

**THE ROLE OF THE AUDITOR-GENERAL IN THE PROMOTION OF EFFICIENT  
FINANCIAL MANAGEMENT IN MUNICIPALITIES: A CASE STUDY OF THE  
NORTH WEST PROVINCE**



**UNIVERSITY of the  
WESTERN CAPE**

**A mini-thesis submitted in partial fulfilment of the requirements for the degree  
of Master of Laws (LLM) in the Faculty of Law, University of the Western Cape**

**by**

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**15 November 2019**

## DECLARATION

I, **Gaopalelwe Lesley Mathiba**, do hereby declare that *The Role of the Auditor-General in the Promotion of Efficient Financial Management in Municipalities: A Case Study of the North West Province* is my original work and has not been submitted for any degree or examination at any university or institution of higher learning. I herewith further declare that while I have relied on a wide range of sources and materials to develop the main argument presented in this study, all those materials and sources have been duly and properly acknowledged by means of complete references.

Signature:



Date: **15 November 2019**

Supervisor: Professor Nico Steytler

Signature: .....

Date: .....



**Cape Town, 2019**

## ABSTRACT

That South African municipalities, in vast majority, are experiencing serious financial problems is well-known to anyone with an interest in local government sector. Given that, the study considers the role of the Auditor-General (AG) in promoting sound financial management in municipalities. The disciplinary perspectives from which the inquiry is considered are law and public administration. The context for this consideration is the North West, a province which is inundated by poorly performing municipalities that are literally on the brink of financial and operational collapse. The study proceeds from the premise that efficient financial management practices are essential to the long-term sustainability of municipalities. The role of the AG is key in this regard in that the latter is a watchdog over state coffers and the pivot of the oversight mechanism over the management of public finances. Furthermore, the AG strives to institutionalise and promote a culture of good governance, accountability and transparency in municipalities. It achieves this through routine auditing and provision of audit recommendations that seek to improve municipalities' internal controls.

However, this purpose gets undermined, and eventually defeated, in the instance where audit recommendations are being ignored. Of concern is that the non-implementation of audit recommendations has become a norm in most municipalities in the North West. The study has considerable breadth in its analysis of this problem by looking closely into three municipalities: Mahikeng, Ditsobotla and Tswaing. It is not immediately clear why this trend is emerging or has emerged. In that note, a resolve to embark on this study was impelled by a sense of commitment to try to understand the real issue behind this trend and to see how best it can be countered. This brings the study to then ask: How can the AG's recommendations be better and adequately given effect in the North West municipalities?

In response, it will be argued that this issue cannot be solved by the AG alone. What is needed, instead, is the development of an action plan, policy and institutional framework that will guide and facilitate the multi-agency approach and inter-institutional collaborations towards addressing the problem. Further argument will be advanced to say that the efforts undertaken to reconstitute and strengthen the legal framework governing the AG through the 2018 amendments to the Public Audit Act do not constitute a magic bullet solution to the dismal downward trajectory across the North West municipalities, as contemporary narratives seek to suggest.

## **KEYWORDS**

Auditor-General

Audit recommendations

Municipalities

Efficient financial management

Supervision

Provincial government

National government



## DEDICATION

In loving thoughts and memory of my dearly departed mother

*Dibakatsatsi Gloria Mathiba*

(1966 - 2003)

Her untimely death robbed me of an opportunity to say to her that: “*Mama I made it!!!*”.

*As with flowers, so with men,  
They blossom, bloom and wither away  
But there are those who always  
Leave a trail of scent behind.  
In them, you belong mom.*

*Rest easy!*



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The financial assistance of the National Research Foundation (NRF) towards this research is hereby acknowledged. Opinions expressed and conclusions arrived at, are those of the author and are not necessarily attributed to the NRF.

My sincere gratitude is also due to Professor Jaap de Visser, first in his capacity as the Director of the Dullah Omar Institute for Constitutional Law, Governance and Human Rights and secondly, in his capacity as the co-ordinator of Local Government law component. Thanks for sharing your expert knowledge of local government systems Prof. I am equally thankful to the entire staff of the Institute, especially: Dr Tinashe Chigwata, Dr Michelle Maziwisa, Mrs Gladys Mirungi-Mukundi, Mrs Mandy Cupido, Mrs Valma Hendricks, Mrs Debbie Gordon and Ms Kirsty Wakefield. I must also thank Mr Henry Paul Gichana for reading and editing all the drafts of this work. Also, special gratitude has to be accorded Mr Curtly Stevens who had to join this project at the verge of its completion by providing editorial support. The feedback of this two doctoral students always impelled me to think carefully and refine my writing.

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May God bless you all.

*“Let us hold unswervingly to the hope we profess, for He who promised is faithful”*

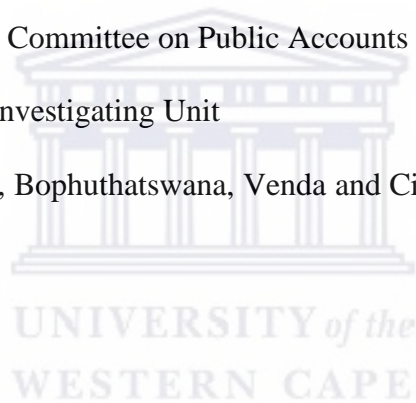
~Hebrews 10:23 (NIV)~

## LIST OF ABBREVIATIONS

AG	Auditor-General
AGSA	Auditor-General South Africa
ANC	African National Congress
CFO	Chief Financial Officer
CoGTA	Cooperative Governance and Traditional Affairs
CSOs	Civil Society Organisations
DPCI	Directorate of Priority Crimes Investigation ('the Hawks')
GRAP	Generally Recognised Accounting Practice
IAASB	International Auditing & Assurance Standards Board
ISA	International Standards on Auditing
IDP	Integrated Development Plan
JOPA	Journal of Public Administration
LG	Local Government
LGTAS	Local Government Turn-Around Strategy
MEC	Member of Executive Committee
MFMA	Municipal Finance Management Act 56 of 2003
MM	Municipal Manager
MPAC	Municipal Public Accounts Committee
MSA	Municipal Systems Act 32 of 2000
NCOP	National Council of Provinces
NPM	New Public Management
NT	National Treasury
NTR	National Treasury Regulations
NWPG	North West Provincial Government



PAA	Public Audit Act 25 of 2004
PAAA	Public Audit Amendment Act 5 of 2018
PELJ	Potchefstroom Electronic Law Journal
PMG	Parliamentary Monitoring Group
PP	Public Protector
PT	Provincial Treasury
SALGA	South African Local Government Association
SAI	Supreme Audit Institution
SCM	Supply Chain Management
SCoAG	Standing Committee on Auditor-General
SCOPA	Standing Committee on Public Accounts
SIU	Special Investigating Unit
TBVC States	Transkei, Bophuthatswana, Venda and Ciskei



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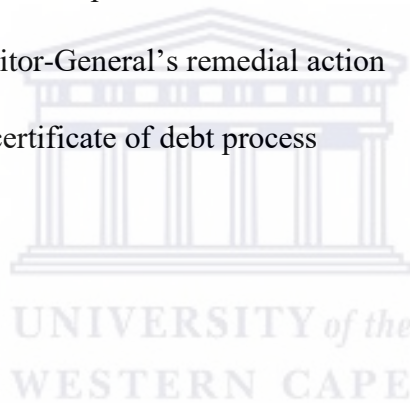
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# CHAPTER ONE

## INTRODUCTION

*'The audit outcomes of North West, the worst since 2012-13, clearly indicated the deteriorating accountability, a blatant disregard of our messages and recommendations, complacency and a lack of commitment to decisively address key areas of concern as well as a lack of political will to effect consequences.'*<sup>1</sup> - The Auditor-General, Mr Kimi Makwetu

### 1.1. Problem statement

South Africa has adopted a multi-level system of government with authority being devolved and entrusted upon three levels of government. This system is reaffirmed by the 1996 Constitution which provides that the government is constituted at national, provincial and local spheres.<sup>2</sup> Steytler makes an intrinsically valid point that these spheres are 'distinctive' in their powers, 'interrelated' in a hierarchy of supervisory authority and 'interdependent' to perform the task of governance in a more cooperative manner.<sup>3</sup> Their cooperation must be based on mutual trust and good faith. Furthermore, each sphere is required to respect the constitutional status, powers and functions of the others and it enjoys a constitutionally entrenched autonomy,<sup>4</sup> which includes fiscal.<sup>5</sup> Pursuant to ensuring the proper exercise of this autonomy, the system of checks and balances has been introduced at each sphere.<sup>6</sup> This system is an important safeguard to track and ensure optimal performance of public service, effective governance, accountability and efficient management of public finances.<sup>7</sup>

Within the bigger scheme of mechanisms and practices to advance the latter aspirations is auditing practice. Auditing is highly acclaimed as the most important part of the financial

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<sup>1</sup> Auditor-General *Consolidated General Report on the Local Government Audit Outcomes: MFMA 2017/18* (2019) 11.

<sup>2</sup> S 40(1) Constitution of the Republic of South Africa, 1996.

<sup>3</sup> Steytler N 'Local Government in South Africa: Entrenching Decentralised Government' in Steytler N (ed) *The Place and Role of Local Government in Federal Systems* (2005) 204. S 40(1) Constitution.

<sup>4</sup> Ntliziywana P 'Municipal Financial Misconduct Regulations: The Draft' (2012) 14(3) *Local Government Bulletin* 12-15.

<sup>5</sup> Ss 40 & 41 Constitution. See also Steytler (2005) 6.

<sup>6</sup> O'Regan K 'Checks and balances: Reflections on the development of the doctrine of separation of powers under the South African Constitution' (2005) 8 *PELJ* 124. See also De Visser J & November J 'Overseeing the overseers: assessing compliance with municipal intervention rules in South Africa' (2017) 9 *Hague Journal of the Rule of Law* 109-110; Steytler N 'The Constitutional Court of South Africa: Reinforcing an hourglass system of multi-level government' in Aroney N & Kincaid J (eds) *Courts in Federal Countries Federalists or Unitarists?* (2017) 338.

<sup>7</sup> Craig SE *An Exploration of the Relationship between Municipal Audit Outcomes and Levels of Service Delivery in South African Local Government* (unpublished Master mini-thesis, UCT, 2017) 2.

structure within public sector.<sup>8</sup> The position is well-documented on its potential to combat corruption, thus fostering efficient financial management,<sup>9</sup> which is key in the realisation of the developmental mandate which is particularly entrusted upon municipalities.<sup>10</sup> It is for that reason, apart from strengthening constitutional democracy, that the Constitution established the Auditor-General as the Supreme Audit Institution.<sup>11</sup>

The functions of the Auditor-General are outlined in section 188(1) of the Constitution, which include auditing and reporting on the accounts, financial statements and financial management of, among other institutions, all municipalities. The audit practice follows the globally observed trend and a distinctive principle of public administration that all government institutions ought to be audited by an independent body in order to strengthen democracy, promote accountability and foster responsiveness.<sup>12</sup> The national legislation is in place to regulate this practice by enumerating further on the operations of the Auditor-General.<sup>13</sup>

Similarly, municipalities are equally the important institutions entrusted with the developmental mandate which transcends a mere service delivery and are 'regarded as the government closest to the people.'<sup>14</sup> They are responsible for the implementation of the national policies,<sup>15</sup> alongside the provision of basic services to the local citizenry.<sup>16</sup> Given this

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<sup>8</sup> Ngoepe M & Ngulube P 'Contribution of record-keeping to audit opinions: an informetrics analysis of the General Reports on Audit Outcomes of the Auditor-General of South Africa' (2013) 32 *ESARBICA Journal* 53. See also Hussain Z *Effectiveness of the Office of the Comptroller and Auditor General of Bangladesh in ensuring Accountability of Auditee Organizations: A Case Study of an MTBF Ministry* (unpublished Masters thesis, North South University, 2011) 1.

<sup>9</sup> Dye K & Stapenhurst R *Pillars of Integrity: The Supreme Audit Institutions in Curbing Corruption* (1998) 25. See also Korje BG 'Assessment of implementation of audit recommendations in public sectors in Oromia Regional Government Public Institutions (2003-2006)' (2016) 4/2 *International Journal of Business & Management* 23.

<sup>10</sup> Fuo O 'Intrusion into the autonomy of South African local government: Advancing the minority judgment in the *Merafong City* case' (2017) *De Jure* 325. See also Koma SB 'Developmental local government: issues, trends and options in South Africa' (2012) 5 *African Journal of Public Affairs* 105-116.

<sup>11</sup> S 1 Public Audit Act 25 of 2004 (PAA) defines 'the supreme audit institution' as 'the institution which, however designated, constituted or organized, exercises by virtue of the law of a country, the highest public auditing function of that country'.

<sup>12</sup> Van der Waldt G *Managing for Excellence in the Public Sector* 3 ed (2016) 163.

<sup>13</sup> The PAA read with the Public Audit Amendment Act 5 of 2018 (PAAA).

<sup>14</sup> *Executive Council of the Western Cape v Minister of Provincial Affairs and Constitutional Development* 2000 (1) SA 661 (CC). See also De Visser J 'Developmental local government in South Africa: institutional fault lines' (2009) 2 *Commonwealth Journal of Local Governance* 11; Thornhill C 'The transformed local government system: some lessons' (2008) 43 *JOPA* 492 & Fuo O *Local Government's Role in the Pursuit of the Transformative Constitutional Mandate of Social Justice in South Africa* (unpublished LLD thesis, NWU, 2014) 82-84.

<sup>15</sup> Steytler (2005) 201.

<sup>16</sup> Tau SF *IDP as an implementation vehicle for service delivery for local government in South Africa* (2013) 186.

important role, there is a clear need for an improved system of financial management to ensure the sustainability of municipalities. However, contemporary trends show that most municipalities are close to financial and operational collapse due to financial mismanagement and corruption.<sup>17</sup> This is a serious problem calling for both short and long term solutions.

Accordingly, there is a need to evaluate the legal framework governing the Auditor-General, particularly the institutional powers. The obvious significance of this evaluation lies with its potential to provide solutions to the financial collapse across municipalities by gauging whether the Auditor-General's powers are structured for success. This has for several years remained topical and has now crystallised into academic debate. Although the opinion is divided in this regard, of common ground is that the Auditor-General is faced with several challenges that are inimical to its oversight function.<sup>18</sup> The challenges are operational and systematic in nature. Standing out among these challenges is the practical inadequacy in the institutional powers to enforce compliance with audit recommendations against defaulting municipalities. This problem is evidenced by the recent municipal audit outcomes,<sup>19</sup> and is further emphasised by Ijeoma.<sup>20</sup>

Compliance with audit recommendations is important for good financial performance in municipalities.<sup>21</sup> These recommendations are useful yardsticks of improvement since they identify specific aspects within the broader municipal financial systems that need performance augmentation.<sup>22</sup> Chandler describes audit recommendations as 'courses of action suggested by the auditor ... to address the condition or adverse audit finding.'<sup>23</sup> Given that, their

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<sup>17</sup> Mathiba G 'Time to clean out the Augean Stables of local government' (2019) available at <https://www.dailymaverick.co.za/opinionista/2019-05-28-time-to-clean-out-the-augean-stables-of-local-government/> (accessed 20 June 2019).

<sup>18</sup> Munzhedzi PH 'Fostering public accountability in South Africa: A reflection on challenges and successes' (2016) 12 *Journal for Transdisciplinary Research in Southern Africa* 4; Mashamaite MM *Improving Accountability in South African Local Government: Elements for Effective Local Government Accountability* (2013) 94; Sibanda MM 'Control, ethics and accountability in the financial management performance of Eastern Cape municipalities' (2017) 52 *JOPA* 329; Zybrands W *A Perspective on Local Government in South Africa* (1995) ch 1; Ntonzima L 'Public financial controls: can South African municipalities improve?' (2011) 43 *JOPA* 1010-11.

<sup>19</sup> *Consolidated Audit Report 2017/18* (2019) 16.

<sup>20</sup> Ijeoma E *South Africa's Public Administration in Context* (2013) 174 & 201.

<sup>21</sup> Sibanda (2017) 314.

<sup>22</sup> Powell DM, O'Donovan M, Ayele Z & Chigwata T 'Operation Clean Audit 2014: Why it failed and what can be learned' available at <https://dullahomarinate.org.za/acsl/operation-clean-audit-2014> (accessed 20 June 2019) 2.

<sup>23</sup> Chandler RA 'Judicial views on Auditing from the Nineteenth Century' (1997) 2(1) *Accounting History* 61-80.

implementation by municipalities bears great potential to enhance good governance and facilitate the desired outcome of improved financial accountability.<sup>24</sup>

In June 2019, the Auditor-General released the audit report for the 2017/18 financial year and it presents a very bleak picture of the municipalities' financial affairs. The majority of municipalities are grappling with poor financial management practices, system regressions in accountability,<sup>25</sup> and an overall operational collapse.<sup>26</sup> The North West tops the list and is getting worse each year since 2012/13 financial year.<sup>27</sup> Strikingly, no municipality in the North West has ever obtained an unqualified financial audit (not even to mention a clean audit) since the emergence of local government in 2000.<sup>28</sup> This trend is attributable to several factors including irregular expenditure, non-compliance with legislative framework, ineffective provincial supervision,<sup>29</sup> weak internal controls, fraud and corruption, as well as lack of skilled personnel in key areas of finance, performance and internal audit.<sup>30</sup>

The Auditor-General provides the annual audit reports with extensive recommendations to municipal councils, provincial executive and the National Treasury (NT). However, these audit recommendations are often blatantly ignored in municipalities. This problem has been existent over the years and it is exacerbated by the Auditor-General's lack of enforcement capacity.<sup>31</sup> The special case in point is the Public Audit Amendment Act 5 of 2018 (PAAA) which introduced new enforcement powers of the Auditor-General. These powers, at a face value, are touted to be progressive measures to translate the current deficient role of the Auditor-General into a more effective one. The study doubts this narrative and an argument will be advanced against it later. The powers include, first, the issuance of a certificate of debt against an errant official to recover the financial loss suffered by the municipality. Secondly, the power to make binding remedial action for non-compliance and lastly, the referral of material irregularities to

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<sup>24</sup> Nsingo S 'Role players in public financial management' in Moeti KB (ed) *Public Finance Fundamentals* (2014) 50. See also Aikins SK 'Determinants of auditee adoption of audit recommendations: local government auditor's perspectives' (2012) 24 *Journal of Public Budgeting, Accounting & Financial Management* 195-220.

<sup>25</sup> *Consolidated Audit Report 2017/18* (2019) 8-9.

<sup>26</sup> CoGTA *Local Government Anti-corruption Strategy* (2015) 10.

<sup>27</sup> *Consolidated Audit Report 2017/18* (2019) 11.

<sup>28</sup> Greffrath W & Van der Waldt 'Section 139 interventions in South African local government 1994-2015' (2016) 75 *New Contree Journal* 138.

<sup>29</sup> *Consolidated Audit Report 2017/18* (2019) 2-3.

<sup>30</sup> Woods G & Mantzaris EA *The Anti-Corruption Reader* (2012) 137.

<sup>31</sup> *Consolidated Audit Report 2017/18* (2019) 9. See also Van der Walt G, Van Niekerk D & Doyle M, Knipe A & Du Toit D *Managing for Results in Government* (2002) 173.

the relevant public investigating bodies.<sup>32</sup> However, the Act fails to provide precise stipulations and practical insights for the effective operationalisation of these powers.

It is against this background that this study problematizes the issue of non-implementation of audit recommendations in municipalities, particularly in the North West. The exploration of this problem is timely and cannot be overemphasised any further than is already emphasised by the Auditor-General.<sup>33</sup>

## **1.2. Research question**

### **1.2.1. Overarching research question**

The overarching question of the study is: ‘How can the Auditor-General’s recommendations be better and adequately given effect in the North West municipalities (thus dealing with dysfunctionality and poor financial performance)?’

### **1.2.2. Ancillary research questions**

In response to the overarching question, the following ancillary questions are pertinent:

1. What is the role of the Auditor-General?
2. How do municipalities implement audit recommendations?
3. How can and does the Auditor-General enforce implementation of its recommendations against municipalities?
4. How can and does the provincial government implement audit recommendations in municipalities?
5. How can and does the national government implement audit recommendations in municipalities?
6. Is the current legal framework and other measures for the implementation of audit recommendations adequate to extract the most benefit of their desired intent?

These questions will be answered in respect of the North West Province due to its long history of dysfunctionality and financial maladministration across its municipalities.<sup>34</sup> To

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<sup>32</sup> S 4 PAAA.

<sup>33</sup> *Consolidated Audit Report 2017/18* (2019) 9. See also Munzhedzi PH ‘The national government’s intervention in the provincial government: A case of Limpopo’ (2014) 5 *Mediterranean Journal of Social Sciences* 701. See also Kraai S, Holtzhausen N & Malan L ‘Oversight Mechanisms in Local Government: A Case of Ekurhuleni Metropolitan Municipality in South Africa’ (2017) 9(6) *African Journal of Public Affairs* 59-63.

<sup>34</sup> *Consolidated Audit Report 2017/18* (2019) 11. See also Molepo M ‘North West Local Municipalities on their Knees’ *Parliament of the Republic of South Africa* (2019) available at <https://www.parliament.gov.za/news/north-west-local-municipalities-their-knees> (accessed 30 August 2019).



contextualise the problem, three municipalities (Mahikeng, Ditsobotla and Tswaing) will be adopted as case studies. The justification for selecting these municipalities is threefold. First, they have never received clean or unqualified audit since 2000.<sup>35</sup> Secondly, at the time of writing, they were under section 139(1) intervention due to financial and operational collapse.<sup>36</sup> Lastly, they have been, and some are still, experiencing violent service delivery protests.

### 1.3. Argument

The study argues that the role of the Auditor-General is important in the promotion of good governance and efficient financial management in municipalities.<sup>37</sup> It is further argued that the Auditor-General's role should not end at making audit recommendations, but should extend further to ensure the eventual implementation of those recommendations by municipalities. The absence of enforcement powers is perhaps what led Murray to conclude, quite correctly, that 'the force of the Auditor-General as an institution ... lies in influence [and] not in formal power'.<sup>38</sup>

It is further argued that the municipal councils are responsible for the implementation of audit recommendations in municipalities and that they often fail in this regard. It is believed that this failure can be addressed if all the involved role-players could have some regard for their duties. These include the Mayor, the administration (MM, CFO, and internal audit units), the Audit Committees and the Municipal Public Accounts Committee (MPAC).

It is also argued that municipalities can be able to effectively implement the audit recommendations if there are strong supervisory measures from the provincial and national governments. However, it will be demonstrated that the provincial and national governments provide ineffective supervision over municipalities, with the negative impact of financial and operational collapse.<sup>39</sup>

Further argument is that the efforts undertaken to reconstitute and strengthen the legal framework governing the Auditor-General (the 2018 amendments to the Public Audit Act) do not constitute a silver bullet solution to the financial and systematic challenges in municipalities. Instead, strong collaborations with other institutions should be fostered to make

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<sup>35</sup> Greffrath & Van der Waldt (2016) 138.

<sup>36</sup> S 139(5) Constitution.

<sup>37</sup> *Certification of the Constitution of the Republic of South Africa*, 1996 (CCT 23/96) [1996] ZACC 26 para 160.

<sup>38</sup> Murray C 'The Human Rights Commission et al: What is the Role of South Africa's Chapter 9 Institutions?' (2006) 9(2) *Potchefstroom Electronic Law Journal* 132.

<sup>39</sup> *Consolidated Audit Report 2017/18* (2019).

the Auditor-General's role more effective. These institutions include, among others, the Public Protector (PP), South African Police Service (SAPS), Special Investigation Unit (SIU) and civil society organisations (CSOs).

Lastly, it is argued that efficient financial management practices are important in achieving the long-term sustainability of municipalities since they complement accountability and transparency. In turn, weak and opaque financial management results in the misuse of municipal resources, thus leading to dysfunctionality and corruption.

#### 1.4. Literature review

There is wealth of literature on the institutional operations, weaknesses and strengths of the Auditor-General,<sup>40</sup> and its correlation with the New Public Management (NPM) framework,<sup>41</sup> public accountability,<sup>42</sup> good governance and anti-corruption regime in public sector is well-established, explored from different perspectives. Similarly, literature on efficient financial management systems in the field of public administration abound. However, this is often not explored in relation to the Auditor-General, particularly from legal and policy perspective. This is so, in part, because of the paucity of attention to the changing dimensions on the current legal framework on the role and enforcement powers of the Auditor-General.<sup>43</sup>

The Auditor-General is undoubtedly one of the most important institutions for ensuring public accountability and good governance. As the name suggests, its primary mandate is to audit the financial statements and accounts of all state departments and institutions.<sup>44</sup> Ngoepe and Ngulube posit that the Auditor-General is the major role-player in safeguarding effective oversight, transparency, accountability and good governance.<sup>45</sup> Similarly, Norgen describes the Auditor-General as a 'watchdog agency' that constantly gauges and oversees financial performance in the public sector for more accountability and openness.<sup>46</sup> On a cautious note,

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<sup>40</sup> Masipa TS *The Nexus between Government Effectiveness and Corruption in South Africa* (2016) 23-38.

<sup>41</sup> Ntliziywana P *The Transformation of Local Government Service Delivery in South Africa: The Failures and Limits of Legislating New Public Management* (unpublished PhD thesis, UWC, 2017) ch 1. See also Steytler N & De Visser J *Local Government Law of South Africa* (2007) ch 7 & 11.

<sup>42</sup> De Visser J 'Performance management in the Systems Act: Implementing accountability' (2001) 3 *Local Government Bulletin* 7.

<sup>43</sup> Ramkumar V & Krafchik W 'The role of civil society organizations in auditing and public finance management' (2005) available at <https://www.internationalbudget.org/wp-content/uploads/The-Role-of-Civil-Society-Organizations-in-Auditing-and-Public-Finance-Management1.pdf> (accessed 18 June 2019).

<sup>44</sup> S 188(1) Constitution.

<sup>45</sup> Ngoepe & Ngulube (2013) 53.

<sup>46</sup> Norgen C 'The world needs International Audit Standards' (2010) 37(1) *International Journal of Government Auditors* 10.

Kayrack indicates that the Auditor-General can only achieve these aspirations if it is independent.<sup>47</sup>

Mashamaite and Moloto contend that the role of the Auditor-General is ineffective since there is lack of political will by public servants to implement his recommendations, and there is nothing he can do about it.<sup>48</sup> However, what Mashamaite and Moloto fail to do is to suggest a potential solution to deal with this problem. Commendably, Masood and Lodhi suggest that the establishment of a proper follow-up system can be one of the measures to address the problem of non-implementation of audit recommendations.<sup>49</sup> However, these two scholars have explored the problem in respect of internal audit recommendations in Pakistan, while this study explores it in respect of external audit recommendations in South African municipalities.

The deficient role of the Auditor-General is also signalled by the appalling state of financial affairs and recurring faults across municipalities.<sup>50</sup> Ntonzima offers an instructive perspective and argues that this crisis calls ‘for tough interventions.’<sup>51</sup> Without explaining what he means by ‘tough interventions’, Ntonzima concludes by recommending that a new design of standard financial systems should be established and that political interference with administration should be avoided. The author does not necessarily address the inefficiencies of the Auditor-General, despite having raised it as one of the root causes. Munzhedzi writes that inappropriate procurement practices, inadequate financial skills and the lack of commitment towards good governance by municipal officials are exacerbating the poor state of financial affairs across municipalities.<sup>52</sup>

In the book entitled *The Management of Public Finance*, Visser and Erasmus emphasise the efficiency of the Auditor-General in securing good financial performance and accountability.<sup>53</sup> In more precise terms, Hussain establishes the relationship between the Auditor-General and

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<sup>47</sup> Kayrak M ‘Evolving challenges for supreme audit institutions in struggling with corruption’ (2008) 15/1 *Journal of Financial Crime* 62.

<sup>48</sup> Mashamaite KA & Moloto KR *Aligning Integrated Development Plan, Service Delivery and Budget Implementation Plan and Budgeting: An Attempt to Enforce Service Delivery Monitoring in South Africa’s Local Municipalities* (2016) 121-32.

<sup>49</sup> Masood A & Lodhi RN ‘Factors Affecting the Success of Government Audits: A Case Study of Pakistan’ (2015) 3/2 *Universal Journal of Management* 59.

<sup>50</sup> *Consolidated Audit Report 2017/18* (2019) executive summary.

<sup>51</sup> Ntonzima (2011) 1010.

<sup>52</sup> Munzhedzi PH *Financial Viability of the South African Municipalities: Some Observations on Legal Compliance* (2013) 282.

<sup>53</sup> Visser CB & Erasmus PW *The Management of Public Finance* (2002) 7.



municipalities and writes that the former constitute a *sine qua non* for accountability and efficient financial management on the daily affairs of the latter.<sup>54</sup> Mashamaite holds a contrary view and argues that the Auditor-General is an office rendered ineffective since it cannot take any action towards enforcing compliance with its recommendations and for that, she describes the institution as having ‘no teeth to bite’.<sup>55</sup> Mafunisa concurs and points out that even if the Auditor-General can have the enforcement powers, non-compliance will remain as an issue given the prevailing political environment of impunity.<sup>56</sup>

Nzewi and Musokeru examined the factors impeding the efficiency of Auditor-General, albeit with focus on the provinces.<sup>57</sup> The authors categorise these factors into political, institutional and technical. Among others, they cite two main challenges, first, the lack of sufficient authority and resources to enforce compliance with audit recommendations.<sup>58</sup> Secondly, non-compliance with key policy and legal provisions.<sup>59</sup> They conclude with few suggestions that the Auditor-General should foster good relations and collaboration with other agencies, as well as the imposition of punitive measures on the failing institutions and individual public officials. However, their recommendations are not devised to suit local government context.

Writing on the factors that are inimical to good financial management and accountability in the broader public sector, Tsheletsane and Fourie observe that the ‘high turnover rate of accounting officers and of parliamentary committees such as the Standing Committee on Public Accounts’ (SCOPA) and a lack of political will are the long ignored problems exacerbating accountability regressions in local government.<sup>60</sup> Kraai and Holtzhausen share the same sentiments.<sup>61</sup> However, despite their broad inquiry, the non-implementation of audit recommendations is not mentioned as one of those factors, and thus no solution is proffered in that regard.

The question as to which role the provincial government can play in ensuring that municipalities implement audit recommendations is worth being explored too. In this regard,

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<sup>54</sup> Hussain (2011) ch 1.

<sup>55</sup> Mashamaite (2013) 95.

