



Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings

Purpose

The implementation of the Municipal Finance Management Act (MFMA) in all municipalities and entities remains an important strategy to modernise and improve financial management and service delivery. Linked to this strategy are the fundamental principles of effective and efficient utilisation of public resources and transparent and accountable financial management practices.

Whilst many of the reforms that form part of this financial management strategy have commenced in a phased manner, over the last ten years, and much has been done to provide support, training and capacity building, it has become imperative to strengthen the enforcement provisions enabled in the MFMA to respond to various challenges in the sector.

The Auditor-General has highlighted a number of issues in the Consolidated Report on Local Government that include, amongst others, persistent non-adherence to financial management policies and prescripts, as well as the need to improve governance arrangements. A significant number of municipalities have also incurred unauthorised, irregular as well as fruitless and wasteful expenditure and a cursory view suggests that amounts in this regard are increasing year on year.

The MFMA through section 62 sets out the general financial management responsibilities of the accounting officer. The accounting officer is required to take all reasonable steps to ensure that the resources of the municipality are effectively, efficiently and economically utilised and that unauthorised, irregular, fruitless and wasteful expenditure are prevented. In addition, section 62 also obliges the accounting officer to ensure that disciplinary or when appropriate, criminal proceedings are instituted against any official of the municipality who has allegedly committed an act of financial misconduct or an offence in terms of the Act. The same responsibilities have also been placed upon other municipal officials.

To give effect to the priorities outlined in government outcomes, and to address requests to provide further regulations to deal effectively with matters of financial misconduct and to give effect to the concept of consequence management, the Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings were promulgated on 31 May 2014 to complement the Local Government: Municipal Systems Act, 2000 (Act No 32 of 2000) ("MSA") as amended and the regulations issued in terms thereof. These Regulations must be read together when implemented.

Objective and overview

The Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings will support measures to expeditiously address financial misconduct and mismanagement.

The objective of the Regulations is to set out processes and procedures that a municipality and municipal entities must follow when dealing with allegations of financial misconduct. The regulations will apply to all officials and political office bearers within municipalities and municipal entities.

The Financial Misconduct Regulations consist of four chapters. Chapter one contains the definition of terms that are used in the Regulations.

Chapter two deals with the manner in which allegations of financial misconduct should be reported within municipalities and municipal entities including simultaneous reporting of all allegations to the South African Police Services for criminal investigation, the establishment and functioning of the disciplinary board, preliminary and full scale investigations of allegations of financial misconduct and the submission of the necessary reports. The Regulations require that the Board be an independent advisory body that will assist the municipal council or the board of directors of a municipal entity with the investigation of allegations of financial misconduct. The Board will also make recommendations based on the findings of the investigation on further steps to be taken regarding the disciplinary proceedings or any other relevant steps.

Chapter two also provides details with regard to the composition of the Board, including those persons that are disqualified from serving on the board. By disqualifying certain persons on the board, especially political office bearers, the regulations ensure that there is clear separation of responsibilities and accountability between employer and employee. The chapter sets out the manner in which the council or the board of directors must refer allegations of financial misconduct to the Board, and the timeframes within which the Board must initiate investigations. The rationale for the proposed composition of the board was to ensure that there is sufficient skills present to perform the activities of the board. It is also important that appropriately experienced and skilled persons serve on the board to ensure that the board conducts its activities in accordance with the applicable legal framework, thereby making sure that proceedings are procedurally fair. In the event that the Board recommends that the allegation be further investigated by an external investigator, the Regulations provide for the framework within which the external investigator must be appointed. The Regulations further provide for the creation and submission of reports to the council or the board of directors by the external investigator. The investigation must be concluded and a report submitted within 30 days of referral by council or board of directors. The MSA provides for the conclusion of disciplinary proceedings within 90 days.

Chapter three deals with instances where a financial offence has been committed by a political office bearer of the municipality or municipal entity, for purposes of section 173(4) and (5) of the MFMA. The municipality has to deal with the allegations in accordance with the procedure set out in item 13 of Schedule 1 of the MSA, if the alleged financial offence also amounts to a breach of the Code of Conduct for Councillors. In the case of municipal entities, the entity must deal with the allegation in terms of section 93L of the MSA, if the alleged financial offence also amounts to a breach of the Code of Conduct applicable to directors of a municipal entity.

