

THE EXTERNAL SUPERVISION OF THE MUNICIPAL PROCUREMENT

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DECLARATION

I, Simphiwe Mkhululi Mbabane, declare that THE EXTERNAL SUPERVISION OF MUNICIPAL PROCUREMENT is my own work. It has not been submitted before for any degree or examination in any other university, and that all resources I have used or quoted have been indicated and acknowledged as complete references.

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KEY WORDS

- The Constitution of the Republic of South Africa.
- Transparency.
- Combat corruption.
- Effectively scrutinise.
- Accountability.
- Municipal Finance Management Act.
- Municipal Systems Act.
- Supervisory and monitoring powers over municipalities.
- Fraud.
- Open and effective competition.



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CHAPTER 1 - INTRODUCTION

1.1 Problem Statement

Government procurement goes to the heart of providing service delivery by the organs of state to communities. It involves the expenditure of taxpayer money and as such it requires transparency and accountability. The proper expenditure of public monies is important for good governance, and ensures that the taxpayer gets value for money. The Constitution guides organs of state when procuring goods or services. Section 217 requires organs of state to procure goods in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. In many instances, organs of state fail to adhere to this constitutional principle due to maladministration and corruption. This is a significant problem as maladministration and corruption impact severely on service delivery. The extent of severity of this problem was also emphasised by Nugent JA in *SA Post Office v De Lacy*¹ when he pointed out that “cases concerning tenders in the public sphere are coming before courts with disturbing frequency”.

Municipalities are distinct spheres of government which procure goods and services on a massive scale in order to meet their constitutional mandate of delivering basic services. They must do so in terms of an elaborate legal framework to ensure fair, equitable, transparent, competitive and cost-effective procurement. The constitutional requirements are given effect to in a number of laws. First, the Municipal Finance Management Act² (MFMA) and its regulations³ regulate the procurement of goods and services by municipalities. Its primary object is to secure sound and sustainable management of the financial affairs of municipalities, including procurement, by establishing norms and standards and other requirements for ensuring transparency, accountability and appropriate lines of responsibility.

¹ [2009] ZASCA 45 para 1.

² 56 of 2003.

³ Municipal Supply Chain Management Regulations, published in GN 868 in GG 27636 of 30 May 2005.

There are also provisions in the Municipal Systems Act⁴ (Systems Act) relating to municipal procurement, that require a municipality to select the service provider through selection processes which minimise the possibility of fraud and corruption.⁵ The Systems Act also makes provision relating to provincial monitoring of municipalities.⁶

Then there are laws that apply to all organs of state including local government. Firstly, there is Preferential Procurement Policy Framework Act⁷ (PPPFA) and its regulations which are aimed at giving effect to section 217(3) of the Constitution that require government to use its procurement power to promote social and policy objectives by, for example, promoting the development of previously disadvantaged groups.

Secondly, there is a Prevention and Combating of Corrupt Activities Act⁸ (Corruption Act) which aims to provide for the offence of corruption and offences relating to corrupt activities. It also provides for the establishment and endorsement of a Register in order to place certain restrictions on persons and enterprises convicted of corrupt activities relating to tenders and contracts.

The regulation of procurement is further enhanced by generic laws that are aimed to ensure good governance. First, there is Promotion of Administrative Justice Act⁹ (PAJA), the object of which is to give effect to the right to administrative action that is lawful, reasonable and procedurally fair. PAJA also ensures the right to written reasons for administrative action in order to promote an efficient administration and good governance, and to create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function, by giving effect to the right to just administrative action. Procurement processes are administrative actions and are reviewable in terms of PAJA.

⁴ 32 of 2000.

⁵ Section 83(1)(c) Systems Act.

⁶ Section 105(1) Systems Act.

⁷ 5 of 2000.

⁸ 12 of 2004.

⁹ 3 of 2000.

Secondly, there is Promotion of Access to Information Act¹⁰ (PAIA) which is aimed at giving effect to the constitutional right of access to information that is held by the State. PAIA is an important tool to combat corruption in that it promotes transparency in all public bodies.

Although the primary responsibility for corruption-free procurement lies with municipalities themselves, ensuring compliance with the legal framework on municipal procurement is complemented by external actors. Municipalities do not function entirely as autonomous spheres outside the supervision of the other spheres of government and national institutions. These institutions are empowered by various laws to scrutinise procurement decisions.

The first institution is the National Treasury. Section 216 of the Constitution requires the National Treasury to prescribe measures to ensure both transparency and expenditure control in each sphere of government. The MFMA gives the National Treasury power to investigate any system of financial management and internal control in a municipality and make recommendations for improvements.¹¹ Furthermore, the National Treasury is empowered to take appropriate steps if a municipality commits a breach of the MFMA, including the stopping of funds to a municipality in terms of section 216(2) of the Constitution.¹² The question is then whether the National Treasury can effectively supervise irregularities in municipal procurement?

The second institution is the provincial government. In terms of the Constitution, provinces must provide for the monitoring and support of local government in the province and must promote the development of local government capacity to enable municipalities to perform their functions and to manage their own affairs.¹³ This monitoring duty is further expanded upon in the Systems Act. The question is whether, on discovery of corrupt procurement practice, provinces are enabled to effect corrective measures effectively.

¹⁰ 2 of 2000.

¹¹ Section 5(2)(d) MFMA.

¹² Section 5(2)(e) MFMA.

¹³ Section 155(6) Constitution.

The third institution is the Auditor-General. The Public Audit Act¹⁴ establishes and gives powers to the Auditor-General to audit state institutions, including municipalities. The Auditor-General is required to audit and report on the accounts, financial statements and functional management of all the municipalities. Thereafter, the Auditor-General must submit audit reports to any legislature that has a direct interest in the audit and to any other authority prescribed by national legislation. All reports must be made public. In the procurement context, the Auditor-General has the power to conduct investigations, including forensic investigations, with a view to determine whether an organ of state followed procurement procedures that were cost-effective.

The fourth institution is the Public Protector. The Public Protector was set up in terms of the Constitution to investigate complaints against government agencies or officials about maladministration and corruption. The Public Protector is empowered in terms of the Public Protector Act¹⁵ 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 have resulted in any impropriety or prejudice, to report on that conduct and to take appropriate remedial action. The Public Protector receives and investigates complaints and has the power to recommend corrective action and to issue reports. The question is whether this institution is capable of ensuring that its recommendations are implemented in case of procurement irregularities.

Despite all these monitoring measures, corruption is rife in municipalities. As a result municipalities struggle to achieve their constitutional objectives. Therefore, there is a compelling need to examine whether external organs of state are able to assist in the enforcement of the procurement system that is corrupt free.

1.2 Research question

The main questions this study addresses are:

¹⁴ 25 of 2004.

¹⁵ 23 of 1994.

- What is the role of each of these institutions to ensure regular procurement in municipalities? Do these institutions have effective means to combat maladministration and corruption in municipal procurement?
- What has been the practice in performing their roles?
- Given the extent of the prevailing corruption problem, can their role be increased and strengthened?

1.3 Argument

It will be argued that each of these institutions has a role to play but all of them have limited measures to combat corruption effectively. The National Treasury is constrained to a regulatory role and its enforcement powers are limited and it cannot act decisively against corrupt municipal officials. The provinces have limited executive powers to intervene into the affairs of the municipalities. Although they have power to monitor municipalities, they do not have ready remedies to correct maladministration in the procurement process. The Auditor-General, although best placed to detect corruption, has only advisory powers and relies on the National Treasury and provinces to enforce their findings. The Public Protector is an effective institution to detect corruption but it is also reliant on other institutions to effect compliance.

Notwithstanding the fact that these institutions are seemingly failing to fight corruption, much can still be done within the current system to improve their role in combatting maladministration and corruption.

1.4 Literature Survey

World-wide much has been written on the impact of corruption in public procurement. J. Egdardo Campos¹⁶ wrote about corruption in the public procurement and deals extensively with its causes and impact to society.

¹⁶ *The Many Faces of Corruption: Tracking Vulnerabilities at the Sector Level* (2007).

The leading text on procurement by Phoebe Bolton¹⁷ sets out extensively the rules relating to procurement but does not deal with the external institutions and their roles in monitoring municipal procurement. Nico Steytler and Jaap de Visser¹⁸ refer generally to provincial supervision but do not make the connection between supervision and procurement specifically. There is also an article by Wayne A. Witting¹⁹ in which he wrote, *inter alia*, about the general framework for controlling corruption in public procurement. The article goes to the arguments and methods for procurement control in institutions and at legislative levels.

While there is a reasonable literature on the rules of procurement, very little has been written on the role of external institutions in relation to the monitoring of municipal procurement. Stuart Woolman²⁰ deals extensively with the roles and functions of the Public Protector, the Auditor-General, the National Treasury, and the provincial supervision but does not address the issue of the external supervision of municipalities by these institutions. Woolman only outlines the general roles and functions of these institutions.

There is also an article by C. Bauer²¹ which looks at the government measures to control unethical behavior on the part of public officials and political office bearers. The article discussed measures to combat corruption which include referrals of unethical behavior and/or corruption to the Public Protector.

W. Webb²² wrote about various remedies to curb corrupt activities and mentioned constitutional mechanisms such as the Auditor-General, Public Protector and Public Service Commission, Independent Complaints Directorate, South African Revenue Service, South African Police Service, National Prosecuting Authority, Special Investigative Unit and the

¹⁷ *The Law of Government Procurement in South Africa* (2007).

¹⁸ *Local Government Law of South Africa* (2007).

¹⁹ *Good Governance for Public Procurement: Linking Islands of Integrity* (2005).

²⁰ Woolman *et al*, *Constitutional Law of South Africa* (2008).

²¹ "Organs/mechanisms/bodies to promote ethical government in South Africa," *Journal of Public Administration*, Vol. 37 no 2 (2002) 166.

²² "Applying the public service anti-corruption strategy in pursuit of accountable South African public administration," *Journal of Public Administration*, Vol. 40 no. 2 (2005) 151.

National Intelligence Agency. The author identified two major weaknesses of these anti-corruption agencies. Firstly, he identified the absence of co-ordination among them and no proper delineation of responsibilities. Secondly, he pointed out that these institutions appear not to approach corruption with complementary preventative and investigative measures. However, this article does not deal in detail on the role of each of these institutions in fighting corruption especially in municipal procurement.

M.J. Mafunisa²³ also wrote about corruption and how it impacts on effective service delivery with specific reference to the Limpopo provincial government. The article also highlights some oversight bodies such as the Auditor-General, the Public Service Commission, the Public Protector, the Internal Audit Services (Limpopo province), and the Fraud and Corruption Unit (Limpopo province) but it does not deal in detail on their roles in monitoring procurement in provincial government.

Therefore, this study seeks to contribute to the literature on the role of the identified external institutions in monitoring municipal procurement by examining their role in more detail.



1.5 Research Methodology

This study is based on primary and secondary documentary materials. As primary materials I used legislation, case law, reports by the Auditor-General, and the Public Protector reports. As secondary source I have referred to books and articles.

1.6 Chapter Structure

Chapter 2 comprises an analysis of South African law relating to procurement and the short overview of the rules as they apply to municipalities. Specific attention will be paid to enforcement and implementation by municipalities.

²³“Corruption and service delivery in the public service: the case of Limpopo province,” *Journal of Public Administration*, Vol. 42 no 3 (2007) 260.

Chapter 3 focuses on the National Treasury's role with regard to municipal procurement. Its primary role is that of regulator but the MFMA gives it power to investigate any system of financial management and internal control in a municipality and make recommendations for improvements.

Chapter 4 focuses on provincial supervision of municipal procurement. The Systems Act empowers the MEC to investigate if he or she has reason to believe that maladministration, fraud, corruption or any other serious malpractice has occurred or is occurring in a municipality in the province. It will be shown that although the Systems Act and the Constitution allow for monitoring, they do not provide the provinces with ready remedies to correct maladministration in the tender process.

Chapter 5 focuses on the role of the Auditor-General in monitoring municipal procurement. It will be shown that although the Auditor-General has power to audit and report on the accounts, financial statements and functional management of all the municipalities, the Public Audit Act does not empower the Auditor-General to take remedial action against municipalities that fail to comply other than to report to the relevant legislature that has the direct interest in the audit.

Chapter 6 deals with the investigative role of the Public Protector with regards to municipal procurement. It will be shown that with regard to irregularities and corruption in the municipal procurement, this institution is empowered to investigate, subpoena witnesses, and obtain documents but its powers to act decisively are limited to making recommendations for action by other authorities.

In the final chapter, I draw general conclusions and make recommendations. Specific emphasis will be paid to legislative reform in order to empower the above mentioned institutions to deal with corruption and maladministration in municipalities decisively and effectively.


CHAPTER 2 - OVERVIEW OF THE LEGAL FRAMEWORK FOR MUNICIPAL PROCUREMENT

2.1 Introduction

The aim of this chapter is to set out the legal framework for procurement. There are laws, regulations and policies that govern public procurement in South Africa. All of these rules must promote fairness and discourage fraud and corruption. These rules also encourage competition in bidding for government contracts, and competition results in better quality and lower cost, both of which are desired outcomes of a well-functioning procurement system.

2.2 Constitution

Public administration at the local government level is governed by the democratic values and principles embodied in section 195(1) of the Constitution. These principles include, but are not limited to, the following:

- 
- (a) The promotion and maintenance of a high standard of professional ethics;
 - (b) The promotion of efficient, economic and effective use of resources; and
 - (c) A public administration which is accountable.

Procurement principles are specifically entrenched in section 217(1) of the Constitution which provides that when an organ of state in the national, provincial or local sphere of government contract for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. Section 217(2) further provides that an organ of state in the national, provincial or local sphere of government is not prevented from implementing a procurement policy providing for categories of preference in the allocation of contracts and the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination. And lastly, section 217(3) requires national legislation to prescribe a framework within which the policy referred to in section 217(2) must be implemented. The five constitutional principles of fairness, equity, transparency, competitiveness and cost effectiveness are the pillars upon which

government procurement rests. Each one of these principles has to be carefully considered when an organ of state is procuring goods and services.

According to Bolton, the principle of competitiveness is interrelated to the principle of cost effectiveness as both these principles concern the attainment of the best value for money when contracting for goods and services.²⁴ Where an organ of the state procures goods or services, the process should be structured in such a way that it affords everyone an opportunity to compete fairly. Therefore, in terms of this principle, organs of state must afford themselves an opportunity to compare offers given by different parties to ensure that the option chosen is cost effective.

Bolton further argues that the principle of fairness is linked to the principle of equality.²⁵ Bidders should be treated in the same way and the procedures followed for the procurement of goods and services must be fair. The word fair in section 217(1) is immediately followed by the notion of equity, which as indicated below, refers to the substance of the decision. The notion of bidders being treated equally in procurement processes should be understood within the context of South Africa's history of discriminatory policies. The historical imbalances whereby most state contracts were awarded to large and usually white-owned businesses, benefiting one population group over others, require special attention and the need to redress such imbalances. Given this history, it is important that the awarding of contracts be fair and equitable. In other words the state may treat private contractors differently in order to achieve equity within society, and this would not be regarded as unfair.

2.3 Procedure for acquisition of goods and services

When procuring goods and services, municipalities must follow certain procurement rules that are set-out in various laws.

²⁴ Bolton, *The Law of Government Procurement in South Africa* (2007) 44.

²⁵ At page 48.

2.3.1 Overview of procurement

Each municipality must have and implement a supply chain management policy which gives effect to chapter 11 of the MFMA.²⁶ A supply chain management policy must provide for an effective system of acquisition management in order to ensure that goods and services are procured by the municipality in accordance with authorised processes only. It must also ensure that bid documentation, evaluation and adjudication criteria, and general conditions of a contract, are in accordance with any applicable legislation and that any Treasury guidelines on acquisition management are properly taken into account.

There are Municipal Supply Chain Management Regulations²⁷ (“the SCM Regulations”), which set out rules on what should be contained in the SCM policy. Regulation 38(1) requires the SCM policy to provide measures to combat the abuse of the system, and must enable the accounting officer:

- (a) To take all reasonable steps to prevent such abuse;
- (b) To investigate any allegations against an official or other role player of fraud, corruption, favouritism, unfair or irregular practices, or failure to comply with the SCM policy, and when justified
 - (i) take appropriate steps against such official or other role player; or
 - (ii) report any alleged criminal conduct to the South African Police Services;
- (c) To check the National Treasury’s database prior to awarding any contract to ensure that no recommended bidder is listed as a person prohibited from doing business with the public sector;
- (d) To reject any bid from a bidder who during the last five years has failed to perform satisfactorily on a previous contract with the municipality or any other organ of state after written notice was given to that bidder that performance was unsatisfactory;
- (e) To reject a recommendation for the award of a contract if the recommended bidder has committed a corrupt or fraudulent act in competing for a particular contract;

²⁶ Section 111 MFMA.