<sup>56</sup> See generally Mafunisa MJ *Enhancing Accountability and Ethics in the Public Services: The case of the Republic of South Africa* (1997).

<sup>57</sup> Nzewi O & Musokeru P ‘A critical review of the oversight role of the Office of the Auditor-General in financial accountability’ (2014) 2 *Africa’s Public Service Delivery & Performance Review* 36.

<sup>58</sup> Nzewi & Musokeru (2014) 44.

<sup>59</sup> Nzewi & Musokeru (2014) 48.

<sup>60</sup> Tsheletsane I & Fourie D ‘Factors hindering public financial management and accountability in South Africa’ (2014) 7 *African Journal of Public Affairs* 42-56.

<sup>61</sup> Kraai, Holtzhausen & Malan (2017) 59-63.

Steytler and De Visser state that the supervision by provincial government over municipalities is an important constitutional design feature which ensures, among other things, viable and sustainable municipal financial management.<sup>62</sup> However, Khumalo, Dawood and Mahabir seem to be viewing the provincial supervision over municipalities as a failing mechanism.<sup>63</sup> The framework on monitoring, support and intervention by the provinces on the financial affairs of municipalities, they argue, ‘has not been very successful thus far’ and that there is no improvement, given poor financial performance across municipalities.<sup>64</sup>

The 2017/18 audit report by the Auditor-General also attests to this view and observes that the provincial role players are not sufficiently supporting municipalities much as they are supposed to be doing to achieve efficient financial management.<sup>65</sup> In proposing a way forward, Mathenjwa writes that the provincial role players must observe the legal requirements for the intervention and support in municipalities.<sup>66</sup> He argues that such observance will foster development, mutual trust, goodwill and good municipal financial management. However, the author’s proposal is bit of a misnomer since there is no legislation regulating interventions as envisaged in section 139(8) of the Constitution.

A 2017 study by Craig attempts to establish the relationship between municipal audit outcomes and service delivery.<sup>67</sup> The author concludes that indeed there is a positive, but weak, relationship between these two variables. The study also observes that the country’s one-size-fits-all auditing standards seem incongruous.<sup>68</sup> However, like Tsheletsane and Fourie, Craig’s study pays little attention to the role of the Auditor-General in fostering good municipal financial management. The same can also be said in respect of Motubatse who explores the factors affecting progress towards achieving clean audits in municipalities,<sup>69</sup> without identifying the deficient aspects and potential challenges on the role of the Auditor-General, including the non-implementation of audit recommendations.

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<sup>62</sup> Steytler & De Visser (2007) ch 15.

<sup>63</sup> See generally Khumalo B, Dawood G & Mahabir J ‘South Africa’s Intergovernmental Fiscal Relations System’ in Ghai Y & Steytler N (eds) *Kenya-South Africa Dialogue on Devolution* (2016).

<sup>64</sup> Khumalo, Dawood & Mahabir (2016) 222.

<sup>65</sup> *Consolidated Audit Report 2016/17* (2017) 3.

<sup>66</sup> Mathenjwa M ‘Contemporary trends in provincial government supervision of local government in South Africa’ (2014) 18 *Law, Democracy & Development* 200.

<sup>67</sup> Craig (2017) 2-4.

<sup>68</sup> Craig (2017) 129.

<sup>69</sup> Motubatse KN *An Evaluation of Factors Affecting the Progression to Clean Audit Outcomes in South African Municipalities* (unpublished PhD thesis, UL, 2016) ch 1.

Pointing back to Craig's argument, Ledger contends that the relationship between municipal financial management and service delivery 'is not simply causal', and terms it a 'very serious error' to perceive the relationship as such.<sup>70</sup> However, this study argues that there is a direct and complementary linkage between efficient municipal financial management and service delivery. The more efficient the municipality is in terms of managing its finances, the greater potential it has to achieve sustainable service delivery. Powell and others share the same sentiment.<sup>71</sup> Reverse is also true, in that poor financial management extremely hampers municipality's efficiency to provide services, as is currently shown in the 2017/18 audit report.

Similarly, Craig asserts that good financial management is not sufficient to assist municipalities to improve their performance and that financial compliance, as emphasised by the Auditor-General, might not be 'the most helpful approach in terms of improving municipal [financial] performance'.<sup>72</sup> This reading cannot be supported based on two grounds. First, the author is second-guessing and oversimplifying the role and significance of the Auditor-General, which is the bedrock institution supporting the country's democratic architecture through accountability promotion. Secondly, the author's assertion is unheeding to the very basic logic that no performance improvement can be recorded without compliance with the relevant laws, regulations and policies.

In a more general approach, with minimal focus on the Auditor-General, Bekink, in his LLD thesis entitled *The Restructuring (Systemization) of Local Government under the Constitution of the Republic of South Africa, 1996*, gives a wide account of the new system of local government and dedicates a chapter to discuss the aspects relating to municipal financial and fiscal management.<sup>73</sup> However, nowhere in the chapter the author turns his focus to deal with the non-implementation of audit recommendations, the Achilles heel of municipal financial systems. What the author simply does, instead, is to regurgitate the legislative provisions regarding the role of the Auditor-General in municipal finance audit process,<sup>74</sup> without proper

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<sup>70</sup> Ledger T 'Municipal audit outcomes – looking for Solutions in all the wrong places' (2016) available at <http://pari.org.za/news-and-posts/municipal-audit-outcomes-looking-solutions-wrong-places/> (accessed 18 June 2019). The author is wrong on this point.

<sup>71</sup> Powell, O'Donovan & Ayele et al (2014) 1-2.

<sup>72</sup> Craig (2017) 128.

<sup>73</sup> Bekink B *The Restructuring (Systemization) of Local Government under the Constitution of the Republic of South Africa, 1996* (unpublished LLD thesis, UP, 2006) ch 18.

<sup>74</sup> Bekink (2006) 494, 514, 531.

contextualisation of those provisions and most importantly, without giving an indication on whether they are effective or not and if they are, to what extent.

The same can be said with Ntliziywana who, in his PhD thesis entitled *The Transformation of Local Government Service Delivery in South Africa: The Failures and Limits of Legislating New Public Management*, explores the factors that occasioned the system failure on the implementation of the NPM model for effective service delivery by South African municipalities.<sup>75</sup> Whereas the author strongly argues for an improved financial management systems across municipalities, with the Auditor-General having a significant role to play in that regard,<sup>76</sup> like Bekink, Ntliziywana does not comment on how exactly can the role of the Auditor-General be revised for more efficiency to achieve improved financial management systems in municipalities.

In the PhD study entitled *The Role of the Office of the Auditor General of South Africa in Enhancing Sound Public Financial Management, with Special Reference to the Eastern Cape Province*, Deliwe does more or less the same as what the present study intends to do, albeit with broadened focus.<sup>77</sup> Deliwe explores alternative ways through which the Auditor-General could be made more effective in acting against poor audit outcomes and recurring audit findings across the provinces. The author also asks more or less the same question as this research study, namely; what is the role of the Auditor-General and to what extent can it assist in enhancing improved systems of financial management within the broader public sector in South Africa? Deliwe's study finds that strong collaborations between the Auditor-General and the Parliament are necessary for the attainment of good financial performance across provincial governments.<sup>78</sup>

However, there are four main aspects that set the present study more distinctive from that of Deliwe. First, sight should not be lost of the fact that this study engages the subject from the perspective of local government, while Deliwe's study looked mainly at provincial government, albeit with limited focus on the Eastern Cape, and intermittently at national government. It did not deal with the role of the Auditor-General in relation to municipalities

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<sup>75</sup> Ntliziywana (2017) ch 2.

<sup>76</sup> Ntliziywana (2017) 2-3.

<sup>77</sup> Deliwe MCC *The Role of the Office of the Auditor General of South Africa in Enhancing Sound Public Financial Management, with Special Reference to the Eastern Cape Province* (unpublished PhD thesis, University of Fort Hare, 2016).

<sup>78</sup> Deliwe (2016) 244.

nor did it even attempt to address its potential challenges at that level. Secondly, whereas Deliwe's study recommends the formation of strong collaborations between the Parliament and the Auditor-General, there is no clear guidance on how exactly those collaborations will be realised in practical terms. Moreover, the author falls short of innovation to suggest other relevant institutions and bodies, besides the Parliament, that the Auditor-General can collaborate with for more efficiency. Thirdly, whereas Deliwe problematised the non-implementation of audit recommendations in provinces, surprisingly, little evidence is proffered of 'everything imaginable'<sup>79</sup> that the Auditor-General did to foster compliance with audit recommendations. Lastly, Deliwe's suggestions on how the audit recommendations can be given effect in provinces are not clear as they should on responsibility division, that is, the question on who does what and when is disappointingly abandoned by the author.

Though Bahtiri raises almost the same problem that the current study has identified, the author does not adequately contextualise it in a municipality setup.<sup>80</sup> The same can be said about Hussain, who evaluates the role of the Auditor-General in the broadest of terms, covering the private sector as well.<sup>81</sup>

### **1.5. Significance of the study**

From the preceding survey of literature, it is safe to say that there is no scholarly work that has specifically explore the question that this study puts forth and seeks to pursue, namely; how can the Auditor-General's recommendations be better and adequately given effect in the North West municipalities? As has been demonstrated, most scholars involved in the debate around this subject are from public administration discipline. For that reason, their deliberations lack a sense of clarity from the legal perspective which this study presents. Thus, the study finds its relevancy in exploring the question on whether the current legal framework underpinning the role and powers of the Auditor-General impedes or facilitate the effective implementation of audit recommendations in municipalities, in order to achieve efficient financial management. Put differently, whether the legal framework governing the Auditor-General provides an enabling environment for the implementation of audit recommendations in municipalities. This inquiry is timely in that it is undertaken in the wake of the 2017/18 deteriorating local government audit outcomes. The context of the study is the North West Province.

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<sup>79</sup> Deliwe (2016) 239.

<sup>80</sup> Bahtiri L *Issue of Non-Addressed Recommendations from the Auditor General in Kosovo* (unpublished thesis, American University in Kosovo, 2015) ch 1.

<sup>81</sup> Hussain (2011) ch 1.

## 1.6. Research methodology

The study employed a desktop and library-based research method. The literature review included both primary and secondary sources that are relevant to the subject-matter of the study. In the main, the primary sources included the Constitution, Acts of Parliament, policies, case law, municipalities' operational reports and the Auditor-General's annual reports on local government audit outcomes. The secondary sources relied upon included textbooks, journal articles, newspaper articles, working papers, conference papers and relevant verifiable internet sources.

## 1.7. Overview of chapters

This study is presented in six chapters, outlined in the sequential order below:

**Chapter one** introduces the study, outlines the problem statement, poses the research question, presents the preliminary argument, literature review, explains the rationale/significance for undertaking the study, methodological approach and maps the structure of the study.

**Chapter two** discusses the role of the Auditor-General with reference to the constitutional and legislative framework. It commences with a brief historical context of the institution and concludes with a discussion on different audit opinions and key aspects that the Auditor-General considers when auditing.

**Chapter three** looks into how the audit recommendations are implemented in municipalities. It outlines the legal duties imposed on various municipal actors, provincial and national governments' role-players insofar as the implementation of audit recommendations is concerned. It also discusses the roles of other institutions that may also come in handy in ensuring the implementation of audit recommendations. These institutions include the Auditor-General, the Public Protector (PP), the South African Police Service (SAPS), the Hawks, the Special Investigation Unit (SIU) and civil society organisations.

**Chapter four** adopts three case study municipalities in the North West Province in order to provide a practical dimension in respect of the framework outlined in chapter three. It commences by sketching a general state of affairs in the province and its history of financial mismanagement across the municipalities. The chapter also reflects on the supervisory measures taken by the province to address the challenges faced by its municipalities. Upon the end, flowing from the case studies, the chapter then identifies and summarises the emerging trends and problems facing municipalities in the province.



**Chapter five** draws from the trends and key issues emerging from chapter four and evaluate the suitability of legal measures and non-legal factors in relation to the implementation of audit recommendations in municipalities. The expanded powers of the Auditor-General are closely analysed in this chapter.

**Chapter six** provides an overall conclusion, present key findings, offers recommendations and make suggestions for future research agenda.



## CHAPTER TWO

### THE ROLE OF THE AUDITOR-GENERAL

#### 2.1. Introduction

The Constitution makes salient provision for the establishment of six state institutions entrusted with the common responsibility of supporting constitutional democracy.<sup>82</sup> The nub of this provision encompasses the need ‘to provide a check on government’,<sup>83</sup> thus reinforcing good governance, accountability,<sup>84</sup> transparency and proper stewardship of public resources.<sup>85</sup> The Auditor-General is fittingly one of these institutions and its contribution to the common responsibility takes the form of routine auditing and reporting on the accounts and financial affairs of government departments, institutions and municipalities.<sup>86</sup> The survey of literature affirms that auditing is the most universally utilised mechanism to foster the answerability of governments to the citizenry. This is perhaps what led Murray to conclude that ‘the Auditor-General is the most powerful of the Chapter 9s’.<sup>87</sup> The Constitution and the relevant national legislation provide a firm basis for the institution of the Auditor-General, defines its role and demarcates the contours within which it must operate.

On that basis, this chapter seeks to ascertain the Auditor-General’s role from the perspective of local government. Before this can be done, a brief historical account is necessary, about the institutional evolution of the Auditor-General. It then proceeds to explore the legislative framework governing the institution. Afterwards, key components of audit reports and the numerous standard audit outcomes that the Auditor-General can give are discussed.

#### 2.2. The historical context of the institution of the Auditor-General

The institution of the Auditor-General is not of recent origin. Its earliest history can be traced back to the establishment of the Union of South Africa in 1910 through proclamation by the South Africa Act 1 of 1909, bringing into one entity four British colonies – Transvaal, Natal, Orange River and Cape of Good Hope.<sup>88</sup> Section 132 of the South Africa Act provided that the ‘Governor-General in Council shall appoint ...[an] Auditor-General who shall hold office

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<sup>82</sup> Chapter 9 Constitution.

<sup>83</sup> Murray (2006) 126.

<sup>84</sup> *Rail Commuter Action Group & Others v Transnet Ltd t/a Metrorail & Others* 2005 (2) SA 35 (CC) para 72.

<sup>85</sup> *President of the Republic of South Africa v South African Rugby Football Union* 2000 (10) BCLR 1059 (CC) paras 133-134.

<sup>86</sup> S 188(1) Constitution.

<sup>87</sup> Murray (2006) 133.

<sup>88</sup> AGSA *100 Years of Legacy and Legends* (2014) 12.



during good behaviour ...’ In addition, the Exchequer and Audit Act 21 of 1911 was then adopted as a frame of reference to guide auditing processes across all the provinces.<sup>89</sup> This Act was amended in 1916 and remained unchanged until the adoption of the new Exchequer and Audit Act 32 of 1956.<sup>90</sup> However, the major shortcoming of the 1956 Act is that it subordinated and subsumed the Auditor-General under the ministerial supervision of the Treasury. The obvious threat this arrangement gave rise to was that it had the potential to undermine the much-needed independence of the institution. In 1992, the Auditor-General Amendment Act 123 of 1992 was passed, which granted the Auditor-General full independence from the Treasury, with the requisite autonomy to execute its mandate fully without favour or prejudice.<sup>91</sup>

In 1975, the concept of performance auditing was introduced and incorporated as part of the Auditor-General’s mandate within the broader auditing framework.<sup>92</sup> This development, alongside other significant reforms dating from 1909, was informed by ‘the systems, customs and traditions of the Dutch and British colonial powers’.<sup>93</sup> From its conception, the role of the Auditor-General consistently entailed performance evaluation, transaction’s verification, reporting on and examination of public accounts. The centennial review of the Auditor-General summarises its role as follows:

[The Auditor-General] had to ‘compare the entries in the cash-book or account with the supporting vouchers and documents and the bank pass-book’. In doing so, he had to check that vouchers corresponded to receipts for payment and that the sums on both were the same. He had to make sure that all the calculations were accurate and had been authorised by the responsible officer and that all relevant regulations had been observed.<sup>94</sup>

Navigating the tricky path towards the new and democratic South Africa, it was inevitable to have, as part of the negotiations between the apartheid government and the African National Congress (ANC), the continued existence of the Auditor-General post-1994.<sup>95</sup> These

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<sup>89</sup> AGSA (2014) 13.

<sup>90</sup> UN Office on Drugs & Crime (UNODC) ‘South Africa Office of the Auditor-General’ (2016) available at <http://www.track.unodc.org/LegalLibrary/LegalResources/South%20Africa/Authorities/South%20Africa%20Authorities.pdf> (accessed 12 August 2019).

<sup>91</sup> Nzewi & Musokeru (2014) 38.

<sup>92</sup> Chap IV Exchequer & Audit Act 66 of 1975.

<sup>93</sup> AGSA (2014) 10.

<sup>94</sup> AGSA (2014) 19.

<sup>95</sup> Murray (2006) 123. See also Nzewi & Musokeru (2014) 38.

negotiations yielded far-reaching changes and developments not only regarding the Auditor-General as an institution, but also the entire realm of government in South Africa. Among other momentous shifts in policy, the amalgamation of the then TBVC states (Transkei, Bophuthatswana, Venda and Ciskei) is worth mentioning. Each of these states had independent status and of course their own Auditor-Generals.<sup>96</sup>

Following the adoption of the 1996 Constitution, all the pre-1994 Auditor-General offices of the TBVC states were incorporated into one Auditor-General of South Africa, appointed,<sup>97</sup> on the recommendation of the National Assembly, by the President.<sup>98</sup> This state reorganisation heralded what Woods describes as ‘a revolution within the South African public sector’.<sup>99</sup> The aftermath of this revolution is still being felt today. In local government space particularly, this revolution culminated in the promulgation of the Municipal Finance Management Act 56 of 2003 (MFMA), the Municipal Systems Act 32 of 2000 (MSA) and the Public Audit Act 25 of 2004 (PAA) – as amended in 2018.<sup>100</sup>

### **2.3. The constitutional and legislative framework**

Great strides have been made by the Parliament of South Africa, through the promulgation of various pieces of legislation, in ensuring that the role and position of the Auditor-General within the entire system of constitutional democracy is precisely defined. A strong legal and policy framework on the role of the Auditor-General, as correctly argued by Mathebula, is an important precursor towards extracting the most benefit from its desired outcome.<sup>101</sup> The desired outcome in this regard is the achievement of sound and sustainable management of the fiscal and financial affairs of the public sector.<sup>102</sup> In that light, this section outlines the legislative framework underpinning the role and position of the Auditor-General as it relates to municipalities.

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<sup>96</sup> AGSA (2014) 40.

<sup>97</sup> Any person who wants to be appointed as the Auditor-General has to be a ‘South African citizen and a fit and proper person’. He or she also has to have a specialised knowledge or experience in auditing, state finances and public administration. See s 193(3) Constitution.

<sup>98</sup> S 193(4) Constitution. See also AGSA (2014) 40.

<sup>99</sup> AGSA (2014) 9.

<sup>100</sup> PAAA.

<sup>101</sup> Mathebula *NE Audit Outcomes and their role in Clean Administration in Municipalities within Limpopo Province, South Africa: A Deterrence Theory Approach* (2016) 215.

<sup>102</sup> Mathebula (2016) 215.

### 2.3.1. The Constitution of the Republic of South Africa, 1996

The Constitution, as the supreme law,<sup>103</sup> establishes the Auditor-General as the Supreme Audit Institution of the country and provides the foundational framework within which it must operate. It further recognises and places great emphasis on the independence of this institution,<sup>104</sup> stating that it must be impartial, exercise its powers and execute its functions without fear, favour or prejudice.<sup>105</sup> Section 188(1) of the Constitution pronounces the functions of the Auditor-General as follows:

The Auditor-General must audit and report on the accounts, financial statements and financial management of –

- (a) all national and provincial state departments and administrations;
- (b) all municipalities; and
- (c) any other institution or accounting entity required by national or provincial legislation to be audited by the Auditor-General.

There are other relevant constitutional provisions that must be read *in tandem* with section 188(1). One of those provisions is section 215(1) which provides that the national, provincial and municipal budgets and budgetary processes ‘must promote transparency, accountability and the effective financial management of the economy, debt and the public sector’. This is followed by section 216(1) which requires national legislation to establish the NT and spell out measures to ensure transparency and expenditure control in each sphere of government.<sup>106</sup> The Constitution also empowers the NT to enforce compliance with measures put in place to ensure transparency and expenditure control across all organs of state by stopping the transfer of funds to any defaulting institution if a material breach of those measures persists.<sup>107</sup> Also, the Auditor-General has a major role to play in this regard, and such role entails reporting on the state of finances in municipalities to Parliament before the NT can approve the stoppage of transfers.<sup>108</sup>

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<sup>103</sup> S 2 Constitution.

<sup>104</sup> *Re: Certification of the Constitution of the Republic of South Africa, 1996* (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) para 160, hereafter ‘*First Certification case*’. See also Woolman S & Schutte Y ‘Auditor-General’ in Woolman S & Bishop M (eds) *Constitutional Law of South Africa* 2 ed (Service 3) 5–11 & *New National Party v Government of the Republic of South Africa & Others* 1999 (3) SA 191 (CC) paras 98-99.

<sup>105</sup> S 181(2) Constitution.

<sup>106</sup> S 216 Constitution.

<sup>107</sup> S 216(2) Constitution.

<sup>108</sup> S 216(5)(a) Constitution.

Section 153(a) of the Constitution requires municipalities to structure and manage their administration, budgeting and planning processes to prioritise the community's basic needs and promote its social and economic development. The MFMA, together with the MSA, aims to regulate and ensure the implementation and facilitation of this constitutional duty by ensuring that the municipalities' priorities, plans, budgets, reports and implementation actions are properly aligned. In facilitating and monitoring municipalities' progress towards achieving this, the Auditor-General audits their performance, records and financial statements.<sup>109</sup>

In essence, the purpose of auditing by the Auditor-General is to detect problems within the internal systems of municipalities. This takes place in various ways, such as scrutinising the financial records to ascertain whether they are free from material misstatements, reporting on the usefulness and veracity of the information provided for auditing by municipalities, reporting on material non-compliance with key legislation, predetermined objectives and identifying key internal control deficiencies.<sup>110</sup> Where certain deficiencies have been identified, the Auditor-General provides audit recommendations requiring concrete actions from audited institutions to address and prevent identified issues from recurring. This is one of the reasons why the implementation of audit recommendations is essential in achieving sound fiscal and financial management in the public sector. Once the auditing process has been completed and reports compiled, the Auditor-General is constitutionally mandated to table annual audit reports in Parliament,<sup>111</sup> reflecting the true state of the financial affairs of all municipalities.<sup>112</sup> In this way, it is clear that the Auditor-General plays a significant role in reinforcing Parliament's oversight function to foster accountability in local government and the public sector in general.

### **2.3.2. Public Audit Act 25 of 2004**

The Auditor-General is not empowered only by the Constitution but has the additional powers and functions as prescribed in national legislation.<sup>113</sup> The PAA is the national legislation envisaged in section 188(4) of the Constitution. Section 6 of the PAA delineates the requirements for the appointment of the Auditor-General and further outlines his or her

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<sup>109</sup> S 188(2) Constitution.

<sup>110</sup> S 20 PAA. Mtswesi A 'Fundamentals of Municipal Finances' *Helen Suzman Foundation* (2015) available at <https://hsf.org.za/publications/hsf-briefs/fundamentals-of-municipal-finances> (accessed 14 August 2019).

<sup>111</sup> And the NT, provincial government and municipal council.

<sup>112</sup> NT *Guidelines for Legislative Oversight through Annual Reports* (2005) 18-20.

<sup>113</sup> S 188(4) Constitution.

additional functions,<sup>114</sup> conditions of employment,<sup>115</sup> and expanded mandate,<sup>116</sup> while also promoting transparency and accountability in the operations of the institution itself by requiring the Auditor-General to report to the National Assembly on his or her affairs.<sup>117</sup> Moreover, the PAA imitates the constitutional version on the role of the Auditor-General in letter and spirit. It reaffirms the independence of the Auditor-General as the Supreme Audit Institution of the country,<sup>118</sup> and also ascertains the Auditor-General's role just as it is in the Constitution.<sup>119</sup>

The Auditor-General's work is of such a nature that its eventual fulfilment depends largely on the cooperation of someone else, namely the authorised official or an employee of the auditee institution, who must provide the relevant information, records and documents for the purposes of auditing. In this way, the possibility exists that the Auditor-General might not get access to the necessary information (or if it does, it might be inadequate or inaccurate) due to several reasons, such as politically-inclined resistance or simply reluctance to cooperate, as is an emerging culture in most municipalities.<sup>120</sup>

The PAA anticipates this potential hindrance and accordingly provides, in sections 15 and 16 respectively, that the Auditor-General (or an authorised auditor designated by the Auditor-General) must have at all reasonable times, within the scope of his or her work, full and unrestricted access to whatever he or she reasonably suspects will provide valuable information in the process of auditing and is being concealed from him or her. These powers include the interrogation of any person and the search of property, premises, vehicles or persons, as the case might be.<sup>121</sup> Conspicuously, these powers resemble the 'policeman theory' which regards the Auditor-General as 'a policeman whose role is to check the [arithmetic] accuracy of financial standings, for preventing and detecting frauds in an entity ... through searching.'<sup>122</sup>

The PAA has expanded the mandate of the Auditor-General to make it broader and more detailed than it is presented in the Constitution. Section 20 of the Act provides that:

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<sup>114</sup> Ss 4 & 5 PAA.

<sup>115</sup> S 7 PAA.

<sup>116</sup> S 20(2) PAA.

<sup>117</sup> S 10(1) PAA.

<sup>118</sup> S 3(a);(c) PAA.

<sup>119</sup> S 4(1) PAA.

<sup>120</sup> For instance, the Auditor-General reported instances of threats, resistance and intimidation at Ditsobotla municipality, see AGSA *Citizens Report: MFMA 2017/18* (2019) 15 & 20.

<sup>121</sup> S 15 read with s 16 PAA.

<sup>122</sup> Hayes RS, Schilder A, Dassen R et al *Principles of Auditing: An International Perspective* (1999) 12.

- (1) The Auditor-General must in respect of each audit referred to in section 11 prepare a report on the audit.
- (2) An audit report must reflect such opinions and statements as may be required by any legislation applicable to the auditee which is the subject of the audit, but must reflect at least an opinion or conclusion on-
  - (a) whether the annual financial statements of the auditee fairly present, in all material respects, the financial position at a specific date and results of its operations and cash flow for the period which ended on that date in accordance with the applicable financial framework and legislation;
  - (b) the auditee's compliance with any applicable legislation relating to financial matters, financial management and other related matters; and
  - (c) the reported information relating to the performance of the auditee against predetermined objectives.

Moreover, the PAA is the first legislation in the entire auditing framework to provide for the formal adoption of auditing standards and the minimum qualification criteria for external auditors. This heralded an immense step in the journey of standardising and professionalising the sector.<sup>123</sup>

### **2.3.3. Public Audit Amendment Act 5 of 2018**

The PAAA amends certain provisions of the PAA. It also introduces new enforcement powers of the Auditor-General. These powers are, first, the power to refer suspected material irregularities arising from the auditing process to the relevant authorities with requisite investigative capacity and skills.<sup>124</sup> Secondly, the power to follow-up on the progress made by the relevant accounting officer in implementing audit recommendations and to take appropriate remedial action if there is any failure in that regard.<sup>125</sup> Lastly, the power to issue a certificate of debt against the accounting officer or accounting authority who failed to implement remedial actions.<sup>126</sup> The Auditor-General believes that these 'amendments to the PAA provide [him] with more powers to ensure accountability in the public sector'.<sup>127</sup> However, given that these

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<sup>123</sup> The International Standards on Auditing and Assurance Pronouncements issued by the International Auditing and Assurance Standards Board (IAASB) of the International Federation of Accountants (IFAC) are applied in the annual audits.

<sup>124</sup> Such as the PP, the Hawks, SIU & others.

<sup>125</sup> S 5A(1);(2) PAAA. If there is financial loss, the accounting officer must recover it from the responsible person.

<sup>126</sup> S 5A PAAA.

<sup>127</sup> *Consolidated Audit Report 2017/18* (2019) 13.



powers have not yet been fully operationalised, it is quite early to leap that high in making this claim. The reverse can also be true, in practice.

#### **2.3.4. Municipal Finance Management Act 56 of 2003**

The MFMA is the key driver of financial reforms in the sphere of local government. As its name suggests, it exists to regulate, promote and secure the sound and sustainable management of the fiscal and financial affairs of all municipalities and their entities. The Act achieves this objective by setting out the treasury norms and standards that must guide the financial affairs of municipalities. Generally, the Act provides guidance on:

- (a) ensuring transparency, accountability and appropriate lines of responsibility in the fiscal and financial affairs of municipalities and municipal entities;
- (b) the management of their revenues, expenditures, assets and liabilities and the handling of their financial dealings;
- (c) budgetary and financial planning processes and the co-ordination of those processes with the processes of organs of state in other spheres of government;
- (d) borrowing;
- (e) the handling of financial problems in municipalities;
- (f) supply chain management; and
- (g) other financial matters.<sup>128</sup>

In particular, chapter 12 of the MFMA details all the nitty-gritties in relation to the auditing procedure by the Auditor-General in municipalities. It begins by imposing a duty on every municipality, through the municipal council,<sup>129</sup> and every municipal entity to prepare, for each financial year, and submit to the Auditor-General, annual financial statements which ‘fairly presents the state of affairs of the municipality or municipal entity.’<sup>130</sup> Upon receipt of these statements, the Auditor-General must audit them and report accordingly.<sup>131</sup> Furthermore, section 131(1) provides that the ‘municipality must [then] address any issues raised by the Auditor-General in an audit report’ and it is the responsibility of the Mayor to ensure compliance in this regard. The obligation is also placed on the MEC for local government to ‘assess all annual financial statements of municipalities in the province, audit reports on such statements ... and determine whether municipalities have adequately addressed any issues

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<sup>128</sup> S 2 MFMA.

<sup>129</sup> S 133(1)(c)(ii) MFMA.

<sup>130</sup> Ss 121 & 122 MFMA.

<sup>131</sup> S 126(3)(a) ; (b) MFMA.

raised by the Auditor-General in the audit report.<sup>132</sup> In an instance where the Mayor or the MM, as the case might be, fails to table the annual report, the Auditor-General may submit the audit report directly to the municipal council, the NT, the provincial treasury and the MEC for local government.

