monitor compliance with items 5 and 7?
- Are there measures in place to investigate the origins of the reported interests or to check whether a growth in an councillors' wealth is commensurate with his or her reported income and taxes?
- What is the practice of making declarations public? How is the balance between public interest and privacy struck? When can it be argued that a public official's confidentiality must outweigh the public interest?

Moreover, the Code prohibits councillors from, *inter alia*-

- using their position or privileges, or confidential information acquired in their capacity as councillors, for private gain or to improperly benefit someone else (Item 6(1));

- requesting, soliciting or accepting rewards, gifts or favours for: voting or not voting in a certain way before a committee or council; persuading the council or any committee in regard to the exercise of any power, function or duty, making a representation to the council or any of its committees or disclosing privileged or confidential information (to unauthorised persons) (Item 9).

Accepting bribes is thus prohibited as it misdirects a councillor's judgment away from the interest of the municipality and instead directs his or her judgment to the goal sought to be achieved by the person who offered the bribe. This is contrary to a councillor's duty to perform his or her functions in good faith, honestly, transparently and at all times in the best interest of the municipality (Item 2(a) and (b)).

### *3.3.2 Councillor misconduct under the MFMA*

The MFMA contains provisions that define when a councillor commits a corrupt act. When a councillor acts in any of the following ways, he or she will be guilty of corruption:

- acting on a municipal bid committee or any committee evaluating or approving tenders , quotations, contracts or other bids, or attends any of these meetings as an observer (s 117);
- deliberately influencing or attempting to influence the accounting officer, CFO, a senior manager or any other official of the municipality to contravene a provision in the MFMA or to refrain from complying with a requirement of the MFMA (s 173(4)(a));
- interfering in the financial management responsibilities or functions assigned, as set out in the MFMA, to the accounting officer of a municipal entity under the sole or shared control of the municipality (s 173(4)(b));
- interfering in the management or operational activities of a municipal entity (s 173(4)(c))
- deliberately or in a grossly negligent way-
    - impeding an accounting officer from complying with any provision of the MFMA;

- giving incorrect, untrue or misleading information material to an investment decision relating to borrowing by a municipality or municipal entity;
- providing false or misleading information for any document that should be, as a requirement of the MFMA, submitted to council, mayor, accounting officer of a municipality, the Auditor General or the National Treasury or which should be made public (s 173(5)(f)(i) and (ii)).

It is worth noting that while section 117 makes it illegal for a councillor to serve on, or attend a bid committee meeting as an observer, breaching this provision does not in and of itself amount to corruption. However, it does however immediately increase opportunities for councillors to unduly influence procurement decision making.

**Questions:**

- **What has been the municipality's experience in handling allegations of councillors committing any of the offences set out in s 173 of the MFMA?**

The next section looks at corruption from a different angle, namely corruption as a criminal offence.

### 3.4 Corruption as a criminal offence

Corruption is defined as a criminal offense in a number of national laws. Some of these are generic (i.e. not specific to local government), others are aimed specifically at local government. The most important ones are set out below.

*3.4.1 Prevention and Combating of Corrupt Activities Act 12 of 2004 (PCCAA)*

The PCCAA describes what constitutes corruption for purposes of the Act. It provides a general offence of corruption in section 3 which is similar to the provisions of the Code of Conduct for Councillors and Code of Conduct for Staff in local government. The PCCAA also sets out offences of corruption relating to specific persons including public officials.

The general offence of corruption as envisaged in section 3 of the PCCAA is a comprehensive provision. It comprises three legs that makes up the criteria for an act to qualify as corruption for purposes of the PCCAA. The first leg deals with the misconduct of the corruptor. The second leg pertains to the motive of the public official or another person to act *ultra vires*.

The third and final leg deals with the effect that the misconduct of the corruptor should have to constitute corruption for purposes of the PCCAA.

3.4.1.1 The conduct of the corruptor

Section 3(a) and (b) deals with the conduct of the corruptor. That is, the corruptor, directly or indirectly, accepts, agrees or offers to accept any gratification from any other person (3(a)); or gives, agrees or offers to give gratification to another person, either for that person's own benefit or for the benefit of someone else (3(b)). The gratification may be either for his or her own benefit or to benefit someone else. The term 'gratification' includes, *inter alia,* money, donations, any office, status, employment, any right or privilege, etc. Section 3(a) therefore refers to where there is an acceptance on the part of the public official (in this case the corruptor) of an offer that was made to him or her in return for some form of gratification. Section 3(b), on the other hand, deals with where the corruptor is the one that is providing the gratification to someone else. Importantly, gratification can, but does not have to be, financial in nature. A donation, office, status, employment, right or privilege may also constitute a gratification in terms of the Act.

The next leg deals with the motive for which the gratification is accepted or offered.

3.4.1.2 Motive

The motive for which the gratification is either accepted or offered is subject to the condition that the party who receives the gratification (either the corruptor who accepts the gratification or another person to whom it is offered) should act in a manner that is unlawful. In exercising any powers, functions or duties arising from a constitutional, statutory, contractual or any other legal obligation, that particular act should -

- be illegal, dishonest, unauthorised, incomplete or biased; or (s 3 (aa))
- amount to the misuse or selling of information or material acquired in the course of exercising the relevant legal obligation (s 3 (bb)).

The wording 'to act' in the text connotes, insofar it applies to public officials, any of the following:

- voting at any meeting of a public body;
- performing, or not adequately performing, any official functions;

- expediting, delaying, hindering or preventing the performance of an official act;
- aiding, assisting or favouring any particular person in the transaction of any business with a public body;
- aiding or assisting in procuring or preventing the passing of any vote or the granting of any contract or advantage in favour of any person in relation to the transaction of any business with a public body;
- showing any favour or disfavour to any person in performing a function as a public officer
- diverting, for purposes unrelated to those for which they were intended, any property belonging to the state which such offer received by virtue of his or her position for purposes of administration, custody or for any other reason to another person; or
- exerting any improper influence over the decision making of any persons performing functions in a public body (s 4(2)).

3.4.1.3 Implication of the act

The third and final leg of the criteria set out in section 3 of the PCCAA deals with the legal implications that must materialise in order to qualify as corruption for purposes of the PCCAA. The 'act' should be designed to achieve an unjustified result (s 3(iii)) or amount to any other unauthorised or improper inducement to do or not to do anything (s 3(iv)). This speaks to the overall objective that the corruptor sought to achieve through accepting or offering the gratification. Moreover, the 'act' itself should amount to:

- a breach of a position of authority (s 3(ii)*(aa)*);
- a breach of trust (s 3(ii)*(bb)*); or
- the violation of a legal duty or set of rules (s3(ii)*(cc)*)

Therefore, a municipal official, a councillor, or a person or legal entity outside the municipality that is connected to the corrupt activity in question is guilty of an offence of corruption where it can be proved beyond a reasonable doubt that his or her conduct falls within the ambit of the criteria set out above.

3.4.1.4 Reporting on corrupt activity in terms of the PCCAA

Aside from defining certain acts as corruption, the Act also makes it an offence not to report on corruption. In terms of this, a councillor, municipal official or anyone outside of the

municipality will be guilty of an offence where he or she does not comply with his or her duty to report corrupt transactions which includes an offence of theft, fraud, extortion, forgery or uttering a forged document (see below).

*3.4.2 Municipal Finance Management Act 53 of 2003 (MFMA)*

The above mentioned criminal offenses in terms of the PCCAA are generic, i.e. not specific to local government. The MFMA prescribes a number of criminal offenses that are specific to local government. In section 137, the Act sets out what constitutes a criminal offence in terms of the Act.

It distinguishes between the municipal managers, senior managers, councillors, municipal officials of a municipality or any other person.

3.4.2.1 Offences committed by the Municipal Manager

In terms of the MFMA, the municipal manager commits an offence when he or she -

- deliberately or in a grossly negligent way-
    - uses his or her position, privileges, or confidential information obtained as accounting officer for personal gain or to improperly benefit another person (s 173(1)(a)*(i)* read with s 61(2)(b));
    - fails to act responsibly in managing the financial administration of the municipality by taking all reasonable steps to ensure, *inter alia,* that the resources of the municipality are used economically, efficiently and effectively (s 173(1)(a)*(i)* read with s 62(1));
    - in managing the assets and liabilities of the municipality, fails to take all reasonable steps to ensure that the municipality has and maintains a management, accounting and information system that accounts for the assets and liabilities of the municipality; or that the municipality has and maintains a system of internal control of assets and liabilities, including an asset and liabilities register, as may be prescribed (s 173(1)(a)*(i)* read with s 63(2)(a) and (c));
    - in managing the revenue of a municipality, fails to take all reasonable steps to ensure that the municipality has effective revenue collection systems consistent with section 95 of the Municipal Systems Act (which pertains to customer care and management) and the municipality's credit control and debt collection policy, or

that all money received is promptly deposited in accordance with this Act into the municipality's primary and other bank accounts (s 173(1)(a)*(i)* read with s 64(2)(a) and (d));

- fails to take all reasonable steps to manage the expenditure of the municipality as envisaged in section 65 of the MFMA (s 173(1)(a)*(i)* read with section 65(2)(a),(b),(c),(d),(f) or (i));
- fails to take reasonable steps to implement the municipality's supply chain management (SCM) policy (s 173(1)(a)*(ii)*);
- fails to take all reasonable steps to prevent unauthorised, irregular or fruitless and wasteful expenditure (s 173(1)(a)*(iii)*); or
- fails to take reasonable steps to prevent corruptive practices in managing the municipality's assets or receipt of money or in the implementation of the SCM policy (s 173(1)(a)*(iv)(aa)-(bb)*).