²⁷ Municipal Supply Chain Management Regulations, published in GN 868 in GG 27636 of 30 May 2005.

- (f) To cancel a contract awarded to a person if that person committed any corrupt or fraudulent act during the bidding process or an official committed any corrupt or fraudulent act during the bidding process; and
- (g) To reject the bid of any bidder if that bidder has abused the supply chain management system of the municipality or has been listed in the Register for Tender Defaulters.

Regulation 38(1) therefore imposes a duty on the accounting officer to implement the municipality's SCM policy and to take all reasonable steps to ensure that a contract procured through the SCM policy is properly awarded.

The SCM Regulations prescribe four main types of procurement. These are: petty cash purchases (for procurement of items up to a transaction value of R2 000),²⁸ written or verbal quotations (for procurements of a transaction value of over R2 000 up to R10 000),²⁹ formal written price quotations (for procurements of a transaction value of over R10 000 up to R200 000),³⁰ and competitive bidding (above R200 000).³¹ A municipality's SCM policy must determine the procedure for the procurement of goods or services through petty cash purchases, written or verbal quotations and formal written price quotations.

2.3.2 Procurement through written or verbal quotations

Conditions for the procurement of goods or services through written or verbal quotations must be stipulated in the SCM policy, which must include conditions stating that quotations must be obtained from at least three different providers preferably from, but not limited to, providers whose names appear on the list of accredited prospective providers of the municipality, provided that if quotations are obtained from providers who are not listed, such providers must meet the listing criteria in the supply chain management policy.³²

²⁸ Regulation 15.

²⁹ Regulation 16.

³⁰ Regulation 17.

³¹ Regulation 18.

³² Regulation 16(a).

2.3.3 Formal written price quotations

Formal quotations must be obtained in writing from at least three different providers whose names appear on the list of accredited prospective providers of the municipality.³³ In addition, the accounting officer must record the names of the potential providers and their written quotations.³⁴

2.3.4 Competitive bidding process

Goods or services above a transaction value of R200 000 and long term contracts may be procured by the municipality only through a competitive bidding process. No requirement for goods or services above an estimated transaction value of R200 000 may deliberately be split into parts or items of lesser value merely for the sake of procuring the goods or services otherwise than through a competitive bidding process.³⁵

The first stage involves, *inter alia*, planning, choice of the procurement method, specifying the requirements, choice of contract type, and preparation of bid documents. In the case of a municipality, the relevant line department is the one that is involved.

The tender is then advertised in a local newspaper or a government bulletin. Thereafter, bids are opened and bidders are also allowed to be present and subsequently the contract is awarded to the bidder who has won the tender by obtaining the highest points unless objective criteria justify the award to another tenderer.

Any invitation to prospective providers to submit bids must be by means of a public advertisement in newspapers commonly circulating locally, the website of the municipality or any other appropriate ways (which may include an advertisement in the Government Tender Bulletin).³⁶

³³ Regulation 17(a).

³⁴ Regulation 17(b).

³⁵ Regulation 19.

³⁶ Regulation 22(1).

The following are the steps that municipalities are required to follow when procuring goods or services through the competitive bidding process:

- (a) the compilation of bid documentation;
- (b) the invitation of bids;
- (c) site meetings or briefing sessions, if applicable;
- (d) the handling of bids submitted in response to the public invitation;
- (e) the evaluation of bids; and
- (f) the award of contracts.³⁷

The accounting officer is required to establish a committee system that will manage the competitive bidding process. It consists of the bid specification committee, bid evaluation committee and bid adjudication committee.³⁸ The accounting officer appoints the members of each committee.³⁹ Councillors are not allowed to be members of bid committees or to approve any tenders, quotations, or to attend any such meetings as observers.⁴⁰



2.3.4.1 Bid Specification Committee

A bid specification committee (BSC) must compile the specifications for procurement of goods or services by the municipality.⁴¹ Specifications must be drafted in an unbiased manner to allow all potential suppliers to offer their goods or services.⁴² A BSC may not create trade barriers in contract requirements in the form of specifications and may not make reference to any particular trade mark, name, patent, design, type, specific origin or producer unless there is no other sufficiently precise or intelligible way of describing the characteristics of the work, in which case such reference must be accompanied by the

³⁷ Regulation 20.

³⁸ Regulation 26(1)(a).

³⁹ Regulation 26(1)(c).

⁴⁰ Section 117 MFMA.

⁴¹ Regulation 27(1).

⁴² Regulation 27(2)(a).

words 'equivalent'.⁴³ Specifications must indicate each specific goal for which points may be awarded in terms of the SCM policy of the municipality.⁴⁴ The accounting officer must approve specifications prior to publication of the invitation for bids.⁴⁵ A BSC must be composed of one or more officials of the municipality, preferably the manager responsible for the function involved.⁴⁶

2.3.4.2 Bid Evaluation Committee

The evaluation of bids is the most important phase of a public procurement procedure, as it is at this juncture that the procuring entity evaluates all the responsive tenders. A bid evaluation committee (BEC) must evaluate bids in accordance with the specifications for a specific procurement and must evaluate each bidder's ability to execute the contract. BECs are established to evaluate the financial and technical aspects of proposals and make recommendations to the bid adjudication committee (BAC). The BEC must as far as possible be composed of officials from departments requiring the goods or services and at least one supply chain management practitioner of the municipality.⁴⁷

The BEC must only evaluate the bid in accordance with the bid documentation and preference point system. For a tender to be eligible for consideration, it must be an acceptable tender.⁴⁸ An acceptable tender is defined as meaning any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document.⁴⁹ Scott JA in *Chairperson: Standing Tender Committee and Others v JFE Sapela*⁵⁰ explained the concept of an acceptable tender as follows:

The definition of acceptable tender in the Preferential Act must be construed against the background of the system envisaged by section 217(1) of the Constitution,

⁴³ Regulation 27(2)(e).

⁴⁴ Regulation 27(2)(f).

⁴⁵ Regulation 27(2)(g).

⁴⁶ Regulation 27(3).

⁴⁷ Regulation 28(2).

⁴⁸ Section 2(1) PPPFA.

⁴⁹ Section 1 PPPFA.

⁵⁰ (2005) All SA 487 (SCA) para 14.

namely one which is fair, equitable, transparent, competitive and effective. In other words, whether the tender in all respects complies with the specifications and conditions of tender as set out in the contract documents must be judged against these values. Merely because each item is priced does not mean that there was proper compliance. What the Preferential Act does not permit a tenderer to do is in effect omit from his tender a whole section of work itemised in the bill of schedules and required to be performed. A tenderer who is permitted to do this has an unfair advantage over competing tenderers who base their tenders on the premise, inherent in the tender documents, that all work itemised in the schedule of quantities is to be performed. Whether work may later be omitted is of no consequence. What is imperative is that all tenderers tender for the same thing. By tendering on the basis that certain work will not be required a tenderer is able to reduce his price to the detriment of other tenderers, and most certainly also to the detriment of the public purse since he is likely to load other items to the detriment of the employer. Such a tender offends each of the core values which section 217(1) of the Constitution seeks to uphold. It would not be a tender which is acceptable within the meaning of the Preferential Act.

As already stated, tender offers must be evaluated by the BEC in accordance with the parameters stated in the bid documents and the advertisement to the public. It then follows that the BEC should not use a different criteria other than the ones specified in the bid documents. Where a different evaluation criterion is applied, other than the one advertised, the constitutional principle of fairness is violated. A tender cannot be evaluated fairly if the conditions applied are different to those stated in the bid documentation.

A BEC carries out evaluations of all the submitted tenders. The BEC evaluates these using the Preferential Procurement Policy point system based on price and the Broad-Based Black Economic Empowerment (BBBEE).⁵¹ The requirement of functionality in the 2001 PPPFA Regulations⁵² was found to be *ultra vires* the provisions of the PPPFA by the High Court because points for functionality were subtracted from price.⁵³ The Court decided that

⁵¹ BBBEE- rated on HDI, gender, youth and disability.

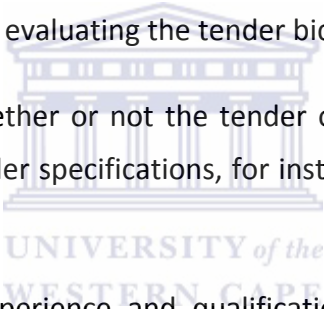
⁵² Preferential Procurement Regulations, published in GN 725 in GG 22549 of 10 August 2001.

⁵³ *Sizabonke Civils CC t/a Pilcon Projects v Zululand District Municipality* (unreported judgment) Kwazulu-Natal High Court (Case No. 10878/2009) 12 May 2010.

Regulation 8(3) of the PPPFA Regulations was in conflict with section 2(1)(b) of the PPPFA since it envisaged that points for functionality may be allocated within the 90 points required by the PPPFA to be awarded by price alone. These regulations were then replaced with effect from 7 December 2011 by the 2011 Regulations,⁵⁴ which make clear that only price and BBBEE are to be considered. Functionality can only be considered as pre-qualification criteria. The 2011 Regulations in principle retain the current model for preferential procurement using the 80/20 and 90/10 preference points systems for award criteria based on price and preference points, respectively. The thresholds for using the 80/20 split is for contracts of a value between R30 000 and R1 million, and the 90/10 split for contracts of a value above R1 million.⁵⁵

Upon completion of the evaluation, the BEC then makes a report on the bids to be considered and approved by the BAC.

In summary, the steps involved in evaluating the tender bids are as follows:

- 
- a) The BEC determines whether or not the tender offers from the bidders meet the requirements of the tender specifications, for instance, with regard to the scope of work specification.
 - b) The BEC verifies the experience and qualifications of contractors, Construction Industry Development Board (CIDB) ratings, and evaluates all the technical aspects of the tender.
 - c) The BEC prepares a tender evaluation report followed by a shortlist of bidders that qualify for consideration by the bid adjudication committee.

The outcomes, findings and recommendations of the BEC are communicated to the BAC and must set out:

- a) a synopsis of the information provided by all tenderers;
- b) the difference between tenderers who have complied with tender requirements and those who have not complied; and
- c) the reasons for the disqualification of various tenderers.

⁵⁴ Preferential Procurement Regulations, published in GN 502 in GG No. 34350 of 8 June 2011.

⁵⁵ Regulations 5 and 6 2011 Regulations.

2.3.4.3 Bid Adjudication Committee

Though the BAC relies on the recommendations made by the BEC in making the decision for award of the tender, it is ultimately the responsibility of the BAC to adjudicate on the matter. A BAC must consider the report and recommendations of the BEC and may, depending on its delegations, either make a final award or recommendation to the accounting officer to make the final award or make another recommendation to the accounting officer on how to proceed with the relevant procurement. Neither a member of the BEC nor its advisor may be a member of the BAC.⁵⁶

2.3.4.4 Exemptions from competitive bidding

The SCM Regulations make provision for the accounting officer to dispense with the official procurement processes and to procure any required goods or services through any convenient process, which may include direct negotiations, in exceptional cases where it is impractical or impossible to follow the official procurement processes.⁵⁷ The accounting officer is also empowered to ratify any minor breaches of the procurement processes which are purely of a technical nature.⁵⁸

This process does not meet all the five constitutional elements as laid down by section 217 of the Constitution. It gives the accounting officer a wide discretion to pick and choose the service provider in a manner that he or she may deem necessary. However, the accounting officer is required to record the reasons for any deviations and report them to the next municipal council meeting and also include them as a note to the annual financial statements.⁵⁹ This to a certain extent ensures transparency on the part of the accounting officer because the municipal council will be able to monitor the abuse of deviations.⁶⁰

⁵⁶ Regulation 29(1).

⁵⁷ Regulation 36(1)(a).

⁵⁸ Regulation 36(1)(b).

⁵⁹ Regulation 36(2).

⁶⁰ Regulation 36(2).

2.4 Enforcement mechanisms

The Promotion of Access to Information Act (PAIA) and Promotion of Administrative Justice Act (PAJA) may be used by unsuccessful bidders to ensure that procurement processes were procedurally fair and transparent.

2.4.1 Transparency

Tenderers in the government procurement process are entitled to procedural fairness and to be furnished with reasons for procurement decisions. In order to enforce these rights, tenderers need to have access to the relevant information held by organs of state. PAIA provides that any person must be given access to a record of a public body if that requester complies with all the procedural requirements of PAIA relating to a request for access to that record.⁶¹ This ensures transparency and accountability which means that tenderers and interested parties are able to scrutinize tender decisions. In *Aquafund (Pty) Ltd v Premier of the Province of the Western Cape*,⁶² Traverso J remarked as follows:

If the applicant is entitled to lawful administrative action, it must, in my view, follow that it will be entitled to all such information as may be reasonably required by it to establish whether or not its right to lawful administrative action has been violated. The applicant will reasonably require this information to make an informed decision on the future conduct of the matter. If it is shown that the tenders were properly considered, the applicant can abandon any proposed application for a review of the decision. If not, the information will enable the applicant to properly formulate the grounds of review.

2.4.2 Procedural fairness

When the bid committees perform their duties in terms of the procurement policy or any empowering legislation, they perform administrative functions. Such functions are to be

⁶¹ Section 11(1)(a) PAIA.

⁶² 1997 (7) BCLR 907 (C) para 10.

effected in terms of PAJA. PAJA was enacted to give effect to the constitutional right to lawful, reasonable and procedurally fair administrative action, as embodied in section 33(1) of the Constitution. Bidders in a tender process are entitled to fair administrative action and have a legitimate expectation that their tenders will be evaluated and adjudicated fairly, properly, justly and without bias.⁶³ As such, the procurement process and all decisions taken in respect thereof, must be lawful, reasonable, procedurally fair, and must comply with the provisions of PAJA. The outcome is also required to be rationally connected to the information which was before the tender authority at the time; it must not be arbitrary.⁶⁴

Failure to comply with the principles of administrative law and fairness in government procurement will render such action liable to review and setting aside by the court. The court may review and set aside an administrative action which has been shown to be procedurally unfair or if such administrative action has been influenced by an error of law or where the administrator has evinced an attitude of bias which has adversely affected the constitutional rights of a party, precisely because the administrator has not been fair, equitable and transparent in the performance of his administrative duties.⁶⁵ A clear example is the decision in *Metro Projects CC & Another v Klerksdorp Local Municipality*.⁶⁶ A municipal official gave one of the tenderers an opportunity to supplement its tender so that its offer might have a better chance of acceptance by the decision-making body. The improved offer was first concealed from and then represented to the mayoral committee as having been the tender offer and it was accepted on that basis. An unsuccessful tenderer brought an application in terms of PAJA for review and setting aside of the award. The Supreme Court of Appeal (SCA) held as follows:

The deception stripped the tender process of an essential element of fairness: the equal evaluation of tenders. Where subterfuge and deceit subvert the essence of a tender process, participation in it is prejudicial to every one of the competing tenderers whether it stood a chance of winning a tender or not.⁶⁷

⁶³ Section 3(1) PAJA.

⁶⁴ Section 6(2)(f) PAJA.

⁶⁵ Section 6(2)(a) PAJA.

⁶⁶ 2004 (1) All SA 504 (SCA).

⁶⁷ Para 14.

2.5 Combatting corrupt procurement

The Corruption Act was enacted to, *inter alia*, provide for the strengthening of measures to prevent and combat corruption and corrupt activities and to further provide for the offence of corruption and offences relating to corrupt activities.⁶⁸ A person is guilty of corruption if he gives or agrees or offers to give to any other person any gratification whether for his benefit or for the benefit of another in order to act personally, or by influencing another to act, in a manner that amounts to:

- (i) Illegal, dishonest, unauthorised, incomplete or biased conduct;
- (ii) the abuse of authority, a breach of trust, or the violation of a legal duty or a set of rules; or
- (iii) any other unauthorised or improper inducement to do or not to do anything.⁶⁹

In the government procurement context, corruption manifests itself in a number of forms, including, *inter alia*, collusion in the submission of tenders, influencing the work of the bid committees, and/or the offering of bribes.⁷⁰ A court may therefore convict a municipal official or a political office bearer, and/or any person or enterprise if it finds that such persons have intentionally acted unlawfully in awarding a bid. In addition to imposing any sentence, court convicting a person or enterprise of corruption may issue an order that the particulars of the convicted person or enterprise be endorsed on the Register that was established by the Minister of Finance in terms of section 29 of the Corruption Act.⁷¹ The object of the Register is to bar the organs of state from trading with any person or business that is listed in the Register.