### **2.3.5. Municipal Systems Act 32 of 2000**

The MSA provides guidance on how municipal powers are to be exercised and functions performed. It also sets out a uniform framework for the core processes of municipal planning, performance management systems, public administration, effective and optimal use of available resources as well as an overall organisational change. This Act also buttresses the notion that local government is developmental in purpose. Also, as Thornhill correctly posits,<sup>133</sup> it promotes local democracy and levels the ground for inclusive and participatory local government by encouraging and instilling in municipalities a culture of community participation as a progressive move towards the social and economic development of local communities.

In relation to auditing, section 38(a) requires all municipalities to develop a performance management system that is in line with their set objectives and IDPs. It goes further and sets out key components that must feature in the formulation of the developed management systems.<sup>134</sup> Once established and operating, the performance management systems and outcomes are to be audited by the municipality's internal audit unit and the Auditor-General.<sup>135</sup> Moreover, an annual performance report, together with the Auditor-General's audit outcome forms part of the municipality's annual report.<sup>136</sup> Lastly, the annual report on actions taken by the MEC for local government to address issues raised by the Auditor-General in audit reports of municipalities and municipal entities must also be submitted to Parliament by the relevant Cabinet Minister.<sup>137</sup> Given this, it is clear that the implementation of audit recommendations in municipalities requires a joint effort from different stakeholders from all spheres of government.

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<sup>132</sup> S 131(2) MFMA.

<sup>133</sup> Thornhill (2008) 502.

<sup>134</sup> S 41(1) MSA.

<sup>135</sup> S 45 MSA.

<sup>136</sup> S 121(3)(c) MFMA.

<sup>137</sup> S 134 MFMA.



### **2.3.6. Municipal Structures Act 117 of 1998**

The Structures Act clarifies the status of municipalities and outlines the framework for their establishment in accordance with the constitutional requirements and criteria relating to categories and types of municipalities. It determines the appropriate division of functions and powers between categories of municipalities. The Act further regulates internal systems pertaining to governance structures, municipal office bearers and provides for appropriate electoral systems for local government,<sup>138</sup> as well as defining the relationship between traditional authorities and local government.<sup>139</sup> In particular, section 44 provides for the functions and powers of the executive committee. This is an important provision insofar as oversight is concerned since it empowers the committee to compel implementation of municipal by-laws and, arguably, audit recommendations of the Auditor-General, although not expressed.

### **2.4. Key aspects of the Audit Report**

The PAA provides that an audit report by the Auditor-General must reflect an opinion, conclusion or findings on three aspects – financial statements of the auditee, compliance with applicable laws and regulations relating to financial matters, as well as the performance of the auditee against its predetermined objectives.<sup>140</sup> In addition, the Auditor-General may include in an audit report ‘recommendations to address any matter’ arising from any of these three focus areas of auditing.<sup>141</sup>

#### **2.4.1. Financial Audit**

Section 20(2)(a) of the PAA requires the Auditor-General to include in an audit report his or her view, conclusion or findings on ‘the financial statements of the auditee in accordance with the applicable financial reporting framework and legislation’. In the context of this study, the applicable legislation is the MFMA and MSA.

#### **2.4.2. Compliance Audit**

Sections 20(2)(b) and 28(1)(b) of the PAA require the Auditor-General's report to reflect an opinion or conclusion on the auditee's compliance with any applicable legislation in relation to

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<sup>138</sup> The long title.

<sup>139</sup> S 81 Structures Act.

<sup>140</sup> S 20(2) PAA.

<sup>141</sup> S 20(4) PAA.

financial management and other related matters. This usually occurs under the *Compliance with laws and regulations* heading in the audit report. The auditing of compliance with legislation is conducted in accordance with the International Standards on Assurance Engagements (ISAE). The audit report must further reflect material findings on non-compliance with relevant legislation in respect of a wide range of matters, such as strategic planning, internal audit systems, budgets, financial statements and reports, procurement and contract management, expenditure management, asset and revenue management, financial misconduct and service delivery.

### **2.4.3. Performance Audit**

Sections 20(2)(c) and 28(1)(c) of the PAA respectively, requires the Auditor-General's report to reflect an opinion or conclusion on the auditee's reported performance against its predetermined objectives. The performance audit is also conducted in accordance with the ISAE standards. Furthermore, performance is audited against the applicable legislation and regulations, the relevant framework issued by the NT, as well as the circulars and guidelines regarding planning, management, monitoring and reporting of performance at local government, as developed by the NT.<sup>142</sup>

## **2.5. Five Standard Audit Outcomes of the Auditor-General**

An audit outcome is essentially an independent view given by the Auditor-General about the state of the financial affairs of an audited institution. Fahami, Pordanjani and Mahmoudi observe that this is the ultimate product of the accounting chain, an expression of the auditor's view on the financial statements, compliance and performance information of an auditee.<sup>143</sup> Furthermore, audit outcomes/findings have also been defined as written explanations of errors, weaknesses, deficiencies, adverse conditions, need for improvements or changes that are disclosed in an audit report.<sup>144</sup> Chandler also indicates that an audit outcome is a constructively critical commentary on actions or inactions which, in the auditors' independent judgement,

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<sup>142</sup> Gildenhuis E & Roos M 'The performance audit: Are there differences in the planning approach and practices followed within the South African public sector?' (2015) 17/1 *Southern African Journal of Accountability and Auditing Research* 49-60 & Prinsloo J & Roos M *Performance Auditing: A Step by Step Approach* 2nd (2011) ch 1 & 2.

<sup>143</sup> Fahami Z, Pordanjani HAM & Mahmoudi MT 'The accepted audit opinion and its impact on the relationship between earnings management and stock returns' (2016) 6/2 *Asian Journal of Research in Banking and Finance* 56-64.

<sup>144</sup> Wadesango N, Chinamasa T & Mhaka C et al 'Challenges faced by management in implementing audit recommendations: a literature review' (2017) 7/4 *Risk Governance and Control: Financial Markets & Institutions* 53.

hinder the accomplishment of desired objectives in an effective and efficient manner.<sup>145</sup> Lastly, Aikins correctly postulates that adverse audit findings/outcomes are ordinarily followed by recommendations for specific actions to rectify the cited deficiency.<sup>146</sup> Once the audit process has been completed, therefore, the Auditor-General is required to give an audit outcome coupled with recommendations. This outcome can be one of the following:

### **2.5.1. Disclaimer of Audit Opinion**

The Auditor-General is required to disclaim an opinion when the auditee has provided insufficient evidence or information on which to base an audit opinion, and conclude that the possible effects on the financial statements of undetected misstatements (if any) could be both material and pervasive.<sup>147</sup> In other words, any information provided by the auditee which is not adequately supported by relevant documents, shall warrant a disclaimer.

### **2.5.2. Adverse Audit Opinion**

An adverse audit opinion is given when the Auditor-General has obtained appropriate audit evidence, sufficiently supported by documents, but has concluded that ‘misstatements, individually or in the aggregate, are both material and pervasive to the financial statements’.<sup>148</sup> This would ordinarily occur when the reporting obligations in accordance with compliance framework have not been properly followed.

### **2.5.3. Qualified Audit Opinion**

An audit opinion should be qualified when the Auditor-General, having obtained sufficient and appropriate audit evidence, finds that misstatements, individually or in aggregate, are material (but not pervasive) to the financial statements.<sup>149</sup> The same opinion can also be given when the Auditor-General fails to obtain sufficient and appropriate audit evidence on which to base the opinion, but concludes that the possible effects of undetected misstatements on the financial statements could be material but not pervasive.<sup>150</sup>

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<sup>145</sup> Chandler R *Auditing and Assurance* (2014) ch 2.

<sup>146</sup> Aikins (2012) 45-65.

<sup>147</sup> IAASB *Handbook of International Quality Control, Auditing, Review, Other Assurance, and Related Services Pronouncements* (2017) 802.

<sup>148</sup> IAASB (2017) 802.

<sup>149</sup> IAASB (2017) 801.

<sup>150</sup> IAASB (2017) 801.

#### **2.5.4. Unqualified Audit Opinion**

An unqualified audit opinion, also known as an unmodified opinion, simply means that the financial statements are free from any material misstatements and no adverse opinion has been made on performance against the predetermined objectives.<sup>151</sup> There seems to be consensus among scholars that this is the most desirable audit opinion, although much better can still be done by an auditee.<sup>152</sup>

#### **2.5.5. Clean Audit Opinion**

A clean audit opinion indicates that the financial statements of the auditee are free from any material misstatements and there are no adverse material findings made on performance against predetermined objectives or compliance with key legislation and regulations. In essence, a clean audit opinion can only be obtained when the audit of financial statements, performance and compliance are completely without reservations. Therefore, in substance, there is not much difference between a clean audit opinion and an unqualified audit opinion.<sup>153</sup>

### **2.6. Conclusion**

The powers and functions of the Auditor-General in the local government space are clearly defined in various pieces of legislation and have lately undergone significant reforms that are yet to face the test of reality. This has been demonstrated from the preceding discussions. The review of the public audit framework locates the Auditor-General as the Supreme Audit Institution of the country, constitutionally mandated to provide an independent oversight role through auditing and to table annual reports in Parliament on the accounts and financial management of auditee institutions. In this chapter, the historical foundations of the Auditor-General as an institution have been traced. The chapter explored how the Auditor-General evolved over the years in terms of its functions and the scope of its mandate. In that regard, it has been pointed out that the Auditor-General's mandate was expanded to include performance auditing in 1975. Also, the Auditor-General was not independent (since it acted at the behest of Treasury) until 1992. The chapter also briefly explored the key components of

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<sup>151</sup> IAASB (2017) 801-802.

<sup>152</sup> Oladipupo AO & Izedonmi FIO 'Propensity of unqualified audit reports and auditors' independence in Nigeria' (2013) *7/3 African Research Review* 34-46; Czerney K, Schmidt JJ & Thompson AM 'Does auditor explanatory language in unqualified audit reports indicate increased financial misstatement risk?' (2014) *89/6 The Accounting Review* 2115-2149.

<sup>153</sup> Van Schalwyk A 'How improved compliance contributes to the achievement of a clean audit' (2013) *Official Journal of the Institute of Municipal Finance Officers* 6-9.

the Auditor-General's reports as well as the standard audit opinions that the Auditor-General may give.

The next chapter looks into how the audit recommendations are (or should be) implemented in municipalities.



## CHAPTER THREE

### INSTITUTIONAL STRUCTURES AND PROCESSES FOR THE IMPLEMENTATION OF AUDIT RECOMMENDATIONS IN MUNICIPALITIES

#### 3.1. Introduction

As a point of departure, and as chapter one problematised, the non-implementation of the Auditor-General's recommendations in municipalities has become a major concern and a fast-growing problem across the country. The audit recommendations are often blatantly disregarded by various role-players who are responsible for their implementation. This, however, happens despite the very fact that audit recommendations are of great significance in facilitating good stewardship of public funds and promoting financial accountability.<sup>154</sup> Furthermore, these recommendations vary in scope and complexity and, as a result, their implementation may require coordination across various role-players, expertise and support functions within (and sometimes beyond) an institution.<sup>155</sup>

This lays a firm basis for the contention that the relevant role-players from the provincial and national governments are also not off the hook in ensuring the implementation of audit recommendations in municipalities. Thus, part of the problem and responsibility is apportionable to them. This is so because they both have supervisory powers over municipalities of which, if adequately exercised, may circumvent the problem. Seen within this light, the question then that leads the focus of this chapter is: what are the legal duties and responsibilities of various role-players in municipalities, provincial and national governments towards implementing audit recommendations in municipalities?

While the previous chapter discussed what audit recommendations are, their significance, different types and how they come into existence, this chapter builds on that framework by exploring how they are being (or supposed to be) implemented in municipalities. In the main, the chapter outlines the legal duties and responsibilities imposed on various municipal actors, provincial and national governments' role-players insofar as the implementation of audit recommendations is concerned. From the premise of multi-agency approach towards ensuring public accountability and good governance, the chapter also discusses the roles and responsibilities of various institutions that may also contribute towards ensuring that

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<sup>154</sup> Institute of Internal Auditors *Supplemental Guidance: The Role of Auditing in Public Sector Governance* 2 ed (2012) 5.

<sup>155</sup> Wadesango, Chinamasa & Mhaka (2017) 51.

municipalities implement audit recommendations. These institutions include the Auditor-General, the Public Protector (PP), the South African Police Service (SAPS), the Directorate of Priority Crimes Investigation (Hawks), the Special Investigation Unit (SIU) and of course civil society organisations.

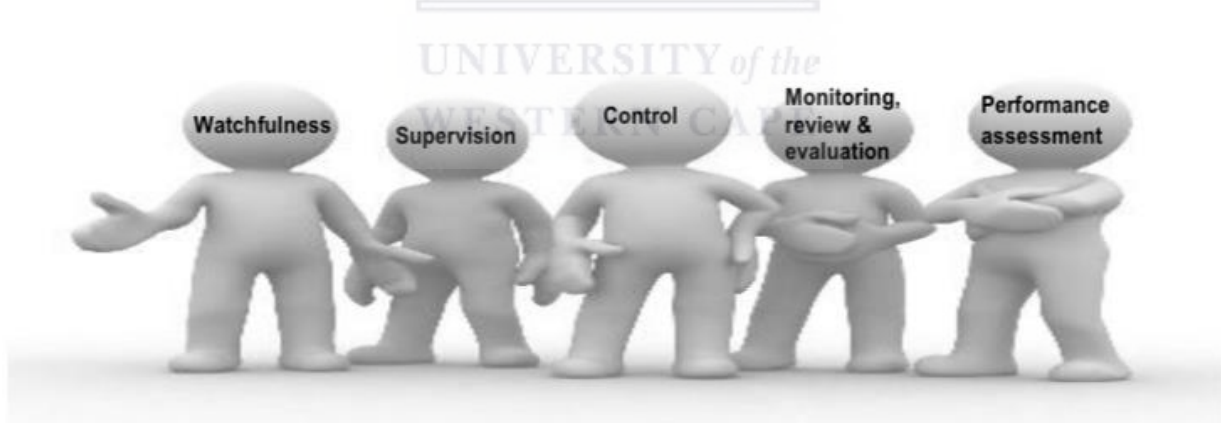
### 3.2. Municipalities

Within a municipality, several duties and responsibilities are imposed on various officials and structures in relation to the implementation of audit recommendations. This section seeks to outline these responsibilities in respect of individual officials and structures.

#### 3.2.1. Municipal council

Section 151(2) of the Constitution provides that the executive and legislative authority of a municipality is vested in its council. This means that the council is the most important structure responsible for all the decisions and operations of a municipality.<sup>156</sup> In its very nature, the council is the political structure and it is vested with decision-making powers and oversight.<sup>157</sup> Oversight entails an evaluation of whether the municipality runs its affairs in a manner that is legally compliant and based on good governance norms and principles.<sup>158</sup> According to the NT and CoGTA, oversight should feature five key elements, as shown in the figure below.

**Figure 1: Key features of oversight**



Source: NT and CoGTA (2011).<sup>159</sup>

<sup>156</sup> Freedman W ‘The legislative authority of the local sphere of government to conserve and protect the environment: a critical analysis of *Le Sueur v Ethekwini Municipality* [2013] ZAKZPHC 6 (30 January 2013)’ (2014) 17/1 *PELJ* 569-578. See also De Visser J *Roles and Responsibilities of the Municipal Manager* (Local Government Working Paper Series: 1, 2001) 1-2.

<sup>157</sup> Siegel D ‘The Leadership Role of the Municipal Chief Administrative Officer’ (2010) 53/2 *Canadian Public Administration* 141. See also Steytler N, De Visser J & Mettler J *Making Law: A Guide to Municipal Council* (2000) ch 1.

<sup>158</sup> Bekink (2006) 372.

<sup>159</sup> NT & CoGTA *Improving Oversight and Accountability: MPAC Guide & Toolkit* (2011) 9.



With a view of enhancing its oversight role, the council may appoint oversight committees in terms of section 79 of the Structures Act and delegate some of its functions to them to deal with specific matters concerning issues raised by the Auditor-General, competency of audit and risk management, discipline and rules.<sup>160</sup> This oversight network is important for accountability and it supports the ‘processes of clean audit and prevent issues highlighted in the Auditor-General’s report from being repeated’.<sup>161</sup>

Since these committees are appointed by the council, they are accountable to it and thus they derive their mandate and powers through council resolutions.<sup>162</sup> Given this legal nature, any decision taken by a section 79 committee can only be reviewed by the council and any power or function delegated to it can only be withdrawn by the council, again, through a council resolution.<sup>163</sup> These committees include the MPAC and the Finance Committee and they are individually discussed below.

### **3.2.1.1. Municipal Public Accounts Committee (MPAC)**

The MPAC may be established in terms of section 79 of the Structures Act to perform an oversight function on behalf of the council. The main objective of having the MPAC is to promote good local governance, accountability, transparency, efficient financial management and optimal service delivery.<sup>164</sup> Among its key functions, the MPAC should consider and evaluate the annual report and make recommendations to the council; track the progress made in terms of implementing previous audit recommendations; scrutinise the financial records and audit reports of the municipality and perform any of its functions delegated through council resolution.<sup>165</sup> In performing its functions, the MPAC relies heavily on the NT guidelines issued in the form of Circular 32.

The establishment of MPACs in municipalities is necessitated by several issues, including recurring poor audit outcomes, inadequate accountability systems, service delivery backlogs, as well as weak monitoring and evaluation of compliance.<sup>166</sup> Since there is no statutory obligation available at present for the establishment of MPACs in municipalities, the Municipal Structures Amendment Bill (B19-2018) gives the position of MPACs a different outlook.

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<sup>160</sup> Kraai, Holtzhausen & Malan (2017) 63.

<sup>161</sup> Kraai, Holtzhausen & Malan (2017) 66.

<sup>162</sup> NT & CoGTA (2011) 9.

<sup>163</sup> NT & CoGTA (2011) 10.

<sup>164</sup> NT & CoGTA (2011) 14.

<sup>165</sup> SCOPA: Limpopo *Municipal Public Accounts Committee – The Road Ahead* (2012) 4.

<sup>166</sup> SCOPA (2012) 3.

First, the Bill proposes that the establishment of MPACs be an obligatory duty of the council.<sup>167</sup> Secondly, in relation to the composition, the Bill does not stipulate who should be part of the MPAC but, instead, stipulates who should not. Excluded persons are the mayor, deputy mayor, any member of the executive committee, any member of the mayoral committee, speaker, whip and municipal officials.<sup>168</sup> Thirdly, the role of the MPAC is to be determined by the council and must include the reviewing of the Auditor-General's reports and providing an advice to the council on same,<sup>169</sup> reviewing of internal audit reports from the Audit Committee,<sup>170</sup> initiating and developing oversight report,<sup>171</sup> as well as investigating and reporting to the council any matter affecting the municipality.<sup>172</sup>

### **3.2.1.2. Finance Committee**

The Finance Committee may also be appointed by the council in terms of section 79 of the Structures Act with a different mandate from that of MPAC. Since this committee is established by the council, it is accountable (and reports) to the council. Its primary responsibility is to ensure that the processes and policies on municipal budget and planning are well aligned, comprehensive and credibly reflect the municipality's priorities and policy initiatives.<sup>173</sup> Moreover, this committee must also review municipality's SCM and procurement processes to ensure that they are fair, equitable, transparent, competitive and cost effective.<sup>174</sup> The committee achieves this by monitoring and overseeing the performance of financial responsibilities assigned to the MM,<sup>175</sup> and the CFO.<sup>176</sup> Quite significantly, the committee is also required to identify financial problems facing the municipality and recommend to the council the corrective measures to those problems.<sup>177</sup>

### **3.2.2. Audit Committee**

The audit committee of a municipality operates within a formal legislative framework that includes the MFMA and the NT Regulations. Section 166(1) of the MFMA provides that each

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<sup>167</sup> Clause 24(1) Bill.

<sup>168</sup> Clause 24(2) Bill.

<sup>169</sup> Clause 24(3)(a) Bill.

<sup>170</sup> Clause 24(3)(b) Bill.

<sup>171</sup> Clause 24(3)(c) Bill.

<sup>172</sup> Clause 24(3)(d) Bill.

<sup>173</sup> NT & CoGTA (2011) 14.

<sup>174</sup> S 217(1) Constitution read with s 112 MFMA.

<sup>175</sup> Ss 60-79 MFMA.

<sup>176</sup> Ss 80-83 MFMA.

<sup>177</sup> Ss 54(1)(e) & 54(2) MFMA.

municipality must have an audit committee as an independent advisory and oversight body to the municipal council. It must comprise of at least three persons who are not in the employ of the municipality.<sup>178</sup> Its central mandate is to ‘advise the council, ... the [MM] and the management staff of the municipality’ on matters relating to internal financial controls and audits, accounting policies, effective governance, performance management and evaluation, compliance as well as the adequacy, reliability and accuracy of financial reports and information.<sup>179</sup> In addition, this committee is also responsible for providing assurance on the adequacy, reliability and accuracy of financial reporting for the purposes of auditing, oversight and accountability.<sup>180</sup> Moreover, the audit committee must monitor the adequacy of corrective measures taken by the municipal council in response to internal control deficiencies emanating from the internal audit process.<sup>181</sup> Lastly, this committee must also respond and advise the municipal council on how best the latter can address any issues raised by the Auditor-General in the audit report.<sup>182</sup> The table below presents the snapshot of the audit committee’s key duties and responsibilities.

**Table 1: Key responsibilities of the Audit Committee**

Assessing the Risk & Control Environment	Overseeing Financial Reporting	Evaluating the Audit Process
Control Environment	Earnings Releases	Internal Audit Mission
Risk Assessment	Financial Reports	Independent Audit Expectations
Control Activities	Committee Diligence	Collaboration and Communication
Information and Communication	Committee Assessment	Understanding Results and Conclusions

Source: Van der Nest, Thornhill and De Jager (2008) 549.<sup>183</sup>

<sup>178</sup> NT MFMA Circular 65: Internal Audit & Audit Committee (2012) 8.

<sup>179</sup> S 166(2)(a) MFMA. See also NT MFMA Circular 32: Internal Audit and Audit Committee (2012) 2-4.

<sup>180</sup> NT MFMA Circular 32: Internal Audit and Audit Committee (2012) 2-4. See also South African Local Government Association (SALGA) *The State of Municipal Audit Committees* (2012) available at <https://salga.org.za/Documents/Municipalities/Municipal%20Focus/Municipal%20Finance/State-of-Audit-Committees.pdf> (accessed 29 August 2019).

<sup>181</sup> NT MFMA Circular 32: Internal Audit and Audit Committee (2012) 2-4.

<sup>182</sup> S 166(2)(c) MFMA.

<sup>183</sup> Van der Nest DP, Thornhill C & De Jager J ‘Audit committees and accountability in the South African public sector’ (2008) 43/4 *JOPA* 549.

### 3.2.3. The Mayor

Section 52 of the MFMA provides that the Mayor of the municipality must generally monitor and provide general political guidance over fiscal and financial affairs of the municipalities. In doing so, the Mayor may monitor and oversee the exercise of responsibilities assigned in terms of the MFMA to the accounting officer. Furthermore, the MFMA provides an incidental provision that if the municipality does not have a Mayor, the designated councillor must exercise the mayoral powers and responsibilities in chapter seven of the MFMA.<sup>184</sup> It goes without saying that audit related matters in general, and the implementation of audit recommendations in particular, falls within the broad spectrum of ‘fiscal and financial affairs’ that the Mayor must provide guidance on. Moreover, the MFMA places a reporting burden on the Mayor to promptly alert ‘the [municipal] council and the MEC for local government in the province’ if the municipality encounters serious financial distress.<sup>185</sup> Lastly, the Mayor must also identify any financial problems facing the municipality and ensure that the preventive measures devised by delegated committees (such as MPAC, Finance Committee and Audit Committee) are accordingly given effect.<sup>186</sup>

### 3.2.4. Administration

The administrative component of a municipality is also actively involved in the implementation of audit recommendations. For this discussion, focus is directed at three entities, namely; the MM, the CFO and the Internal Audit Unit.

#### 3.2.3.1. Municipal Manager (MM)

The MM is the accounting officer of the municipality, and the term ‘head of administration’ is often used as an equivalent,<sup>187</sup> meaning that he or she is responsible for the general administration of the municipality and the implementation of Integrated Development Plan (IDP).<sup>188</sup> This office is the ‘engine’ of the municipality and this speaks to why numerous scholars agree that the MM’s role is ‘quite a complex and difficult one’.<sup>189</sup> The complexity arise from the fact that the MM accounts to two ends, *i.e.* political and administrative arms.

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<sup>184</sup> S 57 MFMA.

<sup>185</sup> S 54(2)(b) MFMA.

<sup>186</sup> S 54(1)(e) MFMA.

<sup>187</sup> S 83 MSA.

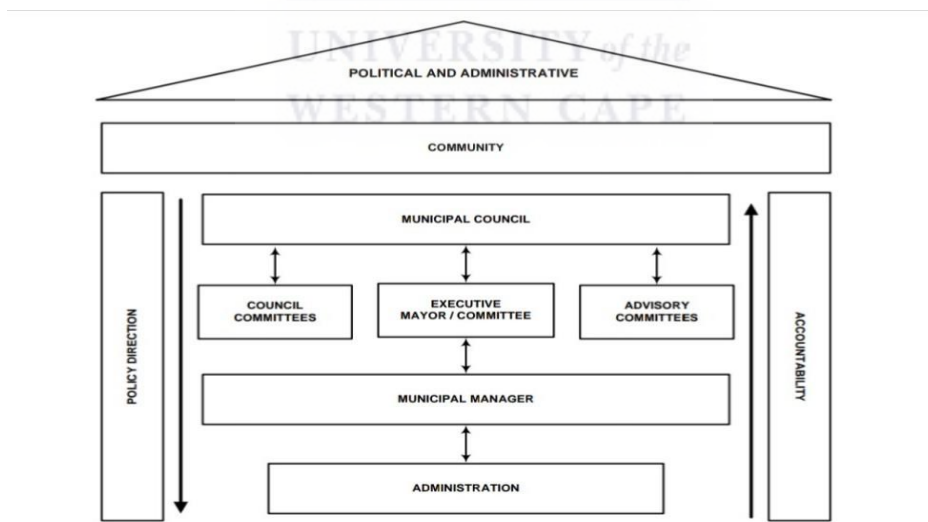
<sup>188</sup> S 55(1)(c) MSA. See also *Executive council of the Western Cape v Minister for Provincial Affairs and Constitutional Development of the Republic of south Africa; Executive Council of KwaZulu-Natal v President of South Africa and Others* 1999 (12) BCLR 1360 (CC) para 109.

<sup>189</sup> Siegel (2010) 169.

This complexity exists alongside the general fiduciary duty, loyalty and diligence that the MM owes to the general public.<sup>190</sup> However, Motubatse points out that the MM's role is purely an administrative role wherein he or she is expected to liaise and report to the council on general matters affecting the municipality, including financial status of the municipality, internal and external audit matters, the progress made in the implementation of municipal policies, strategies and the IDP.<sup>191</sup> The MM must also ensure that disciplinary steps are taken against municipal officials who commit financial misconduct.<sup>192</sup>

In relation to auditing processes, the role of the MM entails the management of the financial administration of the municipality, preparation and fair presentation of the municipality's financial statements to the Auditor-General in accordance with the requisite reporting and accounting standards compatible with the MFMA provisions and the Generally Recognised Accounting Practice (GRAP).<sup>193</sup> Within this context, 'fair presentation of financial statements' means the production of financial statements that are free from material misstatements, due to either fraud or human error. Once the audit process is complete, and audit recommendations given, the MM must ensure the implementation of the same and report on the progress made in that regard to the municipal council and the Mayor.<sup>194</sup> The diagram below depicts the position of the MM within the accountability cycle of a municipality.<sup>195</sup>

**Figure 2: The position of MM within the accountability cycle of a municipality**



Source: Adapted from the NT (2012).

<sup>190</sup> S 61 MFMA.

<sup>191</sup> Motubatse (2016) 86.

<sup>192</sup> This is called 'effecting consequence'.

<sup>193</sup> S 62 MFMA.

<sup>194</sup> S 61(1) MFMA.

<sup>195</sup> NT *Chief Financial Officers Handbook for Municipalities* (2012) 7.

### 3.2.3.2. Chief Financial Officer (CFO)

The CFO of a municipality 'is administratively in charge of the budget and treasury office'.<sup>196</sup> This office is the financial management hub of the municipality where the core finance functions are performed and internal controls implemented. The MFMA also requires the CFO, under delegated powers, to advise and assist the accounting officer in carrying out his or her wide range of financial management responsibilities, such as budget planning, financial reporting and monitoring the implementation plan for internal and external audit recommendations,<sup>197</sup> as the case might be. In essence, what the latter means is that the CFO plays a central role in implementing financial reforms at the direction of the accounting officer, with the assistance of appropriately skilled finance personnel.<sup>198</sup>

### 3.2.3.3. Internal Audit Unit

Section 165(1) of the MFMA provides that each municipality must have an internal audit unit'. The mandate of this entity includes preparing a risk-based audit plan and an internal audit program for each financial year.<sup>199</sup> Furthermore, the audit unit must advise the MM and periodically report to the audit committee on the implementation of the internal audit plan, as well as on any other matter in relation to internal controls and audit, compliance with legislative framework, risk and risk management, as well as accounting procedures and practices.<sup>200</sup> It is also important to note that the municipality may outsource any of its internal audit functions if it does not have the necessary capacity to perform such functions.<sup>201</sup>

## 3.3. Provincial Government

Although municipalities are autonomous,<sup>202</sup> their autonomy is exercised subject to the supervision of the provincial (and national) government.<sup>203</sup> The effect of this supervision is that the autonomy can be curtailed under certain prescribed circumstances and to varying degrees, depending entirely on the distinct merits of each situation. Steytler correctly points out that 'the

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<sup>196</sup> S 81(1)(a) MFMA.

<sup>197</sup> S 81(1)(d)-(e) MFMA.

<sup>198</sup> Ntliziywana (2017) 351.

<sup>199</sup> S 165(2)(a) MFMA.

<sup>200</sup> S 165(2)(b) MFMA.

<sup>201</sup> S 165(3) MFMA.

<sup>202</sup> Ntliziywana P 'Municipal Financial Misconduct Regulations: The Draft' (2012) 14/3 *Local Government Bulletin* 12-15. See *Independent Electoral Commission v Langeberg Municipality* 2001 (9) BCLR 883 (CC) para 26.