- deliberately misleads or withholds information from the Auditor-General on any bank accounts of the municipality or on money received or spent by the municipality (s 173(1)(b)); or
- deliberately provides false or misleading information in any document that must be submitted to the Auditor General, National Treasury, any other organ of state or to the public (s 173(1)(c)*(aa)-(bb)*).

Many of the above failures can be considered as maladministration and are not necessarily immediately signs of corruption. However, it is the phrase "deliberately or in a grossly negligent way" that triggers the criminal liability.

The MFMA does not define what gross negligence is but the Supreme Court of Appeal has defined it as follows: "[it] *must involve the departure from the standard of the reasonable person to such an extent that it may properly be characterised as extreme. The conduct must further demonstrate, where there is found to be conscious risk-taking, a complete obtuseness of mind, or where there is no conscious risk-taking, a total failure to take care. If something less were required, the distinction between ordinary and gross negligence would lose its vitality"* (*Transnet Ltd t/a Portnet v MV Stella Tingas and Another* 2003 (2) SA 473 at paras 480-481).

3.4.2.2 Offences committed by Senior Managers

Senior managers who exercise financial management responsibilities and delegated functions in terms of section 79 and section 106 of the MFMA are also subject to criminal sanctions subject to certain conditions. A senior manager will be subject to criminal sanctions where or she, in the course of exercising any financial management function, deliberately or in a grossly negligent way contravenes or fails to take all reasonable steps as envisaged in s 78 of the MFMA (s 78 read with s 173(3)). Further, a senior manager will be liable to criminal sanctions where he or she deliberately or in a grossly negligent way contravenes or fails to comply with a condition of a delegated function (s 173(3)). The text makes it clear that senior managers can only be subjected to criminal sanctions if it is proved that he or she was either deliberate in contravening or failing to comply with a condition of the delegation or in the event that he or she acted with gross negligence.

3.4.2.3 Offences committed by councillors, municipal officials and other persons

Section 173(5) makes it a criminal offence for councillors, municipal officials and any other person to deliberately or in a grossly negligent manner-

- prevent or hinder an accounting officer from complying with any provision set out in the MFMA (s 173(5)(a));
- provide incorrect, untrue or misleading information material to an investment decision relating to borrowing by a municipality (s 173(5)(b));
- illegally withdraw money from a municipality's bank account (s 173(5)(c));
- fail to disclose material information when the municipality borrows money (s 173(5)(d));
- interfere in the supply chain management system (s 173(5)(e)); or
- provides false or misleading information in any document that should be submitted to the Auditor-General, National Treasury or which should be made public (s 173(5)(f)*(i)-(ii)*)

There are important differences between the MFMA and the PCCAA. The offences in the PCCAA are generic and do not necessarily have to involve financial misconduct. For example, gratification does not need to be financial in nature but can also amount to any office, status, employment, any right or privilege. This casts the net wider than the offences in the MFMA which generally relate to some or other financial or material gain. However, the three-legged approach to the offenses in PCCAA may result in a higher burden of proof than for the

offences in the MFMA, in particular with respect to the 'motive' which is absent from the MFMA offenses.

Another important distinction is that the MFMA offenses obviously speak directly to the municipal context. For example, impeding the accounting officer, interfering in supply chain management, and mismanaging assets are particularly relevant for the municipal context.

The general conclusion, though, is that corruption in local government is criminalised through a wide array of criminal offenses both in the PCCAA and the MFMA. In principle, these laws should enable law enforcement agencies to pursue those engaged in corruption in local government.

Questions:

- From the perspective of municipal and provincial government, what is the experience with prosecution of criminal offences in the PCCAA and the MFMA?
- What is the a preference for the PCCAA or the MFMA when it comes (a) instituting disciplinary proceedings; (2) lay charges for the prosecuting corruption in local government,and (3) is there any preference of the NPA in selecting a charge?
- Has any of the municipalities identified gaps in the legislation when it comes to 'corrupt' behaviour?

## 4 MANIFESTATIONS OF CORRUPTION

This section will provide an overview of the trends in corruption in the Western Cape. What type of corruption is most prevalent? Provisionally, we identify three areas:

1) procurement;
2) human resources; and
3) land use management.

However, we will rely on our field research to collect data to test this assumption and make firm findings.

Questions:

- Which areas of municipal administration are most vulnerable to corruption?
- What have been the trends in the prevalence of corruption in the municipality?

# 5 DETECTING AND REPORTING ALLEGATIONS

## 5.1 Introduction

Having analysed the broad spectrum of definitions of corruption in local government as (1) staff misconduct, (2) councillor misconduct, and (3) as a criminal offense and how they manifest in municipalities in the province, the report now proceeds to the detection and reporting of corruption. How do allegations of corruption surface? How does an allegation of corruption in local government come to the attention of a functionary or authority with powers to take it further?

This will be discussed, first by examining how matters are detected and reported within the municipality, i.e. the internal mechanisms. Then it will examine how 'corrupt' matters are reported to institutions outside the municipality.

## 5.2 Internal detection and reporting

### *5.2.1 Reporting to the immediate senior*

The first key reporting mechanism is the traditional approach whereby a municipal staff member can report allegations to his or her immediate superior. This approach is often laid down in municipal policy. For example, the *Overstrand Municipality Fraud Prevention and Anti-Corruption Policy 2018-19* requires that allegations of financial misconduct, which includes allegations of corruption, be reported in accordance to the following order:


It may be that an immediate senior is also implicated in the alleged corrupt activity. It could also be that the munAicipal official has concerns that reporting to his or her immediate senior may jeopardise an investigation or expose himself or herself to victimisation. If that is the case, the *Overstrand Policy* provides that the municipal official may report the allegation to the next immediate senior up to the municipal manager (p.13).

With respect to allegations involving councillors, it works differently. These must be reported to the Speaker of council and will accordingly be dealt with in terms of the Code of Conduct for Councillors. It is for this reason that Item 13 of the Code of Conduct for Staff provides

municipal staff with two avenues to report breaches of the Code(s). Item 13 states that 'whenever a staff member of a municipality has reasonable grounds for believing that there has been a breach of this Code, the staff member must without delay report the matter to a superior officer or to the speaker of the council'. While the text does not expressly state to whom employees should report allegations against councillors, this can be inferred from the wording of the text. Employees are not permitted to report municipal employees to the Speaker as it involves employees from the administrative arm of the municipality and should thus be reported to, among others, the head of administration, namely the municipal manager. Therefore, staff members should report any allegations of fraud against councillors to the Speaker and in all other instances (that is, allegations involving any other municipal officials in the administration) such matters should be reported to their immediate superiors (Schedule 2, Item 13).

Another example is the *Anti-Corruption and Fraud Prevention Policy 2018/19* of Stellenbosch municipality; item 6.2.4 provides that councillors who suspect that some kind of fraud, corruption or irregularity has been attempted or committed should report their suspicion to the Speaker of council.

At a national level SALGA's *Guideline Document on the Roles and Responsibilities of Councillors, Political Structures and Officials* suggests that complaints against councillors by members of the community should be lodged (reported) with the Speaker (SALGA, 2011). Therefore, it is clear that municipal officials, councillors and members of the community should report allegations of fraud against councillors to the Speaker of the municipality.

There are also specific provisions that compel staff members to report, not just corrupt acts, but also attempts at acts that could signal corruption. For example, the Code of Conduct for staff members provides that a staff member must without delay report any offer of a reward gift or favour that goes beyond what is permitted (item 8, see also para 3.3 above). This must be reported to a superior or to the speaker.

This is not always an optimal reporting channel for those wishing to report an allegation. For example, the person who reports may not be certain that the person to whom he or she is reporting is not also involved in the alleged corrupt activity, or that he or she may be exposed to victimisation as a result of making the allegation.

In many cases, the above risks would deter officials from reporting corruption. This is why the Protected Disclosures Act 26 of 2000 and the corruption hotlines are significant additions to the framework. They are examined below.

*5.2.2 Protected Disclosures made to employers*

Employees may report allegations of corruption to their employers by making a protected disclosure. Section 1 of the Protected Disclosures Act (PDA) defines an employee as, *inter alia,* any person who works for the State. Any municipal staff member may thus make a protected disclosure to report on allegations of corruption.

Importantly, the PDA does not apply to councillors, because the council is the employer in the municipal context. The PDA therefore does not protect against the victimisation that councillors may experience after making an allegation from their peers in council, their party or community members. The lack of protection is confirmed in regulation 18 of the Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings under the MFMA.

A disclosure, insofar as it relates to corruption, includes information that shows -

- that a criminal offence has been committed, is being committed or is likely to be committed;
- that a person has failed, is failing or is likely to fail to comply with a legal obligation in terms of which he or she is legally required to act; and
- that matters such as the above has been, is being or is likely to be deliberately concealed (s 1 PDA).

In order to seek protection in terms of the PDA the disclosure must further qualify as a 'protected disclosure'. This means that the staff member reporting the allegation must comply with the procedures of the PDA in order to later rely on its protections. According to the Practical Guidelines for Employees in Terms of section 10(4)*(a)* these 'procedures' can be described as the routes that can be followed when one makes a protected disclosure. The PDA makes provision for five routes that may be followed when making a disclosure. Disclosures may be made to any of the following: a legal representative, the employer of the person who makes the disclosure, a Minister or member of the Executive Council of a province, a specified person or body and any other person, under certain circumstances as prescribed in s 8 of the PDA (GN 702 *GG* 34572).