Chapter four of the Regulations makes provision for the Minister of Finance and the MEC's for Finance in the provinces to receive investigation reports and an information document that clearly sets out the name and position of the alleged wrongdoer, a summary of the facts

of the allegation, including the monetary value involved, any disciplinary steps taken or to be taken against the alleged wrongdoer, or if no disciplinary steps have been taken, the reason for such a decision. The MEC for Finance, the National Treasury or the Provincial Treasury may intervene by directing that an allegation be investigated if the council or board of directors has failed to act on allegations or recommendations.

In the event that an alleged wrongdoer resigns whilst disciplinary proceedings are ongoing, all investigations including disciplinary proceedings should continue against the alleged wrongdoer in his or her absence. This will ensure that cases do not unnecessarily stall to frustrate proceedings. It will however be important in this instance to ensure that the method of delivering the notice of suspension setting out particulars of the allegation and plans to investigate is appropriate to prove receipt thereof by the recipient. This is usually done via registered post.

Process initiated before the promulgation of the Regulations

If an allegation was reported before the promulgation of the regulations, municipalities should deal with it in terms of the law that was applicable at the time the offence was committed. The parties can however agree to utilise the regulations provided that there is written agreement to that effect.

Process to follow after the promulgation of the Regulations

If an allegation is reported after 1 July 2014, the provisions of the regulations will have to be fully implemented.

Synergy with other local government reforms

The Minister of Cooperative Governance and Traditional Affairs promulgated Disciplinary Regulations for Senior Managers in terms of the MSA. These Regulations are limited in their application as they deal with general acts of misconduct and not financial misconduct for purposes of the MFMA, and they apply to accounting officers and section 56 managers in municipalities, only.

The processes to be followed are now interlinked, as the Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings deal with processes and procedures regarding the reporting of allegations of financial misconduct and financial offences and any internal investigations to be undertaken and the conclusion thereof.

Disciplinary proceedings will be dealt with in terms of the Disciplinary Regulations for Senior Managers or the collective bargaining agreement between the South African Local Government Association (SALGA) and relevant municipal unions. All issues that are not covered in the Disciplinary Regulations for Senior Managers relating to financial misconduct will be dealt with in terms of the Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings. The Regulation also reinforces the prohibition of employment of officials found guilty of financial misconduct for a period of 10 years in the local sphere of government.

The Regulations, therefore, provide a framework that is consistent with the provisions of the MSA and MFMA. The effective implementation of these Regulations is intended to address the current gaps identified. Please refer to the step-by-step flowchart attached as annexure A which explains the process.

Clarification of overall intention and spirit of the regulations

Section 40 of the Constitution of the Republic of South Africa provides that government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated. Furthermore, section 41 of the Constitution goes further by requiring that each sphere of government and all organs of state must, amongst others, co-operate with one another in mutual trust and good faith by informing one another of, and consulting one another on matters of common interest and to avoid legal proceedings against one another. In addition, section 151(4) of the Constitution provides that national and provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.

The regulations in no way impede on the executive authority of municipalities or on their ability to make decisions and it is important to note that accountability to make decisions and take action with regard to allegations of financial misconduct still vests with the municipal council or the board of directors in case of municipal entities. Therefore, the secondary and complementary part is when Council or municipal officials do not act within a reasonable time as stipulated in the regulations, then there are options for the provincial or national treasuries to act as part of our system of cooperative governance as this relates to matters of public resources and public funds. Municipalities can also strengthen current council policies dealing with disciplinary matters to clearly stipulate the decision making powers of council and other relevant municipal structures.

The regulations provide for the disciplinary board to conduct a preliminary investigation into the allegation and if need be, a full investigation to determine the merit of a specific allegation. The disciplinary board does not necessarily have to conduct such investigations itself. A disciplinary board can request existing structures within the municipality, province or national government to conduct such investigations and provide the necessary reports with recommendations. For this purpose the accounting officer should ensure that a delegation is in place to ensure operational efficiency and effectiveness.

Clarification of specific provisions within the regulations

Regulation 3(1) sets out the reporting lines for allegations of financial misconduct against officials in municipalities and municipal entities. Specifically, regulation 3(1)(a) sets out the reporting lines for allegations of financial misconduct against the accounting officer, chief financial officer and a senior manager within municipalities. Regulation 3(1)(b) sets out the reporting lines for allegations of financial misconduct against "all officials other than the accounting officer" of a municipality. The term 'official' is defined in the MFMA to include an employee of a municipality or municipal entity. If we apply the definition to specifically regulation 3(1)(b), the implication is that the same officials who are covered under regulation 3(1)(a), namely the chief financial officer and senior managers, will also be covered under regulation 3(1)(b). The reporting of allegations against the chief financial officer and senior managers must be done under regulation 3(1)(a).