<sup>203</sup> S 154(1) Constitution. See also Malan L 'Intergovernmental relations and co-operative government in South Africa: The ten year review' (2005) 24/2 *Politeia* 227.



extent of supervision inevitably defines the level of local autonomy.’<sup>204</sup> This occurs when the other spheres of government supervise municipalities through monitoring, support and routine evaluation.<sup>205</sup> In the main, the object of supervision is to strengthen municipalities’ performance, enhance their development and capacity,<sup>206</sup> foster fiscal discipline and ensure their compliance with the legislative prescripts when exercising their powers.

Part of the problem outlined in chapter one is the failure by provinces to adequately supervise and monitor municipalities in their implementation of audit recommendations. Under normal course of events, in this instance, two things ought to happen. First, the province may enforce compliance with audit recommendations or, secondly, may use them for wider intervention.<sup>207</sup> In that light, this section discusses the legal duties and responsibilities imposed on the provincial government insofar as the implementation of audit recommendations in municipalities is concerned.

### **3.3.1. Provincial role players**

As already stated, the provinces are, by agreement, required to assist municipalities ‘in building their capacity for efficient, effective and transparent financial management’.<sup>208</sup> The goal is to avert impending financial problems of the municipality, thus improving financial viability.<sup>209</sup> To achieve this goal, responsibilities are apportioned among various role players at provincial level, namely the MEC for Finance, Provincial Treasury and the MEC for Local Government.

#### **3.3.1.1. MEC for Local Government**

The MEC for local government must establish mechanisms, processes and procedures to assess the support needed by municipalities to strengthen their capacity to manage their own affairs and perform their duties.<sup>210</sup> Furthermore, section 105(3) of the MSA authorises the MEC to require municipalities to submit any information to a specified provincial organ either at regular intervals or within a specified period. However, such request should not impose additional reporting burdens on municipalities. If the MEC is of a view that a municipality is failing to

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<sup>204</sup> Steytler N *The Place and Role of Local Government in Federal Systems* (2005) 7.

<sup>205</sup> Steytler (2005) 185-186. See also Steytler & De Visser (2007) ch 15; Khumalo, Dawood & Mahabir (2016) 222 and *Lagoon Bay Lifestyle Estate (Pty) Ltd v Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape and Others* (10751/2011) [2011] ZAWCHC 327 para 12.

<sup>206</sup> De Visser J *Developmental Local Government: A Case Study of South Africa* (2005) 40.

<sup>207</sup> S 139(4) & (5) Constitution.

<sup>208</sup> S 34(3)(a) MFMA.

<sup>209</sup> S 34(3)(b) & (c) MFMA.

<sup>210</sup> S 105(1) MSA.



fulfil its statutory obligations, he or she may intervene.<sup>211</sup> The MEC is also required to receive municipalities' annual reports of each financial year.<sup>212</sup> Once the annual reports have been received, the MEC is then required to compile and submit a consolidated report on the state and performance of the municipalities within the province to the Minister and the National Council of Provinces (NCOP).<sup>213</sup>

### **3.3.1.2. MEC for Finance**

The MEC for Finance is the political head of the provincial treasury and is responsible for the decisions of the latter, except those taken as a result of a delegation.<sup>214</sup> Moreover, the MEC is required to approve the time frames within which the municipalities in the province must table their annual budgets.<sup>215</sup> The MEC is empowered to withdraw funds from municipality's account if it failed to approve the budget within the prescribed time frames.<sup>216</sup> In instances where there is an intervention in a municipality experiencing financial crisis, the MEC is required to review such intervention every three months and report the any progress to the Minister, among others.<sup>217</sup>

### **3.3.1.3. Provincial Treasury**

The functions, powers and responsibilities of the provincial treasury are outlined in section 5 of the MFMA. The provincial treasury is required to fulfil all responsibilities imposed on it in terms of the legislative framework.<sup>218</sup> The most important one is assisting the National Treasury to enforce compliance with the prescribed measures stipulated in section 216(1) of the Constitution.<sup>219</sup> Furthermore, the provincial treasury may also assist municipalities in preparing their annual budgets.<sup>220</sup> Its additional roles include monitoring compliance by municipalities,<sup>221</sup> compliance with their financial reporting duties,<sup>222</sup> as well as guiding the implementation of their budget plans.<sup>223</sup> Lastly, the provincial treasury is accountable (on

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<sup>211</sup> S 106 MSA.

<sup>212</sup> S 46 MSA.

<sup>213</sup> S 47(1) MSA.

<sup>214</sup> S 6(4) MFMA.

<sup>215</sup> S 26(3) MFMA.

<sup>216</sup> S 26(4) MFMA.

<sup>217</sup> Ss 147(1)(a) & (b)(ii) MFMA.

<sup>218</sup> S 5(3)(a) MFMA.

<sup>219</sup> S 5(3)(c) MFMA & Steytler & De Visser (2007) 15-7.

<sup>220</sup> S 5(4)(b) MFMA.

<sup>221</sup> S 5(4)(a)(i) MFMA.

<sup>222</sup> S (4)(a)(iv) MFMA.

<sup>223</sup> S (4)(a)(ii) & (iii) MFMA.

quarterly basis) to the National Treasury and may exercise any power(s) and perform any function delegated to it by the latter.<sup>224</sup>

### 3.3.2. Monitoring

Annually, the Auditor-General furnishes the relevant provincial executive (MECs for Local Government and Finance) with the audit reports of all municipalities in the province. As indicated in previous discussions, these reports constitute a reliable source of information upon which a provincial executive may act, through monitoring (or intervention). The provincial government is required to monitor the municipalities to ensure that they comply with the relevant laws,<sup>225</sup> and that they address the key issues noted in their audit reports. Furthermore, the provincial executive, as part of its monitoring task, may also conduct regular assessments on the state of compliance, with performance and legislative framework, of the municipality.<sup>226</sup>

Monitoring is broad in scope and among its facets is financial. In order for financial monitoring to occur, the municipalities are required to submit quarterly financial reports to the MEC of local government, and of finance, as the case might be. Upon receiving the reports, the MEC is required to evaluate and scrutinise them to satisfy him/herself about the state of compliance of the municipality with the financial reporting legal framework.<sup>227</sup> It is submitted that part of this scrutinisation should particularly be on municipality's progress in giving effect to audit recommendations. Furthermore, where the MEC 'has reason to believe'<sup>228</sup> that an irregularity or non-compliance (in a form of maladministration, fraud or corruption) exists, an investigation may be conducted in that regard.<sup>229</sup> Monitoring may also be done through regular visits to municipalities by the relevant provincial executive. Chigwata terms this 'monitoring visits'.<sup>230</sup>

### 3.3.3. Support

The provincial government must assess the nature (and degree)<sup>231</sup> of support needed by the municipalities in order to effectively manage their own affairs and fulfil their statutory

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<sup>224</sup> S 5(8) MFMA.

<sup>225</sup> S 155(6)(a) Constitution.

<sup>226</sup> Steytler N & De Visser J *Local Government Law of South Africa* (2009) 15-5.

<sup>227</sup> Steytler & De Visser (2007) 15-13. See also Litvack J & Seddon J (eds) *Decentralisation: Briefing Notes* (1999) 43.

<sup>228</sup> Steytler & De Visser (2007) 15-13.

<sup>229</sup> S 106(1)(b) MSA.

<sup>230</sup> Chigwata (2014) 378.

<sup>231</sup> The obligation of support does not mean that the provincial government can be held liable to pay the creditors of the bankrupt municipality. See Steytler (2005) 203.

obligations, including financial.<sup>232</sup> In doing so, it may rely on the information contained in the audit reports of municipalities. The provinces must also establish mechanisms, processes and procedures to provide guidance on how they support and monitor municipalities in general and, in particular, financial management.<sup>233</sup> Support, by definition, refers to measures of assistance taken by the national government (and/or provincial government) to ensure that municipalities are able to carry out their functions adequately.<sup>234</sup>

According to Steytler and De Visser, the understanding of support is twofold.<sup>235</sup> On the one hand, they argue, support should be understood in the context of supervision, which is aimed ‘to prevent a decline or degeneration of such structures, powers and functions’.<sup>236</sup> On the other hand, support should be understood in the context of co-operation, which does not necessarily seek to prevent a decline but rather to support ‘local government as an equal partner in the achievement of common goals.’<sup>237</sup> The circumstances of each case will always determine the appropriate form of support that the concerned municipality needs.<sup>238</sup>

### 3.3.4. Intervention

Intervention, as a form of provincial supervision over municipalities, is of common occurrence in practice and often the subject of contention in theory. Two instrumental provisions are worth mentioning in this regard, namely; section 139 of the Constitution and chapter 13 of the MFMA.<sup>239</sup> These provisions broadly outline three sets of circumstances in terms of which the provincial government (and the national government if certain circumstances prevail) could intervene in a municipality.

The first is regular intervention in terms of section 139(1) of the Constitution, which empowers the provincial executive to intervene in a municipality that fails to fulfil an executive obligation in terms of the Constitution or any empowering legislation. This type of intervention cannot be invoked in respect of a municipality’s failure in relation to legislative acts.<sup>240</sup> Although the

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<sup>232</sup> S 155(6)(a) Constitution & s 105(1)(c) MSA.

<sup>233</sup> S 105(1)(a) MSA.

<sup>234</sup> Chigwata (2014) 386.

<sup>235</sup> Steytler & De Visser (2007) 15-18.

<sup>236</sup> *First Certification case* (1996) para 371.

<sup>237</sup> Steytler & De Visser (2007) 15-18.

<sup>238</sup> Murray C & Hoffman-Wanderer Y ‘Suspension and dissolution of municipal councils under section 139 of the Constitution’ (2007) *Journal of South African Law* 141-145.

<sup>239</sup> The latter regulates interventions in terms of section 139(4) and (5) of the Constitution.

<sup>240</sup> *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1998 (12) BCLR 1458 (CC) paras 45-46.

opinion on what constitutes an ‘executive obligation’ has long been deeply divided, the court dealt with this question at length in the *Mnquma* judgment.<sup>241</sup> Intervention in terms of section 139(1) of the Constitution is three-fold. The first step is an issuance of a directive (a command/instruction) to a municipality stating the extent of the failure and the remedial steps to be taken in addressing such failure.<sup>242</sup> This step, in certain circumstances, may be a precursor of any other section 139(1) step and, in other instances, it may not.<sup>243</sup> The second step is the assumption of responsibility through notice of intervention.<sup>244</sup> In the notice, the provincial executive must inform the defaulting municipality of the ‘executive obligations it allegedly cannot or does not fulfil’.<sup>245</sup> This requirement is important because a clearly spelt out notice of intervention will allow a municipality to identify and work on its deficiencies, to know the scope of intervention and to challenge such intervention if it is of a view that an intrusion in its autonomy is unmerited.<sup>246</sup> The last step is the dissolution of municipal council. Section 139(1)(c) of the Constitution provides that the provincial executive may dissolve council ‘if exceptional circumstances warrant such step’.<sup>247</sup> This is the most drastic step among the three, with far-reaching impact on the overall functioning of a municipality. The substantive requirements of this step were considered in *Ngaka Modiri Molema* judgment.<sup>248</sup>

The second intervention is in terms of section 139(4) of the Constitution which mandates the province to intervene in a municipality on the basis of its failure to adopt a budget and related matters. The latter section provides for the dissolution of the municipal council as well.

The third intervention is in terms of section 139(5) of the Constitution which permits the provincial executive to intervene in municipalities that are encountering crisis in their financial affairs.<sup>249</sup> The lighter version of this measure is found in section 137 of the MFMA.<sup>250</sup> Section 139(5) intervention is a mandatory duty on the provincial executive and not discretionary, as it

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<sup>241</sup> *Mnquma Local Municipality and Another v Premier of the Eastern Cape and Others* (231/2009) [2009] ZAE para 58.

<sup>242</sup> S 139(1)(a) Constitution.

<sup>243</sup> *Mnquma* (2009) para 5.2.3.

<sup>244</sup> S 139(1)(b) Constitution.

<sup>245</sup> *Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and Others* (35248/14) [2014] ZAGPPHC para 31.

<sup>246</sup> *Mogalakwena* (2014) para 31.

<sup>247</sup> S 34(4) Structures Act.

<sup>248</sup> See *Ngaka Modiri Molema District Municipality v Chairperson of the North West Provincial Executive Council and Others* 2015 (1) BCLR 72 CC.

<sup>249</sup> S 139(5) Constitution & s 34(2) MFMA.

<sup>250</sup> Experts indicate that the only source of difference between section 139(5) of the Constitution and section 135 of the MFMA is the seriousness of the financial problem. Steytler & De Visser (2018) 15-44.

is in case of intervention under section 137 of the MFMA. The MEC for finance plays a significant role under section 139(5) intervention. There are two conditions that would suggest that a certain municipality is having a crisis in its financial affairs, namely; if a municipality is in a serious or persistent material breach of its statutory obligations and/or is constantly failing to meet its financial commitments.<sup>251</sup> The MFMA provides indicators to guide in establishing the presence or absence of these conditions. These indicators include instances where the municipality has failed to make settle payment(s) due to its creditor(s),<sup>252</sup> failed to honour a contract of security,<sup>253</sup> failed to make payments amounting to more than the amount prescribed by the Minister of Finance,<sup>254</sup> the municipality's failure to honour its financial commitments has impacted (or likely to impact) on the price of credit to other municipalities,<sup>255</sup> and/or such failure has substantially impaired municipality's ability to procure goods, services or credit on usual commercial terms.<sup>256</sup> All these indicators are evident in most municipalities, as will be demonstrated in the next chapter through case study municipalities.

### 3.4. National Government

The national government, through CoGTA, has an enormous responsibility, as expressed in the National Development Plan (NDP), of ensuring that municipalities are capable to contribute towards achieving the developmental state.<sup>257</sup> The national government has the supervisory powers over municipalities,<sup>258</sup> albeit on an implicit basis.<sup>259</sup> This section considers, in particular, the national supervision over municipalities' financial aspect. This aspect is considered 'a dominant feature of the Constitution'.<sup>260</sup> According to Fombad, the national government's supervision over the affairs of municipalities fosters what he terms an 'upward accountability'.<sup>261</sup> The author defines an 'upward accountability' as 'the degree to which local

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<sup>251</sup> Steytler & De Visser (2018) 15-44.

<sup>252</sup> S 140(2)(a) MFMA.

<sup>253</sup> Ss 48 & 140(2)(b) MFMA.

<sup>254</sup> S 140(2)(c) MFMA.

<sup>255</sup> S 140(2)(d) MFMA.

<sup>256</sup> S 140(3) MFMA.

<sup>257</sup> CoGTA *Annual Report 2013/14* (2014) 9.

<sup>258</sup> Ss 154(1) & 139 Constitution. See also *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 9 BCLR CC para 56.

<sup>259</sup> Steytler (2005) 201.

<sup>260</sup> Steytler & De Visser (2007) 15-5.

<sup>261</sup> Fombad CM 'Regional and continental frameworks for decentralisation in Africa: The African Charter on Decentralisation' in Fombad CM & Steytler N (eds) *Decentralisation and Constitutionalism in Africa* (2019) 75.

government is supervised by the central government'.<sup>262</sup> Therefore, in the main, this supervision entails the systems for auditing of public accounts, the setting of standards for service delivery, as well as the monitoring and evaluation of municipalities' performance in relation to the latter.<sup>263</sup>

Moreover, Steytler and De Visser have correctly pointed out that the national government, through the NT, assumes 'the driver's seat' in scrutinising municipal finances and other matters relating to fiscal discipline.<sup>264</sup> Several extensive financial reporting duties have been imposed on municipalities and a wide range of circulars and regulations have been adopted to provide guidance in that regard.<sup>265</sup> This is in response to the constitutional duty imposed on the NT to enforce compliance with the prescribed measures for transparency and expenditure control in the public sector.<sup>266</sup> The supervisory function of the national government, Steytler argues, 'entails the establishment and structuring of municipalities, regulating the exercise of their competencies, monitoring the exercise of those competencies and, in certain circumstances, intervening in municipalities'.<sup>267</sup>

To that end, this section seeks to answer the following question, which feeds back to the overarching research question: How can and does the national government, through the NT and CoGTA, assist municipalities to effectively implement audit recommendations? The section will also explore measures that the national government can utilise to encourage and compel municipalities to comply with audit recommendations.

### **3.4.1. Regulation**

Section 216(1) of the Constitution affords the national government significant supervisory role and broad regulatory powers in terms of section 216(1). This provision requires the national legislation to establish the NT and prescribe measures to ensure transparency and expenditure control. It achieves this by introducing generally recognised accounting practice, uniform expenditure classifications, as well as uniform norms and standards.<sup>268</sup> Additional obligation is imposed on the NT to enforce compliance with these norms and standards.<sup>269</sup> In executing

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<sup>262</sup> Fombad (2019) 75.

<sup>263</sup> Fombad (2019) 75.

<sup>264</sup> Steytler & De Visser (2007) 15-5.

<sup>265</sup> Steytler (2005) 201.

<sup>266</sup> S 216(2) Constitution.

<sup>267</sup> Steytler (2005) 202.

<sup>268</sup> S 216(1) Constitution.

<sup>269</sup> S 216(2) Constitution.



its enforcement role, the NT may stop the transfer of funds to any defaulting organ of state,<sup>270</sup> including municipalities. Furthermore, apart from section 216 of the Constitution, the national government also has broad legislative and executive ‘authority to see to the effective performance by municipalities of their functions ... by *regulating* the exercise ... of their executive authority referred to in section 156(1).’<sup>271</sup> Regulation here includes the regulation of municipal finances. However, the national government’s regulatory powers over municipalities are not untrammelled, meaning that they can be invoked only ‘to a limited degree’.<sup>272</sup>

The MSA also empowers the Minister for local government to set essential national and minimum standards for any function assigned to municipalities, including the finance and audit sectoral area of municipalities.<sup>273</sup> In doing, consultations must be made with other stakeholders such as the Minister of Finance, the organised local government representing local government nationally,<sup>274</sup> the MECs for local government and any Cabinet member responsible for the regulation of the concerned service.<sup>275</sup> Other national cabinet members may also exercise the power to set minimum and national standards for the service for which they are responsible.<sup>276</sup> So far, the Minister of local government and the NT have made regulations and guidelines on a wide range of sectoral areas of local government.<sup>277</sup>

### 3.4.2. Monitoring

The national government derives its authority to monitor local government from its inherent supervisory powers.<sup>278</sup> In order for monitoring to take place, the municipalities are required to submit within a given time-frame specific information concerning their affairs to certain organ(s) of state as determined by the Minister for local government.<sup>279</sup> In relation to financial monitoring, in particular, the NT plays a prominent role. Among other things, the latter is required to monitor municipalities’ compliance with their financial reporting duties imposed

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<sup>270</sup> See a detailed discussion in para 3.4.5 below.

<sup>271</sup> S 155(7) Constitution, emphasis italicised.

<sup>272</sup> Steytler (2005) 201. See also De Visser ‘The powers of local government’ (2003) 17 *SA Public Law* 223.

<sup>273</sup> S 108(1) MSA.

<sup>274</sup> South African Local Government Association (SALGA).

<sup>275</sup> S 108(1) MSA.

<sup>276</sup> PMG ‘The Municipal Systems Act’ (2018) available at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/bills/municipalsystemsact.htm> (accessed 25 September 2019).

<sup>277</sup> These include Excel schedules of the prescribed budget tables, the Budget Formats Guide, the Funding Compliance Guideline & the annual MFMA budget circulars 48, 51, 54 & 55, financial and performance management, service delivery, credit control, municipal public administration & others. See PMG (2019).

<sup>278</sup> De Visser (2005) 180.

<sup>279</sup> S 107 MSA.



by the MFMA and the ‘applicable standards of generally accepted accounting practices’.<sup>280</sup> The NT, in the process of monitoring, may also investigate ‘any system of financial management and internal control’ in a municipality,<sup>281</sup> and make recommendations to that effect.<sup>282</sup> Relying on the same provision, it is argued, the NT may investigate non-compliance of audit recommendations and recommend a proper cause of action for the responsible official. Furthermore, the NT may also require any information for inspection from the MM, or cause that information to be submitted to the Auditor-General.<sup>283</sup>

### 3.4.3. Support

The national government is constitutionally obliged to support and strengthen the capacity of municipalities so that they can manage their own affairs, exercise their powers and perform their functions.<sup>284</sup> The NT does this by promoting good budget planning, fiscal discipline and a transparent financial management.<sup>285</sup> Additional duties are contained in chapter 5 of the MFMA on co-operative government. The most important one is to assist the municipalities by building their capacity for efficient, effective and transparent financial management,<sup>286</sup> as well as to support them in their efforts ‘to identify and resolve their financial problems’.<sup>287</sup>

There has also been other strategies and programmes to support municipalities, such as ‘Project Consolidate’, ‘Siyenza Manje’, the ‘Turn Around Strategy’ and ‘Back to Basics’. However, De Visser contends that these strategies have been in use for over the past two decades and yet no improvement in performance.<sup>288</sup> The author further argues that if these strategies are implemented adequately, they may yield positive outcomes and, otherwise, it will just be ‘a case of doing the same thing but expecting different results’.<sup>289</sup>

### 3.4.4. Intervention

Section 139(7) of the Constitution empowers the national executive to intervene in a municipality in the event where a provincial executive fails in its duty to intervene. This

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<sup>280</sup> S 5(2)(c) MFMA.

<sup>281</sup> S 5(2)(d) MFMA.

<sup>282</sup> Steytler & De Visser (2007) 15-10.

<sup>283</sup> S 74(1) MFMA.

<sup>284</sup> S 154(1) Constitution.

<sup>285</sup> S 5(2)(b) MFMA.

<sup>286</sup> S 34(1) MFMA.

<sup>287</sup> S 43(2) MFMA.

<sup>288</sup> De Visser J ‘Five suggestions to fix local government’ in GGLN (ed) *Developmental Local Government: Dream Deferred?* (2018) 11.

<sup>289</sup> De Visser (2018) 11.

national intervention is only in respect two circumstances, namely; where there is a budgetary breakdown in a municipality,<sup>290</sup> or a crisis in financial affairs.<sup>291</sup> The substantive requirements for this intervention are that the provincial government cannot or does not intervene (for whatever reason) and/or that the provincial intervention is inadequate.<sup>292</sup> Before it can intervene, as required by the principle of co-operative government, the national executive must first consult with the provincial executive.<sup>293</sup>

### 3.4.5. Stoppage of transfer of funds to municipalities

The Constitution provides that the NT may stop the transfer of funds to an organ of state for a serious or persistent material breach of the measures outlined in section 216(1).<sup>294</sup> The stoppage is applicable to both conditional and unconditional transfers to the municipality.<sup>295</sup> In 2004/5, the NT relied on this provision by withholding and delaying grants to 18 defaulting municipalities as a strategy to encourage them to submit the financial statements to the Auditor-General, of which yielded positive results.<sup>296</sup> Again, in 2015, the NT invoked this provision against 60 municipalities that were not able to pay their debts with Eskom and water boards in line with section 65(2) of the MFMA.<sup>297</sup> According to Steytler and De Visser, section 216(2) 'is a temporary measure that, at the very least, causes discomfort and annoyance, if not shame'.<sup>298</sup>

Like with other measures, there are certain procedural safeguards that must be met before the NT can decide to stop the transfers to municipalities.<sup>299</sup> One is that the municipalities must be given the opportunity to submit written representations in relation to the proposed stoppage,<sup>300</sup> and the MEC for local government must be informed in that regard.<sup>301</sup> Also, if the stoppage

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<sup>290</sup> S 139(4) Constitution.

<sup>291</sup> S 139(5) Constitution.

<sup>292</sup> Steytler & De Visser (2018) 15-50.

<sup>293</sup> S 150(1) MFMA.

<sup>294</sup> S 216(2) Constitution. For a detailed discussion on this subject, see Rahim NA *The Requirements for, and Appropriateness of, Stopping the Equitable Share of Municipalities in terms of Section 216* (unpublished Research Paper, University of the Western Cape, 2016) ch 1-4.

<sup>295</sup> Steytler & De Visser (2007) 15-55.

<sup>296</sup> NT *Local Government Budgets and Expenditure Review: 2001/02 – 2007/08* (2006) 67.

<sup>297</sup> NT 'NT withholds transfers of funds to 60 municipalities' (2015) available at [http://www.treasury.gov.za/comm\\_media/press/2015/20150331%20%20National%20Treasury%20Withhold%20Transfer%20of%20Funds%20to%2060%20Municipalities.pdf](http://www.treasury.gov.za/comm_media/press/2015/20150331%20%20National%20Treasury%20Withhold%20Transfer%20of%20Funds%20to%2060%20Municipalities.pdf) (accessed 27 September 2019).

<sup>298</sup> Steytler & De Visser (2007) 15-55.

<sup>299</sup> S 38(1) MFMA. See also Steytler & De Visser (2007) 15-55 – 15-56.

<sup>300</sup> S 38(2)(a) MFMA.

<sup>301</sup> S 38(2)(b) MFMA.

affects the provision of service, then the provincial executive must closely monitor the process.<sup>302</sup>

### 3.5. Other Institutions

South Africa has adopted a multi-agency approach towards reinforcing accountability and good governance principles within the public sector, including municipalities. This means that besides the provincial and national governments' supervisory mechanisms, there are other institutions that may play certain roles in enforcing compliance with audit recommendations in municipalities. In the case of *Hugh Glenister v President of the Republic of South Africa*,<sup>303</sup> the Constitutional Court emphasised the point that the effective implementation of anti-corruption strategies in public sector depends largely on having strong and independent expert and forensic investigative agencies.<sup>304</sup> These include institutions such as the Auditor-General, the Public Protector (PP), the South African Police Service (SAPS), the Special Investigating Unit (SIU), the National Prosecuting Authority (NPA), and of course civil society organisations. In this section, the potential roles of these institutions in relation to the subject matter are explored.

#### 3.5.1. The Auditor-General

As already discussed in chapter two, the PAAA introduced new enforcement powers of the Auditor-General. The institution believes that these powers, through effective implementation, place it in a better position to adequately address the longstanding issues in municipalities, including the non-implementation of audit recommendations.<sup>305</sup> The Auditor-General is now required to make a follow up on whether the accounting officer or authority has implemented the recommendations as may be contained in the audit report in relation to any material irregularity.<sup>306</sup>

The PAAA defines material irregularity as 'any non-compliance with, or contravention of, legislation, fraud, theft or a breach of a fiduciary duty identified during an audit [process]'.<sup>307</sup> This means the focus of an audit will have to assess thoroughly the existence or otherwise of material irregularities in the transactions and financial statements of municipalities. In case where material irregularity is identified, the Auditor-General may refer such to the relevant

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<sup>302</sup> S 38(3) MFMA.

<sup>303</sup> *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) 2011 (7) BCLR 651.

<sup>304</sup> *Glenister* (2011) paras 117-120.

<sup>305</sup> *Consolidated Audit Report 2017/18* (2019) 13.

<sup>306</sup> S 5A(1) PAAA.

<sup>307</sup> S 1(g) PAAA.

public body with a specific mandate and powers suitable to investigate the nature of that specific suspected material irregularity.<sup>308</sup> The agencies will deal with matter within their own legal mandate and take appropriate action where necessary. These agencies/institutions include the Public Protector, Special Investigations Unit (SAPS) and this brings the study to discuss them individually in the subsequent section.

### 3.5.2. The Public Protector (PP)

The PP is one of the chapter 9 institutions and its functions and powers are outlined in section 182(1) of the Constitution. They include to investigate any conduct in state affairs or in the public administration in *any sphere of government* that is alleged or suspected to be improper or to result in impropriety or prejudice,<sup>309</sup> to report on that conduct,<sup>310</sup> and to take appropriate remedial action.<sup>311</sup> Perhaps what sets the PP more distinct from other chapter 9 institutions is the authority of its remedial actions, which are of binding effect unless successfully reviewed by the relevant court of law.<sup>312</sup> The Constitutional Court jurisprudence on this subject is clear.<sup>313</sup> Just like the audit reports prepared by the Auditor-General, the reports by the PP are valuable sources of reference in measuring the public service and accountability.<sup>314</sup>

### 3.5.3. The South African Police Service

The SAPS is constitutionally empowered and mandated, in terms of the Constitution, to prevent, combat and *investigate crime*, maintain public order, protect and secure the inhabitants and their property, as well as to uphold and enforce the law.<sup>315</sup> It performs this mandate through traditional way of arresting, detaining, charging and bringing anyone accused of any crime before the court of law with sufficient evidence to secure a successful prosecution.<sup>316</sup> Furthermore, in the process of investigating crime, the SAPS has the authority to search (with

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<sup>308</sup> S 3(b) PAAA.

<sup>309</sup> S 182(1)(a) Constitution.

<sup>310</sup> S 182(1)(b) Constitution.

<sup>311</sup> S 182(1)(c) Constitution.

<sup>312</sup> Tchawouo-Mbiada CJ 'The Public Protector as a Mechanism of Political Accountability: The Extent of its Contribution to the Realisation of the Right to Access Adequate Housing in South Africa' (2017) 20 *Potchefstroom Electronic Law Journal* 11.

<sup>313</sup> *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 5 BCLR 618 (CC) para 75. See also *Democratic Alliance v South African Broadcasting Corporation Limited* 2015 1 SA 551 (WCC) para 49-63.

<sup>314</sup> Thornhill C 'The role of the Public Protector case studies in public accountability' (2011) 4/2 *African Journal of Public Affairs* 87.

<sup>315</sup> S 205(1)-(3) Constitution. The enabling legislation is the SAPS Act 68 of 1996 & Criminal Procedure Act 51 of 1977 (CPA).

<sup>316</sup> Altbeker A *Solving Crime: The State of the SAPS Detective Service* (1998) 10.

or without a warrant)<sup>317</sup> and seize articles, gather evidence from any premises linked with the commission of crimes such as fraud and corruption.<sup>318</sup>

These legislative provisions facilitate smooth execution of the SAPS's investigative functions and the gathering of forensic evidence necessary to prove a suspected material irregularity in a municipality.<sup>319</sup> Since the PAAA criminalises 'material irregularity',<sup>320</sup> this means that any official who is reported to have committed it in the audit reports (by action or inaction), is guilty of a prosecutable offence. In instances where the investigation seem to be difficult, the intelligence techniques such as 'wiretapping' are often utilised to trace the relevant information from the telecommunications between the implicated municipal official(s) and the person with whom they are perpetuating these crimes.<sup>321</sup>

### **3.5.3.1. Directorate of Priority Crimes Investigation (DPCI) – The Hawks**

The DPCI, dubbed the Hawks, was established in 2009 in terms of the SAPS Amendment Act 57 of 2008 and the NPA Amendment Act 56 of 2008. Its mandate entails the prevention, combating and investigation into national priority offences, focusing on serious organised crimes and commercial crimes, misappropriation of large amounts of public funds, fraud and corruption.<sup>322</sup> The DPCI is composed of a Commercial Crime Unit, Financial Investigation and Assets Forfeiture Unit, Organised Crime Unit, the Priority Crime Management Centre and Support Services.<sup>323</sup> The Hawks continues to be active in executing their mandate effectively. For instance, in 2018, it investigated a case of corruption involving millions of rands that 'went missing' in Ditsobotla.<sup>324</sup> Lately, its Assets Forfeiture Unit raided the bedevilled former eThekweni mayor, Zandile Gumede's property following her suspension and arrest on account

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<sup>317</sup> Montesh M A *Critical Analysis of Crime Investigation System within the South African Criminal Law Justice System: A Comparative Study* (unpublished PhD thesis, UNISA, 2007) 113.

