

THE DRAFT Municipal Financial Misconduct Regulations

On 13 July 2012, the National Treasury published draft Municipal Financial Misconduct Regulations for public comment. They set out processes and procedures that municipalities and entities must follow when dealing with allegations of financial misconduct. They apply to all officials and political office bearers in municipalities and municipal entities.

The Draft Regulations instruct each municipality to establish and publicise reporting procedures to ensure confidentiality and immunity from prejudice, harassment and dismissal in the reporting of allegations of financial misconduct. Municipal councils must also establish disciplinary boards, as independent advisory bodies, to investigate allegations of financial misconduct and advise the council on further steps to be taken based on its findings.

Allegations of financial misconduct

The Draft Regulations stipulate that allegations against a political office bearer must be reported to the Speaker of the council and to the Minister of Finance. Those against section 57 managers (accounting officers, senior managers or chief financial officers) must be reported to the mayor of the municipality. Allegations of financial misconduct against other officials must be reported to the municipal manager. The provincial and national treasuries must also be informed of any allegation of financial misconduct involving a political office bearer or a section 57 manager.

Referral of allegations of financial misconduct

After receiving a report or allegation of financial misconduct, the council must refer the matter to its disciplinary board.

However, if the alleged financial misconduct constitutes a criminal offence in terms of section 173 of the MFMA, the council or the municipal manager must report it to the police. This must be done promptly if there is likelihood of further financial loss.

Successful prosecution by the police must be reported to the National Treasury, together with full details of the convicted wrongdoer, the name of the municipality and the sanction imposed.

Preliminary investigation

The disciplinary board must initiate and conduct a preliminary investigation within 10 days of receipt of the allegation or report. Depending on the outcome, it must then recommend whether or not the allegation warrants a full investigation. The disciplinary board must terminate the investigation if it finds that the allegations are frivolous, vexatious or speculative.

If the disciplinary board recommends a full investigation, the council must commission it to conduct one. However, if the cost involved is too high, the alleged wrongdoer is senior, or the investigation of the alleged financial misconduct is serious or too sensitive, the council may designate a person outside the municipality who has the appropriate specialist

expertise. Alternatively, it may appoint an investigation team consisting of an outside person with appropriate expertise, a representative of the department responsible for local government in the province and a representative from either the provincial or national treasury.

In the event that the municipality fails to commission an investigation after a recommendation by the disciplinary board that it should do so, the board can approach the provincial or national treasuries or the Municipal Public Accounts Committee for assistance. The provincial or national treasuries or the MEC for finance may intervene and direct that a full investigation is conducted.

Full investigation

After an investigation has been completed, the disciplinary board, the external (independent) investigator or the investigating team (as the case may be) must compile a report with disciplinary recommendations and submit it to the mayor and the municipal manager. Immediately thereafter they must inform the Speaker of the council that they have done so and must also submit a copy to the provincial and national treasuries.

The mayor or the municipal manager must then table the report in council within seven days. The council may reject the report's findings or recommendations, in which case the reasons for doing so must be provided to the investigating body within five days. If the council does not reject the findings or recommendations but fails to implement them, the investigating body must notify the provincial and national treasuries for possible intervention in terms of regulation 13.

Disciplinary proceedings

Disciplinary proceedings must be instituted in term of the Disciplinary Codes and Procedures for Senior Managers Regulations of 2011. However, if the alleged wrongdoer is an official below section 56, the disciplinary proceedings must be in accordance with the collective bargaining entered into between SALGA and the representative municipal unions.

If the alleged wrongdoer is found guilty after the disciplinary proceedings, the moratorium in terms of section 57A of the Municipal Systems Amendment Act of 2011 kicks in. As such, he may not be re-employed by any municipality for ten years.