The regulations provide for a full blown investigation to be conducted when the preliminary investigation warrants such a step. Specifically, regulation 6(8) guides the municipal council or board of directors on how to proceed when the investigator's report recommends that disciplinary processes be instituted against the alleged wrongdoer. Regulation 6(8) therefore provides the synergy with existing reforms and it also gives effect to section 171(4)(b) of the MFMA. Section 171(4)(b) provides that a municipality must, if the investigation warrants such a step, institute disciplinary proceedings against the accounting officer, chief financial

officer or that senior manager or other official in accordance with systems and procedures referred to in section 67 of the MSA, read with schedule 2 of that Act. The intention behind regulation 6(8) was therefore to give effect to section 171(4)(b) of the MFMA, hence the cross-reference to the MSA regulations in relation to senior managers and the collective bargaining agreement for officials below senior management as acknowledged in section 67 of the MSA.

Section 57A(3) of the MSA provides that any staff member dismissed for financial misconduct contemplated in section 171 of the MFMA, corruption or fraud, may not be re-employed in any municipality for a period of ten years. The intention with regulation 6(9) is to re-enforce the provisions of section 57A(3) of the MSA.

Regulation 9(1) specifies the reporting lines for allegations of financial offences against councillors and members of the board of directors in municipal entities. Please note that the reporting lines for officials in municipalities and municipal entities are already clearly spelt in regulation 3(1), hence it was not repeated in regulation 9(1). Therefore, allegations of financial offences against officials in municipalities and municipalities must be reported as per the reporting lines in regulation 3(1).

Whilst the majority of actions by councillors or members of the board of directors in municipal entities will fall within the ambit of the Code of Conduct for Councillors or members of the board of directors, there will also be instances where the actions of councillors or members of the board of directors will fall outside their respective Codes of Conduct. It is important to note that chapter 3 of the regulations deals with two scenarios, namely, (1) where the actions of the councillor or member of the board of directors for purposes of section 173 of the MFMA also breach their respective Codes of Conduct and (2) where their actions do not breach their respective Codes of Conduct. The intention behind regulations 11 and 12 was to provide municipal councils and board of directors of municipal entities clarity on proceeding in cases where the actions of their members do not breach their respective Codes of Conduct. In this way, all roles currently created or existing under the Code of Conduct for Councillors i.e. Speaker and Mayors, will be acknowledged whenever allegations are dealt with in terms of the Code of Conduct for Councillors.

Regulations 11 and 12 require the appointment of a designated official who will receive, investigate and report on allegations of financial offences against the councillors and members of the board of directors in municipal entities. It was left to the municipal council or the board of directors (in cases of municipal entities) to decide and nominate for themselves who this person will be, given that this aspect is only applicable where the allegation is against a councillor or a member of the board of directors.

Regulation 19 allows the National or Provincial Treasury to intervene and direct that allegations be investigated in cases where a municipality, a municipal entity or a designated official fails to act on such allegations. It is important in this instance to understand the context within which the term 'intervention' is used. The term 'intervention', for purposes of the regulations, is used within the context of instances where the municipal council fails to act on allegations of financial misconduct as defined in section 171 and 172 of the MFMA. It is not used within the context of section 139 of the Constitution of the Republic of South Africa.

To improve transparency, provision has also been made in the Regulations for municipalities and municipal entities to report on all suspensions, disciplinary or criminal proceedings instituted in their annual report.

As part of the normal municipal audit cycle, the auditor-general audits compliance with laws and regulations. It therefore follows that during the 2014/15 financial year municipal audit, the auditor-general will audit whether allegations of financial misconduct and financial offences were dealt with in terms of the financial misconduct regulations. It is therefore important for accounting officers to introduce appropriate tracking mechanisms which will ensure that allegations are appropriately dealt with and that relevant documents are safeguarded.

Municipal Public Accounts Committee and the Disciplinary Board and other committees within municipalities

During the countrywide workshops on the Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings there were discussions around the potential conflict or duplication of functions between the Municipal Public Accounts Committee (MPAC) and the Disciplinary Board (DC Board) in so far as it relates to the council committee appointed in terms of section 32(2) of the MFMA to investigate the recoverability of irregular expenditure. Whilst we have taken note of the arguments raised in support of this assertion, the clarification provided below should clear any confusion which might exist in this regard.

In August 2011, the National Treasury and the Department of Cooperative Governance and Traditional Affairs jointly issued a guide on the establishment of MPACs'. This guide explicitly stated that the MPAC, once established, is a committee that will exercise oversight over the executive obligations of the municipal council. The MPAC is therefore the equivalent of the section 79 council committee in terms of the Municipal Structures Act which will assist council with its oversight responsibilities. In terms of the guide council can also assign certain investigation powers to the MPAC.