2.6 Combatting fronting

The fair and equitable procurement process may also be subverted by manipulating the preferential procurement system. The PPPFA was enacted to give effect to section 217(3) of

⁶⁸ Preamble to the Corruption Act.

⁶⁹ Section 3(b) Corruption Act.

⁷⁰ Bolton (2007) 57.

⁷¹ Section 28(3) Corruption Act.

the Constitution by providing a framework for the implementation of the procurement policy contemplated in section 217(2) of the Constitution. The PPPFA creates a points system for the evaluation and adjudication of bids, in terms of which points are awarded on the basis of price and the attainment of specific goals for preference purposes. First, preference may be afforded to persons or categories of persons historically disadvantaged by unfair discrimination on the basis of race, gender or disability (the HDIs), and secondly, for the implementation of the government's Reconstruction and Development Programme (RDP).⁷²

Under the PPPFA, each organ of state must determine its preferential procurement policy and only the Minister of Finance can exempt an organ of state from the provisions of the PPPFA.⁷³ The PPPFA provides that bidders for tenders are to be scored and that once this has been done in terms of the policy, the bidder who scores the highest points ought to be awarded the tender, unless objective criteria, other than that contemplated in the assignment of scores, justify the award of the tender to another bidder.⁷⁴

The importance of preferential procurement system was expressed by Mogoeng J in *Hydro-Tech Systems (Pty) Ltd v City of Cape Town and Others*⁷⁵ as follows:

One of the most vicious and degrading effects of racial discrimination in South Africa was the economic exclusion and exploitation of black people. Whether the origins of racism are to be found in the eighteenth and nineteenth century frontier or in the subsequent development of industrial capitalism, the fact remains that our history excluded black people from access to productive economic assets. After 1948, this exclusion from economic power was accentuated and institutionalised on explicitly racially discriminatory grounds, further relegating most black people to abject poverty. Driven by the imperative to redress the imbalances of the past, the people of South Africa, through their democratic government, developed, among others,

⁷² Section 2(1) PPPFA.

⁷³ Section 2(1) and section 3 PPPFA.

⁷⁴ Section 2(1)(e) PPPFA.

⁷⁵ 2010 (1) SA 483 (CC).

the broad-based black economic empowerment programme and the preferential procurement policy.⁷⁶

These comments by the learned Judge clearly show the importance of the use of public procurement as a policy tool or instrument to redress the imbalances of the past. Given government's priority and goal to empower previously disadvantaged individuals in South Africa, it is important that every procurement process undertaken provides preferential treatment criteria that ensure the achievement of this goal. Where a preferential procurement system is not set, the process fails to comply with the constitutional principles of fairness and equity. Similarly, the overall objective of government with regard to the empowerment of previously disadvantaged individuals is not achieved. The system helps the procuring authority to develop a scoring criterion by setting goals that the successful tenderer should achieve. This criterion is applied to evaluate tenders. However, fronting defeats those policy objectives. Fronting occurs when black people are signed as nominal shareholders in essentially white companies.⁷⁷ There is no definition of fronting in the BBBEE Act or in any legislation but the Department of Trade and Industry has issued some guidelines and defined fronting as follows:

“fronting means a deliberate circumvention of the BBBEE Act and the Codes. It commonly involves reliance on data or claims of compliance based on misrepresentation of facts, whether made by the party claiming compliance or by any other person.”⁷⁸

The Preferential Procurement Regulations of 2001⁷⁹ were replaced with effect from 7 December 2011 by the 2011 Regulations.⁸⁰ The purpose of the 2011 Regulations is to ensure that government's preferential procurement procedures are aligned with the aims of the Broad-Based Black Economic Empowerment Act⁸¹ (the BBBEE Act) and associated Codes of Good Practices. This means that when organs of state are procuring goods and services, they must do so in a manner that promotes the objectives of the BBBEE Act.

The notable changes under the 2011 regulations include the following:

⁷⁶ Para 1.

⁷⁷ Bolton (2007) 57.

⁷⁸ <http://bee.thedti.gov.za/23.htm>

⁷⁹ Published in GN 725 in GG 22549 of 10 August 2001.

⁸⁰ Preferential Procurement Regulations, published in GN 502 in GG 34350 of 8 June 2011.

⁸¹ Broad-Based Black Economic Empowerment Act 53 of 2003.

- (i) Replacing the awarding of bids on the basis of HDI status and the promotion of RDP goals with the BBBEE rating of the bidder.
- (ii) An organ of state is required, upon detecting that the BBBEE status level of contribution has been claimed or obtained on a fraudulent basis, to forward the matter for criminal prosecution.⁸²

Regulation 13 of the 2011 Regulations imposes an obligation upon organs of state to act against any person who has obtained preference points in terms of the PPPFA on a fraudulent basis or where any specified goals are not attained in the performance of a contract. The remedies available to an organ of state against a person awarded a contract which contravenes regulation 13 include the cancellation of the contract.

Fronting has been a wide spread problem and the cases brought before courts illustrate the problem. In *Erasmus Tyres v City of Cape Town*,⁸³ Erasmus Tyres brought a review application citing fronting as one of the grounds for its application. The Court held that the black directors and shareholders of the successful tenderer did not take part in the management and control of Themba Tyres and that Themba Tyres should not have been given a 100% HDI rating. Another example is the recent case of *Hidro-Tech Systems (Pty) Ltd v City of Cape Town and Others*,⁸⁴ where Hidro-Tech lodged a complaint with the City of Cape Town (“the City”) that the HDI’s shareholding for the successful tenderer (Viking Pony Africa Pumps) was not legitimate and that their black shareholders were mere tokens used to secure business deals. The Court directed the City to investigate the allegations made by Hidro-Tech Systems against Viking Pony Africa Pumps, including whether or not the historically disadvantaged individuals who held the majority of the shares in Viking Pony Africa Pumps (Pty) Ltd, were at the time referred to in the complaint, actively involved in the management of the company and exercised control over the company, commensurate with the degree of their ownership.

⁸² Regulation 13(2)(e) 2011 regulations.

⁸³ Unreported (Western Cape High Court, Cape Town) Case No: 6036/08, 17 September 2008.

⁸⁴ 2010 (1) SA 483 (CC).

2.7 Self-enforcement

The Constitution and legislation governing local government encourages self-enforcement. This is to ensure that no inroads are made without good reason into the autonomy of this sphere of government. When there is evidence of corruption or irregularities, municipalities are expected to take action themselves. The municipal manager and municipal council are empowered by the MFMA to take remedial action against corrupt officials. Section 32(6) of the MFMA requires the municipal manager to report to the SAPS all cases of alleged irregular expenditure that constitute a criminal offence, and must also report theft and fraud that occurred in the municipality. The Municipal Council must report to SAPS if the charge is against the municipal manager, or when the municipal manager fails to report to SAPS as required by section 32(6).⁸⁵ This provision goes to the core of section 41 of the Constitution. It promotes the principles of institutional autonomy in co-operative governance, as laid down in chapter 3 of the Constitution.

2.8 Conclusion

The examination undertaken above shows, that there is an elaborate legal framework which municipalities are required to comply with in order to minimise the risk of fraud and corruption when procuring goods and services. The problem is that many municipalities fail to comply with the rules. The question is then whether the external institutions can effectively exercise supervisory powers in order to curb corrupt procurement practices in municipalities.

⁸⁵ Section 32(7) MFMA.

CHAPTER 3 - THE ROLE OF THE NATIONAL TREASURY IN SUPERVISING PROCUREMENT BY MUNICIPALITIES

3.1 Introduction

The National Treasury is established in terms of section 216(1) of the Constitution in order to prescribe measures to ensure transparency and expenditure control in each sphere of government. This includes setting norms and issuing of procurement guidelines for all organs of state. The National Treasury therefore plays a prominent role in the regulation of municipal finances.⁸⁶

The legal framework on procurement is supplemented by guidelines issued by the National Treasury. The General Procurement Guidelines⁸⁷ were issued by the National Treasury not only as a prescription of standards of behaviour, ethics and accountability which it requires of the public service, but also as a statement of the government's commitment to a procurement system which enables the emergence of sustainable small, medium and micro businesses which will add to the commonwealth of South Africa and the achievement of enhanced economic and social well-being of all South Africans. These guidelines define certain core principles into which government procurement rests upon, namely, the Five Pillars of Procurement. If any of them is broken the procurement system falls down. The Five Pillars are:

- (i) Value for Money;
- (ii) Open and Effective Competition;
- (iii) Ethics and Fair Dealing;
- (iv) Accountability and Reporting; and
- (v) Equity.

In this chapter, the focus will be on the role of the National Treasury with respect to procurement by municipalities. It will be argued that while the National Treasury provides

⁸⁶ Steytler and De Visser, *Local Government Law of South Africa* (2007) 11-17.

⁸⁷ <http://www.treasury.gov.za/legislation/pfma/supplychain/general%20procurement%20guidelines.pdf>.

an extensive regulatory framework for procurement, it has limited powers to act against municipalities who fail to adhere to procurement rules.

3.2 Municipal Finance Management Act and Regulations

The principal instrument to regulate municipal finances is the MFMA which include expenditure and procurement. Chapter 2 of the MFMA deals with supervision of local government by the National Treasury. It stipulates the general functions of the National Treasury towards municipalities, which include the following:

- (a) Promoting the object of the MFMA within the framework of co-operative government set out in Chapter 3 of the Constitution;⁸⁸
- (b) monitoring and assessing compliance by municipalities with the MFMA;⁸⁹
- (c) taking appropriate steps if a municipality commits a breach of the MFMA, including the stopping of funds to a municipality in terms of section 216(2) of the Constitution if the municipality commits a serious or persistent material breach of any measures referred to in that section;⁹⁰ and
- (d) taking any other appropriate steps necessary to perform its functions effectively.⁹¹

Although the MFMA suggests a broad enabling power to intervene, such a power must nevertheless be performed within the confines of the constitutional distribution of competencies between the three spheres of government. This includes the duty not to encroach on the geographical, functional or institutional integrity of each other.⁹²

As detailed in Chapter 2, the National Treasury provides a detailed framework for municipal procurement. First, section 111 of the MFMA requires each municipality to have and implement a supply chain management policy (SCM policy). Such policy must provide for measures for combating fraud, corruption, favouritism and unfair and irregular practices in

⁸⁸ Section 5(1)(b) MFMA.

⁸⁹ Section 5(2)(c)(i) MFMA.

⁹⁰ Section 5(2)(e) MFMA.

⁹¹ Section 5(2)(f) MFMA.

⁹² Section 41(1)(g) Constitution.

municipal supply chain management.⁹³ It must provide for an effective system of acquisition management in order to ensure that any National Treasury guidelines on acquisition management are properly taken into account.⁹⁴ The SCM policy of a municipality is required to be fair, equitable, transparent, competitive and cost-effective. Each municipality's SCM policy must comply with the detailed SCM Regulations. The SCM Regulations were enacted in terms of section 168 of the MFMA in order to give effect to section 111 of the MFMA. These regulations provide detailed rules on what should be contained in the SCM policy. This ensures uniformity in the overall procurement processes across all municipalities. In order to continuously improve the supply chain management, the National Treasury encourages municipalities to develop their own monitoring mechanisms that would enhance their own supply chain management.⁹⁵ In terms of Regulation 38(1), the accounting officer of a municipality is empowered:

- (a) To report criminal conduct to SAPS;
- (b) To reject a recommendation for the award of a contract; and
- (c) To cancel a contract awarded.

The accounting officer is required to inform the National Treasury and the provincial treasury in writing when he or she acts in terms of Regulation 38(1).⁹⁶ What happens when the accounting officer fails or neglects to act in terms of Regulation 38? In terms of section 171(1) of the MFMA, the accounting officer commits an act of financial mismanagement if he deliberately or negligently –

- (a) contravenes the provisions of the MFMA;⁹⁷
- (b) fails to comply with a duty imposed by a provision of the MFMA on him as the accounting officer of the municipality;⁹⁸ or
- (c) makes or permits or instructs another official of a municipality to make an unauthorised, irregular or fruitless and wasteful expenditure.⁹⁹

⁹³ Section 112(1)(m)(i) MFMA.

⁹⁴ Regulation 11(1)(e) SCM Regulations.

⁹⁵ The National Treasury - *Supply Chain Management: A guide for accounting officers of municipalities and municipal entities* (October 2005) 98.

⁹⁶ Regulation 38(2) SCM Regulations.

⁹⁷ Section 171(1)(a) MFMA.

⁹⁸ Section 171(1)(b) MFMA.

⁹⁹ Section 171(1)(c) MFMA.

The accounting officer is also guilty of an offence if he or she fails to take reasonable steps to implement the municipality's SCM policy or fails to take reasonable steps to prevent unauthorized, irregular or fruitless and wasteful expenditure.¹⁰⁰

3.3 Preferential Procurement Policy Framework

The National Treasury has also provided a regulatory framework for preferential procurement. In February 2004 the National Treasury issued a document called Supply Chain Management Guide for Accounting Officers.¹⁰¹ In that document, the National Treasury acknowledged that the narrowly-based black ownership structure in the South African economy limited the scope for an immediate meaningful acceleration of direct participation by HDIs in government contracts. According to the National Treasury, this gives rise to a great number of artificially created partnership and joint venture arrangements (fronting practices), where the premiums under the preference system were earned without any real contribution to achieving government's preferential policy objectives.¹⁰² The National Treasury stated further that, in order to overcome the flaws associated with the PPPFA and its Regulations, it is necessary to adopt a more integrated approach as suggested in the BBBEE strategy, where a balanced scorecard methodology is proposed for measuring performance.¹⁰³ The 2011 regulations have now given effect to the Supply Chain Management Guide for Accounting Officers.

In summary, the National Treasury plays a very important regulatory role in ensuring that the government's economic policies are followed by municipalities by issuing guidelines and making regulations. The question is then, how can the National Treasury ensure that this framework is applied and its strategies are employed and followed? It is submitted that same can be ensured or improved by increasing the competence of the personnel tasked with implementing supply chain management, monitoring, support, and enforcement measures.

¹⁰⁰ Section 173(1) MFMA.

¹⁰¹ <http://finance.mpu.gov.za/SCMGuidetoAO.pdf>

¹⁰² *SCM guide for accounting officers*, 23.

¹⁰³ *SCM guide for accounting officers*, 23.

3.4 Minimum competency levels for supply chain management officials

A comprehensive procurement system is as good as people implementing it. It is thus important that the skilled and experienced personnel implement the SCM policy. The National Treasury realised that prescribing rules is not enough, and, accordingly, in 2007 it issued regulations in order to ensure that officials involved in the supply chain management of a municipality have certain minimum qualifications and the relevant experience. The Municipal Regulations on Minimum Competency Levels¹⁰⁴ (Competency Regulations) prescribe minimum qualifications for all senior municipal officials and those officials who are involved in the supply chain management of the municipality.

These regulations provide a framework for ensuring that by 1 January 2013 all these officials will have the required skills commensurate with their financial responsibilities.¹⁰⁵ With effect from 1 January 2008, all officials who were holding the key positions in the implementation of the supply chain management in municipalities at the time of the commencement of the Competency Regulations were given five years to obtain the required qualifications, failing which they will not be eligible to hold such position after 1 January 2013.¹⁰⁶

The municipal manager and any official of a municipality involved in the implementation of the SCM policy of the municipality must generally have the skills, experience and capacity to assume and fulfil the responsibilities and exercise the functions and powers in respect of the supply chain management.¹⁰⁷ The head of a supply chain management unit of a municipality must comply with the minimum competency levels required for higher education qualifications and four years' work related experience.¹⁰⁸ He or she must have at least NQF Level 5 or a National Diploma: Public Finance Management and Administration. The same requirements apply to supply chain management managers.¹⁰⁹

¹⁰⁴ Municipal Regulations on Minimum Competency Levels, published in GN 493 in GG 29967 of 15 June 2007.