<sup>318</sup> S 22 CPA.

<sup>319</sup> Basdeo V 'A critical analysis of police powers of search and seizure: a constitutional challenge' (2009) 22/2 *Acta Criminologica* 75.

<sup>320</sup> S 1(g) PAAA.

<sup>321</sup> Naidoo S *The South African Criminal Law's Response to the Crimes of Fraud and Corruption within Local Government* (unpublished LLM thesis, University of Pretoria, 2016) 94.

<sup>322</sup> Berning J & Montesh M 'Countering corruption in South Africa: the rise and fall of the Scorpions and Hawks' (2012) 39 *SA Crime Quarterly* 7-9.

<sup>323</sup> Berning & Montesh (2012) 8.

<sup>324</sup> Pitjeng R 'Hawks probing Ditsobotla Municipality after revelations of corruption' (2018) available at <https://ewn.co.za/2018/05/24/hawks-probing-ditsobotla-municipality-after-revelations-of-corruption> (accessed 12 October 2019).



of corruption charges regarding 208 million rands for Durban solid waste tender.<sup>325</sup> It is argued that the irregular and fruitless expenditures, as well as municipal resources that are often reported to be ‘missing’ in audit reports, constitute ‘misappropriation of large amounts of public funds’. Thus, these acts fall under the investigative jurisdiction of the Hawks and the latter has technical support to investigate and bring to the book errant officials.

#### **3.5.4. Special Investigating Unit (SIU)**

The SIU is an independent public entity operating as one of the key law enforcement agencies. It was established in 1997 in terms of the Special Investigating Units and Special Tribunals Act 74 of 1996 (SIU Act). Section 4 of the SIU Act outlines the functions of the SIU and they include to investigate allegations and collect evidence regarding acts of fraud, corruption, misuse of public funds, malpractice and maladministration or omissions related to their investigations with a view to instituting civil proceedings for the recovery of losses suffered by the State. It also plays a critical role in the prevention of future losses and in enforcing anti-corruption legislation, as well as in the promotion of good governance practices within the public sector.<sup>326</sup> The SIU achieves its mandate through forensic investigations and civil litigation.<sup>327</sup> In certain instances, it may also refer the matter to the National Prosecuting Authority or the Asset Forfeiture Unit, as the case might be.<sup>328</sup> The SIU has a track record of successful investigations into acts of irregular procurement and supply chain practices, fraudulent qualifications, fruitless and wasteful expenditure, fraud and corruption, nepotism and irregular awarding of tenders in municipalities.<sup>329</sup> In the course of its investigations, it may subpoena, search, seize and interrogate witnesses under oath.<sup>330</sup>

#### **3.5.5. Civil Society Organisations**

The positive impact of civil society organisations in the promotion and advancement of constitutional democracy is readily noticeable. The late Zola Skweyiya, quoted by Barnard and Terreblanche, stated that ‘[civil society organisations] continue to act as monitors of the public

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<sup>325</sup> Nkanjeni U ‘Asset Forfeiture Unit, Hawks raid former Durban mayor Zandile Gumede's home’ (2019) available at <https://www.timeslive.co.za/news/south-africa/2019-10-10-watch-asset-forfeiture-unit-hawks-raid-former-durban-mayor-zandile-gumedes-home/> (accessed 12 October 2019).

<sup>326</sup> SIU *Annual Report 2018/19* (2019) 11.

<sup>327</sup> Lekube BK *Manifestations of Corruption in the City of Tshwane Metropolitan Municipality* (unpublished Masters Thesis, UNISA, 2015) 58.

<sup>328</sup> SIU *Annual Report 2014/15* (2015) 11.

<sup>329</sup> Lekube (2015) 2.

<sup>330</sup> SIU (2015) 11.

good and safeguard the interests of the disadvantaged sections of society.’<sup>331</sup> The contemporary trends also shows that these organisations have increasingly become the last line of defence fighting on behalf of ordinary citizens against the proliferation of corruption and impunity for officials who have no regard for the law, public service delivery failures and general dysfunctionality cutting across several state institutions.<sup>332</sup> To this end, it is argued that a resurgence of civil society movement in local government bears the potential to foster and promote accountability in municipalities by monitoring whether municipalities implement the audit recommendations.

### 3.6. Conclusion

This chapter has explored the institutional structures and processes for the implementation of audit recommendations in municipalities. *First*, the task of implementing audit recommendations is a shared one. This is so because all municipal officials and structures have a role or two to play towards achieving this common goal. *Secondly*, the role and responsibilities of various provincial actors as to how they are supposed to supervise municipalities over financial affairs through intervention, support or monitoring were also discussed. These provincial actors include the MECs for Finance and Local Government, as well as the provincial treasury. Furthermore, the chapter was not unmindful of the fact that the provincial government may also fail to effectively supervise municipalities. Thus, *thirdly*, the discussion was made on how the national government, through CoGTA and NT, may come in handy in circumventing the effects of such failure though regulation, monitoring, support and intervention. Various kinds of interventions were briefly discussed. *Lastly*, the mandates of various institutions, apart from the provincial and national governments, that may also play a role towards enforcing compliance with audit recommendations in municipalities were systematically identified and discussed. The next chapter explores the trends in practice in relation to the legal framework discussed in this chapter. This will be done in respect of three

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<sup>331</sup> Barnard D & Terreblanche Y *PRODDER: The South African Development Directory 1999-2000* (2001) 17. See also Habib A ‘State-Civil Society Relations in Post- Apartheid South Africa’ (2005) 72/3 *Social Research* 671.

<sup>332</sup> Gumede W ‘How civil society has strengthened SA’s democracy’ (2019) available at <https://www.corruptionwatch.org.za/civil-society-strengthened-democracy-south-africa/> (accessed 10 October 2019). See Nhlapo V *The Role of Civil Society in the Implementation of Poverty Alleviation Programmes: A Case for Social Development in South Africa* (unpublished PhD thesis, University of Pretoria, 2012); Mathekga R ‘Voices of protest, social movements in Post-Apartheid South Africa’ (2008) 35/2 *Politikon* 247-249.



case study municipalities in the North West Province, namely; Mahikeng, Ditsobotla and Tswaing municipalities.



## CHAPTER FOUR

### GOOD LOCAL GOVERNANCE – A DREAM DEFFERED IN THE NORTH WEST? EXPLORING EMERGING TRENDS AND ISSUES IN PRACTICE

#### 4.1. Introduction

The preceding chapter discussed the legal framework for institutional structures and processes for the implementation of audit recommendations in municipalities, and further outlined the roles and responsibilities of each involved actor in that regard. Taking these discussions to a different plane, this chapter explores the trends in practice. While the previous chapter laid down the legal duties and responsibilities of various role players, this chapter builds on that and asks: are these role players, in practice, acting in line with their different legal mandates?

Structurally, the chapter is divided into three parts. First, it commences by giving a general state of affairs in the North West Province by sketching a general historical overview of financial mismanagement across municipalities in the province and outlining the supervisory measures taken by the province in its quest to address the challenges faced by its municipalities. Secondly, the chapter contextualises the problem by exploring three case study municipalities, namely: Mahikeng, Ditsobotla and Tswaing Local Municipalities. These municipalities represent the general state of other municipalities within the province and probably beyond. Lastly, the chapter explores the emerging trends, causes and problems facing municipalities in the province.

#### 4.2. State of affairs in the North West Province

Given the prevailing circumstances in the North West, it is not an over exaggerated description that the province depicts the government went horribly wrong, both at local and provincial levels. This section provides a brief highlight in that regard.

##### 4.2.1. Municipalities

The latest audit report (2017/18) by the Auditor-General contains a shocking revelation about the state of municipalities in the North West Province. It reveals that no single municipality in the province has obtained an unqualified financial audit outcome,<sup>333</sup> not even to mention a clean audit. In fact, this has always been the case since the emergence of local government in 2000.<sup>334</sup> Five municipalities in the province recklessly invested with the bedevilled VBS Mutual Bank between the financial years 2016/17 and 2017/18 which consequently caused

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<sup>333</sup> *Consolidated Audit Report 2017/18* (2019) 11.

<sup>334</sup> Greffrath & Van der Waldt (2016) 138.

severe financial losses to them.<sup>335</sup> As of July 2019, 13 out of 22 municipalities in the province were placed under section 139 intervention due to financial mismanagement and overall relapse.<sup>336</sup> Alongside this, violent public protests for poor service delivery are also on the rise.<sup>337</sup> The Auditor-General highlights several issues that stimulate and exacerbate these regressions. Among those issues is the non-implementation of audit recommendations.<sup>338</sup>

#### 4.2.2. Provincial government

The previous chapter gave a comprehensive outline of the general legal duties of supervision of the provinces over municipalities. The position and context under which the provinces can (or must) intervene in municipalities by either implementing audit recommendations or, on the basis of them, invoke a wider intervention, was given. However, it is argued that this has not been done in the North West Province or, if claimed to have been done, has proven to be ineffective. The following discussions on the failure of poorly constructed measures of support will support the latter position, followed by the case studies. Table 1 below provides a breakdown of section 139 interventions per province, with the North West topping the list.

**Table 2: Provincial distribution of interventions 1998-2019**

PROVINCE	NUMBER OF INTERVENTIONS
Eastern Cape	15 (including 3 set aside)
Free State	14
Gauteng	3
KwaZulu-Natal	40 (including 2 set aside)
Limpopo	2 (including 1 set aside)
Mpumalanga	11
North West	43 (including 7 set aside)
Northern Cape	3
Western Cape	9 (including 2 set aside)

Source: Public Affairs Research Institute (PARI).<sup>339</sup>

<sup>335</sup> Auditor-General *Local Government Audit Outcomes (NW) 2017/18* (2019) 14.

<sup>336</sup> PMG ‘Section 139 Interventions: status; North West interventions; with Deputy Minister’ available at <https://pmg.org.za/committee-meeting/28630/?via=homepage-feature-card> (accessed 16 September 2019).

<sup>337</sup> Tau P ‘6 ANC Councillors’ houses among 8 torched in violent North West protest’ *City Press* 17 September 2019. See Sictsha A ‘Ottosdal protests: North West local municipality sinks in financial debt’ *The South African* 07 July 2019.

<sup>338</sup> *Consolidated Audit Report 2017/18* (2019) 11.

<sup>339</sup> PARI *Mind the Gap: Section 139 Interventions in Theory and Practice* (2019) 7.

The North West municipalities, just like with audit outcomes, are the worst performing municipalities in terms of meeting their service delivery expectations, hence the province has consistently been experiencing violent service delivery protests.<sup>340</sup> The rampant nature of these protests makes their quantification difficult. On 17 September 2019, the NCOP's permanent delegates of the North West Province received a report detailing an appalling state of municipalities in the province.<sup>341</sup>

#### **4.2.2.1. Provincial support through policy intervention**

In 2017, the province devised and adopted the Pre-and-Post Audit Action Plan (PAAP) resolutions for municipalities through Circular 1/2017.<sup>342</sup> All the municipalities in the province, with the assistance of the provincial treasury, had to adopt, implement and monitor the PAAP resolutions. These resolutions were taken in response to poor audit outcomes across the municipalities over the past two decades of local government crisis in the province. The main object was to address the concerns (thus preventing their recurrence) in municipalities as has consistently been identified by the Auditor-General over the years.<sup>343</sup> Part of what should reflect in the PAAP of each municipality is all the internal control failures and audit related issues, as well as the responsibility assignment to the relevant municipal actors who must then address the identified failures.<sup>344</sup> The time frames for the implementation and submission of progress report by municipalities in this regard are determined by the MEC for local government.

One of the PAAP resolutions requires the municipal council to establish the 'Audit Steering Committee' in the municipality. This committee deals with all aspects relating to internal control systems, audit processes and monitors the financial reporting duties of the municipality.<sup>345</sup> The composition of the committee includes the MM, CFO, all section 57 managers, representatives of the Auditor-General, internal audit entities and other relevant members who may incidentally be invited, as the case might be.<sup>346</sup>

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<sup>340</sup> Tau P '6 ANC Councillors' houses among 8 torched in violent North West protest' *City Press* 17 September 2019. See also Sicketsha (2019).

<sup>341</sup> RSA Parliament 'Parliament on state of municipalities in North West province' (2019) available at <https://www.gov.za/xh/node/791934> (accessed 19 September 2019).

<sup>342</sup> NWPG: Treasury 'Adoption of Pre-and-Post Audit Action Plan Resolutions: Circular 1/2017' (2017) 1 available at <http://www.treasury.nwpg.gov.za/mfma/Scan0054.pdf> (accessed 20 September 2019).

<sup>343</sup> S 131(1) MFMA. See also NWPG: Treasury (2017) 2.

<sup>344</sup> NWPG: Treasury (2017) 2.

<sup>345</sup> NWPG: Treasury (2017) 2.

<sup>346</sup> NWPG: Treasury (2017) 2.

The department of local government has also adopted a provincial policy to provide guidance on the implementation of section 139 interventions and support in terms of section 154 of the Constitution in the municipalities.<sup>347</sup> This policy outlines the framework for the appointment of Administrators, and their remuneration, for the purposes of section 139 interventions. The obvious contradiction and retrospective nature of this policy is that instead of being modelled towards promoting strong and effective local governance, thus avoiding provincial interventions in municipalities, it rather regulates how to facilitate the latter. On that basis, it is not solution-oriented. Furthermore, the policy lacks innovation and there is nothing much to be said about it since it only regurgitates and rephrases the constitutional provisions.

Therefore, despite the shared aspirations in the above policy interventions, the state of local government in the province remains bedevilled, with financial distresses, proliferating system regressions and widespread violent protests.

#### **4.2.2.2. Intergovernmental support**

In 2018, the two provincial departments (finance and local government) have collaborated through a memorandum of understanding to restore and ensure financial viability across municipalities in the province.<sup>348</sup> The main objective of this departmental collaboration is to improve municipalities' compliance with their statutory obligations through support, monitoring and oversight in terms of the relevant provisions of the Constitution, the MFMA, the MSA and other laws.<sup>349</sup> This joint intervention programme targets 'the 12 priority municipalities', from which 3 are the case studies of this research.<sup>350</sup> These 12 municipalities are in extreme financial distress. To this end, a joint integrated support plan has been adopted to assist those municipalities.<sup>351</sup> The integrated plan considers a wide range of aspects for assessment, such as governance, financial reporting, service delivery performance, revenue and expenditure management practices, as well as audit outcomes.<sup>352</sup>

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<sup>347</sup> NWPG: LG 'Provincial Policy Guidelines on the Implementation of Sections 139 Interventions and Section 154 Support in Municipalities' (2019) available at <http://www.nwpg.gov.za/HumanSettlements/site/documents/policies/Provincial%20Policy.pdf> (accessed 20 September 2019).

<sup>348</sup> NWPG: Finance *Estimates of Provincial Revenue and Expenditure 2019/20* (2019) 273.

<sup>349</sup> NWPG: Finance (2019) 273.

<sup>350</sup> NWPG: Finance 'Presentation to NCOP Ad Hoc Committee: NW DLGHS Section 100(1)(a) Intervention' (2018) 5 available at [http://pmg-assets.s3-website-eu-west-1.amazonaws.com/180627MEC\\_GF\\_Gaolaolwe.pdf](http://pmg-assets.s3-website-eu-west-1.amazonaws.com/180627MEC_GF_Gaolaolwe.pdf) (accessed 20 September 2019).

<sup>351</sup> NWPG: Finance (2019) 273.

<sup>352</sup> NWPG: Finance (2019) 273.

The department of finance, together with the provincial treasury, have been assisting municipalities to adopt the funded budgets as required by section 18 of the MFMA.<sup>353</sup> Additionally, in 2018, the department made several interventions and assisted the affected municipalities to negotiate settlement of their debts with creditors who supply bulk services, namely; Eskom and Sedibeng Water Board.<sup>354</sup> This was done by signing payment arrangement agreements with these creditors.<sup>355</sup> However, this has not yielded any positive outcomes since there are some of the municipalities in the province that are still overly indebted. The Ditsobotla municipality, which owes Eskom an estimated amount of R305 million,<sup>356</sup> is one and the Mahikeng municipality, which owes the Sedibeng Water Board an amount estimated above R50 million,<sup>357</sup> is another.

Moreover, the department of local government has been acting in line with its responsibilities in terms of the joint intervention agreement it entered into in 2018 with the department of finance and provincial treasury.<sup>358</sup> One of those responsibilities is to facilitate capacity building programmes for municipality's oversight structures, such as the MPAC and internal audit committees.<sup>359</sup> This programme started on July 2018.<sup>360</sup> The department has also been monitoring the appointment of senior managers in municipalities to fill up the identified vacancies during the same period.

In 2015, responding to poor audit outcomes, the department of finance also deployed technical advisors to 'priority municipalities' to support their incompetent staff in key areas such as finance, supply chain and procurement, as well as performance systems.<sup>361</sup> However, despite all these attempts, the state of performance in municipalities (particularly in financial aspect) is on a downward trajectory. The latest (2017/18) audit report attests and highlights that the

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<sup>353</sup> NWPG: Finance (2019) 273.

<sup>354</sup> NWPG: Finance (2018) 17.

<sup>355</sup> NWPG: Finance (2018) 17.

<sup>356</sup> PMG 'Eskom debt: hearing with municipalities' (2018) available at <https://pmg.org.za/committee-meeting/26651/> (accessed 19 September 2019).

<sup>357</sup> Department of Water & Sanitation (DWS) 'National Council of Provinces: Question 152 for Oral Reply' (2018) available at <http://www.dwa.gov.za/communications/Q&A/2018/NCOP%20152.pdf> (accessed 20 September 2019).

<sup>358</sup> Parliament (2018) 12.

<sup>359</sup> NWPG: Finance (2019) 390.

<sup>360</sup> NWPG: LG 'Department intensifies its support plan to municipalities' (2018) available <http://www.nwpg.gov.za/HumanSettlements/site/media/statements/Department%20intensifies%20its%20support%20plan%20to%20municipalities.pdf> (accessed 17 October 2019). See the Terms of Reference here: <http://www.treasury.nwpg.gov.za/documents/Vacancies/2015/Local%20Government%20Specialist%20Terms%20of%20reference.pdf> (accessed 26 October 2019).

<sup>361</sup> NWPG: Finance (2019) 389-391.



major concern is the non-implementation of audit recommendations by municipalities in order to address the identified issues and prevent them from recurring.<sup>362</sup>

#### **4.2.2.3. The failing provincial government: Section 100 intervention**

For a better understanding of a terrible regression across municipalities in the North West, it is important to first look at the state of performance of a province itself. On May 2018, the national executive intervened in the province in terms of section 100(1) of the Constitution.<sup>363</sup> This intervention was occasioned by several governance challenges and dysfunctionality that the province encountered, resulting in widespread violent protests.<sup>364</sup> Subsequently, the national executive deployed the Inter-Ministerial Task Team (IMTT) to the province to conduct performance assessments on the then current status across all 13 provincial departments.<sup>365</sup>

Following the assessment, the IMTT recommended that 10 departments be placed under administration, of which 5 departments were under section 100(1)(a) intervention (issued with a directive, less intrusive) and the other 5 departments under section 100(1)(b) intervention (assumption of responsibility, more intrusive).<sup>366</sup> Furthermore, the IMTT made submissions to the NCOP on what interventions and support mechanisms were needed for each one of the 10 departments that were affected. However, the study will only reflect on two departments, namely; the department of finance and the department of local government. These two departments were both under section 100(1)(a) intervention, meaning that they were issued a directive by the national executive.

##### **4.2.2.3.1. Department of Local Government**

More than 80 percent of the municipalities within the province are technically insolvent and unable to meet their financial obligations when they fall due.<sup>367</sup> This is so because most of them are currently implementing a budget which is not funded, they simply do not have sufficient funds to effectively operate.<sup>368</sup> One of the major concern is their inability to implement and

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<sup>362</sup> *Consolidated Audit Report 2017/18* (2019) 8-16.

<sup>363</sup> CoGTA 'Question for Oral Reply: Question 167/2018' (2018) 1. By then, 20 out of 22 municipalities in the province were under section 139 interventions.

<sup>364</sup> Spies D 'SAHRC condemns violent protest action in the North West' (2018) available at <https://www.news24.com/SouthAfrica/News/sahrc-condemn-violent-protest-action-in-the-north-west-20180421> (accessed 19 September 2019).

<sup>365</sup> Parliament of SA 'Presentation to the Ad Hoc Committee to inquire into the intervention in the North west Provincial Government in terms of Section 100 of the Constitution (NCOP)' (2018) 6-7.

<sup>366</sup> Parliament (2018) 6.

<sup>367</sup> PMG (2019) 6 & 8.

<sup>368</sup> PMG (2019) 5.



manage credit control and debt collection, especially on households debtors as they owe an amount of R120 million at an average for each municipality.<sup>369</sup> As a consequent, the municipalities themselves tend to be unable to pay its creditor, more especially Eskom and water boards.<sup>370</sup> Other municipalities, including Tswaing and Mamusa, are unable to pay third party transactions and statutory benefits such as pension funds and medical aids of employees, mainly because of cash flow challenges.<sup>371</sup> Worst scenario, there are some municipalities that have not yet tabled the draft budget and IDPs for 2019/20, Mamusa is one.<sup>372</sup> The latter failure warrants a dissolution of the council,<sup>373</sup> one would wonder why such council is still in existence. To say the least, this simply demonstrates how dysfunctionality and lawlessness have been normalised in the province.

#### **4.2.2.3.2. Department of Finance (Provincial Treasury)**

In its key findings, the IMTT noted several major weaknesses in this department. The department was reported to have failed in monitoring and supporting municipal finance management programs.<sup>374</sup> The financial controls within the provincial finance cluster were in disarray due to historically accumulated unauthorised and irregular expenditures.<sup>375</sup> Moreover, the provincial treasury itself did not adequately fulfil its fiscal oversight role. In proposing the way forward, the IMTT emphasised the strengthening of MFMA unit, a unit within the department of finance. Lastly, it was also proposed that provincial governance structures responsible for planning, budgeting management and compliance with audit outcomes of municipalities be improved, given the poor local government audit outcomes in the province.<sup>376</sup>

### **4.3. Case study municipalities**

#### **4.3.1. Mahikeng Local Municipality**

The Mahikeng serves a constituency of approximately 314, 394 people.<sup>377</sup> This municipality is situated within the Ngaka Modiri Molema District Municipality (NMMDM), with its seat in Mafikeng, the capital city of the North West Province. Its council consists of 69 councillors,

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<sup>369</sup> PMG (2019) 5.

<sup>370</sup> PMG (2019) 3.

<sup>371</sup> PMG (2019) 5.

<sup>372</sup> PMG (2019) 11.

<sup>373</sup> S 139(5)(b) Constitution.

<sup>374</sup> Parliament (2018) 11.

<sup>375</sup> Parliament (2018) 11.

<sup>376</sup> Parliament (2018) 11.

<sup>377</sup> Mahikeng LM *Annual Report 2016/17* (2018) 11.

of which 35 are ward councillors and 34 proportional representation councillors.<sup>378</sup> The municipality has a long history of poor audit outcomes. Over the past five years (and beyond), it has never obtained an unqualified or clean audit outcome. For financial year 2012/13, it obtained a *disclaimer of audit opinion*.<sup>379</sup> For financial year 2013/14, it moved a little bit up and obtained a *qualified audit opinion*.<sup>380</sup> In 2014/15, it worsened and regressed again to obtain another *disclaimer of audit opinion*,<sup>381</sup> which recurred in 2015/16.<sup>382</sup> For 2016/17 financial year, the municipality 'improved' and obtained a *qualified audit opinion*.<sup>383</sup> All these outcomes means that the municipality has been, and still is, in deep financial crisis. The municipality is also counted amongst major debtors to water boards.<sup>384</sup> In 2018, it owed the Sedibeng Water Board an amount of R228 855 994, which is still grappling to settle.<sup>385</sup>

#### **4.3.1.1. Internal functioning of a municipality**

An indication was made earlier that the eventual implementation of audit recommendation in a municipality is a shared responsibility among various role players. This means that in cases of non-implementation, the failure is attributable to all of those involved. These role players include the councillors, the Audit Committee, the Mayor and the administrative component.

##### **4.3.1.1.1. Municipal council**

The Mahikeng council has a long record of dysfunctionality and instability in its composition due to political infightings, among other factors.<sup>386</sup> The Auditor-General have also noted that it has generally failed to adequately oversee the financial and performance reporting, which resulted in material misstatements and control deficiencies.<sup>387</sup> This negatively affects its ability to maintain an effective oversight within the municipality. Concernedly, the municipality is currently without strategic policies such as the anti-corruption and fraud prevention strategy, as well as for poor procurement practices since the council has failed to adopt them.<sup>388</sup>

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<sup>378</sup> Mahikeng (2018) 26.

<sup>379</sup> Mahikeng LM *Annual Report 2012/13* (2013) 101.

<sup>380</sup> Mahikeng LM *Annual Report 2014/15* (2015) 16.

<sup>381</sup> Mahikeng (2015) 326.

<sup>382</sup> Mahikeng LM *Annual Report 2015/16* (2016) 354.

<sup>383</sup> Mahikeng (2018) 327. The 2016/17 report is used as it is the latest, the 2017/18 report is not yet published.

<sup>384</sup> Jordaan N 'Most' municipalities that owe water board honouring arrangements' *Sunday Times* 9 January 2019.

<sup>385</sup> DWS *Written Reply to Question 152* (2018) available at <http://www.dwa.gov.za/communications/Q&A/2018/NCOP%20152.pdf> (accessed 12 October 2019).

<sup>386</sup> Gaedie IJ *Assessment of Basic Service Delivery in Mafikeng Local Municipality* (unpublished Masters Mini-thesis, NWU, 2015) 6.

<sup>387</sup> Mahikeng (2018) 334.

<sup>388</sup> Mahikeng (2018) 66 & 156.

Moreover, there has also been the failure to conduct performance assessments as required by the MFMA.<sup>389</sup> In 2016, the audit committee advised and made recommendations seeking to improve internal financial controls and audits, but the council failed to consider and implement those recommendations.<sup>390</sup> The same occurred in 2017 and 2018.<sup>391</sup>

#### **4.3.1.1.1. Municipal Public Accounts Committee**

The municipality did not have the MPAC until 2017.<sup>392</sup> Since its establishment, the MPAC in this municipality has been dysfunctional. In 2018, the head of Supply Chain Management (SCM) faced several allegations of fraud and corruption and the MPAC, which is responsible for matters concerning discipline, never investigated the said allegations of financial misconduct.<sup>393</sup> Again in 2017, it failed to launch an investigation in respect of the R144 million illegal sale of land for housing project and there is still no municipal official facing disciplinary measures in that regard.<sup>394</sup>

#### **4.3.1.1.2. Finance Committee**

The finance committee has also proven to be ineffective in its monitoring over the CFO when the latter performs his/her financial responsibilities. This is so because during the 2016/17 financial year, the CFO was reported to have failed to implement the recommendations that were made by the finance committee. The recommendations were aimed at improving internal controls and audits in line with the recommendations made by the Auditor-General. In that way, the committee's failure in its oversight over the CFO had a considerable contribution towards the non-implementation of audit recommendations by the latter.

#### **4.3.1.1.2. Audit Committee**

The mandate of this committee includes, among other things, to advise the council on matters concerning internal financial controls and audits.<sup>395</sup> Although it is established,<sup>396</sup> the committee

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<sup>389</sup> Mahikeng (2018) 251. See also s 51(d) MSA & s 69 MFMA.

<sup>390</sup> See the committee's recommendations in page 411 of the Mahikeng 2016/17 Annual Report in juxtaposition with the Auditor-General's findings in page 326 of the same Report.

<sup>391</sup> Mahikeng *IDP 2017/18* (2019) section B.

<sup>392</sup> Mahikeng *LM IDP 2016/17* (2017) 8.

<sup>393</sup> Mahikeng (2018) 251.

<sup>394</sup> NWPG SCOPA 'North West Parliament on Mahikeng LM's failure to investigate R144-million Illegal sale of land abandoned housing project in Mahikeng' available at <https://www.gov.za/speeches/north-west-scopa-lambasts-mahikeng-local-municipality-s-failure-investigate-r144-million> (accessed 25 October 2019).

<sup>395</sup> S 166(2)(a) MFMA. See *MFMA Circular 32* (2012) 2-4.

<sup>396</sup> See Mahikeng *LM* (2018) available at <https://www.mahikeng.gov.za/induction-of-audit-committee/> (accessed 03 October 2019).

in this municipality is simply not active due to incompetency of its members. For instance, it has failed to ensure proper internal financial controls during the 2016/17 financial year, which resulted in the municipality incurring an irregular expenditure of R34 630 851.<sup>397</sup> This was not a new phenomenon in this municipality, it has been the case over the years.<sup>398</sup>

#### **4.3.1.1.3. The Mayor**

Generally, there seem to be no trace of record pointing to the Mahikeng Mayor's adherence to her legal duties. She is required to conduct the general monitoring and provide general political guidance over fiscal and financial affairs of the municipalities. In doing so, she may monitor and oversee the exercise of responsibilities assigned in terms of the MFMA to the MM and the CFO. However, as will be shown in the next section, the Mayor has generally failed to fulfil her role to monitor and guide the MM and the CFO since these two offices have encountered several challenges and failures. In addition, the Mayor has to identify financial problems facing the municipality and ensure that the preventive measures recommended by either by MPAC, finance committee or audit committee, are accordingly given effect.<sup>399</sup> However, it has already been pointed out that the recommendations of the audit committee were previously ignored by the CFO and no disciplinary measures were taken in that regard. In 2018, dissatisfied with the Mayor's performance, the Democratic Alliance (DA) tabled a motion of no confidence against the Mayor on the basis of her incompetency and inability to effectively execute her legal duties and responsibilities.<sup>400</sup> However, the motion of no confidence did not succeed.