Financial misconduct by political office bearers

As noted earlier, allegations of financial misconduct against political office bearers must be reported to the Speaker. If

they amount to a breach of Code of Conduct for Councillors, the Speaker must deal with the allegations in accordance with the procedure set out in item 13 of Schedule 1 of the Municipal Systems Act. If not, the Speaker must deal with them in terms of regulations 16 and 18. The procedure prescribed by regulation 16 is substantially the same as the procedure set out in item 13 of Schedule 1 referred to above. In both cases, the Speaker must initiate an investigation and then give the political office bearer concerned an opportunity to reply in writing. He or she must report the matter to a council meeting. The only difference is that the Speaker is obligated not only to report the outcome of the investigation to the MEC for Local Government, but also to the MEC for Finance in the province and to the Minister of Finance.

After receiving the report on the outcome of the investigation commissioned by the Speaker, the council may investigate the alleged financial misconduct and make a finding. Alternatively, it may designate a council committee to do so and then make appropriate recommendations to the council. If the council or its committee finds a commission of financial misconduct, it may then:

- issue a warning to the concerned officer bearer;
- reprimand the office bearer;
- request the MECs for finance and for local government in the province to suspend the political office bearer;
- fine the office bearer;
- request the MECs for finance and local government to remove the office bearer from office;
- report the findings to the ministers of finance and COGTA.

The office bearer may appeal to the MECs for finance and local government within 14 days and send a copy of the appeal to the council, allowing it to make representation within 14 days of receipt thereof. The MECs may appoint a person or committee to investigate the allegations. They may then confirm, set aside or vary the decision of the council and inform the office bearer and the council of the outcome of the appeal. Should they find that there was a commission of financial misconduct, the MECs may:

- suspend the office bearer for a period and on condition determined by them; or
- remove the office bearer from office.

Analysis

The Constitution provides that government is constituted in national, provincial and local spheres, which are distinctive, interdependent and interrelated. Each sphere of government must respect the constitutional status, powers and functions of the others and each should exercise its powers and perform

amend the Constitution or the principal Act by adding an instance of intervention not envisaged in either one.

Secondly, it is not clear what Regulation 13 actually means by 'may direct'. What is it that the MEC for Finance may direct? Does it mean that the MEC may direct the municipality to investigate the allegation, or that the MEC may do the investigation him/herself by designating a person or persons in line with section 106 of the Systems Act and Item 14(4) of the Code of Conduct for Councillors? If 'may direct' means the latter, then this provision is a duplication/ repetition of the existing law.

Thirdly, it is not clear what 'and' means in Regulation 18(2)(e) read with 18(6). Which MEC may actually remove the political office bearer? The Code of Conduct says the MEC for local government. Must the two MECs agree on this? Does one have a veto over the other?

Fourthly, the Regulation 18(6)(a) intervention goes against jurisprudence, particularly *Van Wyk v Uys NO* (2001) JOL 8976 (C). This judgment dealt with the question of the circumstances under which the MEC was permitted to investigate.

The Court understood item 14 of the Code of Conduct for Councillors to mean that only after a council requests an MEC in terms of item 14(6) to dismiss or suspend a councillor may the MEC use his or her powers of investigation under item 14(4) to assess that request.

The MEC does not have the power to investigate

and suspend on his or her own initiative, nor the power to initiate the enquiry and suspend the councillor before the council has completed its own enquiry.

Codes of conduct

The following question must be answered: can a councillor or staff member commit financial misconduct without falling foul of the codes of conduct for councillors and municipal staff members, as the case may be?

The enactment of the Draft Financial Misconduct Regulations presupposes that one can commit an act of financial misconduct and not fall foul of these codes of conduct. Both prohibit misconduct. If, by committing an act of financial misconduct, a councillor or municipal staff member is also committing a breach of one of these codes, then there is no need for the Regulations. All that is required is strengthening the codes of conduct to achieve the objectives pursued by these Draft Regulations.

Secondly, Regulation 2(1)(b) of the Draft Regulations provides that 'any allegation of financial misconduct against the accounting officer, a senior manager or the chief financial officer of a municipality, must be reported to the mayor of the municipality'.

This is in direct conflict with Item 13 of the Code of Conduct for Municipal Staff Members, which requires that the person to whom a breach of the Code is reported must be a superior officer or the Speaker of the council, not the mayor.



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