¹⁰⁵ Steytler and De Visser, *Local Government Law of South Africa* (2007) 11-15.

¹⁰⁶ Regulation 15 Competency Regulations.

¹⁰⁷ Regulation 10 Competency Regulations.

¹⁰⁸ Regulation 11 Competency Regulations.

¹⁰⁹ Regulation 12 Competency Regulations.

With effect from 1 January 2013, no municipality is allowed to employ a person as a supply chain management official if that person does not meet the competency levels prescribed for that position in terms of the Competency Regulations.¹¹⁰

It is submitted that these regulations, with effect from 1 January 2013, will play a very important role in minimising irregularities in municipal procurement. The field of procurement is a complex field which requires specific knowledge and experience, and procurement officers cannot follow formal rules or interpret them in an intelligent manner if they do not receive adequate training on the application of those rules. The question remains whether the National Treasury will have the powers and commitment to enforce these Competency Regulations. Already, the National Treasury has announced that municipalities may ask an extension of the deadline for 18 months from 1 January 2013 in exceptional circumstances.¹¹¹

3.5 Monitoring

In order to give effect to its supervisory role, the National Treasury may monitor and assess compliance with the MFMA and the regulatory schemes it has established. It monitors through reports that are routinely obtained or when requested by it.¹¹² Section 74(1) of MFMA requires the municipal manager to submit to the National Treasury, the provincial treasury, the department for local government in the province and the Auditor-General such information, returns, documents, explanations and motivations as may be prescribed or as may be required.

A specific area of monitoring is compliance with the Competency Regulations. Regulation 14(2) requires a municipality to submit specific information about senior officials and supply chain management officials to the National Treasury by 30 January and 30 July of each year until 30 July 2015. Such report must contain information on, *inter alia*, the following:

- (a) The total number of supply chain management officials employed;¹¹³

¹¹⁰ Regulation 18(1) Competency Regulations.

¹¹¹ National Treasury: MFMA Circular No. 60 (20 April 2012) 4.

¹¹² Section 74(1) MFMA.

¹¹³ Regulation 14(4)(c) Competency Regulations.

- (b) The total number of supply chain management officials whose competency assessments have been completed;¹¹⁴ and
- (c) The total number of supply chain management officials that meet the prescribed competency levels.¹¹⁵

With this report the National Treasury would be able to monitor compliance with the regulations and would be able to track municipalities that do not have qualified supply chain management officials. However, these regulations do not make provisions for specific sanctions to be imposed in the event that municipalities fail to comply.

3.6 Support by National Treasury

Another role of the National Treasury is to support municipalities and to ensure that they comply with the law and court judgments. For example, after the judgement in *Sizabonke* case, the National Treasury issued an Instruction Note,¹¹⁶ advising all accounting officers that the evaluation of the bids must be conducted in the following two stages. First, the assessment of functionality must be done as a pre-qualification criterion, and that a bid must be disqualified if it fails to meet the minimum threshold for functionality as per the bid invitation. Thereafter, only the qualifying bids are evaluated in terms of the 80/20 or 90/10 preference points systems, where the 80 or 90 points must be used for price only and the 20 or 10 points are used for HDI ownership and / or for achieving the prescribed RDP goals. It is important to note that such pre-qualification assessment of functionality was subsequently incorporated in the 2011 Regulations.

The National Treasury further provides support by training officials who are involved in day-to-day operation of the supply chain management. In October 2004, the National Treasury issued a Practice Note¹¹⁷ relating to training of supply chain management officials. This Practice Note provides that in order to develop officials for a career in supply chain management, the following types of training are conducted through the National Treasury:

¹¹⁴ Regulation 14(4)(d) Competency Regulations.

¹¹⁵ Regulation 14(4)(e) Competency Regulations.

¹¹⁶ *National Treasury Instruction Note on the amended guidelines in respect of bids that include functionality as a criterion for evaluation* (issued September 2010).

¹¹⁷ *Guide for minimum training and deployment of supply chain management officials* (Practice Note No. SCM 5 of 2004).

- (a) Introduction to supply chain management;
- (b) Intermediate training with the focus on intensive training in all the elements of supply chain management; and
- (c) Advanced training that includes specialist skills within each element of supply chain management, such as strategic sourcing.

It is not clear whether municipalities are taking up the offer and actually send their supply chain management officials for such training and whether such training is compulsory. The Practice Note only provides that the accounting officers are required to ensure that supply chain management officials are trained and deployed in accordance with the requirements of this guide, and that the names of all officials who have successfully completed the training or the course must be submitted to the National Treasury.

3.7 Enforcement measures by National Treasury

Municipalities have their own self-enforcement remedies and the National Treasury is not given many powers by the MFMA or the SCM Regulations to act against an accounting officer when he or she fails to act against corrupt officials.

There seem to be two clear measures that the National Treasury can take to enforce procurement rules. The first is the stopping transfer of funds to a municipality and the second is the barring of corrupt service providers. The MFMA also mentions 'any appropriate steps'. The question is what is the ambit of such steps?

3.7.1 Stopping transfer of funds to municipalities

The MFMA confers general enforcement mechanisms on the National Treasury by providing that it may take appropriate steps, including stopping the transfer of funds, if a municipality commits a breach of the MFMA or if it commits a serious or persistent breach of section 216(1) of the Constitution.¹¹⁸ The question is whether failure to comply with the procurement rules amounts to a breach of the MFMA. It is submitted that it does and

¹¹⁸ Section 5(2)(e) MFMA.

therefore, the National Treasury may in terms of section 5(2)(e) of the MFMA stop the transfer of funds.

However, there is a procedural requirement which the National Treasury must adhere to before it can stop the transfer of funds to a municipality. It must give the municipality an opportunity to submit written representations with regard to the proposed stopping of the funds and must inform the MEC for Local Government in the province.¹¹⁹

To date there appears to have been no instance of the National Treasury withholding transfers to any municipality despite numerous incidences of persistent and serious breaches of accountancy requirements as evidenced by some municipalities who get disclaimers from the Auditor-General year after year. Question is why is this so? It could be argued that it is not a readily usable practical measure because stopping transfers merely put a municipality and its residents that are already in distress at a further disadvantage.

3.7.2 Barring corrupt service providers

Another enforcement mechanism available to the National Treasury is the barring of corrupt service providers from conducting business with any municipality.

The Minister of Finance is required in terms of section 29 of the Corruption Act¹²⁰ to establish a Register for Tender Defaulters within the office of the National Treasury. The object of the Register is to bar the organs of state from trading with any person or business that is listed in the Register. Section 29 of the Corruption Act empowers a court convicting a person of corruption, in addition to imposing any sentence, to issue an order that the particulars of the convicted person be endorsed in the Register.

Where the person has been endorsed in the Register, in addition to any other legal action, the National Treasury may impose the following restrictions:

¹¹⁹ Section 38(2) MFMA

¹²⁰ Prevention and Combating of Corrupt Activities Act 12 of 2004.

- (i) terminate any agreement with the person;
- (ii) determine the period (which period may not be less than five years or more than 10 years) for which the particulars of the convicted person must remain in the Register;
or
- (iii) during the period of endorsement, the purchasing authority or any Government Department must ignore any offer tendered by a person so endorsed or must disqualify such person from making any offer or obtaining any agreement relating to the procurement of a specific supply or service.¹²¹

The Corruption Act requires a person or business convicted of crimes under the Corruption Act and who has been endorsed in terms thereof, to disclose such conviction and endorsement in any future applications for contracts or tenders. If they fail to do so, they will be guilty of another crime and can be fined or imprisoned.¹²² This means that there is also an onus on businesses or people to disclose their convictions under the Corruption Act.

Section 33 of the Corruption Act also empowers the Minister of Finance, in consultation with the Minister of Justice and Constitutional Development, to make regulations relating to:

- (a) the maintenance and management of the Register, the particulars to be entered in such Register, the manner in which such particulars must be recorded and the period for which the information in the Register must be retained;
- (b) access to information contained in the Register;
- (c) the safe-keeping and disposal of records; and
- (d) any other matter which the Minister may consider necessary to prescribe in order to achieve the objectives of section 28.

Such regulations were published in 2005.¹²³ The Regulations appear to have failed as there were only two names on the Register which were endorsed on 15 December 2010.¹²⁴ Since

¹²¹ Section 28(1)(d) Corruption Act.

¹²² Section 28(6)(a) Corruption Act.

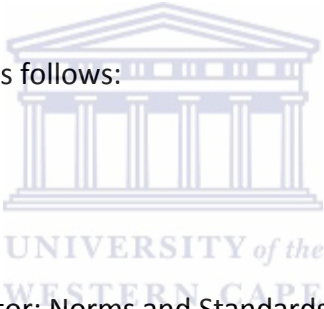
¹²³ Regulations regarding the Register for Tender Defaulters, published in GN 194 in GG 27365 of 11 March 2005.

15 December 2010, no further entries were endorsed in the Register. This cannot be the true reflection of the tender fraud conviction rate.

In 2009 and in response to a parliamentary question posed by the Democratic Alliance (DA),¹²⁵ the National Treasury admitted that the Register for Tender Defaulters did not have any names listed at all. Dr D. T. George of the DA asked the Minister of Finance, *inter alia*, the following questions:

- “(1) Whether the Register for Tender Defaulters, established under the Prevention and Combating of Corrupt Activities Act, Act 12 of 2004, is maintained by the National Treasury; if not, (a) why not and (b) who maintains the register;
- (2) what is the number of entries that have appeared in the register since its inception.”

In response the Minister replied as follows:

- 
- “(1) Yes
(a) Falls away
(b) The Chief Director: Norms and Standards
- (2) None

Reason: Section 28(1)(a) of the Prevention and Combating of Corrupt Activities Act, 2004, prescribes that when a court convicts a person for offences relating to tenders or contracts, in addition to imposing any sentence contemplated in section 26 of the Act, the court may also issue an order that the name of the convicted person, the conviction and sentence and any other order of the court consequent thereupon be endorsed on the Register. Section 28(1)(b) prescribes that if the person so convicted is an enterprise, the court may also order that the particulars of that enterprise,

¹²⁴ National Treasury website

(www.treasury.gov.za/publications/other/Register%20for%20Tender%20Defaulters.pdf).

¹²⁵ Parliamentary Monitoring Group: *Question and Replies No 1501 to 1525*, Question Number 09/ 1501, Question No. 1522, date of publication: 9 October 2009.

the particulars of any partner, manager, director or other person, who wholly or partly exercises or may exercise control over that enterprise and who was involved in the offence concerned or who knows or ought reasonably to have known or suspected that the enterprise committed the offence concerned, and the conviction, sentence and any other order of the court consequent thereupon, be endorsed on the register. To date no such order was issued by any court of law and therefore no name appears on this Register.”

From the responses of the Minister, it is clear that the implementation of section 28 has its own challenges. The Minister blames it on the courts. The fact of the matter is that there is an institution that is failing (either the courts when imposing sentences or the office of the National Treasury that does not update its data) or that there is no proper co-operation between the courts and the National Treasury. In order to eliminate the confusion and to ensure the co-operation between the courts and the National Treasury, section 33 of the Corruption Act creates a communication platform between the Minister of Justice and the National Treasury. It is submitted that the purpose of the section 33 is to enable the two Ministers to come up with a plan on how to get the information from the courts to the National Treasury and both ministries have failed to accomplish that.

It may also help to add in the regulations a clause stating that the Registrar of the High Court or the Clerk of the Magistrate’s Court convicting any person in terms of the Corruption Act must within a certain number of days submit to the National Treasury particulars of the person who is so convicted and endorsed.

Another way of ensuring that the National Treasury is aware of the corrupt service providers is to require municipalities to include in their annual report a list of all court cases brought against service providers or their directors. This will ensure that the National Treasury can monitor such cases and subsequently endorse them in the Register if a conviction is secured.

It is submitted that because the application of section 29 of the Corruption Act by the courts is discretionary, courts do not always appreciate the seriousness or the impact of corruption

in our society; hence they fail to issue orders of endorsement. In order to avoid this from happening, section 29 must be amended to make it compulsory for a court convicting a person of corruption to issue an order that the particulars of such person be endorsed in the Register. This will ensure that particulars of all the convicted corrupt tenderers are endorsed in the Register by eliminating the discretion of the courts.

While the Corruption Act may exclude corrupt service providers, its provisions are not direct enforcement mechanisms against corrupt municipal officials. However, these provisions can have a positive impact in discouraging would-be offenders, and in prohibiting municipalities from conducting business with those offenders. This can significantly reduce tender fraud and corruption in municipalities.

3.7.3 Other appropriate steps

As stated earlier, the National Treasury is also empowered to take any other appropriate steps necessary in order to perform its functions effectively.¹²⁶ The question is what can be deemed appropriate? Can the National Treasury bring a legal action against a municipality that fails to comply with the MFMA, in particular, the provisions relating to procurement? It is submitted that the National Treasury is able to do so but subject to the principles of co-operative government as laid out in chapter 3 of the Constitution.

3.8 Co-operation between the National Treasury and the Auditor-General

The National Treasury and the Auditor-General cannot function independently of one another. When the National Treasury, on one hand, issues guidelines and practice notes, it ensures that it forwards copies of such guidelines or practice notes to the Auditor-General in order to ensure that its contents are included in the audit scope. When performing an audit on the other hand, the Auditor-General checks compliance with the National Treasury regulations and guidelines, and non-compliance may lead to a municipality receiving a qualified audit. The question is then, what can the National Treasury do when the Auditor-

¹²⁶ Section 5(2)(e) MFMA.

General's reports show that certain municipalities repeatedly receives disclaimers or qualified audits.

3.9 Conclusion

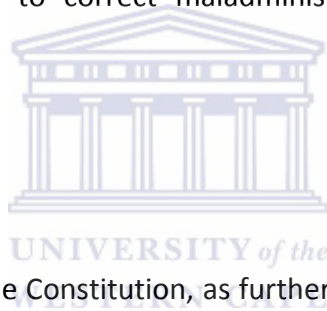
It is clear from the above discussion that the main purpose of the National Treasury is to establish the framework of procurement and relies on self-enforcement by municipalities themselves. Its role is to guide rather than intervene. It creates regulatory measures which would ensure transparency, accountability and compliance with legislation. It demands skilled and experienced officials.

The National Treasury has also access to routine reports or can request information from municipalities. It can also support municipalities by issuing guidelines and making regulations that ensure transparency thereby minimising the risk of corruption. However, its powers are limited and it cannot act decisively on its own against corrupt municipal officials. Its intervention powers of stopping transfers have never been used and the register for corrupt tenderers has barely been used. The National Treasury can also obtain a court order directing a non-complying municipality to comply with procurement rules but such will require a political will and there is no evidence that this option has been utilised in the past. Otherwise, the National Treasury is ultimately reliant on the provincial government to effect enforcement.

CHAPTER 4 - MONITORING AND INTERVENTION BY PROVINCES

4.1 Introduction

The primary bodies to monitor and intervene in municipalities are the provinces. However, they have limited powers regarding maladministration in municipal procurement. This chapter will show that although the Constitution and Systems Act provide for remedial action to be taken against municipalities by the relevant provincial executives, these are limited. Moreover, there is no statutory provision regarding what direct remedial action could be taken by a province in cases where corruption surfaces in municipalities, other than reporting to the Minister of Local Government, the Minister of Finance and the NCOP. Although the Constitution and the Systems Act require monitoring, they do not provide provinces with ready remedies to correct maladministration in the municipal tender process.



4.2 Monitoring

Monitoring is done in terms of the Constitution, as further elaborated in the MFMA and the Systems Act.

4.2.1 Constitution – the duty to monitor

In terms of section 155(6) of the Constitution, a provincial government is required, by legislative or other measures, to provide for the monitoring and support of local government in the province and to promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs. The Constitutional Court in the *First Certification*¹²⁷ judgement provided clarity on the meaning of monitoring. It held that:

¹²⁷ *In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC).