Where a disclosure is made to an employer (s 1), an employee may not be subjected to an occupational detriment on account of having made a protected disclosure (s 2(1)(a)). This means that he or she may not, subsequent to having made a protected disclosure:

- be subjected to any disciplinary action;
- be dismissed, suspended, demoted, harassed, or intimidated;
- be transferred against his or her will;
- be refused transfer or promotion;
- be subjected to a term or condition of employment or retirement which is altered or kept altered to his or her disadvantage;
- be refused a reference or being provided with an adverse reference from his or her employer;
- be denied appointment to any employment, profession or office;
- being threatened with any of the actions referred to above;
- being subjected to any civil claim for the alleged breach of duty of confidentiality;
- being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security (s 1).

In the event that an employee is nonetheless subjected to an occupational detriment as defined, the employee will have the remedy of approaching a court for appropriate relief or pursue any other process that is allowed or prescribed by any law (s 4(1)(a)-(b)). In particular, where an employee has been dismissed on account of having made a protected disclosure, the dismissal will be deemed automatically unfair as contemplated in s 187 of the Labour Relations Act 66 of 1995 (LRA). It follows that the dismissed employee will then have the remedies arising out of an unfair dismissal as envisaged in the LRA at his or her disposal. In terms of the (PDAA), it is provided that a court may grant any of the following orders:

- payment of compensation by the employer
- payment by the employer of actual damages suffered by the employee;
- an order directing the employer to take steps to remedy the occupational detriment (s 4(1B)).

The PDA mentions that protected disclosures may be made to, *inter alia,* an employer (in the municipal context, the employer is the municipal council). However, the PDA does not state to whom disclosures must be made within the municipality. The lines of reporting vary from

municipality to municipality as set out in their Whistle Blowing policies. For example, in terms of the *Whistle Blowing (Policy Number 25749B)* of the City of Cape Town, issues should be raised with immediate supervisors or managers. This is so unless the allegation will implicate the employee's immediate supervisor or manager, in which case the matter should be reported to the Director: Forensics, Ethics and Integrity Department. The policy further makes provision for protected disclosures to be made via their fraud hotline (p13).

Questions

- how does your municipality implement the Protected Disclosures Act? what is the reporting line/procedure?
- have there been instances of staff members invoking the PDA?

Another way to report on corrupt activities and to also mitigate the risk of victimisation is the fraud hotline.

*5.2.3 Corruption hotlines*

Through the use of corruption hotlines, those reporting an allegation have the option to remain anonymous when they report allegations. In this way, they can avoid the risk of being victimised subsequent to reporting the allegation. Tip-offs provided through the corruption hotline may result in a subsequent investigation or, if there is too little *prima facie* evidence or if the allegation is spurious, may be dismissed. A high frequency of allegations made on a fraud hotline, even if not followed through with investigations for a lack of *prima facie* evidence, may also be an indicator of distress and may signal to the municipality or other stakeholders to closely monitor a department or municipality.

In reality, there is also the possibility of the 'weaponisation' of anonymous allegations. This is when allegations are made, in the comfort of anonymity, purely to spite or compromise individuals or to pursue factional battles in the municipality or the administration.

This all points to the need for municipalities to have appropriate systems in place to receive, analyse and process anonymous allegations made through a corruption hotline. This starts with the appropriate provisions in a municipal policy. For example, the City of Cape Town has a qualifying provision in its *Whistle Blowing Policy* aimed at addressing the weaponisation of anonymous allegations. Clause 1.1.6.4 provides that, while employees are not expected to prove the truth of an allegation, they must demonstrate that there are sufficient grounds for

concern. To establish whether there are sufficient grounds requires an objective evaluation of the facts. The facts must point out that an investigation is warranted. This clause enables the City of Cape Town to disregard any allegations that are not made in good faith or which are frivolous or absurd.

The survey of corruption measures in municipalities indicates that, save for Kannaland and Matzikama municipality, all municipalities in the Western Cape Province make use of either the national fraud hotline or their local fraud hotline to report corruption. The Public Service Commission manages the national fraud hotline (through a service provider). Allegations that are reported to the national fraud hotline are referred to the relevant departments for investigation. For example, allegations involving municipal employee matters in the Western Cape are referred to the Forensic Audit Unit in the office of the Premier in the Western Cape. The Forensic Audit Unit then deals with those allegations (Public Service Commission, 2011). Some municipalities establish their own fraud hotline, usually operated through a service provider.

Questions:

- What are the practical differences between the national fraud hotline and the local hotlines? What are the benefits that prompt some municipalities to establish their own?
- What happens when an allegation is reported? (distinguish between national fraud hotline and local fraud hotline)
    - What are common or unique operational procedures?
    - What are the investigative procedures followed upon receipt of an allegations?
    - What human resources in terms of number, skills and expertise are in place to staff a municipal hotline?
    - How is the success of the hotline measured and what data is available in terms of calls received, types of complaints, etc?
    - What are the types and frequency of allegations of corrupt activities?

*5.2.4 Internal Audit Unit*

The internal audit unit is another important mechanism through which allegations of corruption can come to light.

In terms of MFMA Circular 65 an internal audit unit must develop the annual audit plan by utilising a risk-based methodology. This responsibility requires that the internal audit unit must consider the areas that are prone to corruption and respond appropriately by auditing the controls of that area. Moreover, the internal audit unit should further advise the accounting officer and report to the audit committee on matters relating to, *inter alia,* the internal audit and risk and risk management (s 165(2)(b) MFMA). Therefore, during the course of exercising these powers, where it is reflected in the internal audit that there is corruption in a municipality, such a unit should advise the municipal manager accordingly. If it is established that the matter involves theft or fraud, it follows that the municipal manager should then report to the South African Police Service for further investigation (s 32(6)(b) MFMA).

*5.2.5 Audit Committee*

In terms of risk management, the audit committee has the responsibility to provide an independent and objective view of the effectiveness of the municipality's risk management (MFMA Circular 65, 12). In addition, the audit committee should provide feedback to the accounting officer and the municipal council on the adequacy and effectiveness of risk management in the municipality (p 13). In analysing whether the municipality's risk management is effective, the audit committee will be required to determine whether or not the internal controls are working to prevent corruption. Where it is found that these are not working it, it may point towards acts of corruption. Whenever a report from the internal audit unit or any other source implicates any councillor or staff member in fraud, corruption or gross negligence, the chairperson of the audit committee is obliged to promptly report this to the relevant executive authority and the Auditor General (reg 27.1.11). Whereas the MM is the accounting officer, the council is the accounting authority. Therefore, while it is not a statutory function of the audit committee to detect corruption per se, the nature of an audit committee's statutory functions is such that the audit committee is positioned to bring matters of corruption to light and to report thereon.

*5.2.6 Municipal Public Accounts Committee (MPACs)*

MPACs are council committees (established in terms of section 79 of the Municipal Structures Act) that perform a number of functions including to consider and evaluate the content of a municipality's annual report, which includes the financial statements (s 121(3)(a) MFMA), and

advise the council accordingly. In terms of s 124 of the MFMA, the notes on the financial statements of a municipality should include particulars of, *inter alia,* salaries, allowances and benefits of councillors, municipal managers, CFOs and other municipal officials as may be prescribed (s 124(2)(a) and (c)). In this regard, MPACs may detect and report on corruption where it is found that, in evaluating the financial statements, salaries paid to these officials are not commensurate with the payments as set out in their employment contracts. Moreover, MPACs play a key role in highlighting matters of financial misconduct in municipalities and advising the council accordingly (National Treasury & CoGTA, p18).

As an example, the general functions of the City of Cape Town municipality's MPAC are set out in its Systems of Delegations. They are as follows:

- to consider and evaluate the annual report, and the annual report of any municipal entity under the City's sole or shared control, and to make recommendations to Council when it adopts the oversight report on the annual report in terms of section 129 of the Municipal Finance Management Act;
- to investigate the recoverability of unauthorized, irregular or fruitless and wasteful expenditure in terms of section 32 and 102 of the MFMA, as instructed by Council, and as guided by the National Treasury Circular 68: Unauthorised, Irregular and Fruitless and Wasteful Expenditure and advise Council in respect of such unauthorised, irregular or fruitless and wasteful expenditure in terms of section 32(2) of the MFMA.

However, in terms of the City of Cape Town's *Integrated Annual Report 2017/18* (p.322) it is clear that their functions also include the responsibility to –

- investigate allegations of bids that are awarded to family members in the service of the State;
- irregularities in tenders;
- allegations of fraudulent payments to service providers;
- allegations of non-compliance with the Remuneration of Public Office Bearers Act 20 of 1998; and
- allegations of unauthorised transactions.

In this way the MPAC serves the purpose of detecting and reporting on public sector corruption as defined above.

## 5.3 Reporting to institutions outside the municipality

### *5.3.1 Introduction*

Having discussed the key internal mechanisms for detecting and reporting allegations of corruption we discuss in this section the role of other state institutions in the detection of corruption. This happens when allegations of corruption are reported to government institutions outside the municipality. The reports can be made by officials of the municipality, councillors, other state institutions or ordinary citizens.

### *5.3.2 South African Police Service (SAPS)*

Section 34(1) of the Prevention and Combating of Corrupt Activities Act (PCCAA) imposes an obligation on a Municipal Manager, as the accounting officer, to report any suspected or proven cases of corruption or fraud, extortion etc., involving an amount of R100 000 or more to the South African Police Service (SAPS). The same obligation applies when a person acts as an accessory to or after an offence or if a person attempts, conspire, induces or aids another person to commit offence.

Failing to comply with s 34 of the PCCAA may attract any of the following penalties:

- if the sentence is imposed by the high court or a regional court, a fine or imprisonment for a period not exceeding 10 years; or
- in the case of a sentence to be imposed by a magistrate's court, a fine or imprisonment not exceeding three years (s 26(1)(b)).