Section 32(2) of the MFMA states that a municipality must recover, amongst others, irregular expenditure unless it is certified, after an investigation by a council committee, as irrecoverable and be written off. We have noted that in most instances municipalities utilise the MPAC for purposes of MFMA section 32 investigations. It is therefore clear that the role of the MPAC for purposes of section 32(2) is limited to investigating the recoverability of the irregular expenditure.

The Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings makes provision for the establishment of a Disciplinary Board which will receive and investigate allegations of financial misconduct within municipalities. It is important to note that this board is made up of municipal officials and external representatives. Councillors are however prohibited from serving on this board. The main purpose of this board is to assist the Accounting Officer to discharge his or her responsibility to institute disciplinary proceedings against officials who commit acts of financial misconduct.

It is clear that both structures have different functions within the municipalities and their representation is also fundamentally different in that the MPAC consists solely of councillors whereas the DC Board is made up of officials. However, in the unlikely event that there is a duplication of functions, we suggest that the respective terms of reference be amended to ensure that all the investigative powers relating to allegations of financial misconduct vest solely with the DC Board.

The same argument is also relevant to the utilisation of the audit committee for purposes of the investigation of allegations of financial misconduct. The audit committee consists solely of external persons whereas the disciplinary board is composed of municipal officials and only one member of the audit committee.

Although section 166 of the MFMA allows council to provide the audit committee with some investigative powers, it is our understanding that the nature of such investigation is normally from an institutional perspective whereas the nature of the disciplinary board investigation relates to the conduct of individuals within the municipality. Municipalities and municipal entities are required to utilise the disciplinary board as a regulated structure to dispense with these matters and to make recommendations to Council for final decisions. This will also assist during the external auditor, performed by the Auditor-General.

Names of provincial officials responsible for monitoring implementation of regulations

Although the regulations were promulgated by the Minister of Finance, the MFMA does assign oversight responsibilities to the provincial treasuries through the MEC's for Finance to oversee the implementation of the Act in their respective provinces. It is for this reason that officials have been identified who will assist with the monitoring responsibilities of the implementation of the regulations. Monitoring will entail, regular follow up by provincial officials on status of allegations, actions taken, reports produced, council resolutions and propose interventions, to the MEC for Finance where actions are not taken in terms of the regulations. The provincial treasuries will maintain a database of all allegations against officials and all those found guilty of financial misconduct. Regular feedback must also be provided to the respective provincial legislatures to enable oversight over municipalities. This information will be shared with other government departments who have other legislated responsibilities in this regard. These persons will also be the first line of support in the provinces should municipalities or municipal entities need any assistance with regard to the implementation of the regulations. Please see below names of provincial officials responsible for monitoring implementation of these regulations:

| Name | Province | E-mail Address | Office number |
|-------------------|---------------|--|----------------|
| Ndomelele Madyibi | Eastern Cape | Ndomelele.Madyibi@treasury.ecprov.gov.za | (040) 101-0288 |
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| Seipati Tsiu | Gauteng | Seipati.tsiu@gauteng.gov.za | (011) 227-9063 |
| Phehello Maloi | KZN | Phehello.Maloi@kzntreasury.gov.za | (033) 897-4664 |
| JN Raphela | Limpopo | RaphelaJN@treasury.limpopo.gov.za | (015) 291-8444 |
| Nimrod Hlabane | Mpumalanga | nhlabane@mpg.gov.za | (013) 766-8713 |
| Philip Seane | Northern Cape | pseane@ncpg.gov.za | (053) 836-3000 |
| Sello Makwepa | North West | smokwepa@nwpq.gov.za | (018) 388-4070 |
| Bazil Vink | Western Cape | Bazil.Vink@westerncape.gov.za | (021) 483-6646 |

Conclusion

It is important that the accounting officer ensures that this Circular together with the Regulations is brought to the attention of the Municipal Council and other relevant officials within municipalities and municipal entities.

In order to better support the implementation of the regulations, the National Treasury has developed a process flowchart which explains step-by-step process to be followed. The flowchart is attached as annexure A. This Circular should be communicated within the municipality and especially to the senior manager responsible for Human Resources, Chief Finance Officer and Internal Audit to enable implementation and improvements to processes.

All requests for assistance should be addressed to the postal details below or email mfma@treasury.gov.za

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Annexure A: Flowchart aligning processes in the MFMA and MSA