‘The word monitor is the least textually delineated of the terms used in chapter 7 to describe the ambit of provincial powers in relation to local government. The monitoring power is more properly described as the antecedent or underlying power from which the provincial power to support, promote and supervise local government emerges. Textually, the word monitor either appears alongside support or is made subject to provisions in which the support, promotional and supervisory roles are adumbrated. In its various textual forms monitor corresponds to observe, keep under review and the like. In this sense it does not represent a substantial power in itself, certainly not a power to control local government affairs, but has reference to other, broader powers of supervision and control. It is unlikely therefore, that provincial governments could seek to underpin a legislative intervention to promote the performance and management capacity of local government or recast the manner in which local government matters are administered by relying on a broad monitoring power’.¹²⁸

Monitoring is necessary not only to ensure that legislative frameworks are complied with, but also to indicate when support is required to enable the supervised sphere of government to exercise its autonomy fully.¹²⁹

4.2.2 Municipal Finance Management Act

Monitoring occurs through routine reports. In terms of the MFMA, the municipality is required to prepare an annual report for each financial year.¹³⁰ The municipal council must consider such report and must adopt an oversight report containing the council’s comments on the said annual report.¹³¹ The annual report contains, *inter alia*, the following information:

- Record of the activities of the municipality;¹³²
- report on performance against the budget of the municipality;¹³³

¹²⁸ At 1370.

¹²⁹ Steytler and De Visser, *Local Government Law of South Africa* (2007) at 15-5.

¹³⁰ Section 121(1) MFMA.

¹³¹ Section 129(1) MFMA.

¹³² Section 121(2)(a) MFMA.

- record of the decisions made throughout the financial year by the municipality;¹³⁴
- annual financial statements;¹³⁵
- Auditor-General's audit report;¹³⁶
- particulars of any corrective action taken or to be taken in response to the audit reports;¹³⁷
- any explanations that may be necessary to clarify issues in connection with the financial statements;¹³⁸ and
- recommendation of the municipality's audit committee.¹³⁹

The annual report generally provides a record of the activities of the municipality and its purpose is also to promote accountability to the local community for the decisions made by the municipality throughout the year.¹⁴⁰

The annual report also contains the Auditor-General's audit report. An audit report contains very important information with regard to the financial affairs of the municipality. It also reflects an opinion on whether the annual financial statements of the municipality fairly represent, in all material respects, its financial position for a particular period in accordance with the applicable financial framework and legislation. The audit report may reveal information of irregular procurement as explained in chapter 5 below.

Upon receiving the annual report, the provincial government gets information on the internal affairs of the municipality. It is therefore submitted that the annual report provides some information that may assist the provincial government when performing its monitoring functions with regard to procurement.

¹³³ Section 121(2)(b) MFMA.

¹³⁴ Section 121(2)(c) MFMA.

¹³⁵ Section 121(3)(a) MFMA.

¹³⁶ Section 121(3)(b) MFMA.

¹³⁷ Section 121(3)(g) MFMA.

¹³⁸ Section 121(3)(h) MFMA.

¹³⁹ Section 121(3)(j) MFMA.

¹⁴⁰ Section 121(2) MFMA.

4.2.3 Systems Act

The Systems Act contains provisions relating to provincial monitoring of municipalities also in relation to procurement. An MEC for Local Government is required to establish mechanisms, processes and procedures to monitor municipalities in the province in managing their own affairs, exercising their powers and performing their functions.¹⁴¹ The MEC is also empowered to request any information as he or she may reasonably require at regular intervals or within a specified period.¹⁴² If the MEC considers it necessary, he or she may also designate a person or persons to investigate, if he or she has reason to believe that a municipality cannot or does not fulfil a statutory obligation binding on that municipality or that maladministration, fraud, corruption or any other serious malpractice has occurred or is occurring.¹⁴³

Two requirements must, in terms of section 106(1), be met for the appointment of an investigation into matters listed in that section. First, the conduct which the MEC wishes to have investigated must be “maladministration, fraud, corruption or any other serious malpractice”. How should the latter term be interpreted? The High Court in *Democratic Alliance WC v Minister of Local Government, WC*¹⁴⁴ held that:

The wrongdoing of serious malpractice at section 106 must also be interpreted in relation to the type of the words which precede it in the section, namely maladministration, fraud and corruption, wrongdoings to which typically are ascribed an element of dishonesty, impropriety and perhaps even the breach of a fiduciary duty. The words are suggestive also of some form of misrepresentation giving rise to prejudice. In this context, the phrase other serious malpractices in a municipality at section 106(1), must be intended to refer to wrongdoings of such ilk, the existence of which necessitates the intervention of an MEC, thus wrongdoings of some severity. That an MEC must, under section 106(3), submit a written statement to the National Council of Provinces motivating any action taken under section

¹⁴¹ Section 105 (1)(a) Systems Act.

¹⁴² Section 105(2) Systems Act.

¹⁴³ Section 106(1)(b) Systems Act.

¹⁴⁴ [2006] 1 All SA 384 (C).

106(1), supports the view that an MEC's intervention is intended for matters of sufficient and severe gravity of the type referred to above. Serious malpractices as contemplated at section 106(1) are therefore wrongdoings in the performance of assigned functions in a municipality of the nature described above, in the genre of acts of dishonesty which also characterise the wrongs of maladministration, fraud and corruption.¹⁴⁵

The judgment makes it clear that the MEC may not lightly commence an investigation. In order for the MEC to investigate, the substance of the complaint must be serious and must only relate to maladministration, fraud, corruption or any other serious malpractice.

Secondly, the MEC must have *reason to believe* that such conduct has occurred or is occurring in the municipality. Mere suspicion is not enough. The question is what constitutes a reason to believe. In the same case, the Court held as follows:

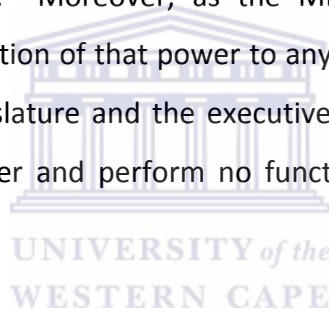
In order for the provisions of section 106(1)(b) to have been properly invoked, the MEC must have had reason to believe that a serious malpractice had occurred or was occurring in the municipality. It is accepted that the test as to whether there is 'reason to believe' is objectively determined and must be constituted by facts giving rise to such belief. The belief in itself must be rational or reasonable and whilst it has been recognized that the phrase 'reason to believe' places a much lighter burden of proof on an applicant than the phrase that the 'court is satisfied', a blind belief, or a belief based on such information or hearsay evidence as a reasonable man ought or could not give credence to, does not suffice.¹⁴⁶

It is clear that a reason to believe must be informed by concrete information which may give rise to such belief. An unsubstantiated claim of a serious malpractice cannot lawfully be investigated under section 106(1).

¹⁴⁵ At 393.

¹⁴⁶ At 391.

If the two requirements are met, then section 106 prescribes monitoring measures. Section 106(2) empowers the MEC to appoint a commission of enquiry in terms of the Commissions Act.¹⁴⁷ If there is provincial legislation, the commission of enquiry must be appointed in terms of such provincial legislation. Kwazulu-Natal, for example, has the KZN Commissions Act,¹⁴⁸ section 2(1) whereof empowers the Premier to appoint commissions of enquiry. In the Western Cape, the Constitution of the Western Cape empowers, in terms of section 37(2)(e), the Premier to appoint commissions of enquiry. Both the KZN Commissions Act as well as the Western Cape Constitution empowers only the Premier to set up commissions of enquiry, and not the MEC. This was confirmed by the Supreme Court of Appeal in *Minister of Local Government, Housing & Traditional Affairs (KwaZulu-Natal) v Umlambo Trading 29 CC*¹⁴⁹ which found that the MEC had no power to appoint a commission; this power vested in the Premier in terms of the applicable legislation. The MEC's appointment of a commission was thus unlawful. Moreover, as the MEC also had no power to issue subpoenas, his purported delegation of that power to anyone was likewise unlawful.¹⁵⁰ It is clear that both a provincial legislature and the executive are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.



Any investigation into a municipality must be done in terms of section 106. The provincial executive may not escape the requirements of section 106 by relying on the Premier's general constitutional power to appoint a commission of enquiry. The High Court in *City of Cape Town v Premier of the Western Cape and Others*¹⁵¹ held that if the Premier was entitled to appoint a commission in terms of the Western Cape Provincial Commissions Act with the automatic conferral of coercive powers to investigate the affairs of a municipality without regard to the provisions of section 106(1), it would render these provisions superfluous. The object of section 106(1) is to ensure that before investigators are appointed to intrude into the affairs of a municipality, the requirements of section 106(1) must be complied with. What would be the point in establishing such stringent

¹⁴⁷ Commissions Act 8 of 1947.

¹⁴⁸ KwaZulu-Natal Commissions Act 3 of 1999.

¹⁴⁹ [2007] SCA 130.

¹⁵⁰ Para 18.

¹⁵¹ 2008 (6) SA 345 (C).

requirements to be complied with by the MEC when the Premier could ignore them by establishing a commission independently? It is a trite principle of statutory interpretation that a statute should not be construed so as to render any part of it superfluous.¹⁵²

As the municipality is an autonomous sphere of government with powers to govern on its own subject to the Constitution and the law, the MEC's powers to interfere in its affairs are limited. In *City of Cape Town v Premier of the Western Cape* it was thus correctly submitted on behalf of the City of Cape Town that the restrictions imposed upon the MEC by section 106 (1) are consistent with the constitutional autonomy of municipalities. An enquiry into a municipality's affairs by investigators enjoying commission powers is a potentially serious invasion of the municipality's constitutional autonomy. The appointment of investigators may create intergovernmental conflict, as in the present case. The legislature did not intend the MEC to have a free hand. He or she should be entitled to investigate only in cases of serious misconduct and on objectively reasonable grounds.¹⁵³

The final question is whether the commission appointed in terms of section 106(1) can investigate criminal conduct which is often present in maladministration procurement cases? Section 106(1) allows the commission to investigate when fraud or corruption has occurred or is occurring in a municipality. It is a well-known fact that in South Africa, fraud and corruption are criminal acts which may result in prosecution by the National Prosecuting Authority (NPA). It is therefore important to tread carefully when deciding on the scope of an investigation so as to ensure that the commission does not usurp the functions of the SAPS. The issue of whether the commission appointed by the MEC or the Premier had powers to investigate possible criminal conduct was also canvassed in *City of Cape Town v Premier of the Western Cape and Others*. In this case, when invoking section 106(1) for an investigation into the affairs of the City of Cape Town, the Premier relied on the information provided by the Western Cape Provincial Commissioner of Police, Mzwandile Petros, who during October 2007 disclosed to the Premier information

¹⁵² At paras 69 and 70.

¹⁵³ At para 48.15.

discovered at the home of one Mr Du Toit,¹⁵⁴ during a search conducted at his home. Du Toit was instructed by the City to do certain investigative work on councillors who may have taken bribes to cross the floor. The information discovered from Du Toit's home included audio recordings of conversations found on Du Toit's computer, which were played to the Premier, as well as electronic copies of quotations and invoices. At the request of the Premier, Commissioner Petros addressed the provincial cabinet on the evidence he had shown the Premier. As a consequence it was accordingly decided by the provincial cabinet that the MEC should institute a section 106 investigation in the City.

Two relevant issues arose during argument. First, whether the information obtained by the police during a search and seizure can be used for the purposes of a section 106(1) enquiry. Secondly, whether the commission of inquiry was eligible to investigate a breach of the Prevention and Combating of Corrupt Activities Act¹⁵⁵ by councillors who allegedly paid other councillors to cross the floor and join another political party.

It was successfully argued by the City that the sharing of this information by the police with the Premier was unlawful. The Court held that the independence of the police in the investigation of crime is a vital aspect of the rule of law and the separation of powers. The vesting of powers of search and seizure in police officers in terms of section 21 of the Criminal Procedure Act requires that such powers be exercised in a fair and reasonable manner, with the sole object of achieving the purpose for which they were conferred, namely, the investigation of crime by the police. The use of information obtained as a result of the exercise of such power for any other purpose would be unlawful. If the information obtained as a result of the searches at Du Toit's home revealed the commission of any crimes by Du Toit, or anybody else, this should have been fully investigated by the police and then handed to the Director of Public Prosecutions for the appropriate action. Such

¹⁵⁴ Mr Du Toit was a private investigator who was working for the firm of private investigators, George Fivaz & Associates (GFA). During the period June 2007 to September 2007, he was instructed to investigate the conduct of Mr Chaaban who was a councillor for the City at the time. The lawfulness of the conduct of the City in investigating Mr Chaaban and hiring a firm of private investigators to do so attracted the attention of the MEC and the Premier. It was their contention that a reasonable suspicion existed that the City was paying for the investigation which was for the benefit of the DA, and that the City had not followed the usual supply chain management process in appointing GFA. They established a commission to investigate the City in terms of section 106(1)(b) of the Systems Act.

¹⁵⁵ Act 12 of 2004.

information should not have been supplied to the executive branch of government, in the form of the Premier, for investigation by a commission of inquiry. Even if such information carried an implication of maladministration on the part of the City, in relation to any suspected criminal conduct, this did not justify the disclosure of what had to be regarded as confidential information in the hands of the police, which had to be used for one purpose only, namely, the investigation and prosecution by the appropriate prosecuting authority of any crimes revealed by its contents.¹⁵⁶

On the second issue, the Court held that the investigation of criminal conduct as a primary task by a commission of inquiry is inherently undesirable, for the reason that it leads to a blurring of the functions of the executive and the police, and the independence of the police and NPA is a vital component in any democratic state.¹⁵⁷

Steytler and De Visser are of the view that this judgment must not be understood to suggest that provincial governments may not investigate corruption and fraud in a municipality. They state further that the purpose of the provincial investigation may not be to investigate whether individuals who have committed criminal acts should be prosecuted; such investigation is a prerogative of the police.¹⁵⁸ It is therefore submitted that the purpose of an investigation must only be to provide the MEC with sufficient information on whether fraud or corruption has actually occurred or is occurring before he or she can take the measures of reporting the matter to the SAPS or before he or she can decide to take remedial action in terms of section 139 of the Constitution.

The recent amendments to the Systems Act have made certain provisions relating to provincial monitoring. Municipalities are now prohibited to employ municipal officials who have been dismissed for financial misconduct, fraud or corruption.¹⁵⁹ A municipality is required to maintain a record that contains the prescribed information regarding the disciplinary proceedings of staff members dismissed for misconduct and submit such

¹⁵⁶ Paras 144 and 145.

¹⁵⁷ Para 93.

¹⁵⁸ Steytler and De Visser, *Local Government Law of South Africa* (2007) 15-17.

¹⁵⁹ Section 57A(3) Systems Act.

information on quarterly basis to the MEC for local government.¹⁶⁰ If properly implemented, this provision will play a significant role in ensuring that those who have been dismissed for financial misconduct, fraud or corruption are not employed by municipalities for at least ten years. This can also discourage would-be offenders from committing these unlawful acts and can significantly reduce corruption in municipalities.

In conclusion, the province has powerful means of collecting information of irregular procurement.

4.3 Intervention

On completion of an investigation, which revealed a serious malpractice in the area of procurement, the question is: what powers does the MEC have or what can he or she do with the information? Can he or she act against a municipal official or the municipality? Can he or she set aside a procurement contract irregularly or fraudulently concluded? It will be shown that the MEC is not empowered to act decisively against officials who are in violation of procurement rules under section 106. Section 106 of the Systems Act is only aimed at placing provincial governments in possession of information. When the MEC is in possession of such information he or she can report the matter to the Public Protector, or refer the matter to the Auditor-General for auditing, or lay a criminal charge with the SAPS. However, in certain limited circumstances the Constitution authorises intervention by a provincial executive in the affairs of a municipality. The provincial intervention in terms of section 139 is possible when a municipality fails to fulfil an executive obligation conferred by statute or the Constitution.

There are three forms of intervention that are authorised under section 139 of the Constitution. The first form of intervention in terms of section 139(1) occurs when a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation. The provincial government may intervene by taking any appropriate steps to ensure fulfilment of the executive obligation including:

¹⁶⁰ Sections 57(A)(6) and 57(A)(7) Systems Act.

- (a) “Issuing a directive to the municipal council, describing the extent of the failure to fulfil its obligations and stating the required steps to be taken in order to meet its obligations;
- (b) Assuming responsibility for the relevant obligation in that municipality to the extent necessary to (i) maintain essential national standards or meet established minimum standards for the rendering of a service; (ii) prevent the municipality from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or (iii) maintain economic unity; and
- (c) In exceptional circumstances, dissolving the municipal council and appointing administrator until a newly elected municipal council has been declared elected.”