The 2012 Amendment to the South African Police Service Act specifies that cases of corruption should be reported to a police official in the Directorate for Priority Crime Investigation (The Hawks). This amendment was enacted to ensure that corruption cases are dealt with by a specialised unit with the required skills. In practice, evidence suggests that there is a limited number of police officials of this elite police unit on the ground dealing with corruption in municipalities.

The MM or the council is also under an obligation to report a financial offence, committed by the MM, a senior manager or a councillor to SAPS. If there is a likelihood that the municipality may incur a further financial loss as a result of the financial offence, the accounting officer is required to immediately inform SAPS without having to wait for the outcome of an ongoing

investigation on the matter. In cases of successful prosecutions, the MM or accounting officer must notify the National Treasury and provide the full details of the convicted person, the name of the affected municipality and the sanction given to the offender (reg 10 of the Regulations on Financial Misconduct and Criminal Proceedings). Section 32(6) requires the MM to report to SAPS all cases of alleged irregular expenditure that constitute a criminal offence and theft and fraud that occurred in the Municipality. If these cases involve the MM, the council is under an obligation to report to SAPS. Obviously, there have been reports that have been made to SAPS concerning cases of financial misconduct and offence. What has come out of the reports? How many cases were taken upon by SAPS and how many eventually made it to the National Prosecuting Authority (NPA).

The Public Administration Management Act also provides that when the municipality "discovers an act of corruption", it must immediately report it to SAPS for further investigation (s 5(a)).

*5.3.3 The Public Protector (PP)*

Cases of corruption, fraud and maladministration in municipalities are typical cases of improper conduct that fall within the jurisdiction of the Public Protector. Section 182(1) of the Constitution empowers the Public Protector (PP) to investigate any conduct in state affairs and at any level of government that is alleged or suspected to be improper or to result in any impropriety or prejudice. The Public Protector can report on that conduct and take appropriate remedial action. Section 6(1) of the Public Protector Act allows any member of the public to report to the Public Protector any matter in respect of which the Public Protector has jurisdiction.

Questions:

- How often have the PP accepted cases for investigating corruption in municipalities in the Western Cape?
- If there have been investigations, what have been the outcomes of those investigations?
- Has the PP played a significant role in the fight against corruption in municipalities in the Western Cape?

*5.3.4 Special Investigation Unit (SIU)*

The President may refer cases of corruption, serious maladministration, unlawful expenditure and other cases involving abuse of office in state institutions, including municipalities, to the Special Investigation Unit (SIU) for investigation (s 2(2) of the Special Investigation Units and Special Tribunals Act of 1996). The Special Investigation Unit is an independent statutory body that was established by the President in terms of the Act. The Unit undertakes investigations (and also litigation) following a presidential proclamation, and reports to the President on the outcomes. Its budget comes from Parliament through the Department of Justice and Constitutional Development. It is thus accountable to both the President and Parliament. The outcomes of the SIU's investigations should ideally provide good grounds for the President to act on corruption related matters. And other relevant institutions can also make use of its findings if they are relevant for their respective mandates. The Special Investigation Unit has been operational for many years and between April and September 2018, the President issued proclamations for the SIU to investigate cases in eThekwini Metropolitan Municipality, Ekurhuleni Metropolitan Municipality, Mopani District Municipality, and Mbhashe Local Municipality, among others. Besides the President, the Public Protector (PP) may refer any matter (including a corruption related case) to the SIU for investigation (s 5(6)(b)) if in his or her opinion the matter can be best dealt with by the Unit. Likewise, the SIU may also refer any matter to the PP on similar grounds. The SIU may refer any evidence or information acquired during the course of investigation which points to the commission of a (corruption) offence to the relevant prosecuting authority, state attorney or relevant institution. After the conclusion of its investigation, the Unit is required to submit a report on the matter to the President. The Unit has undertaken several investigations in municipalities nationwide. However, the general sentiment is that its impact in local government has been limited.

Questions

- What has been the experience in the Western Cape with the SIU?
- Have there been successful investigations?
- What is the SIU's capacity to conduct investigations on corruption in municipalities in the Western Cape?
- What are the factors that impede its work, if any?

*5.3.5 Auditor General*

The AG has been steadfast in its fight against lawlessness in public finance at all levels of government. The audit reports of the AG have over the years shown that unauthorised, irregular or fruitless and wasteful expenditure in local government is not contained. Of course, not all of unauthorised, irregular or fruitless and wasteful expenditure automatically amounts to corruption. However, there is no doubt that a portion of it constitutes corrupt behaviour and that the rest of the irregularities either make corruption easier or even facilitate corruption. The level and pattern of such expenditures therefore warrants a closer look by anti-corruption agencies, including the AG. Section 32(4) of the MFMA requires the MM to promptly report unauthorised, irregular or fruitless and wasteful expenditures to the mayor, AG and MEC for local government in the relevant province. Thus, the AG is one of the state institutions that can receive potential cases of corruption insofar as it relates to unlawful expenditure. The municipality is required to recover such unlawful expenditures from the person liable for that expenditure.

Questions:

- What is the record of recovery of unlawful expenditures in Western Cape municipalities?
- What are the impediments to municipalities recovering unlawful expenditures?

*5.3.6 Provincial and National Government (MEC/PT/NT/COGTA)*

The Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings provide a clear reporting channel to the national and provincial government.

Cases of financial misconduct, such as corruption, against the municipal manager, a senior manager, the CFO, or any other officials of a municipality must be reported, not only to the council, but also to the provincial and national treasuries. A similar report can be made to SAPS.

If the municipality or a designated official (the official identified in a municipality to receive reports of allegations of financial offences against councillors) fails to investigate this allegation of financial misconduct, the provincial or national treasury may undertake a full investigation or direct that an investigation be undertaken (reg 5(4)(b) of the Regulations on Financial Misconduct and Criminal Proceedings).

Allegations of financial offences against a councillor can be reported by anyone to the designated official, the Minister of Finance and the relevant MEC for finance (reg 9(10(a).

Such a matter is dealt with in terms of the Code of Conduct for Councillors. It is not immediately clear how the reporting line relates to the Code of Conduct for Councillors which provides that the Speaker of the Council is the designated authority to investigate councillors misconduct.

Once an investigation into a financial offence that does not amount to a breach of the Code, is complete and the report on it submitted to the council, the relevant official is under an obligation to submit a copy of the report, within five days of its submission to the council, to the MEC for finance and MEC for local government in the relevant province as well as to the national Minister responsible for finance and local government (reg 11(4)).

When reporting the financial misconduct and financial offences, the municipality is required to provide-

a) the name and position of the alleged offender
b) a summary of facts and circumstances of the alleged misconduct or financial offence
c) any disciplinary steps take or to be taken against the person concerned, or if not disciplinary steps have been or to be taken, the reason for that decision
d) in the case of a financial offence, the case number issued by the SAPS
e) any steps taken or to be taken to recover any authorised, irregular or fruitless and wasteful expenditure incurred as a result of the alleged financial misconduct and financial offence.

The above information, together with any investigation report, must be submitted within five days of finalising it to the mayor, MEC for local government, COGTA, provincial treasury, national treasury and the AG (reg 14). Any resolutions taken by the council pertaining to the above information must also be reported to the provincial and national treasuries. If a municipality fails to investigate an allegation of financial misconduct or financial offence, the provincial treasury or the national treasury may direct a municipality to undertake an investigation into the allegation (reg 19). The MM has a duty to inform the provincial treasury if a political structure or office-bearer of the municipality fails to comply with its budget-related policy or a supply chain management policy (s 73 MFMA). As mentioned above,

corruption is perhaps most evident in supply chain management which suggests that there should be numerous reports on this area.

Questions

- How are the regulations implemented in the province?
- How do DLG and PT coordinate with each other around these provisions?
- Do MMs in the province report financial offences to the provincial and national treasury? If not, why not?

*5.3.7 Public Service Commission*

Corrupt acts in the public administration, including in municipalities, can also be reported to the Public Service Commission. The Commission may, on its own accord or on receipt of any complaint -

a) investigate and evaluate the application of personnel and public administration practices, and to report to the relevant executive authority and legislature;
b) investigate grievances of employees in the public service concerning official acts or omissions, and recommend appropriate remedies; and
c) monitor and investigate adherence to applicable procedures in the public services (s196(4)(f)(i)(ii)(iii) of the Constitution)

The Public Administration Management Act of 2014 gives effect to the constitutional role of the Public Service Commission. Section 15(5)(a)(b) of the Act requires municipalities, after discovering a corrupt act, to report such acts immediately to the police for investigation in terms of any applicable law, including the PCCAA.

The provision further provides that 'any issues of misconduct emanating from criminal investigations must be reported' to the Public Administration Ethics, Integrity and Disciplinary Technical Assistance Unit of the Commission and the relevant head of Municipality for initiation and institution of disciplinary proceedings. The Municipality is however under an obligation to deal with matters relating to misconduct without undue delay and report progress to the Unit (s15(6). In terms of section 15(7)(c) of the Act, the municipality may request the assistance of the Unit. This Unit may assist in particular with disciplinary proceedings (see section 15(4) of the Act). However, it is not clear whether this Unit has been established yet by the Minister of Public Service and Administration.

The Unit may also be brought in by the MEC, as part of an investigation under section 106 of the Municipal Systems Act, ostensibly to assist with disciplinary proceedings. A section 106 investigation is not sufficient to permit the MEC and the Unit to conduct internal disciplinary investigations so the Unit's role must be to assist the municipality.

## 5.4 National and provincial monitoring and support

The national and provincial governments have various instruments at their disposal to monitor and support municipalities and the use of these instruments may bring allegations of corruption to light. Two pieces of legislation are particularly key for monitoring corruption in Western Cape municipalities.