#### **4.3.1.1.4. Administration**

##### **4.3.1.1.3.1. Municipal Manager**

Since 2013, the MM has been failing to ensure a fair presentation of accurate financial records to the Auditor-General, hence Mahikeng has been obtaining disclaimers and qualified audit opinions.<sup>401</sup> Apart from this, the MM has also been failing to effect consequences in terms of section 32(2)(b) of the MFMA, which requires the recovery of unauthorised, irregular, fruitless and wasteful expenditure from municipal official liable for it, unless such expenditure is written

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<sup>397</sup> Mahikeng (2018) 329.

<sup>398</sup> Mahikeng (2015) 329.

<sup>399</sup> S 54(1)(e) MFMA.

<sup>400</sup> Mothibedi L 'Mahikeng Municipality mayor survives motion of no confidence' (2018) available at <http://www.sabcnews.com/sabcnews/mahikeng-municipality-mayor-survives-motion-of-no-confidence/> (accessed 14 October 2019).

<sup>401</sup> Mahikeng (2018) 23 & 327.

off or declared irrecoverable by the council following the investigations. The Auditor-General reported that no investigation was made in line with the latter provision to determine if any official was liable for the R34 630 851 irregular expenditure, as well as fruitless and wasteful expenditures incurred by the municipality.<sup>402</sup> In 2017, the MM admitted his failure to ensure consequence management in respect of the R144 million illegal sale of land abandoned housing project in Mahikeng.<sup>403</sup> The MM was also found to have failed in ensuring the implementation of adequate monitoring controls throughout the year and also failed to report.<sup>404</sup>

Furthermore, there has also been a number of internal control deficiencies noted in this municipality. To mention a few, in 2014, the MM was suspended due to his failure to properly account for the R1.5 billion unauthorised and irregular expenditure that was incurred by the municipality over a single financial year (2013/14).<sup>405</sup> Another suspension of the MM occurred in 2018. This time around the suspension was based on the MM's unilateral decision to invest an amount of R83 million into the embattled VBS bank in contravention with the relevant provisions of the MFMA.<sup>406</sup> Following his suspension, the MM and other perpetrators were also criminally charged with fraud and corruption,<sup>407</sup> and the current MM is acting.

#### **4.3.1.1.3.2. Chief Financial Officer**

The MFMA requires the CFO to advise and assist the MM in carrying out his or her financial management responsibilities, including budget planning, financial reporting and monitoring the implementation plan for internal and external audit recommendations. The Mahikeng CFO is clearly not adequately fulfilling his monitoring role in this regard and this is evident from the non-implementation of audit recommendations in the municipality.<sup>408</sup> In 2016, the audit

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<sup>402</sup> Mahikeng (2018) 334.

<sup>403</sup> NWPG SCOPA (2017).

<sup>404</sup> Mahikeng (2018) 335.

<sup>405</sup> News24 'Mahikeng municipal manager suspended' (2013) available at <https://www.news24.com/SouthAfrica/News/Mahikeng-municipal-manager-suspended-20141022> (accessed 15 October 2019).

<sup>406</sup> SA Government 'North West on forensic investigation regarding VBS investment' (2018) available at <https://www.gov.za/speeches/findings-forensic-investigation-nw-municipalities%E2%80%99-vbs-investment-24-oct-2018-0000> (accessed 14 October 2019).

<sup>407</sup> IOL News 'Municipal officials suspended, charged over #VBSBankHeist' (2018) available at <https://www.iol.co.za/business-report/economy/municipal-officials-suspended-charged-over-vbsbankheist-17606809> (14 October 2019).

<sup>408</sup> *Consolidated Audit Report 2017/18* (2019) 11.

committee advised and made recommendations seeking to improve internal financial controls and audits to the CFO and the latter just ignored them.<sup>409</sup>

In 2017, the CFO failed to ensure that the internal controls were implemented and this failure resulted in the municipality incurring a loss of R139 million that was not recoverable from a bankrupt company.<sup>410</sup> This emanated from an illegal sale of land. In 2018, following the incident of illegal investment into VBS Bank as discussed above, the CFO resigned for unknown reasons, perhaps in an attempt of evading the criminal charges of fraud and corruption.<sup>411</sup> To date, there is little in the way of documented evidence that the responsible official was accordingly dealt with.

#### **4.3.1.1.3.3. Internal Audit Unit**

This unit must advise the MM and report to the audit committee on the implementation of the internal audit plan, as well as on any other matter in relation to internal controls and audit, compliance, risk and risk management.<sup>412</sup> However, the Mahikeng internal audit unit is generally ineffective. In 2017, the unit failed to effectively monitor the implementation of action plan to address the issues raised in the audit reports, and the Auditor-General reported that this failure has been consistent over the past 4 years.<sup>413</sup> In 2018, the Auditor-General indicated that the internal audit unit was generally ineffective, while the audit committee failed to effectively monitor action plan to address the previous year's audit findings.<sup>414</sup>

#### **4.3.1.2. Provincial government**

##### **4.3.1.2.1. Support**

In 2017, the MEC for local government in conjunction with the provincial treasury devised the PAAP support programme.<sup>415</sup> The aim of this programme is to assist the 'priority municipalities', including Mahikeng, to effectively deal with poor audit outcomes.<sup>416</sup> A detailed discussion on this has already been made in section 4.2.2.1. above. Before the PAAP

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<sup>409</sup> See the committee's recommendations on page 411 of the Mahikeng 2016/17 Annual Report in juxtaposition with the Auditor-General's findings on page 326 of the same Report.

<sup>410</sup> NWPG SCOPA (2017).

<sup>411</sup> Kekana M 'Municipalities to feel the heat over VBS investments' (2019) available at <https://mg.co.za/article/2018-10-23-municipalities-to-feel-the-heat-over-vbs-investments> (accessed 16 October 2019).

<sup>412</sup> S 165(2)(b) MFMA.

<sup>413</sup> Mahikeng (2018) 335.

<sup>414</sup> Mahikeng (2018) 335.

<sup>415</sup> NWPG: Finance (2018) 17.

<sup>416</sup> NWPG: Treasury (2017) 2.



came into existence, disappointingly, the provincial government never took any step to improve the financial performance in municipalities, hence the problem developed to this crisis stage. In 2018, the provincial treasury assisted the municipality to negotiating the settlement of its debt with Sedibeng Water Board.<sup>417</sup> This was through drafting of payment arrangement contracts with Sedibeng.<sup>418</sup> The municipality has also benefitted from other capacity building programmes that the MEC of finance arranged for all the municipalities in the province.<sup>419</sup>

#### 4.3.1.2.2. Interventions

The Mahikeng municipality has encountered five interventions (2003, 2004, 2010, 2016 and 2018) in terms of section 139 of the Constitution.<sup>420</sup> In all these years, the same reasons for the intervention, ranging from governance, financial mismanagement and service delivery backlogs, have been recurring. The Auditor-General annually provides recommendations for improvement, but then the recurrence could only mean one thing, namely that those recommendations are simply ignored.<sup>421</sup> Table 2 below provides a breakdown of interventions in this municipality.



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<sup>417</sup> NWPG: Finance (2018) 17.

<sup>418</sup> NWPG: Finance (2018) 17.

<sup>419</sup> SA Government 'North West Treasury on failure of municipal CFOs attendance of forum' (2019) available at <https://www.gov.za/speeches/north-west-treasury-failure-municipal-cfo's-non-attendance-forum-23-sep-2019-0000> (accessed 26 October 2019).

<sup>420</sup> Greffrath & Van der Waldt (2016) 158-160. See also November J *The Role of Provinces in the use of Interventions in terms of Section 139(1)(a)-(c) of the Constitution* (unpublished LLM research-paper, UWC, 2015) 38. See also NCOP archives, available at <https://www.parliament.gov.za/storage/app/media/NCOP-Interventions/20170707.pdf> (accessed 16 September 2019).

<sup>421</sup> This problem spans over various election periods hence reflecting a change in political leadership. This suggests that the recurrence goes deeper than just willingness to act and brings out systemic/institutional challenges/ineffectiveness. It might be necessary to mention that the ANC has been the ruling party in this municipality since 2000.



**Table 3: Breakdown of interventions in Mahikeng LM (2000-2019)**

Year of intervention (1994-2019)	Reason(s) that triggered intervention	Legal provision(s) that informed the decision taken
03 September 2003	Recurrent poor audit outcomes; overall dysfunctionality; service delivery backlogs and failure to raise sufficient revenue.	Section 139(1)(b),(4) & (5) of the Constitution; and Several provisions of the MFMA.
10 March 2004	The 2003 intervention did not bear the desired outcome. In other words, the noted problems were persistent.	Section 139(1),(4) & (5) of the Constitution; and Several provisions of the MFMA.
01 July 2010	Recurrent poor audit outcomes; service delivery backlogs; financial mismanagement; poor administration and governance (political leadership).	Section 139(1),(4) & (5) of the Constitution; Several provisions of the MFMA and National Treasury Regulations.
23 June 2016	Recurrent poor audit outcomes; governance; financial mismanagement and service delivery backlogs.	Section 139(1)(b) of the Constitution, and Section 137 of the MFMA.
01 September 2018 (to date)	Recurrent poor audit outcomes; poor administration; financial mismanagement and service delivery backlogs.	Section 139(1)(b) of the Constitution; and Section 137 of the MFMA.

Source: Author's construct (2019).<sup>422</sup>

#### 4.3.1.3. National government

In 2018, the CoGTA and NT identified what they call '12 priority municipalities' in the province, to which Mahikeng is one.<sup>423</sup> These municipalities are dysfunctional and at the brink of collapse. The CoGTA's support and interventionary programmes to these municipalities focuses on three broad areas, namely; governance and administration; financial management and service delivery.<sup>424</sup> For Mahikeng in particular, the NT has also requested the municipality to present its state of financial affairs, particularly its debt to Sedibeng Water Board.<sup>425</sup> The latter was done in a view of assisting the municipality in drafting payment settlement agreement with Sedibeng.<sup>426</sup> The CoGTA has also established an Advisory Panel to coordinate and help

<sup>422</sup> Various sources were consulted in constructing this table, including the PMG publications, NCOP & CoGTA notices & reports; municipality's annual reports; NWPG notices & reports; municipality's audit reports; Greffrath & Van der Waldt (2016) 158-160 & November (2015) 38.

<sup>423</sup> CoGTA (2018).

<sup>424</sup> CoGTA (2018).

<sup>425</sup> CoGTA (2018).

<sup>426</sup> CoGTA (2018).

in this regard.<sup>427</sup> Before 2018, no supervisory measures were noted from the national government.

Furthermore, between the 2017-2018 periods, the NT visited some municipalities in the North West to monitor their progress in relation to the implementation of the adopted budgets,<sup>428</sup> audit action and service delivery plans.<sup>429</sup> Mahikeng was one of those municipalities. Subsequently, the NT and CoGTA deployed technical advisors to these municipalities to complete assessments and resolve identified problems in audit reports.<sup>430</sup>

#### 4.3.1.4. Other institutions

Subsequent to the MM's suspension due to irregular investment into VBS Bank in 2018, the SAPS accepted and investigated criminal charges of fraud and corruption against him and other perpetrators who were involved and the case is ongoing.<sup>431</sup> Also, in 2009, the former President Jacob Zuma signed a presidential proclamation mandating the SIU to investigate 24 North West municipalities that were alleged of high risk corruption incidents.<sup>432</sup> Mahikeng was one. Although the SIU managed to recover some misappropriated funds from certain councillors, some of the issues were beyond its jurisdiction and had to refer them to the Hawks for further probing.<sup>433</sup> Since 2013, nothing has happened.

#### 4.3.2. Ditsobotla Local Municipality

The Ditsobotla is under the NMMDM, with its seat in Lichtenburg. It serves a constituency of approximately 168,902 people.<sup>434</sup> Its council consists of 40 members, of which 20 are ward councillors and the other 20 proportional representation councillors. Like Mahikeng, this municipality has a long history of poor audit outcomes. Over the past five years, and beyond that, it has never obtained an unqualified audit outcome. For the financial years 2012/13,<sup>435</sup> 2013/14,<sup>436</sup> and 2014/15,<sup>437</sup> it has been obtaining a *disclaimer of audit opinion*. During the

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<sup>427</sup> CoGTA (2018).

<sup>428</sup> S 129(4) Constitution.

<sup>429</sup> CoGTA *Annual Report 2017/18 Financial Year* (2019) 43-44.

<sup>430</sup> CoGTA (2019) 44.

<sup>431</sup> IOL News 'Municipal officials suspended, charged over #VBSBankHeist' (2018) available at <https://www.iol.co.za/business-report/economy/municipal-officials-suspended-charged-over-vbsbankheist-17606809> (14 October 2019).

<sup>432</sup> PMG 'SIU findings on North West Municipalities' (2012) available at <https://pmg.org.za/committee-meeting/14873/> (accessed 28 October 2019).

<sup>433</sup> PMG (2012).

<sup>434</sup> Ditsobotla LM *Annual Report 2017/18* (2019) 15.

<sup>435</sup> Ditsobotla LM *Annual Report 2012/13* (2013) 17.

<sup>436</sup> Ditsobotla LM *Annual Report 2013/14* (2014) 18.

<sup>437</sup> Ditsobotla LM *Annual Report 2014/15* (2015) 17.

2015/16 financial year, it ‘improved’ to a *qualified audit opinion*.<sup>438</sup> It then regressed again to a *disclaimer of audit opinion* in 2016/17,<sup>439</sup> which recurred in 2017/18 financial year.<sup>440</sup>

This trail of disclaimed audit opinions means nothing other than that the municipality is in deep financial crisis and at the brink of collapsing. Ditsobotla is amongst the top ten Eskom debtor’s in the country. In 2015, it owed Eskom an amount over R100 million and this debt is escalating.<sup>441</sup>

#### **4.3.2.1. Internal functioning of a municipality**

The three key actors in the implementation of audit recommendations in Ditsobotla is obviously the municipal council, together with its MPAC, the Mayor and the administrative component, comprising of the MM, CFO and internal audit unit (although poorly functional). Strikingly, unlike Mahikeng, Ditsobotla does not have the Audit Committee.<sup>442</sup>

##### **4.3.2.1.1. Municipal council**

The fact is that the Ditsobotla council is dysfunctional.<sup>443</sup> It continues to battle with an issue of instability in its composition and this is mainly due to suspensions and resignations that are often politically concocted.<sup>444</sup> This weakens oversight mechanism within the municipality. Despite several allegations of fraud and corruption against some municipal officials, the council is still reluctant to adopt fraud prevention and anti-corruption strategy.<sup>445</sup> The Auditor-General has also indicated that the municipal leadership is generally failing to recruit appropriately skilled workforce in key positions of finance performance and compliance units of the municipality.<sup>446</sup> As a result, the municipality tends to excessively rely on external consultants, with exorbitant service fees, to compile financial statements and other information for audit purposes.

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<sup>438</sup> Ditsobotla LM *Annual Report 2015/16* (2017) 132.

<sup>439</sup> Ditsobotla LM *Annual Report 2016/17* (2018) 132.

<sup>440</sup> Ditsobotla (2019) 132-142.

<sup>441</sup> Tau P ‘Ditsobotla’s problems blamed on acting head’ (2016) available at <https://www.news24.com/SouthAfrica/News/ditsobotlas-problems-blamed-on-acting-head-20161210> (accessed 16 October 2019).

<sup>442</sup> PMG ‘Report of the Selection Committee on CoGTA Inspection Loco on Notice of Intervention in Ditsobotla LM’ (2019) available at <https://pmg.org.za/taled-committee-report/3674/> (accessed 28 October 2019).

<sup>443</sup> CoGTA ‘List of dysfunctional and distressed municipalities’ (2018) available at <http://www.cogta.gov.za/?p=4088> (accessed 28 October 2019).

<sup>444</sup> Ditsobotla (2019) 28.

<sup>445</sup> Ditsobotla (2019) 28.

<sup>446</sup> Ditsobotla (2019) 145.

Moreover, the 2016/17 annual report was not tabled on time before the municipal council as required by section 127(2) of the MFMA and the council failed to adopt an oversight report in terms of section 129(1) of the MFMA during the same year.<sup>447</sup> Besides an ineffective MPAC, the council has also failed to establish the finance committee to assist it with oversight, and the audit committee is also not established.<sup>448</sup>

#### **4.3.2.1.1.1. Municipal Public Accounts Committee**

The Ditsobotla council established its MPAC in 2011.<sup>449</sup> This is the only committee it has in terms of section 79 of the Structures Act. However, the MPAC, just like the council, is dysfunctional. The MPAC acknowledged its ineffectiveness in the 2016/17 oversight report, highlighting that it does not have ‘basic tools of trade as well as appropriate personnel’ to effectively function.<sup>450</sup> The ineffectiveness of MPAC, as well as the absence of audit committee and finance committee, makes it difficult for this municipality to improve on financial controls and it also negatively affects the general oversight cycle.<sup>451</sup> This also explains the trail of disclaimed and qualified audit findings the municipality has been obtaining since 2000.

#### **4.3.2.1.1.2. The Mayor**

The Mayor is required to monitor the fiscal and financial affairs of the municipalities. In that process, he/she may monitor and oversee the exercise of legal duties and responsibilities assigned to the MM and the CFO. However, this has not been done (or has been done ineffectively) in Ditsobotla. The fact that the municipality has obtained five disclaimer of audit opinions over the past six years, and that its debt to Eskom is mounting up, clearly shows that the municipality has reached a point of financial crisis. The concern is that the Mayor is doing nothing about it and he is continuously failing to monitor the MM and CFO in their exercise of legal duties. There is little in the way of documented evidence, even in the latest annual report of the municipality (2017/18) itself, that the Mayor has previously taken any efforts to secure and sustain a sound and healthy financial status of the municipality. The Ditsobotla constituency can no longer bear with his ineptitude, hence they held him hostage in 2017.<sup>452</sup>

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<sup>447</sup> Ditsobotla (2019) 142.

<sup>448</sup> Ditsobotla (2019) 24.

<sup>449</sup> Presentation by NW CoGTA (2012) available at [http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/120904nwest\\_0.ppt](http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/120904nwest_0.ppt) (accessed 28 October 2019).

<sup>450</sup> Ditsobotla LM MPAC Oversight Report 2016/17 (2018) 8.

<sup>451</sup> Ditsobotla MPAC (2018) para 7.

<sup>452</sup> News24 ‘Mayor held hostage outside Coligny’ (2017) available at <https://www.news24.com/SouthAfrica/News/mayor-held-hostage-outside-coligny-police-20170524> (accessed 26 October 2019).

Historically, there has always been instability in this office. For instance, in 2013, the then Mayor, Lesego Holele, was removed through a motion of no confidence, only to be restated after 3 months.<sup>453</sup>

#### **4.3.2.1.3. Administration**

##### **4.3.2.1.3.1. Municipal Manager**

The municipality has not been fully cooperating with the Auditor-General by ensuring a fair presentation of its accurate financial records,<sup>454</sup> hence it has consistently been obtaining disclaimer of audit opinions.<sup>455</sup> The latter is the responsibility of the MM and therefore he has failed in one of his legal duties. Moreover, the MM has on several occasions reported to have failed in effecting consequences against cases of financial misconduct and irregularities. For instance, during 2017/18 financial year, the municipality incurred an unauthorised expenditure of R38 186 563, irregular expenditure of R8 476 149, as well as fruitless and wasteful expenditure of R53 620 717, and yet no investigation was conducted with a view of identifying the responsible officials so that the recovery of this loss can be made, as required by section 32(2)(a),(b) & (c) of the MFMA.<sup>456</sup> The Auditor-General notes that ‘similar non-compliance was also reported in the previous years’,<sup>457</sup> albeit with different amount of money involved.

The MM position also has a long history of instability. In 2013, Justin Bhine was appointed as the MM, albeit contrary to recruitment processes for senior officials, with no experience and relevant qualifications.<sup>458</sup> In 2015, from August to November, Solomon Nnete was the acting MM.<sup>459</sup> In his four-month long acting, Nnete suspended the CFO on account of corruption claims after the latter was alleged to have solicited a bribe from a service provider to the municipality in order to secure a tender.<sup>460</sup> On 17 November 2015, Monde Juta was appointed

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<sup>453</sup> Tau P ‘Jobs for pals is sinking NW municipalities’ (2013) available at <https://www.iol.co.za/news/africa/jobs-for-pals-is-sinking-nw-municipalities-1511756> (accessed 16 November 2019).

<sup>454</sup> Ditsobotla (2019) 142.

<sup>455</sup> Ditsobotla (2019) 132.

<sup>456</sup> S 32(2)(b) of the MFMA.

<sup>457</sup> Ditsobotla (2019) 142.

<sup>458</sup> Tau (2013).

<sup>459</sup> Stone S ‘Bribery scandal: Official suspended for ‘not disclosing previous allegations of corruption’ (2015) available at <https://www.news24.com/SouthAfrica/News/bribery-scandal-official-suspended-for-not-disclosing-previous-allegations-of-corruption-20151117> (accessed 16 November 2019).

<sup>460</sup> Corruption Watch ‘Businessman blows the whistle on corrupt officials’ (2015) available at <https://www.corruptionwatch.org.za/businessman-blows-the-whistle-on-corrupt-officials/> (accessed 16 November 2019).



as the acting MM, thus replacing Nnete.<sup>461</sup> Juta's appointment was also controversial since he was reported to have faked his qualifications and his character also being questioned, given that he was previously suspended on two occasions as the MM of the Madibeng Local Municipality on allegations of several irregularities, corruption and fraud.<sup>462</sup>

#### **4.3.2.1.3.2. Chief Financial Officer**

The CFO is required to advise and assist the MM in carrying out his or her financial management responsibilities, ranging from financial reporting as well as monitoring of the implementation plan for internal and external audit recommendations.<sup>463</sup> However, the CFO of Ditsobotla is not fulfilling this legal duty. In 2017/18, he failed put in place a system for liability management and, during the same year, he has also failed to monitor the implementation of internal audit plan.<sup>464</sup>

The Auditor-General also indicates in this regard that 'similar non-compliances were also reported during the previous years'.<sup>465</sup> In 2015, the CFO (Leeto Dintwe) was suspended on account of corruption allegations that he has solicited a bribe from a service provider to the municipality in order to secure a tender.<sup>466</sup> However, he successfully challenged his suspension before the Labour Court.<sup>467</sup>

#### **4.3.2.1.3.3. Internal Audit Unit**

Section 165(2)(b) of the MFMA requires this unit to advise on and make recommendations for the improvement of financial controls and internal audit related matters. However, the Auditor-General indicates in his report that there was no internal audit for the financial year 2017/18 in this municipality.<sup>468</sup> In addition, this means that the unit has also failed in ensuring the implementation of an internal audit plan so as to address the issues raised in the audit report. The Auditor-General concernedly noted that this failure has been recurring since 2012/13.<sup>469</sup>

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<sup>461</sup> *Dintwe* (2016) para 6.

<sup>462</sup> *Tau* (2016).

<sup>463</sup> S 81(1)(d)-(e) MFMA.

<sup>464</sup> *Ditsobotla* (2019) 24.

<sup>465</sup> *Ditsobotla* (2019) 143.

<sup>466</sup> Corruption Watch 'Businessman blows the whistle on corrupt officials' (2015) available at <https://www.corruptionwatch.org.za/businessman-blows-the-whistle-on-corrupt-officials/> (accessed 16 November 2019).

<sup>467</sup> *Leeto Jeremiah Dintwe v Ditsobotla Local Municipality & Another* (J65/16) [2016] ZALC (1 February 2016).

<sup>468</sup> *Ditsobotla* (2019) 24.

<sup>469</sup> *Ditsobotla* (2019) 24.



### **4.3.2.2. Provincial government**

#### **4.3.2.2.1. Support**

The Ditsobotla was also targeted by the 2017 PAAP support programme by the MEC for local government and the provincial treasury.<sup>470</sup> The aim of this programme is to assist the ‘priority municipalities’ to effectively deal with poor audit outcomes.<sup>471</sup> A detailed discussion on this has already been made in section 4.2.2.1. In 2018, the provincial treasury assisted the municipality to negotiating the settlement of its debt with Eskom.<sup>472</sup> This was through payment arrangement agreements with Eskom.<sup>473</sup> Other forms of support include those discussed in section 4.2.1 above, since those measures were general. The municipality also participated on the capacity building programme that the MEC of finance arranged for all the municipalities in the province, of which the recent one was arranged for CFOs.<sup>474</sup>

#### **4.3.2.2.2. Interventions**

The Ditsobotla is currently under section 139 intervention.<sup>475</sup> Since 2000, this municipality experienced three provincial interventions, for the first time in 2013, followed by 2016 and 2018 (to date).<sup>476</sup> Among other reasons for the intervention, recurrence of poor audit outcomes, financial mismanagement and service delivery backlogs are worth mentioning. An overview of the provincial interventions in this municipality is presented in the table 3 below.

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<sup>470</sup> NWPG: Finance (2018) 17.

<sup>471</sup> NWPG: Treasury (2017) 2.

<sup>472</sup> NWPG: Finance (2018) 17.

<sup>473</sup> NWPG: Finance (2018) 17.

<sup>474</sup> SA Government ‘NW Treasury on failure of municipal CFOs attendance of forum’ (2019) available at <https://www.gov.za/speeches/north-west-treasury-failure-municipal-cfo's-non-attendance-forum-23-sep-2019-0000> (accessed 26 October 2019).

<sup>475</sup> AGSA (2019) 14.

<sup>476</sup> Greffrath & Van der Waldt (2016) 158-160. See also November (2015) 38.

**Table 4: Breakdown of interventions in Ditsobotla LM (2000-2019)**

Year of intervention (1994-2019)	Reason(s) that triggered intervention	Legal provision(s) that informed the decision taken
01 April 2013	Recurrent poor audit outcomes; improper procurement and SCM practices, financial mismanagement; service delivery backlogs and failure to raise sufficient revenue.	Section 139(1)(b),(4) & (5) of the Constitution; Ss 51, 54A & 56 of MSA; and Several provisions of the MFMA.
23 June 2016	Recurrent poor audit outcomes; service delivery backlogs; financial mismanagement; poor administration and governance (political leadership	Section 139(1),(4) & (5) of the Constitution; and Several provisions of the MFMA.
01 September 2018 (to date)	Recurrent poor audit outcomes; vacancies in senior management positions; service delivery backlogs; financial mismanagement; and governance.	Section 139(1),(4) & (5) of the Constitution; Several provisions of the MFMA and National Treasury Regulations.

Source: Author's construct (2019).<sup>477</sup>

#### 4.3.2.3. National government

The Ditsobotla is one of the 12 priority municipalities that the CoGTA identified as municipalities needing strong support from the national government.<sup>478</sup> As already discussed, the CoGTA and the NT seek to support these municipalities in three broad areas, governance and administration; financial management and service delivery.<sup>479</sup> In 2015, the NT took a decision to withhold the transfer of equitable share from municipalities until formal arrangements have been made with their creditors, particularly Eskom.<sup>480</sup> Given its growing culture of non-payment to Eskom, of which the Auditor-General also noted as a concern, the Ditsobotla was one of those municipalities. However, 'no improvements have been observed and the debt continues to grow'.<sup>481</sup>

<sup>477</sup> Ditsobotla LM audit reports; Greffrath & Van der Waldt (2016) 158-160 & November (2015) 38.

<sup>478</sup> CoGTA (2018).

<sup>479</sup> CoGTA (2018).

<sup>480</sup> Steyn L 'Councils told to pay Eskom or else' Mail & Guardian 10 April 2015 available at <https://mg.co.za/article/2015-04-09-councils-told-to-pay-eskom-or-else> (accessed 17 October 2019). See NT 'NT withholds transfers of funds to 60 municipalities' available at [http://www.treasury.gov.za/comm\\_media/press/2015/20150331%20%20National%20Treasury%20Withhold%20Transfer%20of%20Funds%20to%2060%20Municipalities.pdf](http://www.treasury.gov.za/comm_media/press/2015/20150331%20%20National%20Treasury%20Withhold%20Transfer%20of%20Funds%20to%2060%20Municipalities.pdf) (accessed 17 October 2019).

<sup>481</sup> Fin24 'Debt from municipalities has only grown, Eskom laments' available at <https://www.fin24.com/Economy/Eskom/debt-from-municipalities-has-only-grown-eskom-laments-20190624> (accessed 26 October 2019).

#### 4.3.2.4. Other institutions

In 2018, the Hawks conducted an investigation in Ditsobotla after having received a report of allegations of fraud and corruption against certain municipal officials.<sup>482</sup> In July 2019, the North West Premier, Job Mokgoro, proclaimed the institution of forensic investigation by the SIU into the financial affairs of the municipality and the investigations are ongoing.<sup>483</sup> Lastly, the SAPS has also deployed some of its members to the Ditsobotla municipal offices to secure the Administrator since he was threatened by the councillors who were opposing section 139(1) intervention into the municipality.<sup>484</sup>

#### 4.3.3. Tswaing Local Municipality

Tswaing municipality serves a constituency of approximately 130, 478 people.<sup>485</sup> It is situated within the NMMDM, with its seat in Delareyville. Its council consists of 29 councillors, of which 15 are ward councillors and 14 proportional representation councillors.<sup>486</sup> Like the other two case studies, Tswaing has a long history of poor audit outcomes. It has never obtained an unqualified audit outcome over the past six years and beyond. For the financial years 2012/13,<sup>487</sup> 2013/14,<sup>488</sup> and 2014/15,<sup>489</sup> it sustained a *disclaimer of audit opinion*. It then went up to a *qualified audit opinion* during the financial years 2015/16,<sup>490</sup> 2016/17,<sup>491</sup> and 2017/18 (latest).<sup>492</sup> Discernible from the latter trend is that the municipality has been and still is in deep financial distress. Further proof to this is that the municipality was even unable to pay its staff

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<sup>482</sup> Eyewitness News ‘Hawks probing Ditsobotla Municipality after revelations of corruption’ available at <https://ewn.co.za/2018/05/24/hawks-probing-ditsobotla-municipality-after-revelations-of-corruption> (accessed 28 October 2019).

<sup>483</sup> NWPG: Premier ‘SOPA Debate Response’ available at <http://premier.nwpg.gov.za/newpremier/wp-content/uploads/2019/07/SOPA-DEBATE-RESPONSE-04-JULY-2019.pdf> (accessed 28 October 2019).

<sup>484</sup> News24 ‘Ditsobotla municipality denies claims it barred administrator from entering its premises’ available at <https://www.news24.com/SouthAfrica/News/ditsobotla-municipality-denies-claims-it-barred-administrator-from-entering-its-premises-20190704> (accessed 28 October 2019).