Can the MEC invoke section 139(1) of the Constitution and intervene when a municipality fails or ignores to follow the procurement rules? There are a number of difficulties when invoking section 139(1). The first challenge is that the power of the provincial executive to intervene in a manner as provided for in sub-section 1 is subject to the existence of the fact that a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation.¹⁶¹ In the context of sub-section (1), it constitutes a jurisdictional fact, the existence of which is a necessary prerequisite to the exercise by the relevant provincial executive of its statutory power to intervene.¹⁶²

The second challenge is that section 139(1) does not empower the province to intervene without sufficient evidence or good reason and such is not left entirely at the discretion of the province. The Court in *Mnquma* held that:

The existence of the jurisdictional facts in subsection (1) is not left to the discretion of the provincial executive but is an objective fact which is independently triable by a Court. Sub-section (1) does not provide that the provincial executive has the power or jurisdiction where it “is of the opinion” or it “is satisfied” of certain matters, or where certain facts “appear” to exist, in which case different considerations arise and the power of the Court to intervene may be more limited.¹⁶³

¹⁶¹ *Mnquma Local Municipality and Another v Premier of the Eastern Cape and Others* [2009] ZAECBHC 14 at para 49.

¹⁶² *Mnquma*, para 49.

¹⁶³ *Mnquma*, para 50.

The third challenge is the uncertainty regarding what constitutes an executive obligation? The Court in *Mnquma* held that precise definitions of what constitutes administrative, executive or legislative functions are not attainable as one class of function tends to shade off into another. The meaning to be attributed to the words “executive” and “administrative” would vary according to the context and the purpose for which the classification is attempted.¹⁶⁴ The word “executive” in sub-section (1) is used in the context of an obligation that is imposed on a municipality in terms of the Constitution or legislation and accordingly, what would constitute an executive obligation must be determined with reference to the Constitution and the legislation referred to.¹⁶⁵ The Court further held that the term “executive” must be understood to mean the obligation of local government to provide government at local level which must be exercised within its functional areas and extends to the obligation to:

- implement and administer legislation in relation to those functional areas;
- provide the services associated with its functional areas;
- provide an administration to deliver those services;
- develop policy in relation to the functional areas; and
- initiate by-laws to effectively govern within those functional areas.¹⁶⁶

Steytler and De Visser argues that, rather than attempting to carefully define the term executive obligation, it is more useful to define the legislative function and conclude that anything that does not fall within that definition is executive in nature and therefore falls within the ambit of section 139.¹⁶⁷ In *Mnquma*, the Court explained that the executive obligations must not be confused with statutory obligations or duties that are aimed at ensuring the effective performance by local government of its executive obligations. The failure to comply with statutory provisions of this nature may rather lead to a conclusion that a municipality is failing to comply with an executive obligation such as providing an

¹⁶⁴ *Mnquma*, para 56.

¹⁶⁵ *Mnquma*, para 57.

¹⁶⁶ *Mnquma*, para 64.

¹⁶⁷ Steytler and De Visser, *Local Government Law of South Africa* (2007) 15-20.

effective administration to fulfil its constitutional mandate of providing government at a local level.¹⁶⁸

The fourth challenge with section 139(1) is that it gives a provincial government a flexibility to decide whether or not to intervene. The use of the word “may” in the section gives the discretion to the provincial government to choose whether it wants to take the appropriate steps or not, should the municipality fail to perform its executive obligation. This was also confirmed in *Mnquma* case when the Court held that, once it has been established that a municipality cannot or does not fulfil an executive obligation, the relevant provincial executive is given the discretion to intervene. The Court held that the use of the word “may” is a clear indication that this is so. Accordingly, even though the jurisdictional fact may exist, the provincial executive concerned is not obliged to intervene.¹⁶⁹

Does compliance or non-compliance by the municipal manager with the procurement regulations amount to failure to perform an executive obligation? It is submitted that a distinction should be made between executive and administrative functions, as the executive functions of the municipality vests in the municipal council. The internal structure of a municipality is designed in such a way that there is a clear distinction between politicians and officials. The executive mayor is the head of the executive (political) and the municipal manager is the head of administration (officials). The executive functions differ from administrative functions. In order to determine whether the function is executive or not, one has to determine whether there is a political consideration in respect of the performance of that function. Putting it in a procurement context, the decision to award a tender, for example, is taken without any political consideration. There are prescribed procurement rules in which municipal officials must adhere to which exclude politicians from procurement processes. A member of the municipal council is not eligible to be a member of the bid committee or any other committee evaluating or approving tenders, quotations, contracts or other bids.¹⁷⁰ A councillor may not even attend any such meeting

¹⁶⁸ *Mnquma*, para 65.

¹⁶⁹ *Mnquma*, para 67.

¹⁷⁰ Section 117 MFMA.

as an observer.¹⁷¹ Members of the executive have other functions, such as, the development of policy and the initiation and preparation of legislation, which are not directly concerned with the administration. It is on that basis that I submit that section 139(1) interventions only relate to political decisions taken by a municipal council. It is further submitted that the failure to follow procurement rules is not an executive failure and accordingly the province cannot invoke section 139(1) to intervene. This was alluded to by the Court in *Mnquma* when it held that:

It must be acknowledged that the use of the term executive obligation was intentional. In the context of the autonomous position occupied by local government in the constitutional framework, the aim was to limit intervention to a failure to fulfil obligations that are executive in nature¹⁷²

The Court then declared invalid and set aside the decision of the provincial executive to intervene in the *Mnquma* municipality on the basis that the jurisdictional facts applicable to the exercise of the provincial executive's power were absent and as a consequence it acted *ultra vires* in dissolving the municipal council. The principle established is thus that section 139(1) applies only to executive obligations that rest on the council. Excluded are administrative obligations which rest on the administration. Intervention in terms of section 139(1) can therefore not be possible when there are tender irregularities unless it can be shown by the province that tender irregularities occurred as a result of executive's failure to establish and maintain an effective administration or they were involved in such procurement. It is therefore submitted that the province cannot intervene in terms of section 139(1) when tender irregularities come to the surface in a municipality where the maladministration was perpetrated by officials. However, where councillors were involved in the procurement process contrary to their obligation not to be part thereof, an intervention may be possible. The same principle applies when a municipal council fails to adopt the SCM policy as required in terms of section 111 of the MFMA.

Another challenge is that the wording in section 139(1) of the Constitution suggests that intervention is only possible when there is an on-going failure. This was confirmed in *City of*

¹⁷¹ Section 117 MFMA.

¹⁷² At para 64.

Cape Town v Premier of the Western Cape & Others,¹⁷³ where the Court held that section 139 is framed in the present tense, being concerned with an on-going failure and not a past failure. Intervention would not be appropriate where a past omission had already ceased. The province therefore cannot intervene where a municipality has failed to follow the procurement rules and awarded tenders in a corrupt manner because that is in the past.

The second form of intervention as provided by the Constitution is an intervention in terms of section 139(4). It empowers the provincial executive to intervene if the municipality cannot or does not fulfil an obligation in terms of the Constitution or legislation to approve a budget or any revenue raising measures necessary to give effect to the budget. The question is then whether the provincial executive can intervene using section 139(4) of the Constitution if he or she discovers tender irregularities or fraud in municipalities? It is submitted that the MEC cannot invoke section 139(4) as it only applies when a municipality cannot or does not fulfil an obligation to approve a budget or a revenue-raising measure. The failure to follow procurement rules is not a revenue raising measure but an expenditure decision and it has nothing to do with the approval of a budget.

The third form of intervention as provided in the Constitution is in terms of section 139(5) which may be possible if a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments. It is submitted that before the province can intervene using this section in case of irregular procurement, the following requirements must be met:

- (a) the municipality must be in a financial crisis;
- (b) the financial crisis must have occurred as a result of its failure to obey the procurement rules; and
- (c) as a result of such financial crisis, it commits a breach of its obligations to provide basic services or to meet its financial commitments.

It is submitted that if the province can show that as a result of the municipality's failure to follow the procurement rules, it is in financial crisis and therefore unable to provide basic services as a result thereof, there can be no reason why it cannot intervene using section

¹⁷³ Para 79.

139(5). This could conceivably happen in extreme cases of procurement maladministration.

After the three requirements have been established, the province can intervene by:

- (a) Imposing a recovery plan that will be aimed at securing the municipality's ability to provide basic services or to meet its financial commitments;
- (b) dissolving the municipal council if the municipality cannot or does not approve legislative measures which are necessary to give effect to the recovery plan; or
- (c) assuming responsibility for the implementation of the recovery plan, if the municipal council is not dissolved.

It is therefore submitted that a province can impose a recovery plan which includes a proper SCM policy, if the municipality does not have one. Basically, a recovery plan can include anything that can assist a municipality recover from its financial crisis and can monitor the implementation of such plan until the crisis is resolved.

4.4 Conclusion

A province can do much to monitor compliance with the procurement rules but it cannot act itself upon its findings of irregularities and fraud unless the stringent requirements of sections 139(1) and 139(5) of the Constitution are met. Its strongest power is seemingly limited to conducting investigation if all the requirements of section 106(1) of the Systems Act are met. It has thus limited powers to take direct remedial action against municipalities who fail to follow procurement rules.

CHAPTER 5 - THE AUDITOR-GENERAL

5.1 Introduction

The purpose of this chapter is to assess whether the Auditor-General is sufficiently equipped to identify procurement irregularities within municipalities and whether it can act upon its findings of municipal transgressions. It will be shown that while this institution has powers to audit and investigate fraud and corruption in the field of procurement, there are distinct limits to these powers. Moreover, its powers are limited to revealing maladministration and corruption rather than acting upon its discovery. Given the general nature of the duties of the Auditor-General, this discussion will focus on specific issues relating to the audit of municipal procurement.

5.2 Overview of the Auditor- General

The Constitution establishes the Auditor-General as a state institution supporting constitutional democracy.¹⁷⁴ This institution was established in order to ensure the financial probity of the organs of state by providing an opinion on the financial affairs of each organ of state. Factors, such as, poor quality of financial statements, non-compliance with supply chain management procedures, and poor internal control may lead to a disclaimer or a qualified audit report.

The Auditor-General is an independent institution and is only subject to the Constitution and the law and is required to be impartial and to perform its powers and functions without fear, favour or prejudice.¹⁷⁵ It derives its powers from the provisions of section 188 of the Constitution and the Public Audit Act (PAA).¹⁷⁶ The Auditor-General is accountable to the National Assembly only.¹⁷⁷

¹⁷⁴ Section 181(1)(e) Constitution.

¹⁷⁵ Section 181(2) Constitution.

¹⁷⁶ 25 of 2005.

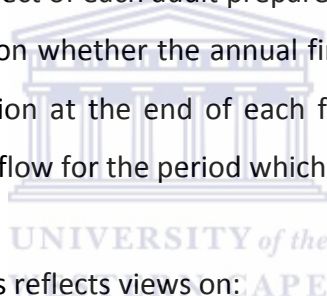
¹⁷⁷ Section 181(5) Constitution.

5.3 Functions and powers

The Auditor-General is required to audit and report on the accounts, financial statements and financial management of all organs of state.¹⁷⁸ The PAA and its Regulations give the Auditor-General power to audit and express an opinion on, *inter alia*, the following:

- Financial statements of municipalities;
- whether there is compliance with any applicable legislation relating to financial matters;
- performance of the municipality against predetermined objectives; and
- whether resources were obtained and used in accordance with the adopted budget.¹⁷⁹

The Auditor-General must in respect of each audit prepare a report.¹⁸⁰ An audit report must reflect an opinion or conclusion on whether the annual financial statements of the auditee fairly present the financial position at the end of each financial year. It also includes a report of its operations and cash flow for the period which ended on that date.



The Auditor-General's report thus reflects views on: **APE**

- financial information;
- performance information;
- internal controls;
- non-compliance with applicable laws and regulations relating to financial matters, financial management and other related matters; and
- any other pertinent matters related to key governance responsibilities.¹⁸¹

The Auditor-General may for the purpose of an audit direct a person to produce any document, book or written or electronic record or information, including any confidential, secret or classified document, book, record or information of whatever nature, and may

¹⁷⁸ Section 188(1)(b) Constitution.

¹⁷⁹ Section 20(2) PAA.

¹⁸⁰ Section 20(1) PAA.

¹⁸¹ *Audit functions performed by the AGSA*, published in GN 1570 in GG 32758 of 27 November 2009.

inspect and question any person about any such document, book or written or electronic record or information, or any such asset.¹⁸²

5.4 Auditing municipalities

The Auditor-General performs the municipal audit after every financial year. The accounting officer of a municipality is required to prepare the annual financial statements of the municipality and within two months after the end of each financial year submit those statements to the Auditor-General for auditing.¹⁸³ The Auditor-General must then audit those financial statements and submit an audit report on those statements to the accounting officer of the municipality within three months of receipt of those statements.¹⁸⁴

Municipalities must in terms of their performance management system and in accordance with any regulations and guidelines that may be prescribed, set appropriate key performance indicators as a yardstick for measuring performance, including outcomes and impact, with regard to the municipality's development priorities and objectives set out in its integrated development plan.¹⁸⁵ The results of performance measurements must be audited as part of the municipality's internal auditing processes and annually by the Auditor-General.¹⁸⁶

There are various internal municipal structures with which the Auditor-General works hand in hand. Section 165 of the MFMA requires each municipality to have an internal audit unit. This internal audit unit of a municipality has a duty to prepare a risk-based audit plan and an internal audit programme for each financial year and to advise the accounting officer and report to the audit committee on the implementation of the internal audit plan and matters relating to, *inter alia*, the internal audit, internal controls and compliance with the MFMA, the annual Division of Revenue Act and any other applicable legislation. The internal audit unit reports to the audit committee on matters relating to an internal audit and all other matters relating to or incidental to the internal audit processes. An audit committee is an

¹⁸² Section 15(2) PAA.

¹⁸³ Section 126(1)(a) MFMA.

¹⁸⁴ Section 126(3) MFMA.

¹⁸⁵ Section 41(1) Systems Act.

¹⁸⁶ Section 45 Systems Act.

independent advisory body which must, among other things, advise the municipal council on matters relating to internal financial control and internal audits.¹⁸⁷ In performing its functions, the audit committee must liaise with the internal audit unit as well as with the Auditor-General. The audit committee is entrusted to review the annual financial statements to provide the council of the municipality with an authoritative and credible view of the financial position of the municipality, its efficiency and effectiveness, and its overall level of compliance with the MFMA; to carry out such investigations into the financial affairs of the municipality or municipal entity as the council of the municipality may request; and to respond to the council on any issues raised by the Auditor-General in the audit report.¹⁸⁸ When audit committees and internal audit units fail to fulfil their legislated functions, financial governance at a municipality is obviously weak.

5.6 Practice of the Auditor-General in municipal procurement

The audits conducted at 237 municipalities for 2009/2010 included an assessment of procurement processes, contract management, and the controls in place to ensure a fair, equitable, transparent, competitive and cost-effective supply chain management system that complies with legislation and minimises the likelihood of fraud, corruption, favouritism as well as unfair and irregular practices.¹⁸⁹ According to the Auditor-General's Report, the 2009/2010 audit saw an increase in a number of municipalities found to have contravened laws and legislation.¹⁹⁰

For example, in KwaZulu-Natal (KZN), the Report shows that 99,59 per cent of the irregular expenditure incurred was as a result of contravention of the SCM policy and legislation, with 95 per cent of the irregular expenditure detected as a result of the audit process.¹⁹¹ According to the Auditor-General, in most instances irregular expenditure was incurred as a

¹⁸⁷ Section 166 MFMA.

¹⁸⁸ Section 166(2) MFMA.

¹⁸⁹ Auditor General South Africa, *Consolidated general report on the local government audit outcomes (2009-10)* 70.

¹⁹⁰ Auditor General South Africa, *Consolidated general report on the local government audit outcomes (2009-10)* 2.

¹⁹¹ Auditor General South Africa, *General report on audit outcomes of KwaZulu- Natal local government 2009-10*, 14 – 15.

result of incorrect interpretation of the SCM Regulations, and inadequate processes and procedures to identify such expenditure.¹⁹² It was further stated that the irregular expenditure incurred in KZN was driven by the awards made to persons in the service of state institutions (a finding at 49 per cent of auditees); at least three written quotations not being obtained for procurements having value of between R10 000 and R200 000 (a finding at 34 per cent of auditees); and awards made to persons in the service of the auditee (a finding at 22 per cent of auditees). The Auditor-General further states that whilst there were SCM policies in place at the majority of the auditees, it was the lack of enforcement by management and no monitoring compliance with the SCM policy by leadership that resulted in significant irregular expenditure.