### *5.4.1 Section 105 of the Municipal Systems Act*

The Municipal Systems Act provides an important mechanism of detecting corruption, fraud and maladministration in municipalities. Section 105 of the Act requires the MEC to establish mechanisms, processes and procedures to monitor municipalities when carrying out their obligations, assess their capacity and determine the level of support required by municipalities to effectively deliver on their obligations. The monitoring mechanisms may include the requirement for municipalities to submit information to the provincial government at regular intervals. Such requests must be reasonable taking into account the administrative burden on municipalities to furnish the information, any applicable costs and existing performance monitoring mechanisms in the municipality.

### *5.4.2 The Western Cape Monitoring and Supporting of Local Government Act*

The Western Cape Monitoring and Supporting Local Government Act allows municipalities to request the assistance of the provincial government when carrying out their general functions or to deal with a specific matter (s 3(1)). Thus a municipality can refer specific matters such as corruption, fraud and maladministration in the municipality to the provincial government for assistance. Once any of these matters is referred to the provincial government, the provincial department responsible for local government and any other relevant provincial organs are required to cooperate with the relevant municipality and provide the relevant support in a coordinated manner (s 3(2)). It is however important to note that the request for provincial assistance does not absolve the municipality from carrying out the relevant duty (s 3(3)). In the case of a corruption case, once a matter has been referred to the provincial

government, it does not mean that the relevant municipality can fold its hands. It must still do whatever is necessary within its powers and capacity to address the relevant matters.

Questions:

- Do municipalities in the Western Cape make use of the opportunity to request provincial assistance to assist it to deal with allegations of corruption?
- If they did, what has been the experience: do the relevant provincial departments cooperate to ensure that the relevant assistance has been rendered?

*5.4.3 Auditor-General may refer matters for investigation*

Section 5(1A) of the amended Public Audit Act now empowers the AG to refer any suspected material irregularity to a relevant investigative body for further investigation. Material irregularity is defined in the Act as 'any noncompliance with, or contravention of, legislation, fraud, theft or a breach of a fiduciary duty' [identified by the AG] …that resulted in or is likely to result in a material financial loss, the misuse or loss of a material public resource or substantial harm to a public sector institution or the general public'. Thus, corrupt practices fall within the definition of material irregularity. The investigative bodies capable of handling such matters include: the South African Police Service (SAPS), the Special Investigation Unit, and the Public Protector. Once a matter has been referred to any of these investigative bodies, the relevant body is required to inform the AG of the progress of the investigation and its final outcome. While these powers of the AG could be useful, the AG lacks control over the outcome of the relevant investigations. It is up to these investigative bodies to decide how to proceed with the investigations and what to do with the outcome.

Questions:

- What has been the practice: has the AG referred any matters for investigation by the investigative bodies mentioned above?

## 6 INVESTIGATION

Once an allegation of corruption has surfaced through any of the means described above, the next phase concerns the investigation. This section is concerned with this question: if the

allegation warrants an investigation, how is the investigation conducted and who makes the critical decisions?

The first section deals with the investigation of corruption as staff misconduct, followed by a section on the investigation of corruption as councillor misconduct. Subsequent to that, the external investigation (i.e. by other organs of state, such as the Minister of Local Government) is discussed. Finally, the investigation of corruption as a criminal offence is discussed.

## 6.1 Investigation of corruption as staff misconduct

Generally, disciplinary issues pertaining to municipal staff members are dealt with in terms of the Code of Conduct for Staff members, collective agreements adopted by the Local Government Bargaining Chamber, and the municipality's own policies on staff discipline.

The latter category, i.e. the municipal policies, generally defer to national legislation when it comes to investigation of corrupt activities. For example, the Stellenbosch Anti-Corruption Policy says that all allegations against senior managers will be dealt with in terms of the regulations under Systems Act and the MFMA (see below).

### *6.1.1 Allegations against senior managers*

Allegations of misconduct by senior managers are dealt with in terms of a special set of national rules, namely the Disciplinary Regulations for Senior Managers. The Regulations distinguish between "serious" and "less serious" offences. The first category relates to illegal acts, corruption, bribery, other financial misconduct, violations of the Code of Conduct for staff members etc (see para 3.3 above for a discussion on the definition of corruption). The penalties are suspension without pay, demotion, transfer, reduction in salary or benefits, a fine or dismissal (see para 7 below for a discussion of the sanctions). The second category relates to issues such as absence without leave, using municipal property without permission, rude behaviour etc. These offences attract a punishment of corrective counselling, a verbal warning or a written warning.

Any allegation of any type of misconduct by a senior manager must be brought to the attention of the council by the municipal manager or, if it concerns the municipal manager, by the mayor or the executive mayor. The allegation must be tabled before the council within seven days and the council then decides whether or not to investigate. The investigation is

conducted by an independent investigator who prepares a report that is tabled in the council by the municipal manager (or the mayor). The Regulations then provide that the council must institute proceedings, which seems strange given that the investigation could exonerate the manager. It must be assumed that the council may, on the basis of the investigation, also decide not to proceed. If the proceedings continue, the council must categorise the offence as “serious” or “less serious”.

The council may decide to suspend the official pending the investigation if his or her continued presence will jeopardise the investigation, endanger the well-being of a person, endanger the safety of municipal property or cause instability. It may also suspend the official if he or she is likely to interfere with witnesses or conduct further misconduct. The manager must be given an opportunity to argue why suspension is not warranted. If the official is indeed suspended, the hearing must start within three months. These rules are intended to end practices such as in *Heyneke v Umhlatuze Municipality* (2010) where a senior manager was granted ‘special leave’ for six months pending an investigation. The Court faulted the municipality for using leave arrangements as a façade for suspension and for the long period of the special leave.

If the offence is “less serious”, the municipal manager him- or herself finalises the matter after affording the manager an opportunity to respond. If the municipal manager is being charged, the mayor or executive mayor finalises the matter. If the offence is “serious”, the Regulations prescribe the contours of a disciplinary hearing with a formal charge sheet, the summoning of witnesses, the right to representation, interpretation, prior notice of the hearing etc. The hearing is presided over by an external and independent presiding officer, appointed by the municipal manager. The municipal manager must also appoint an officer to lead evidence. If the municipal manager is being charged, the mayor or executive mayor makes these appointments. The hearing comprises an examination of charges and, if the official is found guilty, the determination of a penalty. The basic rules are set out in the Regulations. The hearing must adhere to the rules of natural justice which means that the senior manager must have the opportunity to respond to all allegations and examine all the evidence produced by the evidence leader. The chairperson must balance these requirements with the imperative to conduct the hearing with a minimum of legal formalities. The outcome of any disciplinary hearing must be reported to the Minister and to the MEC. If the senior manager wishes to

take the matter further, a dispute may be lodged with the Bargaining Council, the Commission for Conciliation, Mediation and Arbitration or another agency accredited in terms of the Labour Relations Act.

### *6.1.2 Disciplinary Boards*

The *Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings*, promulgated under the MFMA, set out the basic rules for the procedures to investigate allegations of financial misconduct.

The *Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings* requires that municipal councils 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 (s 4(1)). This function however can only be exercised in respect of the accounting officer, CFO and senior managers as envisaged in s 171 and 172 of the MFMA (reg 1). The authority to investigate therefore does not extend to councillors.

Allegations of financial misconduct must be tabled before the municipal council not later than seven days after receipt thereof, or at the next sitting of the council. This rule is more lenient than the Disciplinary Regulations for Senior Managers which are adamant that an allegation must always be tabled within seven days (i.e. at a specially convened council meeting, if need be).

A disciplinary committee should first commence with a preliminary investigation to establish whether the allegation is founded and warrants a full investigation by the disciplinary committee, provincial treasury or national treasury subject to the conditions set out in Reg 19 (reg 2 read with reg 5(4)(a)-(b)). Once a full investigation has been completed, the board compiles a report which is then submitted to, among others, the mayor, speaker and accounting officer of the municipality (reg 6(3)(a), (b) and (c)).

By exercising the above function, the report compiled by the disciplinary board also serves to inform the mayor, speaker and accounting officer of when financial misconduct as corruption has been detected. It exercises the additional function of providing recommendations on how to effectively respond to these founding allegations.

There is considerable overlap between these (MFMA) Regulations and the (Systems Act) Disciplinary Regulations for Senior Managers. A key objective of the investigation under the first Regulations, i.e. the MFMA Regulations, is to examine whether disciplinary proceedings are warranted (reg 7). Any subsequent disciplinary proceedings would then take place in terms of the Disciplinary Regulations for Senior Managers or the Bargaining Council agreement (reg 6(8), see also below). However, the initial phase of the investigation under the Disciplinary Regulations for Senior Managers serves the exact same purpose, namely to assess whether disciplinary proceedings are necessary. In other words, there is an unnecessary and awkward overlap between the two regulations.

Field work questions:

- have municipalities in the Western Cape established Disciplinary Boards under the MFMA?
- has there been discussion about establishing one provincially or at district level?
- how do municipalities deal with the overlap between the Disciplinary Regulations for Senior Managers and the Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings?

#### *6.1.3 Disciplinary proceedings against ordinary staff members*

Allegations of corruption against 'ordinary' staff members (i.e. not senior management) are dealt with in terms of the Disciplinary Procedure Collective Agreement, concluded under the auspices of the Local Government Bargaining Council. Clause 7.1 of this agreement provides that an allegation of misconduct against an employee shall be brought before the Municipal Manager or his [or her] authorised representative for consideration and decision. The procedure set out in Clause 7.6 of the Collective Agreement applies.