<sup>485</sup> Tswaing LM Annual Report 2017/18 (2019) 9.

<sup>486</sup> Tswaing (2019) 21-23.

<sup>487</sup> Tswaing LM Annual Report 2012/13 (2013) 161.

<sup>488</sup> Tswaing LM Annual Report 2013/14 (2014) 148.

<sup>489</sup> Tswaing LM Annual Report 2014/15 (2016) 144.

<sup>490</sup> Tswaing LM Annual Report 2015/16 (2017) 148.

<sup>491</sup> Tswaing LM Annual Report 2016/17 (2018) 162.

<sup>492</sup> Tswaing (2019) 147.

for two months in 2019,<sup>493</sup> and some of its assets were attached after it ignored a court order to settle a debt it owed to an aggrieved service provider.<sup>494</sup>

Tswaing is also overly indebted to Eskom, with no hope for complete settlement of debt anytime soon.<sup>495</sup> Although not openly aired, this municipality seem to be favoured by top leadership of the ANC. Its senior municipal officials, who tend to fail in their duties during their tenure, are often elevated to provincial and national ranks of leadership. For instance, Dakota Legoete, the former MM, is currently occupying leadership position within the ANC at national level. Also, Manketsi Tlhape, the former Mayor, was appointed as the MEC for local government in the province in 2013.<sup>496</sup>

#### **4.3.3.1. Internal functioning in a municipality**

##### **4.3.3.1.1. Municipal council**

The Tswaing council has generally failed to observe the principles of good governance within the municipality. It has a backlog of over nine financial years of oversight reports, and this is in contravention of section 129 of the MFMA.<sup>497</sup> Moreover, the council is reluctant to establish other oversight committees (*i.e.* finance committee) in terms of section 79 of the Structures Act to assist it with oversight role by, among other things, dealing with matters concerning competency of audit, risk management, discipline and financial controls.<sup>498</sup> The audit report indicates that the council failed in its oversight role and in the implementation of post audit action plans to address the previous adverse audit findings.<sup>499</sup> Further concern was noted that it has failed to take effective measures in preventing irregular expenditure of R31 098 699 as well as fruitless and wasteful expenditure of R13 156 445, as required by section 62(1)(d) of the MFMA. Furthermore, there is also poor oversight over administration due to municipal

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<sup>493</sup> Moerane B 'Tswaing Local Municipality workers not paid, services halted' *SABC News* 2 July 2019 online available at <http://www.sabcnews.com/sabcnews/tswaing-local-municipality-workers-not-paid-services-halted/> (accessed 14 October 2019).

<sup>494</sup> Moerane (2019).

<sup>495</sup> The Citizen 'Nafcoc wants Tswaing municipality in North West disbanded' available at <https://citizen.co.za/news/south-africa/politics/2154685/nafcoc-wants-tswaing-municipality-in-north-west-disbanded/> (15 October 2019).

<sup>496</sup> IOL News 'Outcry as 'bad' ex-mayor gets MEC post' <https://www.iol.co.za/news/politics/outcry-as-bad-ex-mayor-gets-mec-post-1539943> (15 October 2019).

<sup>497</sup> PMG 'Memorandum' 29 May 2019 available at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/190723masondo.pdf> (accessed 17 October 2019).

<sup>498</sup> Kraai, Holtzhausen & Malan (2017) 63.

<sup>499</sup> Tswaing (2019) 157.

council being divided in decision making.<sup>500</sup> The Auditor-General has also expressed his dissatisfaction in relation to unskilled staff in key positions such as SCM, compliance and finance units.<sup>501</sup> The municipal leadership fails to recruit competent personnel.

#### **4.3.3.1.1. Municipal Public Accounts Committee**

The Tswaing MPAC was established in 2011 and is the only committee of council established in terms of section 79 of the Structures Act.<sup>502</sup> The fact is that the MPAC in this municipality is ineffective, it has never tabled its oversight report.<sup>503</sup> There is also an instability in its composition, with the latest restructuring having occurred in December 2018.<sup>504</sup> The MEC of local government has noted the challenges of this committee, including that its members do not attend meetings and as result, the numbers do not quorate for the decisions to be taken on recommendations to be made to the council.<sup>505</sup>

#### **4.3.3.1.2. The Mayor**

The Mayor is required to monitor the fiscal and financial affairs of the municipalities. Like it is with the other two case studies, there is no record of the efforts taken by the Tswaing municipality to improve the financial performance of the municipality by ensuring proper monitoring over the implementation of audit recommendations. Over the past three years, the municipality has been obtaining qualified audit outcomes and before that, it retained disclaimer of audit.<sup>506</sup> Furthermore, the Mayor has failed to identify the financial problems facing the municipality and to ensure that the necessary preventive measures are devised to address those problems.<sup>507</sup> The Auditor-General expressed his dissatisfaction about this state of affairs highlighting the failures are recurrent and there is simply no willingness on the leadership to act accordingly.<sup>508</sup>

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<sup>500</sup> PMG 'Report on Oversight Visit to Tswaing Local Municipality' available at <https://pmg.org.za/taled-committee-report/590/> (accessed 17 October 2019).

<sup>501</sup> Tswaing (2018) 169-172.

<sup>502</sup> Tswaing (2019) 23.

<sup>503</sup> PMG (2019) 4.

<sup>504</sup> PGM (2019) 4.

<sup>505</sup> Tswaing (2019) 23. See also PGM (2019) 4

<sup>506</sup> PGM (2019) 4.

<sup>507</sup> PGM (2019) 4-5.

<sup>508</sup> Tswaing (2018) 170.



#### 4.3.3.1.3. Administration

##### 4.3.3.1.3.1. Municipal Manager

The audit report notes several issues that are facing the administration of the municipality, which is headed by the MM. One of those issues is the non-cooperation of the municipality with the Auditor-General by.<sup>509</sup> The failure is attributable to the MM. The audit report further indicates that the MM has also failed in his duty to install good governance principles within the municipality, include the failure to effectively monitor the development and implementation of risk management policy, fraud and corruption prevention plan.<sup>510</sup> In the previous financial years (2014/15 and 2016/17), the MM was again reported to have failed in ensuring that sufficient and accurate financial records, which are free from material misstatements, are submitted to the Auditor-General, hence resulting in a disclaimer of audit opinion.<sup>511</sup>

The office of the MM in Tswaing also has a history of instability. In 2009, Dakota Legoete was suspended as the MM on allegations of fraud and corruption, the decision he challenged before the court.<sup>512</sup> In 2015, Shadrack Mere was also suspended as the MM on account of several irregularities. Like Legoete, Mere also challenged his suspension before the Labour Court, which turned out unsuccessful.<sup>513</sup> Dissatisfied by the Labour Court ruling, he then appealed before the North West High Court, where he lost again.<sup>514</sup>

##### 4.3.3.1.3.2. Chief Financial Officer

The CFO is required to advise and assist the MM in carrying out his or her financial management responsibilities, ranging from financial reporting as well as monitoring of the implementation plan for internal and external audit recommendations.<sup>515</sup> As already discussed, there was no effective monitoring over the implementation of risk management policy, fraud and corruption prevention plan in this municipality during the financial years 2014/15, 2016/17

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<sup>509</sup> Tswaing (2019) 157.

<sup>510</sup> Tswaing (2019) 157.

<sup>511</sup> Tswaing (2018) 162.

<sup>512</sup> Masondo S 'Dubious officials hired by the state elsewhere' *Sunday Times* 25 August 2011 available at <https://www.timeslive.co.za/news/south-africa/2011-08-25-dubious-officials-hired-by-the-state-elsewhere/> (16 October 2019).

<sup>513</sup> *Mere v Tswaing Local Municipality and Another* (J1236/15) [2015] ZALCJHB 193.

<sup>514</sup> *Mere v Chairperson of the North West Provincial Executive Council and Others* (M454/2015) [2017] ZANWHC 26 (15 June 2017) paras 34-35.

<sup>515</sup> S 81(1)(d)-(e) MFMA.



and 2017/18.<sup>516</sup> The implication is that the CFO failed to advise the MM on the effective implementation of internal controls. Despite its several failures, unlike the MM, the CFO office has been stable over the years. It only encountered one suspension in 2017 where Isaac Moruti was suspended as the CFO due to financial irregularities and the current CFO, Stonea Pelele, is acting.<sup>517</sup>

#### **4.3.3.1.3.3. Internal Audit Unit**

Section 165(2)(b) of the MFMA requires this unit to advise on and make recommendations for the improvement of financial controls and internal audit related matters. However, the Auditor-General indicates in his report that there was no internal audit for the financial year 2017/18 in this municipality.<sup>518</sup> The municipality did not have an effective risk management system in place, of which the internal audit unit is also required to advise the council on its development and implementation.<sup>519</sup> This suggests the failure on the side of the unit. Similar concerns were noted in the previous audit reports.

#### **4.3.3.2. Provincial government**

##### **4.3.3.2.1. Support**

Tswaing has also benefited from several support programmes from the provincial government, as already discussed.<sup>520</sup> In May 2016, the MEC for local government deployed a team of finance officials to improve the municipality's financial performance.<sup>521</sup> Later in the same year, following the intervention in the municipality, two officials were deployed to assume the positions of Administrator and the CFO.<sup>522</sup> The same support was also given in 2010, and no improvement was noted.<sup>523</sup> Currently, the municipality is under section 139(1)(b) intervention.<sup>524</sup>

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<sup>516</sup> Tswaing (2019) 157.

<sup>517</sup> Tswaing LM 'Finance' available at <http://www.tswaing.gov.za/index.php/departments/finance> (accessed 16 October 2019).

<sup>518</sup> Tswaing (2019) 157.

<sup>519</sup> S 165(2)(b) MFMA.

<sup>520</sup> See para 4.2.1. above.

<sup>521</sup> SA Government 'North West Local Government on Tswaing municipality financial assistance' 18 March 2016 available at <https://www.gov.za/nr/node/750132> (accessed 17 October 2019).

<sup>522</sup> SA Government (2016).

<sup>523</sup> PMG 'Report on Oversight Visit to Tswaing LM' available at <https://pmg.org.za/taled-committee-report/590/> (accessed 17 October 2019).

<sup>524</sup> PMG (2019).

#### 4.3.3.2.2. Interventions

Tswaing has experienced three interventions since its establishment. The first intervention was in 2010, followed by 2015 and 2018.<sup>525</sup> In all these instances, the interventions were necessitated by many issues such as the municipality’s financial mismanagement, maladministration, poor governance, service delivery backlogs and lack of capacitated staff.<sup>526</sup> This history is detailed in table 4 below:

**Table 5: Breakdown of interventions in Tswaing LM (2000-2019)**

Year of intervention (1994-2019)	Reason(s) that triggered intervention	Legal provision(s) that informed the decision taken
10 March 2010	Recurrent poor audit outcomes; financial mismanagement; service delivery backlogs and governance.	Section 139(1)(b) of the Constitution; Section 4 of Municipal Structures Act; and Section 71 of the MFMA.
01 May 2015	Service delivery backlogs; financial mismanagement; poor administration and governance (political leadership)	Section 139(1),(4) & (5) of the Constitution; and Several provisions of the MFMA.
01 September 2018 (to date)	Recurrent poor audit outcomes; vacancies in senior management positions; service delivery backlogs; financial mismanagement; and governance.	Section 139(1)(b) of the Constitution; Several provisions of the MFMA and National Treasury Regulations.

Source: Author’s construct (2019)<sup>527</sup>

#### 4.3.3.3. National government

The Tswaing is one of the 12 priority municipalities identified by the CoGTA as municipalities needing strong support from the national government.<sup>528</sup> As already discussed above, the CoGTA and the NT seek to support these municipalities in three broad areas, governance and administration; financial management and service delivery.<sup>529</sup> In 2018, the CoGTA deployed

<sup>525</sup> Tswaing (2018) 162. See also Greffrath & Van der Waldt (2016) 158-160 & November (2015) 38.

<sup>526</sup> Report of the Select Committee on CoGTA on the Notice of Intervention Issued in terms of Section 139(1)(b) of the Constitution in Tswaing LM (01 September 2015).

<sup>527</sup> Tswaing’s annual reports; Greffrath & Van der Waldt (2016) 158-160 & November (2015) 38.

<sup>528</sup> CoGTA (2018).

<sup>529</sup> CoGTA (2018).

an Advisory Panel on a site visit to Tswaing and one of the issues the panel was determined to resolve was the infrastructure problems, especially the poor sewerage systems.<sup>530</sup>

#### **4.3.3.4. Other institutions**

As already indicated above, in 2009, the former President Jacob Zuma signed a presidential proclamation mandating the SIU to investigate 24 North West municipalities that were alleged of high risk corruption incidents.<sup>531</sup> Tswaing was one. Although the SIU managed to recover some misappropriated public funds from certain councillors, some of the issues were beyond its jurisdiction and had to refer them to the Hawks for further probing.<sup>532</sup>

#### **4.4. Emerging trends, causes and challenges**

The deteriorating state of municipalities in the province is attributable to several problems and causes. The MEC of local government captured these challenges in the memorandum (dated 06 May 2019) which was addressed to the NCOP as a notice of section 139(1) intervention in seven municipalities in the province.<sup>533</sup> This memorandum represents a general status of all municipalities in the province. It considers the challenges ranging from governance, administration, service delivery and financial management.<sup>534</sup> This section seeks to briefly reflect on these challenges.

##### **4.4.1. Financial management issues**

More than 80 percent of the municipalities within the province are technically insolvent and unable to meet their financial obligations when they fall due.<sup>535</sup> This is so because most of them are currently implementing a budget which is not funded, they simply do not have sufficient funds to effectively operate.<sup>536</sup> One of the major concern is their inability to implement and manage credit control and debt collection, especially on households debtors as they owe an amount of R120 million at an average for each municipality.<sup>537</sup> As a consequence, the municipalities themselves tend to be unable to pay its creditors, more especially Eskom and

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<sup>530</sup> Politics Web ‘COGTA to intervene in dysfunctional municipalities’ 21 June 2018 available at <https://www.politicsweb.co.za/opinion/cogta-to-intervene-at-dysfunctional-municipalities> (17 October 2019).

<sup>531</sup> PMG ‘SIU findings on NW Municipalities’ (2012) available at <https://pmg.org.za/committee-meeting/14873/> (accessed 28 October 2019).

<sup>532</sup> PMG (2012).

<sup>533</sup> PMG (2019) 1.

<sup>534</sup> PMG (2019) 2.

<sup>535</sup> PMG (2019) 6 & 8.

<sup>536</sup> PMG (2019) 5.

<sup>537</sup> PMG (2019) 5.

water boards.<sup>538</sup> Other municipalities, including Tswaing and Mamusa, are unable to pay third party transactions and statutory benefits such as pension funds and medical aids of employees, mainly because of cash flow challenges.<sup>539</sup> Worst scenario, there are some municipalities that have not yet tabled the draft budget and IDPs for 2019/20, Mamusa being one.<sup>540</sup> As the latter failure warrants a dissolution of the council,<sup>541</sup> one would wonder why such council is still in existence. To say the least, this simply demonstrates how dysfunctionality and lawlessness have been normalised in the province.

#### 4.4.2. Governance and administrative issues

The three case studies discussed above have demonstrated several governance and administrative problems facing municipalities. There is often instability within the council due to many reasons (including factions) and this, as a result, weakens the effective oversight within the municipality.<sup>542</sup> There is also instability within the administrative component of the municipality and this is due to resignations and suspensions of key senior managers such as the MMs and the CFOs.<sup>543</sup> This tend to weaken internal controls. The councils are also failing to meet their statutory obligations, such as appointing oversight committees and the audit committee.<sup>544</sup> Important structures such as the MPAC are not functional.<sup>545</sup> This happens to be the problem in most municipalities not only in the North West, but across the country.<sup>546</sup> The challenge in establishing and having active MPACs has been ascribed to several issues, such as the ambiguity around their composition, the absence of standard procedure for their establishment as well as their unclear role and relationship with other municipal structures.<sup>547</sup> In rare cases where MPAC's composition is stable, non-attendance of members to the meetings is an issue since they then struggle to form a quorum in order to take official resolutions and

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<sup>538</sup> PMG (2019) 3.

<sup>539</sup> PMG (2019) 5.

<sup>540</sup> PMG (2019) 11.

<sup>541</sup> S 139(5)(b) Constitution.

<sup>542</sup> PMG (2019) 2.

<sup>543</sup> PMG (2019) 7 & 9.

<sup>544</sup> PMG (2019) 5.

<sup>545</sup> PMG (2019) 7.

<sup>546</sup> Chonco T 'Amendment of the Local Government Municipal Structures Act: Is local government finally structured for success?' (2019) 14/1 *Local Government Bulletin* available at <https://dullahomarinstitute.org.za/multilevel-govt/local-government-bulletin/volume-14-lgb/municipalities-are-not-off-the-hook-for-food-security> (01 October 2019).

<sup>547</sup> Botes C *Adopting the Public Accounts Committee Model for Financial Oversight in South African Municipalities – A Case Study of the Public Accounts Committee in the City of Cape Town* (unpublished Masters thesis, Stellenbosch University, 2011) 36-37.

decisions, and Tswaing is a case in point.<sup>548</sup> In relation to audit outcomes, there is no municipality in the province that has obtained an unqualified or clean audit. They have remained stagnant in terms of improving on audit and the trend has always been, as shown with the three case studies above, disclaimer of audit opinion and qualified audit opinion over the past two decades.<sup>549</sup> While the annual audit reports for each municipality indicate the growing large sums of unauthorized, irregular, fruitless and wasteful expenditures incurred by the municipality in previous years, there are usually no investigations to determine if any person is liable for those expenditures,<sup>550</sup> despite being a requirement in terms of section 32(2)(a) and (b) of MFMA.

#### 4.4.3. Service delivery issues

Since 2004, South Africa has been engulfed in widespread service delivery protests.<sup>551</sup> The communities embark on these protests to demonstrate their dissatisfaction with the failure by municipalities to render basic services such as the provision of water, sanitation, electricity, refuse removal, poor maintenance of infrastructure and other issues.<sup>552</sup> In giving an overview of municipalities in the province, the MEC for local government paints the following grim picture:

Poor delivery of basic services ... such as water and sanitation, electricity, infrastructure, ... service delivery protests, financial [in]viability and ... general incapacity and failure to retain ... skilled human capital who in turn is replaced by unqualified employees ... Among other many unresolved issues, this is allegedly the result of some municipalities consecutively receiving qualified audit reports and disclaimers.<sup>553</sup>

In the Mahikeng, service delivery protests are often sparked by failure to provide water services.<sup>554</sup> In Tswaing municipality, the most violent service delivery protest that occurred in Ottosdal was due to allegations of corruption against some municipal officials that were not

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<sup>548</sup> PMG (2019) 2.

<sup>549</sup> PMG (2019) 7.

<sup>550</sup> PMG (2019) 7-8.

<sup>551</sup> Alexander P 'Rebellion of the poor: South Africa's service delivery protests – a preliminary analysis' (2010) 37/123 *Review of African Political Economy* 37.

<sup>552</sup> Roux NL & Nyamukachi PM 'A reform model for the improvement of municipal service delivery in South Africa' (2005) 40/4 *Journal of Public Administration* 688. See also Atkinson D 'Taking to the streets: has developmental local government failed in South Africa?' in Buhlungu S, Daniel J, Southall R et al (eds) *State of the Nation: South Africa 2007* (2007) ch 2.

<sup>553</sup> Parliament of SA (2019).

<sup>554</sup> Mleya MP *An Analysis of Sanitation and Water Service Delivery in Mahikeng Local Municipality* (unpublished LLM mini-thesis, NWU, 2016) 6-8.



investigated. The municipality was in a serious financial distress to an extent that its employees were not salaried and some of the service providers were unpaid.<sup>555</sup> Lastly, the protests in Ditsobotla have often been as a result of, among other things, electricity cut-offs due to municipality's failure to pay Eskom an amount of money estimated at R305 million in 2018.<sup>556</sup>

#### **4.4.4. Key findings on the role of provincial and national government**

In respect of the provincial government, a much cannot be said about the effectiveness or impact of its interventions and support in the case study municipalities. The evidence, as demonstrated thorough case studies, is overwhelming that the North West provincial government is failing (of ineffective) in its supervision of municipalities in the province. One would not have much expectations on the province to have effective and smooth operating municipalities while it is itself failing to get it right, hence section 100 intervention.

In respect of the national government, as already discussed above, the CoGTA and the NT have support programmes for poorly performing municipalities, including the case studies. These programmes seek to support the municipalities in three broad areas, governance and administration; financial management and service delivery.<sup>557</sup> However, the support programme is seemingly carried out in a form of one-size-fits-all approach. The problem with this approach is that municipalities are not assisted based on their specific needs and demands, issues and challenges, but on the basis general state of affairs as with other municipalities.

#### **4.4.5. Ineffective role by other institutions**

It has been demonstrated in the above case studies that although other involved role-players (such as SAPS and SIU) have tried to assist in solving the problem by investigating corruption allegations against certain officials, their efforts seem inadequate. For instance, in case of Mahikeng, the SAPS has accepted and investigated fraud claims against the MM in 2018 and to date, there has never been an outcome report of the investigations. The cause might be of lack of resources or sufficient and skilled workforce.

### **4.5. Conclusion**

Flowing from chapter three, the current chapter sought to explore the trends in the practice of local government in relation to the legal framework for institutional structures and processes

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<sup>555</sup> Sicetsha (2019).

<sup>556</sup> PMG 'Eskom debt: hearing with municipalities' available at <https://pmg.org.za/committee-meeting/26651/> (accessed 19 September 2019).

<sup>557</sup> CoGTA (2018).



for the implementation of audit recommendations. The discussions were modelled towards answering the question of whether the role players involved in the implementation of audit recommendations in municipalities are, in practice, acting in line with their legal duties in that regard. The chapter answered the latter question in the context of the North West Province, with three case study municipalities.

First, the chapter commenced with a general discussion on the state of affairs in the province. Readily evident was that the state of municipalities in the province is on a downward trajectory. The province tried to put in place support measures to circumvent the deterioration. However, such measures appear not to have been sufficient or effective since no improvement has been noted. The reason for that could probably and arguably be that it is because the province itself is failing to get it right, hence the proclamation of section 100 intervention.

Secondly, three case study municipalities were explored, namely: Mahikeng, Ditsobotla and Tswaing. Flowing from these cases studies were many challenges, causes and problems that hinders effective implementation of audit reports. From governance and administrative point of view, the municipal councils are generally failing to ensure sound oversight mechanism within their municipalities. They do not appoint key structures such as the MPAC, Finance Committee, Audit Committee and section 79 committees. There are lot of instability in councils' compositions due to politically motivated suspensions and resignations. At times the quorum cannot be met to take official resolution to address key issues noted in audit reports due to non-attendance to council meetings by councillors. Several irregularities are also common to the MMs and the CFOs since they fail to facilitate budget planning, financial reporting and monitoring of the implementation plan for internal and external audit recommendations.<sup>558</sup> Furthermore, the municipalities are in financial distress and this suggests that the Mayors are not effectively monitoring and providing political guidance over fiscal and financial affairs of the municipalities, let alone overseeing the exercise of responsibilities assigned to the MMs and CFOs.<sup>559</sup>

Lastly, the chapter also considered general issues common to all municipalities in the province. These issues ranges from financial affairs, governance and administration, as well as service delivery. In light of the issues emanating from this chapter, the next chapter is set to evaluate

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<sup>558</sup> S 81(1)(d)-(e) MFMA.

<sup>559</sup> S 52 MFMA.

the current legal framework for the implementation of audit recommendations in municipalities.



## **CHAPTER FIVE**

### **EVALUATING THE SUITABILITY OF LEGAL MEASURES AND OTHER FACTORS FOR THE IMPLEMENTATION OF AUDIT RECOMMENDATIONS**

#### **5.1. Introduction**

Following on chapter four, this chapter seeks to evaluate the appropriateness of the legal framework in dealing with the identified challenges. It also asks whether the real issues lie with other factors and main problems that the case studies exposed. These include lack of sound financial controls, which leads to service delivery backlogs; governance and administrative deficiencies (dysfunctionality of MPACs and absence of Audit Committees); inadequate supervisory measures by the provincial and national governments, as well as ineffective role by other institutions. Here the question, therefore, is: does the current legal framework contribute, through gaps (if any), to any of these problems? If so, can the expanded powers of the Auditor-General contribute meaningfully in addressing these problems? In other words, will these powers make any difference? In the instance of legal framework not being the major cause of these problems, what are the other factors? Is there a legal answer (or real practical response) that may contribute in dealing with these issues? The chapter seeks to answer these questions, in the same sequential order they are being posed.

#### **5.2. Gaps and flaws in the legal framework**

Through case studies, several gaps within the legal framework were identified. First is the non-differentiated auditing standards as applied by the Auditor-General across municipalities. Secondly, the dysfunctionality of MPACs and deficiencies around audit committees. Thirdly, the challenges and nuances around the provincial intervention powers. Lastly, the one-size-fits-all approach in the national government's support programmes towards municipalities. These gaps are dealt with separately below.

##### **5.2.1. Non-differentiation of auditing standards**

An apparent fact is that municipalities vary considerably in many respects, especially in expert human resource and financial capacity. Given this, the Auditor-General's non-differentiated approach towards auditing of municipalities tends to be problematic. The key point to be made here is that one-size-fits-all application of auditing standards set up to fail the under-resourced municipalities, including the three case studies. The audit reports usually contain extensive and complex recommendations of which their implementation requires skilled human resource and

significant financial and technical capacity. Unfortunately, in Mahikeng, Ditsobotla and Tswaing municipalities,<sup>560</sup> there is capacity and skills constraints. As a result, these municipalities outsource this task to external consultants and this carries a considerable price tag (Mahikeng is one example).<sup>561</sup> In turn, this causes a serious financial strain on the municipality and tends to ‘frequently cause delays in implementing audit recommendations.’<sup>562</sup>

## **5.2.2. Key issues relating to local government legal framework**

### **5.2.2.1. Dysfunctionality of MPACs**

MPACs are supposed to play an important role in ensuring observance of the Auditor-General’s reports. However, this has never happened in respect of three case studies where, although established, MPACs were ineffectual.<sup>563</sup> The problem is countrywide.<sup>564</sup> It is argued that one of the main causes for this dysfunctionality is the confusion/uncertainty around, and the absence of clear statutory provision on the functions of MPACs. Commendably, clause 24 of the Municipal Structures Amendment Bill (B19-2018) clarifies and outlines the mandatory functions of MPACs, at the same time allowing the council to also determine further functions. However, this is still a Bill and until it has been assented to and signed by the President, the problem will persist. Other factors that may also make MPACs more effective include effective consequence management and the subjection of errant members (who do not attend to committee meetings and programmes) to disciplinary measures. It may also be necessary for the SCOPA to provide technical support to MPACs.

### **5.2.2.2. Deficiencies around Audit Committees**

Out of the three case studies, only one (Mahikeng) has the audit committee, albeit dysfunctional. The other two are clearly in breach of section 166(1) of the MFMA which makes it compulsory for a municipality to have an audit committee. The MFMA is silent on what should be the solution in this regard. Apart from this, there are other several deficiencies that threaten the audit committees’ potential in ensuring observance of audit recommendations. Two is noteworthy.

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<sup>560</sup> See ch 4 para 4.3.

<sup>561</sup> Mahikeng (2016) 8; 20.

<sup>562</sup> Australian National Audit Office *Operations of the Australian National Audit Office* (2015) 23.

<sup>563</sup> See paras 4.3.1.1.1.1; 4.3.2.1.1.1 & 4.3.3.1.1.1.

<sup>564</sup> Chonco (2019).

First, while the committee is mainly composed of external members, uncertainty exists as to what constitutes the ‘appropriate experience’ requirement for selection.<sup>565</sup> While NT crafted the guidelines in this regard,<sup>566</sup> the council may simply disregard them. As a result, it is upon the council to determine the level of experience required. This deficiency, it is argued, constitute a point where cadre deployment often ensues. This is evident from Mahikeng case study, where the committee is completely dysfunctional, probably due to incompetency. Therefore, clearly defined experience requirements will help.

Secondly, the major concern is that the role of this committee is constrained to an advisory one. It lacks the statutory vested powers to require from the municipality’s administration any information on, among others, how they implemented the audit plan, internal controls and risk management. The composition (largely external) of this committee gives it a more independent voice to ensure effective oversight, but this is clogged by its lack of enforcement powers.

### **5.2.3. Provincial intervention powers: few challenges**

Given the dire state of affairs in three case studies, and the apparent inefficiency of the province’s interventionary efforts to address the problems in a meaningful and sustainable manner, it is necessary to dissect few challenges around the provincial intervention powers. Aggravating the inefficiency is the fact that there is no detailed regulation to provide the practical insights on the application of section 139(1) interventions. This is unlike sections 139(4) and (5) interventions, which are extensively regulated by the MFMA.<sup>567</sup> This lack of regulation, as a result, the provision is often misconstrued and incorrectly applied, thus yielding no positive outcomes as already demonstrated through case studies.

For instance, the NWPG has invoked section 139(1) intervention in respect of all three municipalities. This is despite the audit report, in respect of each municipality, indicating that they are in a serious financial distress, meaning that section 139(5) is most suitably applicable in the circumstances as opposed to section 139(1). Furthermore, the problems is even worsened by the fact that the province itself is failing to get it right, hence itself is the subject of a section 100(1) intervention. There is seemingly little funds and resources to provide adequate support to these municipalities.

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<sup>565</sup> S 166(4) MFMA.

<sup>566</sup> NT *MFMA Circular 65* (2012).

<sup>567</sup> Ss 136 – 150 MFMA.

#### **5.2.4. Ineffective supervision by the national government**

The three case studies demonstrated that the supervisory measures of the national government were often ineffective and thus yielded insignificant outcomes. It is argued that the one-size-fits-all approach towards most of the municipal support programmes that were provided to these case study municipalities by the CoGTA and NT, may be guilty of this inefficiency. The uniformity formulation has proven to be problematic, unsustainable and unrealistic given huge gaps and discrepancies that exist between municipalities in urban areas and those in deep rural areas, such as Tswaing.

The call for differentiation approach is well-timed and has since garnered more support from various scholars. For instance, Steytler correctly observes that the differentiated approach 'may accommodate the diversity of capacity found in municipalities by issuing asymmetrical regulations.'<sup>568</sup> Koma concurs and points out that the differentiated approach and nature of municipal support initiatives may accommodate and set free rural municipalities from the complexities of compliance with standardised performance standards that far surpasses their capacity to implement.<sup>569</sup>

#### **5.3. Auditor-General's expanded powers: a renewed hope or a new myth?**

Given the identified problems, the question then is: will the Auditor-General's additional powers to make referrals, remedial action and impose liability through certificate of debt make any difference in the context of three case studies? The study doubts and argues that these powers do not constitute a magic bullet solution to the identified problems. These powers are dealt with separately below, each followed by a brief assessment.