For the Western Cape, the analysis of irregular expenditure shows that almost 100 per cent of the irregular expenditure incurred was due to contravention of the SCM policy and legislation.¹⁹³ The significant findings from the audit of procurement and contract management were attributable to deficiencies in leadership, financial and performance management and governance.¹⁹⁴ Whilst SCM policies were in place at the majority of the auditees, a lack of enforcement and monitoring of compliance with the SCM policy by leadership resulted in significant irregular expenditure.

These audit reports show that the Auditor-General, when performing a municipal audit, looked carefully at compliance with procurement legislation and the processes followed. For instance, in terms of Regulation 12(1)(c) of the SCM Regulations read with Regulation 17(1), three written quotations must be obtained for procurement of goods and services of a transaction value between R10 000 and R200 000. The Auditor-General's findings for non-compliance with Regulation 12(1)(c) stood at 34 per cent of the auditees.¹⁹⁵

¹⁹² Auditor General South Africa, *General report on audit outcomes of KwaZulu- Natal local government 2009-10*, 1.

¹⁹³ Auditor General South Africa, *General Report on Audit Outcomes of Western Cape Local Government (2009 – 2010)* 79.

¹⁹⁴ Auditor General South Africa, *General Report on Audit Outcomes of Western Cape Local Government (2009 – 2010)* 58.

¹⁹⁵ Auditor-General South Africa, *Consolidated general report on the local government audit outcomes (2009-10)*, 80.

The Auditor-General's findings for non-compliance with Regulation 12(1)(d) of the SCM Regulations which provides for a competitive bidding process to be followed when procuring goods and services above a transaction value of R200 000, stood at 19 per cent of the auditees.¹⁹⁶ Deviations from competitive processes that were found to be approved without any justifiable grounds as outlined in legislation, amounted to R372 million.¹⁹⁷ The report further shows that the failure to comply with preferential points system stands at 9 per cent of the auditees.¹⁹⁸

5.7 Evaluation of the Auditor-General's detection of tender irregularities

The general findings of the Auditor-General show that by and large, the Auditor-General can identify tender irregularities. The legal framework is designed in such a way that the Auditor-General can easily identify a fraudulent activity by following a paper trail. The Auditor-General has access to all the records, documents or any information of the municipality which reflects or may elucidate the business, financial results, financial position or performance of the municipality. A paper trail or lack thereof can easily lead to inconsistencies which can be identified during a normal audit.

However, there are a number of limitations to the Auditor-General's ability to detect irregular procurement such as the difficulty to detect conflict of interest, rigging, and fronting.

5.7.1 Conflict of Interest

A conflict of interest occurs when municipal officials, relatives or friends benefit as a result of their connections with any member in the bid committees. A municipality is prohibited to make any award to a person –

- (a) who is in the service of the state;

¹⁹⁶ Auditor-General South Africa, *Consolidated general report on the local government audit outcomes (2009-10)*, 80.

¹⁹⁷ Auditor-General South Africa, *Consolidated general report on the local government audit outcomes (2009-10)*, 80.

¹⁹⁸ Auditor-General South Africa, *Consolidated general report on the local government audit outcomes (2009-10)*, 75.

- (b) if the provider is not a natural person, of which any director, manager, principal shareholder or stakeholder is in the service of the state, or
- (c) who is an advisor or consultant contracted with the municipality.¹⁹⁹

The notes or financial statements of a municipality must disclose particulars of any award of more than R2 000 to a person who is a spouse, a child or parent of a person or a service provider who is in the service of the state, or who has been in the service of the state for the previous twelve months.²⁰⁰

In terms of Regulation 46(2) of the Municipal Supply Chain Regulations, an official or other role player involved with supply chain management –

- (a) must treat all providers and potential providers equitably;
- (b) may not use his or her position for private gain or to improperly benefit another person;
- (c) may not accept any reward, gift, favour, hospitality or other benefit directly or indirectly, including to any close family member, partner or associate of that person;
- (d) notwithstanding sub-regulation (2)(c), must declare to the accounting officer details of any reward, gift, favour, hospitality or other benefit promised, offered or granted to that person or to any close family member, partner or associate of that person;
- (e) must declare to the accounting officer details of any private or business interest which that person, or any close family member, partner or associate, may have in any proposed procurement or disposal process, or in any award of a contract by the municipality;
- (f) must immediately withdraw from participating in any manner whatsoever in a procurement or disposal process or in the award of a contract in which that person, or any close family member, partner or associate, has any private or business interest.

SCM officials with an interest in a service provider are, in terms of Regulation 46(2)(f) of the SCM Regulations, not allowed to participate in the procurement processes as such officials

¹⁹⁹ Regulation 44 SCM Regulations.

²⁰⁰ Regulation 45 SCM Regulations.

can possibly influence the awarding process. A case example where there was a clear conflict of interests is *Erasmus Tyres v City of Cape Town*.²⁰¹ Erasmus Tyres brought an application for review and setting aside of an award of tender to Themba Tyres, citing bias as one of the grounds for the application. Bias was based on a perceived relationship between Mr Martin Rademan (who was part of the Bid Evaluation Committee) and Southey Grobbelaar (who was identified as the General Manager Themba Tyres). The award was reviewed and set aside by the Court.

The question is how readily can the Auditor-General pick up a conflict of interests? The audit report for 2009/2010 shows that the Auditor-General did detect conflicts of interest on a large scale. Irregular expenditure incurred in the provinces was mostly due to awards made to persons in the service of the state or their family members at 56 per cent of auditees.²⁰² Although the Reports show a significant number of instances of conflict of interest, the question is how can they detect family members and friends? For example, in order to detect whether an award was made to a person in the service of the state, the Auditor-General must have a data base of all state employees. Another possibility is that the Auditor-General has access to records held by the Companies and Intellectual Property Registration Office (CIPRO), which records contain important information about companies' shareholders.

5.7.2 Rigging by municipalities

One of the forms of corruption that cannot be easily identified during a routine audit is rigging. It usually occurs when the municipal representative (the project manager) develops specification in a way that favours one tenderer. Specification tailoring is more likely to occur during the first stage of a bidding process. This stage involves, *inter alia*, planning, choice of the procurement method, specifying the requirements, choice of contract type, and preparation of bidding documents. In the case of a municipality, the relevant line department is the one that is involved at this stage and the project manager usually comes

²⁰¹ Unreported (Western Cape High Court, Cape Town) Case No: 6036/08; Judgement delivered on 17 September 2008.

²⁰² Auditor-General South Africa, *Consolidated General Report on the local government audit outcomes 2009-10*, 71.

from the relevant line department which identifies the need. What is more problematic is that the MFMA and the SCM Regulations do not prohibit the project manager from sitting on both the BSC and BEC.²⁰³ The project manager is usually involved at the earliest stage of the acquisition, which is the time of writing the specification, and later sits on the BEC. It is submitted that it is unnecessary to have the project manager at the BEC as the tenders are required to be evaluated according to the advertised specifications.

When using the audit method as aforementioned and applying the applicable legal framework, the Auditor-General is not equipped to identify tailoring without conducting a forensic investigation. There is no indication in any of the audit reports that the Auditor-General investigated tailoring and it is therefore submitted that tailoring can only be detected when conducting a forensic investigation.

5.7.3 Rigging by tenderers

Rigging means pre-determining the outcome of a competitive tendering. It occurs when a competitive public tender, which has as its purpose open and fair competition between all interested bidders, is manipulated in such a way that a pre-selected bidder wins the tender.²⁰⁴ Eckhard Volker²⁰⁵ identified the following forms of bid rigging:

- when multiple quotations are presented from entities owned or controlled by the same individual;
- when alternate quotations are presented from entities which do not exist;
- collusive bidding, where competitors agree to inflate their prices;
- when an alternative quotation is presented on a forged letterhead of a competitor, where the latter is not involved in the transaction, nor has knowledge of quotations presented in their name;
- when a supplier allows another company to use their letterhead to produce an alternative quotation in their name, often on rotational basis.

²⁰³ Regulation 27(3) read with regulation 28(2) of the SCM Regulations.

²⁰⁴ J. Egdardo Campos, *The Many Faces of Corruption: Tracking Vulnerabilities at the Sector Level* (2007) 295.

²⁰⁵ Eckhard Volker, 'Bid rigging: new legislative relief,' *Auditing SA* (Summer 2010/11) 43.

Volker argues that although it is relatively easy to identify rigging, it is very difficult to take appropriate action against the offending party/parties. He said that the complications arise from the absence of a clear misrepresentation which would have to be proven in a criminal court, if fraud is alleged.

Rigging cannot be identified during a routine audit and can only be identified in a more comprehensive forensic investigation. The detection of rigging requires digging behind the face value of tender documents. Consolidated audit report and various audit reports do not show whether there were cases of rigging identified by the Auditor-General.

5.7.4 Fronting

There have been many cases of fronting which resulted in specific laws that were enacted to combat this scourge. The question is whether the Auditor-General can detect fronting. Although section 15(2) of the PAA empowers the Auditor-General to direct a person to produce any document or information of whatever nature; and may also inspect and question any person about any such document, there is no indication from the audit reports that show that the Auditor-General does indeed request information from private companies that trade with municipalities in order to determine whether there is any fronting practice. Without requesting such information from private companies, the Auditor-General cannot be in a position to detect if the companies appointed by the municipalities comply with B-BBEE legislation. He or she can see the BEE compliant certificate but not the inner workings of the companies. For example, in *Hidro-Tech Systems (pty) Ltd v City of Cape Town and Others*,²⁰⁶ Hidro-Tech lodged a complaint with the City of Cape Town (“the City”) that the HDI’s shareholding for Viking Pony Africa Pumps (Pty) Ltd was not legitimate and that their black shareholders were mere tokens used to secure business deals. The City in defence relied on the information provided in its Tradeworld data base. The Court *a quo* held that the investigation conducted by Tradeworld was inadequate since that investigation did not address the real issues, viz, the inner workings of Viking and the actual status of its historically disadvantaged directors. The same applies with the audits by the Auditor-General; they do not address the inner workings of

²⁰⁶ 2010 (1) SA 483 (C).

companies and their actual BEE status. There is no indication or evidence from the 2009/2010 general audit report to suggest that the Auditor-General did actually investigate the possibility of fronting. It is submitted that fronting is best detected during a forensic investigation and not when conducting a routine audit.

5.8 Enforcement

At the conclusion of the audit, the Auditor-General submits a report, indicating any problems, to the provincial legislature and to the municipal council. The municipal council must address any issues raised by the Auditor-General in its audit report.²⁰⁷ The MEC for local government in the province must assess all annual financial statements of municipalities in the province, the audit reports on such statements, and any responses of municipalities to such audit reports.²⁰⁸ The MEC must also determine whether municipalities have adequately addressed any issues raised by the Auditor-General in previous reports and report to the provincial legislature any omission by a municipality to adequately address those issues.²⁰⁹

Although the Auditor-General has power to audit and report on the accounts, financial statements and functional management of all the municipalities, the Constitution and the PAA do not empower the Auditor-General to take remedial action against municipalities that fail to comply, other than to report to the relevant legislature that has a direct interest in the audit, and to make the report public. This means that in the case of a municipality the report is submitted to the provincial legislature which will have to use its discretion whether to act or not. Moreover, the power of the province is limited, as was outlined in the previous chapter. Furthermore, in many cases these malpractices end up being swept under the carpet due to the lack of any political will to act decisively against political colleagues, especially when both the mayor and the provincial MEC come from the same political party. In these instances, it's usually political interests that are taken into account, which result into impunity of procurement transgressions.

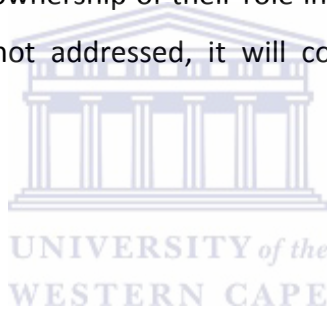
²⁰⁷ Section 131(1) MFMA.

²⁰⁸ Section 131(2)(a) MFMA.

²⁰⁹ Section 131(2)(b) MFMA.

The Auditor-General in 2009/2010 the audit report concluded by stating that strong ethical leadership, and monitoring of well-established policies, processes and procedures for SCM and fraud prevention and detection and active governance by internal audit and audit committees, can solve the problem of corrupt practices.²¹⁰ The ability of municipalities to achieve clean administrations will continue to be compromised unless these control deficiencies are effectively addressed by the leadership of the municipalities with the assistance of internal audits.

In the foreword to the 2010/2011 consolidated audit report, the Auditor-General averred that he found that more than half of municipalities can attribute their poor audit outcomes to mayors and councillors that are not responsive to the issues identified by the audits and do not take their recommendations seriously.²¹¹ He said that they are slow in taking up their responsibilities and do not take ownership of their role in implementing key controls and if this widespread root cause is not addressed, it will continue to weaken the pillars of governance.



5.9 Evaluation

Based on the above discussion, there is a lot that the Auditor-General can do to fight fraud or corruption. Its powers of detection are extensive. However, the powers which this institution has are not enough to take action against municipalities that have transgressed the procurement rules. It only ensures transparency by submitting its report to a provincial MEC for further investigation. The usefulness of the Auditor-General lies in how other institutions use the information detected by the Auditor-General during the audit. It is therefore my view that additional powers should be given to this office in order to be effective in combatting fraud and corruption. These powers must include, *inter alia*, the ability to liaise directly with the office of the Special Investigative Unit or the South African Police Services (SAPS) in instances where there is clear evidence of criminal conduct that

²¹⁰ Auditor General South Africa, *Consolidated general report on the local government audit outcomes (2009-10)* 81.

²¹¹ Auditor General South Africa, *Consolidated general report on the audit outcomes of local government (2010-2011)* 13.

requires further investigation. Also, the Auditor-General must have the power to lay criminal charges in instances where it can be proved that there was corruption and/or fraudulent activity. As things stand now, the PAA does not oblige the Auditor-General to lay any criminal charges. If the additional obligations, as suggested above, are given to the Auditor-General, they can serve as a deterrent to other would be offenders because an increase in criminal charges being laid against officials and politicians can send a strong message about how serious government is in fighting fraud and corruption.



CHAPTER 6 - THE PUBLIC PROTECTOR

6.1 Introduction

This chapter focuses on role of the Public Protector in combatting irregular procurement. It will be shown that although this institution has many powers to investigate maladministration and corruption in municipal procurement, it cannot act decisively against municipalities when evidence of corruption and maladministration surfaces. As is the case with the Auditor-General, the Public Protector cannot take any direct remedial action against municipalities, but must rely on the council and other relevant authorities to implement its recommendations.

6.2 Constitutional overview

The Public Protector is established in terms of section 181(1) of the Constitution as one of the institutions that support constitutional democracy in South Africa. It is an independent institution, subject only to the Constitution and the law, that must be impartial, and exercise its powers and perform its functions without fear, favour or prejudice.²¹² In *Public Protector v Mail and Guardian Ltd and Others*,²¹³ Nugget JA explained the important role of the Public Protector in our constitutional democracy as follows:

The Constitution upon which the nation is founded is a grave and solemn promise to all its citizens. It includes a promise of representative and accountable government functioning within the framework of pockets of independence that are provided by various independent institutions. One of those independent institutions is the office of the Public Protector. The office of the Public Protector is an important institution. It provides what will often be a last defence against bureaucratic oppression, and against corruption and malfeasance in public office that is capable of insidiously

²¹² Section 181(2) Constitution.