### 6.2 Investigation of corruption as councillor misconduct

When the speaker has reasonable suspicion that a councillor has committed misconduct as public sector corruption, the Code places an obligation on the speaker to authorise an investigation into the facts (Item 13(1)(a)). The council may also conduct an investigation or establish a special committee to conduct the investigation and to make recommendations to council accordingly (Item 14(1)(a)-(b)). Neither the Code of Conduct, nor any other national legislation sets out the detail of the procedure to investigate a councillor under the Code of

Conduct, apart from insisting that the rules of natural justice shall apply. The Council must adopt, as part of its council rules and orders, procedures to investigate councillor misconduct.

If the Council or committee finds that the Code has been breached, the Council itself may issue a formal warning, reprimand or fine the councillor, or alternatively, it may request the Minister of Local Government to suspend the councillor or remove the councillor from office.

There is a contestation (currently in Gauteng with respect to the MEC's actions with respect to Tshwane) over whether Item 14(4) and (6) of the Code entitles the Minister to act on his or her own accord. In *Van Wyk v Uys* the Court made it clear, however, that nothing in Item 13 or 14 of the Code permits the Minister to suspend or remove a councillor on its own accord. The Minister may therefore only act when it is requested to act by the council, unless it is clear that the council is refusing to investigate a matter that clearly merits investigation or if it is clear that the investigation by the council is seriously flawed.

Finally, where a councillor is alleged to have committed a financial offence which is not covered by the Code of Conduct for Councillors and thus does not amount to a breach of that Code, the Local Government: Municipal Finance Management Act, 2003, Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings, 2014 (MFMA Regulations of 2014) is applicable. Financial offences not covered by the Code refers to offences that are committed in accordance with s 173(4)-(5) of the MFMA (see para 3.4 above). In this regard, the MFMA Regulations of 2014 provides that a designated official must authorise an investigation of the facts and circumstances of the alleged financial offence and provide the councillor with an opportunity to make written submissions (reg 11(1)(a)-(b)).

Field work questions:

- Do all municipalities have rules in place for investigating councillor misconduct?
- What is the municipality's experience with investigating councillor misconduct?
- who is the designated official that authorises an investigation wrt financial misconduct allegations? What sanctions are imposed in this regard?

## 6.3 Provincial oversight role

### *6.3.1 Section 106 of Municipal Systems Act and the Western Cape Monitoring and Support of Municipalities Act*

The MEC for local government may also investigate maladministration, fraud and corruption in a municipality in terms of section 106 (1) of the Municipal Systems Act. This provision empowers the MEC to request, through a written notice, the relevant municipal council or municipal manager to furnish him or her with information specified in the notice. The MEC can also appoint an investigator if in his or her opinion it is necessary to investigate corruption in this way. The Western Cape Monitoring and Support of Municipalities Act gives further effect to section 106 of the Municipal Systems Act. The provincial Act guides the MEC on what factors to consider before and after invoking section 106.

Questions:

- What is the Provincial government's experience with section 106 investigations: has section 106, together with the provincial act, been effective in anti-corruption efforts?

### *6.3.2 Provincial oversight with regard to Code of Conduct for Councillors*

Provincial oversight is also evident in matters to do with councillor misconduct which sometimes involves corruption. As stated above, the council, through the speaker, has been given the responsibility to investigate any breaches of the Code of Conduct for Councillors and institute appropriate sanction. However, if the council unreasonably decides not to institute an investigation into any alleged breach of the Code of Conduct, the MEC may appoint a person or team to investigate the allegations and make appropriate recommendations (see s 14(4) of the Code of Conduct for Councillors). Like the council, the investigator or the team appointed by the MEC may recommend that the relevant councillor be given a form warning, reprimanded, fined or removed from office.

### *6.3.3 Intervention in terms of section 139*

Provincial governments have a wide array of powers to investigate corruption in municipalities. Section 139(1)(a) of the Constitution empowers the MEC for local government to issue a directive to a municipality which cannot or does not fulfil an executive obligation as defined by the Constitution or legislation. The MEC may use these intervention powers to

instruct a municipality to investigate any allegations or cases of corruption, fraud and maladministration.

*6.3.4 National oversight role*

The national government plays a crucial oversight role over provincial governments' exercise of their oversight powers over local government. If the national minister responsible for local government is of the view that maladministration, fraud, corruption or any other serious malpractice has occurred or is occurring in a municipality, he or she may request the relevant MEC to undertake an investigation (s 106(4)(a). Upon receiving such a request, the MEC must undertake that investigation and table a report containing its findings in the relevant provincial legislature within 90 days. At the same time, a copy of the report must be forwarded to the national Minister responsible for local government, the Minister responsible for finance and the National Council of Provinces (s106(4)(b)). The national government can also undertake direct oversight over municipalities particularly in the financial terrain. For example, section 5(2)(d) of the MFMA empowers the national treasury to investigate any system of financial management and internal control in any municipality and make relevant recommendations.

## 6.4 Investigation of corruption as a criminal offense

Having discussed the myriad of legal provisions and schemes that deal with the investigation of corruption as councillor or staff misconduct, the report now turns to the issue of investigation of corruption as a criminal offense.

*6.4.1 Municipal policing powers*

The investigation of crime is constitutionally the preserve of the national government; local government has been accorded formally only limited policing powers which do not explicitly include investigations. However, in practice, municipal police services (MPS) have incrementally expanded their reach, including also the investigation of corruption when it occurs within a municipality.

In terms of section 206(7) of the Constitution, national legislation 'must provide a framework for the establishment, powers, functions and control of municipal police services'. The South African Police Service Act 68 of 1995, as amended in 1998, provides such a regulatory

framework. It limits the functions of a municipal police service to three categories: traffic policing, subject to any legislation relating to road traffic; the policing of municipal by-laws and regulations which are the responsibility of the municipality in question; and the prevention of crime (s 64E(a)-(c) SAPS Act).

After 1998 there has been an incremental increase through regulations in the powers of MPS, indirectly equipping MPS with the necessary means to 'investigate' crime. The MPS may seize objects under a search warrant (s 21 of Criminal Procedure Act (CPA)); seize articles under a search warrant (s 22 CPA), enter premises to obtain evidence (s 26 CPA), use force against resistance to a search (s 27 CPA), and take body-prints (s 37 CPA). Specific powers were also assigned to MPS in the fields of drugs, domestic violence and stock theft. In 2018 additional powers were devolved to MPSs (GG 41982 19 October 2018). The powers of arrest without a warrant (s 40) were made applicable in respect of all offences for which municipal law enforcement officials have jurisdiction, including all by-law offences. A municipal law enforcement official can also search an arrested person and seize any article used in the commission of an offence (s 23 CPA). The range of offences for which these powers may be used include Schedule 1 offences (including corruption, but excluding treason and sedition), tampering with or destroying essential infrastructure, failure to give account of possession of goods, and offences relating to the control of access to public premises and vehicles. It should be noted that the powers to access bank accounts and interception of electronic communications have not been extended to municipalities.

Within this context of the overall increase in municipal policing powers, the following questions arise:

1. What is the legal basis of a municipality investigating alleged acts of corruption within its midst?
2. What has been the practice among municipalities in exercising such powers?
3. If there is a solid basis for such investigatory powers, could a municipality forward a document directly to the provincial Director of Public Prosecutions for prosecution?
4. Could the municipality perform the prosecution function itself?
5. What role is there for the Province in this area?

*6.4.2 Legal basis for investigating acts of corruption*

There seems to be at least two bases for a municipality to investigate alleged acts of corruption. First, municipalities have received by regulation the explicit mandate to investigate such acts. In terms of regulations issued under the MFMA in 2014 (Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings, GG 37699, GN 430 of 30 May 2014), municipalities (or municipal entities) are obliged to establish a disciplinary board to investigate allegations of financial misconduct in the municipality or municipal entity, and to monitor the institution of disciplinary proceedings against a person so accused (Reg 4 Municipal Regulations on Financial Misconduct). The focus on disciplinary proceedings suggests that the investigation is based on employment law; however, the regulations also make implicitly reference that the municipality may refer the matter to the SAPS for criminal investigation (Reg 16 Municipal Regulations on Financial Misconduct).

The second basis for investigations is located in the 'incidental powers' of a municipality. In terms of section 156(5) of the Constitution, a municipality "has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions." This power is reiterated in section 8(2) of the Municipal Systems Act. As both the Constitution and legislation (Systems Act and the MFMA) impose obligations to ensure a clean administration (as outlined above), the investigation of corruption falls squarely within the powers of a municipality.

*6.4.3 Practice among municipalities in exercising such powers*

The major metropolitan municipalities have all established investigative capacity to deal, among other things, corruption. Redpath reports that eThekwini Metropolitan Municipality has established a City Integrity and Investigations Unit (CIIU), which is responsible for the implementation of the Anti-Fraud and Anti-Corruption strategy in the Municipality, and is mandated to investigate all allegations of fraud and corruption within the municipality, using a staff complement of 70 members (Redpath 2019, 200). The City of Johannesburg Metropolitan Municipality, in turn, established a Group Forensic Investigation Service (GFIS) in 2017, mandated by municipal resolution to, within the municipality, 'prevent, detect, investigate and resolve all reported allegations of fraud, corruption, theft and maladministration' (Redpath 2019, 200). The Cape Town Metropolitan Municipality, too, established a 'Special Investigating Unit', which initially investigated any matter affecting staff

or councillors (including former mayor De Lille) (Redpath 2019, 200). The reason for this unit, the MayCo member for safety and security explained, was to support an understaffed and under-resourced SAPS (Redpath 2019, 200).