##### **5.3.1. Referral of suspected material irregularity**

Section 5(1A) of the PAAA empowers the Auditor-General to refer any suspected material irregularity to a relevant public investigative body and such body is required to inform the Auditor-General of the progress and the outcome of the investigation. Material irregularity is an open-ended concept which encompasses fraud and theft, financial mismanagement, maladministration and any non-compliance with, or breach of legislation.<sup>570</sup> Furthermore, the investigative body is any 'authority with requisite investigative capacity and skills including

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<sup>568</sup> Steytler N *Paper III: The Strangulation of Local Government* (2008) 10-11.

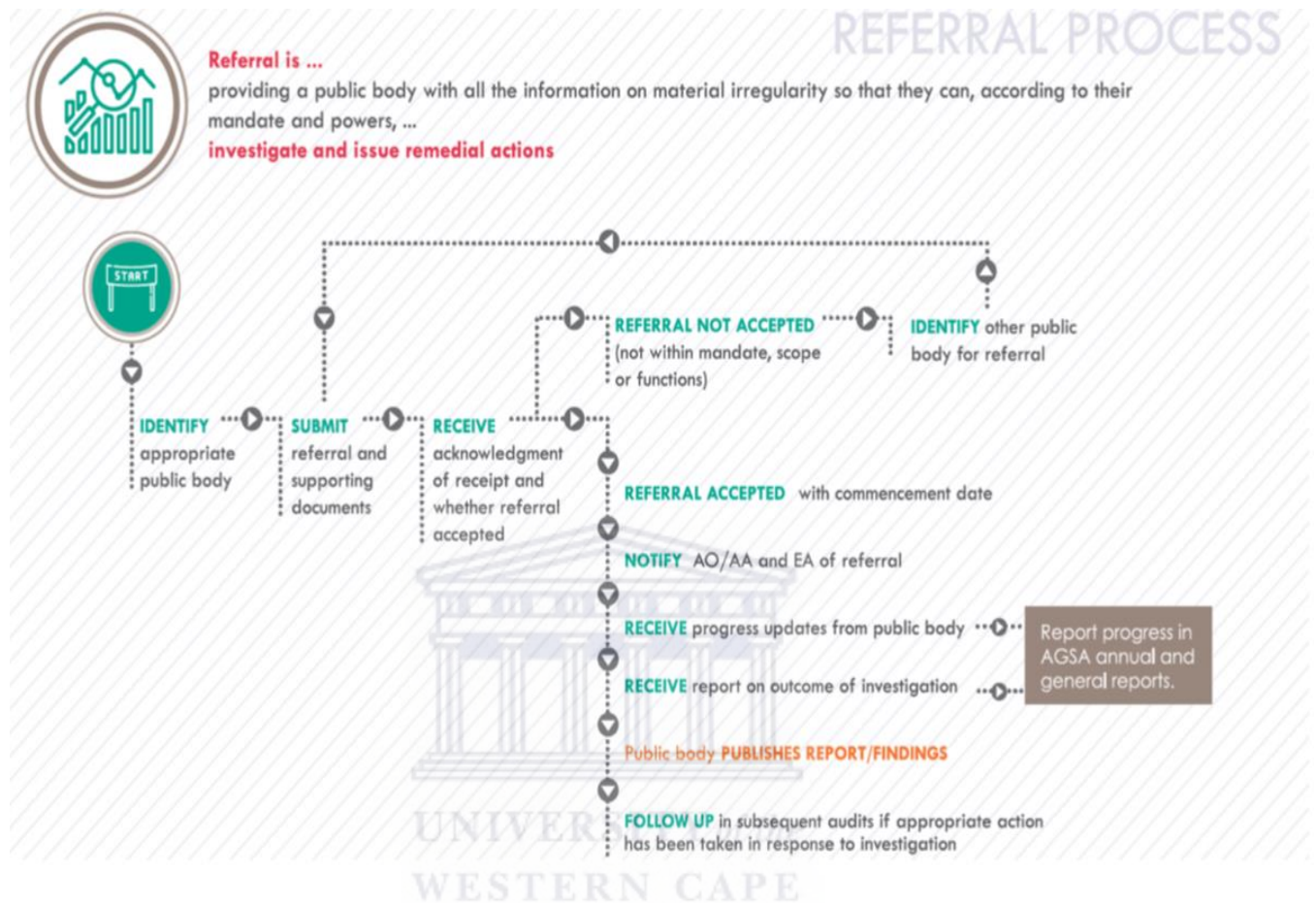
<sup>569</sup> Koma SB 'The state of local government in South Africa: issues, trends and options' (2010) 45/1 *Journal of Public Administration* 118.

<sup>570</sup> S 1 PAAA.



the PP, SIU and the SAPS'.<sup>571</sup> The process of referral is quite lengthy and the diagram below best illustrates how it flows.

**Figure 3: Auditor-General's referral process**



Source: AGSA (2019).

### 5.3.1.1. Assessment

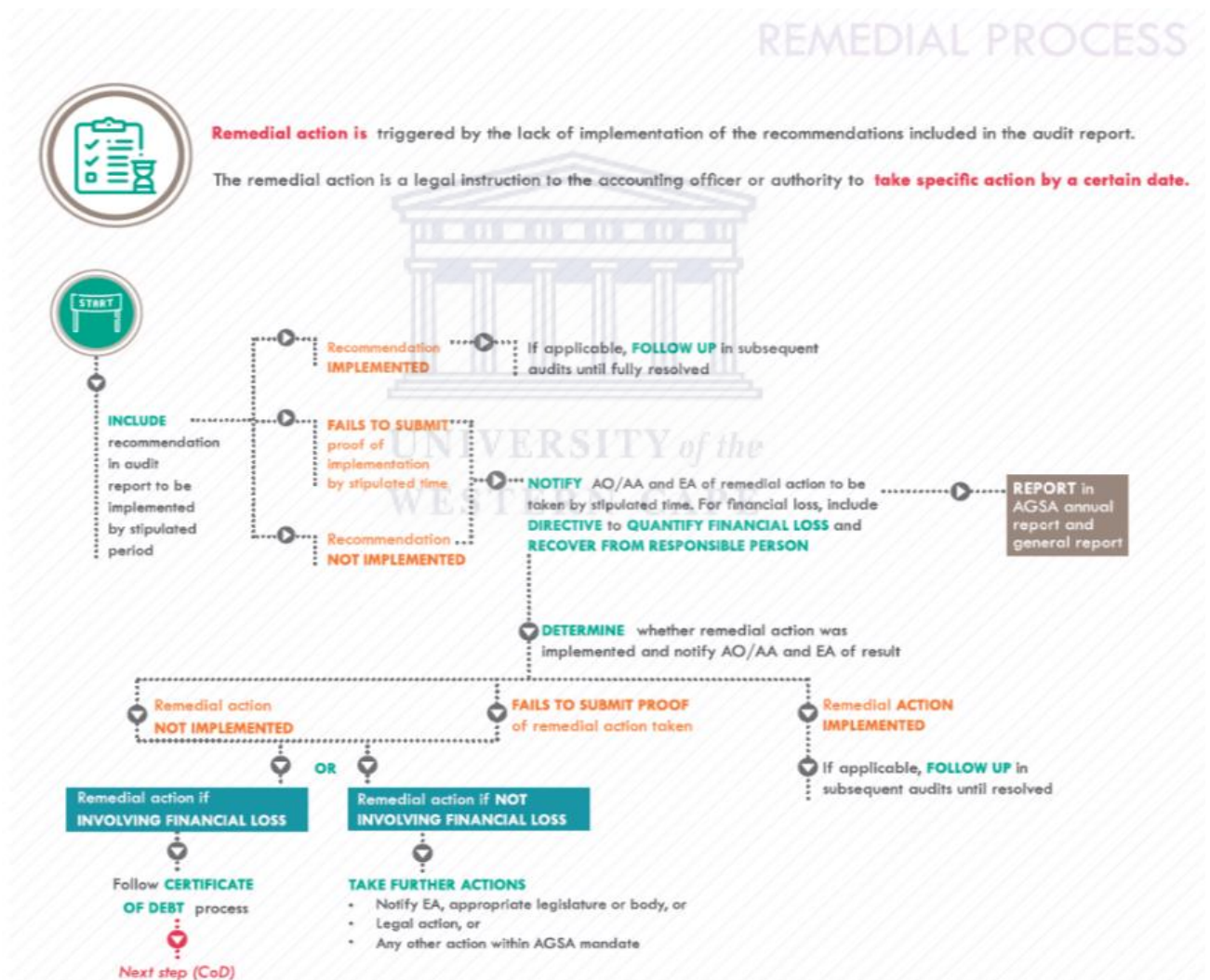
The Auditor-General's referral powers are not without shortcomings. As depicted in the above illustration, upon the end of the process, the investigative body has to update and inform the Auditor-General about the outcome. However, there is clearly no recourse for the Auditor-General in the instance of failure by the investigative body to update and report the investigation outcome. The point is, the end-result/manifestation of this power lies not with the Auditor-General, but with the investigative body. In the case studies, it was indicated that referrals were previously made to SAPS and SIU, but no results were noted. Therefore, it is argued that this power is more unlikely to have any significant impact in practice.

<sup>571</sup> AGSA 'Audit perspectives: Audit Act Amendments aim to foster clean governance in the public sector' available at <https://www.agsa.co.za/Portals/0/AuditPerspectiveAGApril2019.pdf> (accessed 05 October 2019).

### 5.3.2. Taking a remedial action

Section 5A(1) of the PAAA requires the Auditor-General to make a follow-up on whether the accounting officer or executive authority has implemented the recommendations contained in the audit report relating to any material irregularity. An ‘accounting officer’ is a person identified as such by the MFMA (in the context of this study, the MM) or any person designated as such, whilst the ‘executive authority’ means an authority identified as such by the relevant law (in this study, the municipal council).<sup>572</sup> Failure to implement the audit recommendations, the Auditor-General is required to take appropriate remedial action to address such failure. The diagram below illustrates how the process unfolds.

**Figure 4: Process for the Auditor-General’s remedial action**



Source: AGSA (2019).

<sup>572</sup> S 1 PAAA.

### 5.3.2.1. Assessment

It is fitting to set the record straight on the legal effect of Auditor-General's recommendations, that they are not binding. This means that they are complied with on a voluntary basis and one may simply choose to disregard them. Section 5A of the PAAA introduces binding remedial action. However, the apparent flaw with this provision is that it is incidental, secondary and dependant on the non-implementation of a non-binding audit recommendation. Alternatively put, such power can only be exercised after a failure has already ensued. In that way, it is not preventive in purpose, but retrospective. In comparison, the Public Protector's findings/recommendations are binding and subject only to judicial review.<sup>573</sup> Thus, it is argued that the Auditor-General's recommendations be of same formulation and effect.

### 5.3.3. Issuance of certificate of debt

Where the failure to implement the remedial action resulted in a financial loss, section 5B of the PAAA requires the Auditor-General to issue a certificate of debt to the accounting officer to pay back to the State the amount stipulated in the certificate. The Auditor-General must also serve a copy of certificate on the executive authority (council), which must then ensure the collection of repayment and keep the Auditor-General informed of the progress in that regard. This amount of money might be an irregular, fruitless or unauthorised expenditures.

#### 5.3.3.1. Assessment

The fact that the responsibility to collect repayment does not lie with the Auditor-General is on its own problematic. Here, again, the eventual intended effect of the provision lies somewhere else *i.e.* municipal council (executive authority).<sup>574</sup> The council (or some of its members) may also be implicated or simply become reluctant to act due to party loyalty towards the accounting officer (MM). This is one other hazard of cadre deployment, to be discussed in the next section.

Apart from that, at a practical level, these powers do not seem to be feasible or realistic. The case studies showed that irregular and fruitless expenditures often counts up to millions of rands and under ordinary discourse, recovering such a large sum of money from the MM alone is highly improbable. For instance, it was indicated that there was a R144 million illegal sale of land in Mahikeng; R38 186 563 of unauthorised expenditure in Ditsobotla and R31 098 699 irregular expenditure in Tswaing. It is highly improbable that this large sums of money would have easily been recovered from the respective MMs.

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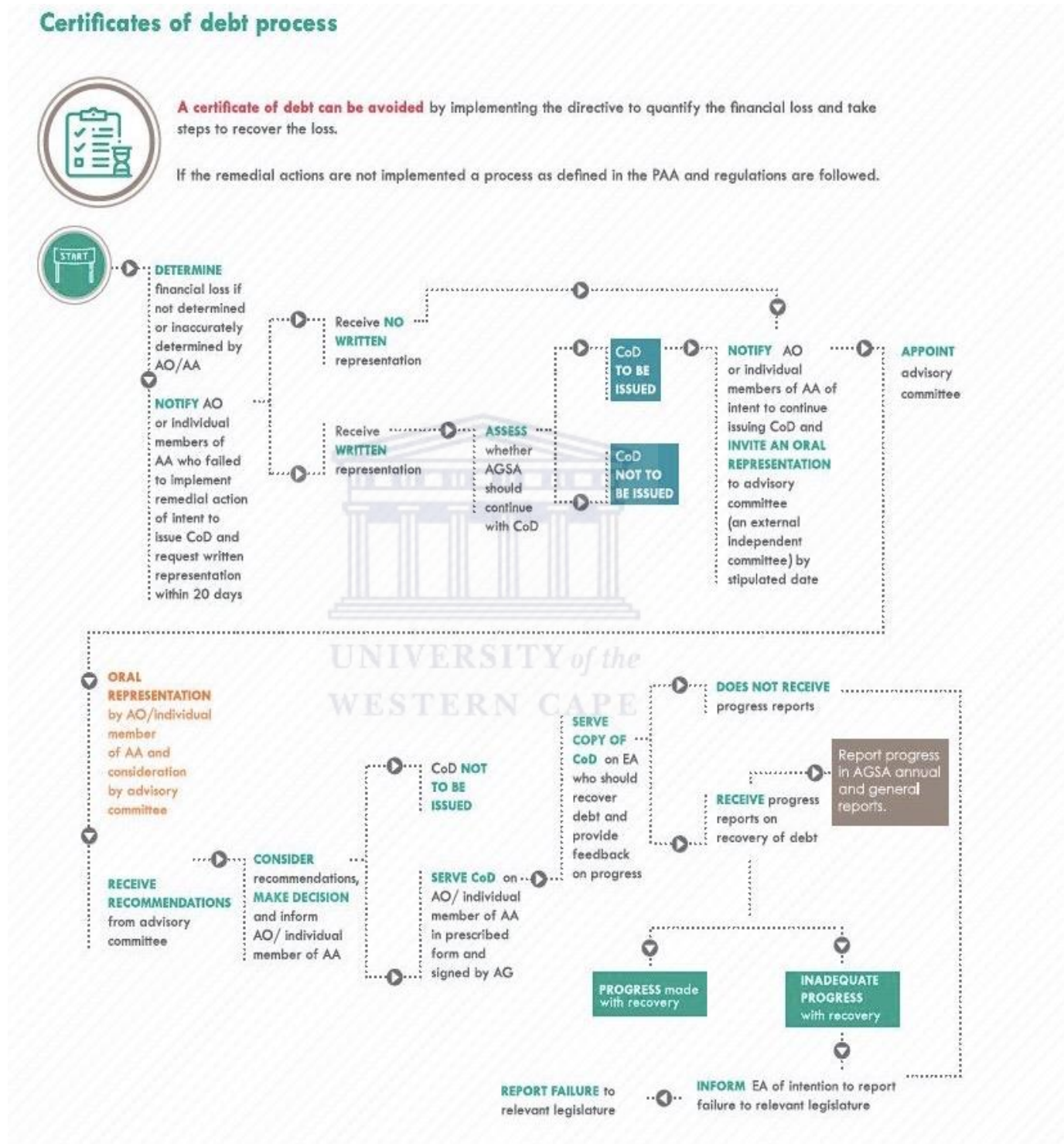
<sup>573</sup> *EFF Case* (2016) para 71.

<sup>574</sup> S 5B(2) PAAA.



Therefore, it is argued that the imposition of liability measure is impractical and too far-fetched. Below is the diagram illustrating how the certificate is to be imposed.

**Figure 5: Auditor-General’s certificate of debt process**



Source: AGSA (2019).

## 5.4. Other factors

As indicated, the problem does not only lie primarily with the legal framework. The real problem lies with the various institutions themselves, lacking the skills, resources and political will to ensure compliance with the Auditor-General's recommendations. Other non-legal factors are discussed below.

### 5.4.1. Lack of (and poor) internal audit monitoring processes

The internal audit monitoring process is viewed as a corrective measure to ensure that remedial actions are taken on issues identified by the Auditor-General.<sup>575</sup> Its significance is also recognised in the MFMA.<sup>576</sup> It operates under extensive regulatory framework providing guidance on its establishment, composition and functions across all municipalities. Putting more emphasis on this measure, Motubatse, Barac and Odendaal posit:

In order to monitor the implementation of audit findings and recommendations, the audit committee requires the internal audit to compile a formal findings register that would indicate corrective actions taken and list the unresolved findings. This could also assist the audit committee in overseeing how management is responding to the recommendations made by external and internal auditors. It may also assist the audit committee to affect accountability and to follow up on critical audit recommendations.<sup>577</sup>

However, despite its significance, the internal audit function in municipalities is faced with several challenges and this is evident from the three case studies discussed in the previous chapter. These challenges include lack of adequate training and capacity building programmes for internal auditors, non-cooperation of other municipal structures and officials with internal audit units, as well as financial constraints.<sup>578</sup>

### 5.4.2. Cadre deployment versus competent employment

Several instances where municipalities failed to recruit competent workforce in key positions of finance, procurement and compliance units were highlighted in respect of three case

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<sup>575</sup> Motubatse N, Barac K & Odendaal E 'Perceived challenges faced by the internal audit function in the South African public sector: A case study of The National Treasury' (2015) 7/6 *African Journal of Science, Technology, Innovation and Development* 405.

<sup>576</sup> S 165 MFMA.

<sup>577</sup> Motubatse, Barac & Odendaal (2015) 405.

<sup>578</sup> Alktani S & Ghareeb A 'Evaluation of the quality of the internal auditing position in the public sector in Saudi Arabia: An applied study' (2014) 5/1 *Global Review of Accounting and Finance* 103.

studies.<sup>579</sup> What has turned out to be the norm is the employment of people against recruitment policies and not on the basis of their experience, qualifications and competency, but on the basis of their loyalty to a ruling political party in a concerned municipality. This emerging norm is often referred to as ‘cadre deployment’.<sup>580</sup> Cadre deployment, as Twala points out, is ‘a recipe for a constitutional crisis’<sup>581</sup> and it has showcased itself as an undermining factor for the dream and vision of developmental local government. The Auditor-General has on multiple occasions indicated that the municipalities are excessively reliant on external consultants, with exorbitant service fees, to compile financial and other information for audit purposes. In many instances where the financial reports are prepared by internal staff (cadres), significant errors, inaccuracies and unreliable records were noted.<sup>582</sup> All this is attributable to lack of the necessary skills and incompetency.

#### **5.4.3. Ineffective role by other institutions**

Evident from the case studies is that even though other institutions, such as SAPS and SIU, have previously tried to assist in addressing the problem, their efforts proven to be inadequate. Therefore, unless these institutions have adequate technical support, resources and enough workforce, nothing will change and the problem will persist.

#### **5.5. Conclusion**

This chapter was directly informed by chapter four. It sought to evaluate the legal framework and explore non-legal factors that exacerbate the problems exposed by the case studies. The chapter first considered legal framework and the indication is that there are indeed some gaps in law that needs to be addressed. The chapter went further to evaluate the expanded powers of the Auditor-General and found that these powers are more unlikely to have significant impact in practice. Lastly, there are several other factors observed from the case studies, namely; lack of internal audit monitoring, cadre deployment and other institutions’ lack of skills, resources, political will and capacity. The chapter concluded with a brief discussion on each of these factors.

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<sup>579</sup> Ditsobotla (2019) 145 & Tswaing (2018) 169-172.

<sup>580</sup> See Twala C ‘The ANC and the Cadre Deployment Policy in the Post-Apartheid South Africa: A Product of Democratic Centralisation or a Recipe for a Constitutional Crisis?’ (2014) 41/2 *Journal of Social Sciences* 159-165.

<sup>581</sup> Twala (2014) 159-160.

<sup>582</sup> Ditsobotla (2019) 145.



The next chapter presents a general conclusion. It provides recommendations and thus attends to the question: are there any legal answers (or real practical responses) that may contribute in dealing with these issues?



## **CHAPTER SIX**

### **CONCLUSION AND RECOMMENDATIONS**

#### **6.1. Introduction**

In this chapter, the research questions are answered by drawing together the research findings. Then, relying on the scholarly insights emanating from the critical review of literature and the practical patterns observed from the case studies, a number of constructive recommendations modelled towards addressing the non-implementation of audit recommendations in the North West municipalities are presented. Lastly, the chapter highlights issues which may benefit from future research.

#### **6.2. General background**

The main objective of this study was to explore how the different organs of state, concerned with sound financial management in municipalities, could see to the implementation of the Auditor-General's reports. This was done with reference to three case studies in the North West (Mahikeng, Ditsobotla and Tswaing). The flow of discussions was guided by the research question that undergirds the study: *How can the Auditor-General's recommendations be better and adequately given effect in the North West municipalities?*

This research question was underpinned by the following ancillary questions:

1. What is the role of the Auditor-General?
2. How do municipalities implement audit recommendations?
3. How can and does the Auditor-General enforce implementation of its recommendations against municipalities?
4. How can and does the provincial government implement audit recommendations in municipalities?
5. How can and does the national government implement audit recommendations in municipalities?
6. Is the current legal framework and other measures for the implementation of audit recommendations adequate to extract the most benefit of their desired intent?

#### **6.3. Answering the research question**

The legal framework for the institutional structures and processes for the implementation of the Auditor-General's recommendations in municipalities was outlined in chapter three. The

practical experience of this framework was then explored in chapter four in respect of three case studies. Flowing from chapter four is the revelation that these institutional structures and process are, in practice, generally poor. This is not sustainable and that is apparent from the case study municipalities that have reached the state of financial and operational collapse. In chapter five, evaluation was then made to try to understand why the practice (chapter four) does not reflect the framework (chapter three). Emerging from the evaluation in chapter five are several issues that explain this disjuncture between law and practice. These issues are briefly sketched below.

First, the municipal councils are generally failing to meet their oversight role and, in doing so, ensuring that audit recommendations are given full effect. Standing out is their reluctance to establish oversight committees, like MPACs, as well as the audit committees to supplement its oversight function. This happens despite the significant statutory role of MPACs in ensuring that the corrective measures are taken in response to issues raised in audit reports. The other point worth mentioning is the municipalities' common failure to recruit competent staff with the necessary skills required to facilitate full implementation of audit recommendations. This particular point highlights a need for the institutionalisation of a culture of prudence, discipline, ethics, efficiency, adequate controls and accountability that should be central to the municipal financial management systems.

Secondly, as far as the provincial supervision is concerned, it was observed that despite the province's efforts to assist municipalities in improving their financial performance, there were no improvements recorded to that effect. Instead, the situation worsened. The study then found that the province itself is in a mess and thus it would have been impossible, and perhaps wishful, to expect effective supervision from it. This is explained by section 100(1) intervention in the province.

Thirdly, the study observed no significant impact of the national government's support programmes in the case study municipalities, and surely in other municipalities across the province. The study found that the supervisory measures, in many instances, were applied in a one-size-fits-all manner, and thus being ineffective and not directly responsive to the specific needs and issues of individual municipalities. Despite national government's support, the municipalities continued to obtain poor audit outcomes and retained their culture of non-compliance with audit recommendations.

Fourthly, the study demonstrated how other institutions, such as SAPS (Hawks), SIU and the PP have attempted to enforce compliance with audit recommendations in municipalities. However, their efforts have also proven to be ineffective and the reason for this, apart from the political environment of impunity, is the poorly co-ordinated multi-agency network towards addressing the problem. What was also observed is that civil society organisations in the North West play a minimal role in addressing this problem, at least not in the three municipalities explored in this study, where there is no trace of civil society's involvement.

Lastly, the study found that there is little prospect of success for the Auditor-General to be able to effectively enforce compliance with his audit recommendations against municipalities. Looking at his expanded executive powers, the study doubts the perception and narrative which seeks to suggest that these powers will provide a form of magic bullet that will solve deeply-rooted problem of non-compliance and impunity across the North West municipalities.

In sum, the issue of non-implementation of audit recommendations in municipalities is very complex and hard to resolve. Therefore, to think that a mere expansion of the Auditor-General's executive powers is a magic bullet to solve this problem is an irrational expectation. The realistic means and way forward to address the problem, it is argued, begin with the construction of a consistent and well-coordinated multi-agency approach. It was against this premise that this study extended its reach on the other structures and institutions, apart from the Auditor-General, that may play a role or two in resolving the problem.

#### **6.4. Recommendations and their implications on law, policy and practice**

In view of the foregoing discussion, the following recommendations are proposed to improve the state of compliance with audit recommendations in municipalities. These recommendations are by no means a silver bullet that will solve all the issues confronting the North West municipalities, but it is believed that they present a fresh look at some of the issues.

##### **6.4.1. The Auditor-General**

The fact that the Auditor-General is given referral powers appreciates the significance of multi-agency approach and/or inter-institutional collaboration with other role-players in ensuring that his audit recommendations are complied with. Therefore, it is recommended that clear guidelines and regulations be crafted to guide this collaboration since several loopholes and uncertainties exist, as identified in chapter five. Further clarity is also needed on the Auditor-General's powers to impose liability on defaulting officials. Here it is recommended that the Auditor-General should be empowered to sue outright, and not through the executive authority,

as currently framed. Furthermore, it is recommended that the recommendations of the Auditor-General, like those of the PP, be of binding effect on the auditee institution. This bears great potential to enhance compliance.

#### **6.4.2. Municipalities**

There is a general need for a change and reform in the culture, perceptions and certain practices of municipal officials. The general oversight mechanisms should be strengthened and, among others, this can be done by establishing oversight committees, such as MPACs and audit committees. In respect of MPACs', fast-tracking of the adoption of the Municipal Structures Amendment Bill is recommended due to its promise of switching the compulsory mode towards the establishment of MPACs. The Bill should be accompanied by regulations to provide practical guidance to its provisions (once promulgated). In respect of audit committees, the clear terms of reference should be crafted to provide clarity and further insights on the committee's duties and responsibilities. The mere existence of an audit committee is not enough, it should be skilled, informed, diligent and probing in fulfilling its oversight function.

It was demonstrated how the appointments on the grounds of political loyalty/affiliation, and not on the skills and experience of the person, can undermine certain fundamental objectives of good governance (cadre deployment). This does not only affect efficiency of administration due to staff incompetency, but also comes with a financial strain since the municipality must rely on the expensive external consultants for certain tasks. Therefore, it is recommended that the municipal leadership should recruit members who possess the appropriate skills and expertise to effectively discharge their responsibilities, especially in key areas of finance, internal audit, performance management and the SCM. This underscores the idea of professionalisation of local government that entails the appointment on the basis of professional qualifications, knowledge and subjection to a code of professional ethics.<sup>583</sup> The municipalities should also adopt fraud prevention and anti-corruption strategies. Additionally, whistleblowing and awareness programs on fraud and corruption might also be necessary.

In order for a municipality to secure a clean audit, it should have a committed leadership with impeccable levels of discipline. It should have a sound oversight mechanism in both its financial management and operational activities. This kind of a municipality should have responsible officials who are transparent and accountable. No municipality in the North West

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<sup>583</sup> Ntliziywana P *Professionalisation of Local Government: Legal Avenues for Enforcing Compliance with the Competency Framework* (unpublished LLM research-paper, UWC, 2009) 24.

is close to this standard, but it is hoped that a change might come with this recommendations, provided they care to implement them.

#### **6.4.3. Provincial government**

It is further recommended that the North West province, through the department of local government and provincial treasury, should assume a more strategic and focused role to provide the necessary support and resources to the municipalities with poor audit outcomes. The support may take the form of capacity building programmes for officials in key areas such as finance and SCM. The implementation of audit recommendations would not be a difficult task for a well-trained and skilled official. The provincial SCOPA should also avail technical assistance to the members of MPACs in order to improve their efficiency and performance.

#### **6.4.4. National government**

The three case studies demonstrated that the supervisory measures of the national government are also ineffective and the problem was found to be the one-size-fits-all kind of approach. It is apparent that this approach is unsustainable and unrealistic given the unique challenges, contexts and various factors that set municipalities incomparable with one another. These variances, obviously, require unique responses. Therefore, the study recommends the implementation of differentiated system of local government. This system will ensure that the national government's support programmes appreciate the differences between the municipalities, thus being more responsive and providing relevant means of support to unique challenges facing individual municipalities. The study calls on CoGTA to take a firm stance in this regard.

It is also recommended that the NT should exercise its section 216(1) measure to stop the transfer of funds to municipalities that are blatantly disregarding audit recommendations. This may be an effective tool of encouraging compliance. However, and of course, this should be done within the constraints of the prescribed legalities.

#### **6.4.5. Other institutions**

There are other role-players that may contribute towards the eventual implementation of audit recommendations in municipalities. Their potential and mandates were discussed in chapter three. These include the PP, SAPS (Hawks), SIU and civil society organisations. Insofar as these institutions are concerned, there is a need for clarity in responsibility division, to provide practical insights and guidance on who does what when and with whom, as the case might be.



This reflects back on the recommendation made earlier, namely; a need for the construction of a well-coordinated action plan for multi-agency approach towards addressing the problem.

#### **6.5. Suggestions for future research agenda**

It is important to restate that the inquiry set out in this paper is necessarily limited in scope and effect to three municipalities in the North West. This is the worst performing province according to the latest local government audit report (2017/18) of the Auditor-General. Second to North West is Free State and, therefore, it may be necessary in the future to conduct the study of same nature in respect of Free State. In addition, this study only explored the problem of non-implementation of audit recommendations as it relates to municipalities. It may also be necessary for future research to explore the problem, this time at a different plane, either provincial or national government. Lastly, it may as well be necessary for future research to evaluate the efficiency of the Auditor-General, this time in a more comparative sense with a view of extracting best practices from other jurisdictions.



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