*6.4.4 Forwarding investigative dockets to the provincial Director of Public Prosecutions*

The need for, and establishment of units, investigating corruption stem directly from the resource constraints of the SAPS and other law enforcement agency (as set out above). Both the Hawks and the SIU play a central role in investigating corruption at municipal level. However, the Hawks are thinly spread as its investigative mandate covers corruption in all spheres of government and the SIU is limited by the need for presidential proclamations. Both institutions are hampered by resource constraints. Moreover, after a thorough municipal investigation, it would be a duplication of effort if the SAPS, after a referral, must conduct the investigation afresh, interviewing all witnesses again. The practical question is then whether a municipal investigative unit could fulfil the SAPS's investigative function by directly forwarding a docket of their investigations to the provincial Director of Public Prosecutions.

There seems to be no legal barrier in the National Prosecuting Authority Act 32 of 1998 that requires a docket must originate from the SAPS. However, the various regulations and codes in terms of which a CR number is given to each case, an investigating officer is allocated for each case, and the case entered in the court book, etc, may prove to be practical impediments.

This area requires further investigation into the practicalities of municipal units communicating directly with the DPP. It may be that the SAPS remains nominally the referring authority, but in practice the municipal unit does the footwork, responding to prosecutors' queries, getting witnesses to court, etc. For a change in the system to occur, there should be a conversation and an agreement between a municipality, the SAPS and the DPP how available resources can best be utilized to deal with the scourge of corruption.

*6.4.5 Municipal prosecutions*

Even if the SAPS expeditiously investigate charges of corruption, or municipalities do so, and either refers the matters to the DPP, there are typically backlogs in the lower courts which results in cases not being prosecuted timeously or properly (Linde and Mare 2003). In larger municipalities so-called 'municipal courts' have been established where a municipal official

prosecutes in the name of the municipality violations of traffic offences, building regulations and by-laws. The 'municipal court' system, which operates within the national court system and the Magistrates Court Act 32 of 1944, entails a magistrate appointed through the Department of Justice (the Regional Court), paid for by the municipality, adjudicating alleged violations of by-laws. The municipality may also provide the court room and other facilities. In terms of an agreement between the Department of Justice and the DPP, prosecuting authority is devolved to municipal officials, who prosecutes in the name of the municipality persons accused of violating by-laws. The range of offences that may be prosecuted is determined by the agreement.

The question is then whether charges of corruption committed by municipal employees (and councillors) could be prosecuted in these 'municipal courts'? First, if the devolved prosecuting authority is limited to by-laws, then 'corrupt practices' must be criminalised in by-laws. Second, by agreement with the DPP, a broader prosecuting authority, including statutory offences relating to corruption, may be devolved to municipalities.

### *6.4.6 Provincial role with regard to municipalities investigating corruption*

In the emerging field of municipal investigative powers, what role can the Provincial Government play in advancing municipal capacity and competence in this regard? As the primary role would be performed by municipalities in the establishment of investigative units and engaging with the SAPS and the DPP, the Provincial Administration may play an important supportive role.

First, in as much as the Western Cape has in the past made specialised training available to the SAPS, it can so with regard to municipal officials. During 2003, the MEC for Safety and Security saw the training of specialist investigators and prosecutors as "an integral part of the province's broader strategy to reduce the general level of criminal activity" (quoted in Redpath 2019, 127). In particular, it organised for the training of specialist investigators and prosecutors in all aspects of money laundering and the legislation governing financial transactions. There is thus an important opportunity for the Province to play an important supportive role in the establishment and training of investigative units.

Second, as municipalities across the Western Cape may seek to enlarge their investigative role, the Province may facilitate generalised agreements between municipalities and the DPP.

# 7 SANCTIONS

Once it is found, by the body investigating and prosecuting the allegation, that a corrupt act has taken place, what are the various sanctions that can be imposed and by whom? In line with threefold approach, the report again looks at corruption as staff misconduct, as councillor misconduct and as a criminal offense.

## 7.1 Staff disciplinary sanctions

### *7.1.1 General sanctions in national law and the collective agreement*

In response to corruption as staff misconduct, the sanctions are listed in item 14A of the Code of Conduct for Staff Members: dismissal, suspension (without pay) for not longer than three months, demotion, transfer, fine and reduction in compensation.

Sometimes, municipal policies add further sanctions. For example, the Stellenbosch Anti-Corruption Policy (SAP) also adds the repayment of losses to the municipality (item 9 SAP).

The sanctions set out in the Collective Agreement, applicable to staff other than senior management, differ slightly. In Clause 8.3.1.1 the Collective Agreement provides for the following sanctions:

- written warning
- final written warning
- suspension without pay for a maximum of 10 days
- withholding of salary increment for a period not exceeding 12 months
- demotion with or without financial loss to one post below the one in which the offense occurred
- dismissal

The effect of this provision is that, when it comes to the sanctions of suspension, withholding of remuneration and demotion, the Collective Agreement effectively reduces the scope of penalties, made possible under national legislation, such as the Code of Conduct for Staff Members. The Code of Conduct limits the number of months' unpaid suspension to three months. Furthermore, it allows for withholding of more than just the salary *increment* and doesn't limit the demotion to the post below the current post.

The Collective Agreement stipulates that, as a guide, dismissal is an appropriate sanction for dishonesty, bribery or corruption (Annexure A, 2.7).

*7.1.2 Prohibition on re-employment*

A further sanction is the prohibition on re-employment. In terms of section 11 of the Collective Agreement, a staff member against whom disciplinary proceedings have started, is entitled to resign, retire or terminate employment prior to the handing down of a finding. It would seem that there are no adverse effects.

A staff member dismissed for financial misconduct (as defined in s 171 MFMA, see above), corruption or fraud, may not be employed in any municipality for a period of 10 years (Schedule 2 Regulations for Appointment and Conditions of Employment). With respect to various other forms of misconduct, the Regulations prescribe a 'cooling off' period of 2 or 5 years.

### 7.2 Councillor disciplinary sanctions

The Code of Conduct for Councillors regulates the sanctions which may be imposed for councillors who are found guilty for misconduct as public sector corruption. Item 14(2) of the Code authorises a council to do any of the following where a councillor has been found to have breached a provision in the Code:

- issue a formal warning to the councillor;
- reprimand the councillor;
- request the MEC for local government to suspend the councillor for a period;
- fine the councillor; and/or
- request the MEC for local government to remove the councillor.

Further, the Local Government: Municipal Finance Management Act, 2003, Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings, 2014 expressly refers to allegations of financial misconduct not covered by the Code of Conduct for Councillors. Reg 11 makes provision for a designated official to authorise an investigation into any allegations of financial misconduct against a councillor (see para 6.2 above). However, the Regulations do not make provision for any other sanctions which may be imposed where a councillor is found to have committed financial misconduct in contravention of the MFMA.

It is thus not clear whether the legislature intended for councillors to only be subjected to the sanctions as envisaged in the Code of Conduct for Councillors.

Where less stringent sanctions are contemplated, the council itself may impose a sanction on the councillor. These sanctions are: issue of a formal warning, reprimanding a councillor or a fine. However, where the council wants to impose more stringent sanctions on the councillor, the council must first refer the matter to a higher authority, the MEC for local government, to request the MEC to either remove or suspend the councillor (*Kannaland* case par 23).

## 7.3 Sanctioning service providers (procurement)

### *7.3.1 Introduction*

Municipalities may not do business with a person that has been convicted of corruption and fraud. The MFMA (s 111 and 112) requires every municipality to adopt a supply chain management policy which must be fair, equitable, transparent, competitive and cost-effective. Among other things, the policy must provide for the barring of persons from participating in tendering or other bidding processes, including persons who were convicted of fraud or corruption during the past five years.

### *7.3.2 Cancellation of contracts*

Municipalities are empowered to terminate any unlawful contracts. The supply chain management policy of a municipality should provide for the invalidation of recommendations or decisions that were unlawfully or improperly made, taken or influenced (see s 112(1)(n) of the MFMA). Such recommendations or decisions include those that were taken or influenced by councillors or staff members who did not disclose their interests in a matter before the council which they had interests. They also include councillors and staff members that use their position, privileges or confidential information for personal benefit. Contracts for the provision of goods and services to a municipality, under which a councillor or a staff member is a party to or a beneficiary, are also some of the recommendations or decisions that can be invalidated. What kind of contracts are often terminated by municipalities, if any?

### *7.3.3 Listing on national register offenders*

Persons that are convicted of corruption may be endorsed on the national register of offenders. The register is administered by the National Treasury in terms of section 28 of the

PCCAA. Once an offender has been endorsed on the register, the National Treasury may terminate any agreement or contract with the relevant person or enterprise. Further, the National Treasury is required to determine the period (not less than five but not more than 10 years) within which the offender must remain on the register. During this period the National Treasury or any other government departments are required to ignore or disqualify the offender from participating in any procurement process. One of the key questions for field work is to establish whether municipalities are actually making use of the register to determine who should participate in their tender processes.

Questions:

- Are municipalities in the Western Cape complying with this requirement?
- What mechanisms has the provincial government put in place to monitor municipalities' compliance with this requirement?

### 7.4 Criminal sentences

Once a person has been convicted of corruption, the courts may impose a fine or imprisonment (or both) depending on the nature of the crime (s 26(1) of the PCAA). Magistrates' courts may impose a fine or imprisonment for a period not exceeding five years while regional courts may impose a fine or imprisonment for a period not exceeding 18 years. High courts may give the harshest sentence of life in prison besides imposing a fine. In cases where the courts opt for a fine, section 26(3) of the PCCAA allows the courts to impose a fine equal to five times the value of gratification involved in the offence. The High Court and the Magistrates' Court may impose a fine or imprisonment of a period not exceeding ten years or three years for the following offences:

(a) any public servant that conducts unauthorised business with the state;
(b) any person who intentionally interferes or hinders an investigation of an offence,
(c) any person who acts as an accessory to or after offence;
(d) any person who obstruct or hinders an investigator into possession of property disproportionate to a person's known sources of income; and
(e) any person who holds a position of authority, such as an MM, who fails to report a confirmed or suspected case of corruption (s 26(1)(b) of the PCCAA).

Corrupt offenders who have been endorsed on the registers of offenders are required to disclose the endorsement when entering into any agreement with or when participating in any tender process of the state. Failure to disclose is an offence that warrants a fine of R250 000 or an imprisonment for a period not exceeding three years (s26(1)(c) of the PCCAA).

It is an offence for a municipal manager, senior manager, councillor, municipal official or any other person to breach any of the provisions as envisaged in section 173 of the MFMA. Such an offence, warrants imprisonment for a period not exceeding five years or an appropriate fine as determined by applicable legislation (s 174 of the MFMA).

Questions:

- In the Western Cape province, how many councillors and municipal officials have been convicted of corruption and given a sentence? In those cases, was the sanction deterrent enough?

### 7.5 Recovering losses

The duty to recover losses or damages faced by the state due to corruption is shared among several institutions such as the National Treasury, municipal manager, the Asset Forfeiture Unit and the Special Investigation Unit.

#### *7.5.1 National Treasury*

As stated above, once an offender's details have been endorsed on the register of offenders, the National Treasury may terminate any applicable agreement or contract. Subsequent to this termination, the National Treasury may (in terms of s 28(3)(c) of PCCAA), among other legal remedies recover any damages incurred or sustained by the municipality as a result of the tender process. The recovery of damages also applies with respect to any costs which the municipality may suffer by having to make less favourable arrangements or agreement after the termination of the relevant contract.

#### *7.5.2 Municipal Manager*

The municipal manager, as the accounting officer of the municipality, has a duty to recover public resources lost to corruption. For instance, section 176(1)(2) of the MFMA requires the municipal manager to recover from a councillor or municipal official any loss or damages suffered by the municipality as a result of that councillor or municipal official's deliberate or

negligent unlawful actions. There is no doubt such actions include any corruption activities. Section 32(2) of the MFMA requires the Municipal Manager to recover unauthorised, irregular and wasteful expenditure. As argued above, a portion of the unlawful expenditure is likely to be attributed to corrupt behaviour. While the obligation to recover money is a key instrument, it is often not easy for the municipal manager to recover public resources lost to corruption. The SIU established that municipalities often do not investigate or recover such unlawful expenditure (PMG, 'SIU investigations into municipalities; NPA on SIU-referred cases', Public Accounts Committee, 16 October 2019). It attributes this to several reasons including poor governance.

Questions:

- What mechanisms are in place to investigate and recover stolen money and assets
- What has been the experience with recovery of stolen money and assets, and the key challenges that municipal managers face when trying to recover stolen assets?

### *7.5.3 The Asset Forfeiture Unit*

The Asset Forfeiture Unit (AFU) is an agency that is critical in the pursuit of illegally obtained money and assets. The Unit, which is based in the Office of the National Director of Public Prosecutions, enforces Chapter 5 (civil recovery of property) and Chapter 6 (proceeds of unlawful activities) of the Prevention of Organised Crime Act, 1998. Its main duty is to recover ill-gotten wealth by seizing criminal assets. The unit works closely with relevant government institutions such as the South African Revenue Services, the courts and SAPS. It thus has a role to play in recovering public resources lost by municipalities due to corruption.

Questions for field work

- How effective is the AFU?
- What is its record in recovering public resources lost by municipalities in the Western Cape?

### *7.5.4 Special Investigation Unit*

The SUI also plays a role in the recovery of financial losses to the state due to corruption, maladministration and fraud. Thus, the Unit should be active in helping municipalities to recover these financial losses. While there is evidence to suggest that the Unit has been active

in pursuing culprits that siphoned public resources in municipalities in other provinces (such as North West and KwaZulu-Natal) it is unclear if the Unit is active in the local government sector of the Western Cape. The nature of its contribution in working with municipalities to recover assets is also unclear. It is thus crucial to trace the Unit role recovering assets and resources lost by municipalities in the Western Cape.

## 8 CONCLUSION

An approach to combating corruption must be informed by the three components of corruption, namely –

- motive (inducements and incentives);
- opportunity (opportunities in, and weakness of the state); and
- means (accomplices and silencing of the diligent).

It must also be informed by the reality that the underlying premise of a legal approach (on which this report focuses) is that of rational choice; it is not smart to commit an act of corruption because of the inevitability of detection, conviction, serving time, and the loss of status and loot. As law must be animated by people, equal if not more attention should be given to change the human side. This report focuses on the legal framework, designed to minimise the opportunities for corruption. It uses a threefold manifestation of corruption, namely corruption as staff misconduct, as councillor misconduct and corruption as a criminal offense. It looks at definitions of corruption, detecting corruption, investigating and prosecuting corruption and the available sanctions.

Corruption in local government is defined in a significant number of provisions in the law, most notably the Prevention and Combating of Corrupt Activities Act, the Municipal Systems Act and the Municipal Finance Management Act. Generally, the law presents a reasonably coherent picture of what constitutes corruption in local government. However, at times there are inconsistencies between the various applicable laws. For example, the Municipal Systems Act, the Public Administration Management Act and the Collective Agreement all adopt different approaches to issues such as municipal staff members conducting outside work and conducting business with a municipality. Municipal policies generally defer to national legislation for their definition of corruption and there are few, if any, by-laws that specifically

deal with corruption. It is important to obtain further clarity on internal rules and protocols, for example with regard to the decision making on the publication of councillor and staff interests.

There are a great many mechanisms for the detection of corruption in local government as staff misconduct and councillor misconduct. These include internal oversight and risk management mechanisms, fraud hotlines and protected disclosures. Mechanisms have been built in to protect those reporting allegations from adverse consequences. These internal mechanisms are complemented by an impressive array in external oversight mechanisms, operated by the Auditor-General, the MEC, the Provincial Treasury, the National Treasury, the Public Protector, the Public Service Commission. All of these institutions are empowered, in one way or another, to receive and process allegations of corruption in local government. While there are some gaps, inconsistencies and overlaps, it is often the municipal policies themselves that play a consolidating role, establishing reasonably clear reporting lines for councillors, staff and members of the public to report allegations of corruption. In sum, it is safe to say that there is no shortage of mechanisms, designed to bring allegations of corruption to the attention of those who have authority to investigate. There are inconsistencies, though and the question is to what extent these hamper the efforts to combat corruption. For example, the law for dealing with corruption as staff misconduct is particularly fragmented. First, there is an unnecessary and awkward overlap between the regulations under the MFMA and the regulations under the Municipal Systems Act, dealing with the disciplining of staff. Secondly, the manner in which the Collective Agreement deals with corruption is at times out of sync with what the Code of Conduct for Staff Members provides.

The law is also rife with duties to report incidents of corruption into the criminal justice system. The Municipal Manager in particular is compelled by a number of provisions to report cases of corruption to SAPS. In addition, other organs of state such as the Public Protector, the SIU, the AG and the Public Service Commission are empowered and sometimes compelled to report allegations of corruption to SAPS.

With respect to the investigation of staff misconduct, there are again overlapping and sometimes contradictory laws. The overlap between the regulations under the MFMA and

those under the Municipal Systems is obvious. It is not clear yet what the effect of this is on the efficacy of the efforts to combat corruption.

The role of municipalities in investigating corruption with a view to assisting in the criminal prosecution of alleged offenders and complementing the scarce resources of SAPS and other law enforcement agencies, is a particularly important issue. The first theme is the mandate of municipal police services, applicable only to the City of Cape Town. In this respect, there has been a gradual increase in investigative powers of municipal police services.

More broadly, there is the issue of the legal basis for municipalities investigating corruption with a view to criminal prosecution. The report argues that there is such a legal basis and practice suggests that municipalities (metropolitan municipalities in particular) are establishing investigative capacity. A critical practical question is whether a municipality could augment SAPS's investigative function by directly forwarding a docket of its investigation to the provincial Director of Public Prosecutions. The report argues that there seems to be no legal barrier and there are opportunities that may be pursued at the provincial level in the NPA. Implementing this would require significant changes to the current protocols used for prosecution as well as negotiations between a municipality, the SAPS and the Deputy Director of Public Prosecutions.

A similar argument applies to municipal prosecutions and municipal courts where the law offers opportunities. In principle, devolved prosecutorial authority must relate to offences in by-laws. In this respect, it is important to note that most municipalities have not adopted by-laws that criminalise corruption. Municipal prosecution of statutory offences related to corruption requires an agreement with the DDP.

A range of sanctions are available in the law to respond to proven cases of corruption. This can be a 'conviction' and a sentence, some of which are disciplinary (demotion, dismissal, expulsion etc) and others are criminal (fines, prison sentences). Other sanctions are the blacklisting of service providers, cancelation of contracts and the recovery of stolen money and assets. One key instrument is the prohibition on re-employment after conviction for corruption as staff conduct. This applies to senior managers but not to ordinary staff.

Depending on the nature of the procedure, these sanctions are imposed by a variety of institutions, ranging from the Municipal Manager, the Council, the MEC, the National Treasury, and of course the courts.

With so many agencies and institutions playing a role, a key emerging theme is the question as to who plays the overall coordinating role with respect to combating corruption in local government. In particular, what should the role by of the provincial department of local government?

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