²¹³ [2011] JOL 27350 (SCA).

destroying the nation. If that institution falters, or finds itself undermined, the nation loses an indispensable constitutional guarantee.²¹⁴

This institution is accountable to the National Assembly, and must report at least once a year to it on its activities and the performance of its functions.²¹⁵ The Public Protector has the power to investigate any conduct of government institutions in any sphere of government that is alleged or suspected to be improper or to result in any impropriety or prejudice, to report on that conduct, and to further take appropriate remedial action.²¹⁶ The Public Protector has the additional powers and functions prescribed by national legislation.²¹⁷ The national legislation that is envisaged in section 182 of the Constitution is the Public Protector Act²¹⁸ (PPA). The role of the Public Protector is not only to receive complaints, and investigate and recommend corrective action, but also to strengthen and support constitutional democracy in South Africa.²¹⁹

6.3 Investigative powers of the Public Protector

The PPA gives the Public Protector power to investigate any act of maladministration in relation to municipal procurement. In terms of section 6(4) of the PPA, the Public Protector is competent to investigate, on his or her own initiative or on receipt of a complaint, the following:

- (a) any alleged maladministration in connection with the affairs of government at any level;²²⁰
- (b) the abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function;²²¹

²¹⁴ [2011] JOL 27350 (SCA) 4.

²¹⁵ Section 181(5) Constitution.

²¹⁶ Section 182(1) Constitution.

²¹⁷ Section 182(2) Constitution.

²¹⁸ 23 of 1994.

²¹⁹ Preamble of the PPA.

²²⁰ Section 6(4)(a)(i) PPA.

²²¹ Section 6(4)(a)(ii) PPA.

- (c) any improper or dishonest act, or omission or offences referred to in the Prevention and Combating of Corrupt Activities Act, with respect to public money;²²²
- (d) improper or unlawful enrichment or receipt of any improper advantage, or promise of such enrichment or advantage, by a person as a result of an act or omission in connection with the affairs of an institution;²²³ and
- (e) any act or omission by a person in the employ of an institution which results in unlawful or improper prejudice to any other person.²²⁴

The Public Protector can therefore investigate complaints relating to tender irregularities, such as rigging and conflict of interest in municipalities. Rigging by municipalities constitutes a dishonest act, and therefore the Public Protector has the power to investigate it in terms of section 6(4)(a)(iii) of the PAA. Conflict of interest occurs when relatives or friends are awarded a tender because of their connections with the decision making municipal officials. Such conduct involves improper conduct and therefore the Public Protector has jurisdiction to investigate such conduct in municipalities.

It is therefore submitted that the scope of investigation of the Public Protector is sufficient to investigate improper conduct and maladministration in municipal procurement.

6.3.1 Commencement of investigations

The Public Protector initiates the investigation on his or her own initiative or after a complaint has been laid on matters over which he or she has jurisdiction.²²⁵ The PPA does not state who is entitled to lodge a complaint to the Public Protector. It is therefore submitted that any person (natural or juristic) can lodge a complaint with the Public Protector in the following capacities:

- (a) Acting in their own interest;
- (b) acting on behalf of another person who cannot act in their own name;

²²² Section 6(4)(a)(iii) PAA.

²²³ Section 6(4)(a)(iv) PPA.

²²⁴ Section 6(4)(a)(v) PPA.

²²⁵ Section 6(4) PPA.

- (c) acting as a member of, or in the interest of, a group or class of persons;
- (d) acting in the public interest; and
- (e) an association acting on behalf of its members.

The complaint may be lodged with the Public Protector by means of a written or oral declaration under oath or by such other means as the Public Protector may allow with a view to making his or her office accessible to all persons.²²⁶ The investigation may thus be started by a complaint made by any person and if the Public Protector has jurisdiction to investigate the matter, he or she is required by law to investigate.

The mandate of the Public Protector is not limited to the investigation of complaints, but he or she can also investigate allegations of improper conduct on his or her own initiative.²²⁷

Gary Pienaar²²⁸ wrote:

the relevance of the Public Protector is to boost public confidence in that he or she is not only a watchdog, but also an official whom they can easily relate to. As an institution, it must be seen as one that protects the rights of the citizen at all times. Its mere existence should be a comfort – though not only to the individual citizen, but also to a government that takes clean and professional administration seriously. One way of doing this is for the Public Protector to launch own initiative investigations, without having received any complaint.

The power of the Public Protector to initiate investigations was confirmed in *Public Protector v Mail and Guardian Ltd and Others*.²²⁹ The Court held as follows:

The Public Protector is not a passive adjudicator between citizens and the State, relying upon evidence that is placed before him or her before acting. His or her mandate is an investigatory one, requiring pro-action in appropriate circumstances. Although the Public Protector may act upon complaints that are made, he or she may also take the initiative to commence an enquiry, and on no more than

²²⁶ Section 6(1) PPA.

²²⁷ Public Protector, *Against the Rules Too: Report of the Public Protector on an investigation into complaints and allegations of maladministration, improper and unlawful conduct by the Department of Public Works and South African Police Services relating to the SAPS office accommodation in Durban* (24 July 2011) 31.

²²⁸ "The role of the public Protector in fighting corruption," *African Security Review*, Vol. 9 No.2 (2000) 2.

²²⁹ [2011] JOL 27350 (SCA).

information that has come to his or her knowledge of maladministration, malfeasance or impropriety in public life.²³⁰

Bishop and Woolman²³¹ state that own initiative investigations are often related to individual complaints. They argue that when the Public Protector receives a number of complaints related to similar constellations of issues, he or she should institute an investigation into the root cause of the problem with the aim of pre-empting future complaints.²³²

The Public Protector can therefore, upon receipt of an audit report, initiate own investigation on all municipalities that received disclaimers or qualified audit reports.

6.3.2 Conduct of investigations

After the Public Protector has received a complaint, he or she is empowered to conduct a preliminary investigation for the purpose of determining the merits of the complaint and the manner in which the matter concerned should be dealt with.²³³ The format and procedure followed in conducting an investigation are determined by the Public Protector with due regard to the circumstances of each case.²³⁴ In terms of the mandate given to the Public Protector it is therefore expected of her or him to conduct an enquiry that focuses on good administration and proper conduct.

According to the Public Protector, such investigation has three components:

- (a) What happened?
- (b) What should have happened?
- (c) Is there a discrepancy between the two; does this constitute improper conduct as envisaged in section 182(1) of the Constitution, or maladministration, or abuse of

²³⁰ [2011] JOL 27350 (SCA) 5.

²³¹ Bishop and Woolman, 'Public Protector' in Woolman *et al*, *Constitutional Law of South Africa* (2008) 24A.

²³² At 24A – 12.

²³³ Section 7(1)(a) PPA.

²³⁴ Section 7(1)(b)(i) PPA.

power, improper enrichment and conduct resulting in unlawful or improper prejudice to any person, as envisaged in the PPA?²³⁵

Although the Public Protector is empowered by the PPA to initiate own investigation, there is no evidence that they have ever done so in the case of municipal procurement.

In determining whether conduct was improper or constituted maladministration or any of the violations envisaged in the PPA, the Public Protector compares the conduct of organs of state and persons complained against, with the relevant legislation and other prescripts in order to ascertain whether such conduct complied with the constitutional requirements of fairness, reasonableness, and transparency, and local and international best practice.²³⁶

6.3.2.1 Power to obtain information

The Public Protector is empowered to conduct interviews and request information from relevant officials of the institution that is under investigation. The Public Protector may, by way of a subpoena, direct any person to submit an affidavit or affirmed declaration or to appear before him or her to give evidence or to produce any document in his or her possession or under his or her control which has a bearing on the matter being investigated.²³⁷ The Public Protector may also examine such a person.²³⁸ The Public Protector may also request an explanation from any person whom he or she reasonably suspects of having information which has a bearing on a matter being or to be investigated.²³⁹

The Public Protector is also empowered, on receipt of a complaint or a request relating to the operation or administration of the PAIA, to endeavour in his or her sole discretion, to resolve any dispute by:

- (i) mediation, conciliation or negotiation;

²³⁵ Public Protector, *Against the Rules Too*, 31.

²³⁶ Public Protector, *Against the Rules Too*. 31.

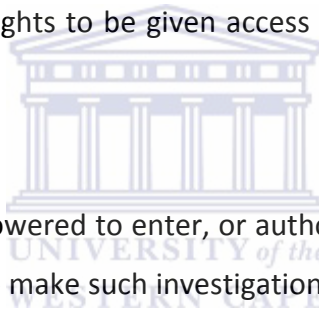
²³⁷ Section 7(4)(a) PPA.

²³⁸ Section 7(4)(a) PPA.

²³⁹ Section 7(4)(b) PPA.

- (ii) advising, where necessary, any complainant regarding appropriate remedies; or
- (iii) any other means that may be expedient in the circumstances.²⁴⁰

As stated in Chapter 2, tenderers in the government procurement process are entitled to a process that is procedurally fair, and in order to know if their rights to procedural fairness have been violated, tenderers need to have access to the relevant information held by organs of state. Most of the time organs of state refuse to give information to the members of the public, especially when they are hiding tender irregularities. People are then obliged to proceed through the strenuous and expensive litigation route by approaching the High Court for an order compelling state organs to provide such information. The inclusion in the PPA of the power to resolve access to information disputes is important in that it saves people a lot of time and money in that they do not have to follow a protracted litigation route in order to enforce their rights to be given access to the information that is held by the municipalities.



The Public Protector is also empowered to enter, or authorise another person to enter, any building or premises and there to make such investigation or inquiry as he or she may deem necessary, and to seize anything on those premises which in his or her opinion has a bearing on the investigation.²⁴¹ But the normal procedure relating to search and seizure applies; the premises may only be entered by virtue of a warrant issued by a magistrate or a judge of the area of jurisdiction within which the premises are situated.²⁴² Such a warrant may only be issued if it appears to the magistrate or a judge from information on oath or affirmation, stating the following:

- (a) the nature of the investigation or inquiry;
- (b) the suspicion which gave rise to the investigation or inquiry;
- (c) the need, in regard to the investigation, for a search and seizure; and

²⁴⁰ Section 6(4)(d)PPA.

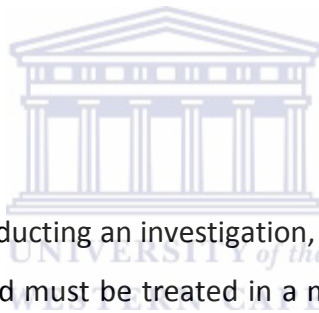
²⁴¹ Section 7A(1) PPA.

²⁴² Section 7A(2) PPA.

(d) that there are reasonable grounds for believing that the items sought for investigation are on or in such premises or suspected to be on or in such premises.²⁴³

If during the execution of a warrant or the conducting of a search a person claims that any item found in the premises concerned contains privileged information, the person executing the warrant or conducting the search must, if he or she is of the opinion that the item contains information which is relevant or necessary to the investigation, request the registrar of the High Court to seize and remove that item for safe custody until a court of law has made a ruling on the question whether the information concerned is privileged or not.²⁴⁴

The PPA, therefore, gives the Public Protector wide investigative powers including the power to compel witnesses to produce any document and to search and seize relevant materials.



6.3.2.2 Fair Process

When the Public Protector is conducting an investigation, the rules of acquiring evidence do apply and the person investigated must be treated in a manner that is procedurally fair.²⁴⁵

Section 7(9)(a) of PPA provides that if it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector must afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances. If such implication forms part of the evidence submitted to the Public Protector during an appearance of such person, he must be afforded an opportunity to be heard in connection therewith by way of giving evidence and such person must be given an opportunity, through the Public Protector, to question witnesses who have appeared before the Public Protector.²⁴⁶

²⁴³ Section 7A(3) PPA.

²⁴⁴ Section 7A(8) PPA.

²⁴⁵ Section 7(9)(a) PPA.

²⁴⁶ Section 7(9)(b) PPA.

When the Public Protector investigates any allegations about certain municipal officials who are implicated in tender irregularities, she cannot make any adverse findings against such officials without having afforded such official opportunity to respond to such allegations.

6.4 Remedies

The Constitution provides that the Public Protector has the power to “take appropriate remedial action.”²⁴⁷ The Constitution and the PPA do not define what is ‘appropriate’ and this effectively leaves the Public Protector without any power to act decisively against officials or institutions that transgress the law. It is clear from past reports and investigations that the powers of the Public Protector are limited to investigation and making recommendations to a relevant authority.

Section 8(1) of the PPA is clear on what the Public Protector can do after he or she has concluded the investigation. This section provides that the Public Protector may, in the manner he or she deems fit, make known to any person any finding, point of view or recommendation in respect of a matter investigated by him or her. This clearly shows that the Public Protector merely investigates and publicises his or her findings and recommends action; he or she cannot take remedial action himself or herself. For example, in the Police Lease report²⁴⁸ the Public Protector, acting in terms of section 182(1)(c) of the Constitution, recommended, *inter alia*, that:

- (a) The President must consider taking action against the Minister of Public Works for her actions; and
- (b) the Minister of Police should, with the assistance of the National Treasury, take urgent steps to ensure that the appropriate action is instituted against all the relevant officials of SAPS that acted in contravention of the law, policy and other prescripts in respect of the procurement processes referred to in the Report.²⁴⁹

²⁴⁷ Section 182(1)(c) Constitution.

²⁴⁸ Public Protector, *Against the Rules Too*.

²⁴⁹ Public Protector, *Against The Rules Too*, 130 – 131.

Another example is in the Report of the Public Protector titled *In The Extreme*²⁵⁰ which was issued in response to complaints lodged in connection with the alleged violation by the then Minister of Co-operative Governance and Traditional Affairs, Mr Sicelo Shiceka, of the Executive Code of Ethics. The Public Protector again recommended, *inter alia*, that:

- (a) The President consider taking serious action against Mr Shiceka for his violation of the Executive Code of Ethics;
- (b) The Director-General of the Department take the appropriate action to recover from Mr Shiceka the expenditure incurred by the Department in connection with:
 - (i) His visit to Switzerland in December 2008;
 - (ii) his accommodation at the One and Only Hotel after he took occupation of his official residence in Cape Town; and
 - (iii) the traveling expenses incurred by the Department in respect of Mrs Mntambo when she visited him in Cape Town in June 2009.
- (c) The Director-General of the Department take urgent steps to ensure that the investigation into the alleged abuse of Mr Shiceka's travelling privileges is concluded and that appropriate measures be taken to deal with its findings.²⁵¹

These examples show that the Public Protector merely recommends to the relevant bodies that they take the appropriate action. It then depends on the executive of those bodies whether they want to act or not. This substantiates criticism levelled against the Public Protector that this institution lacks the power to make binding decisions.²⁵² There is therefore no binding obligation on the Executive to act on the recommendations of the Public Protector. However, in recent high profile investigations relating to the SAPS lease deals and the investigations against Mr Sicelo Shiceka, the President has acted, as recommended by the Public Protector, by suspending the National Commissioner of Police (General Bheki Cele), by removing from the cabinet the Minister of Co-operative Governance and Traditional Affairs (Mr Sicelo Shiceka) and the Minister of Public Works (Ms Mahlangu-Nkabinde).

²⁵⁰ Public Protector, *In the Extreme: Report of the Public Protector on an Investigation into Allegations of a Breach of the Executive Ethics Code by the Minister of Cooperative Governance and Traditional Affairs, Mr Sicelo Shiceka, MP (undated)*.

²⁵¹ Public Protector, *In the Extreme*, 90 – 91.

²⁵² Bishop and Woolman, 'Public Protector' in Woolman *et al*, *Constitutional Law of South Africa* (2008) 24A – 3.

But not all institutions follow the recommendation of the Public Protector; it mostly depends on the political will on the part of the executive or the entities investigated. Recently there have been reports that the Public Protector has lashed out at state entities who fail to implement remedial action recommended by her office.²⁵³ According to the reports, she said that she was concerned that several state entities had either deliberately ignored findings of investigations conducted by her office or did not understand her mandate and related powers. She further stated that in recent months several state bodies, including the Commission for Conciliation Mediation and Arbitration (CCMA), Department of Water Affairs, and the SA Board of Sheriffs, have either refused to adhere to her findings or have told her to wait for court processes to conclude first. The Public Protector further stated that ignoring her investigations was a recipe for impunity and that there would be no real accountability or incentive to change if punitive measures were not formulated.

6.5 Investigating maladministration in municipal procurement

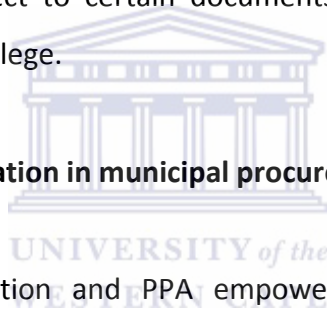
When investigating municipalities, the Public Protector can subpoena and may have access to all the relevant tender documents which include, *inter alia*, the following depending on the scope of the investigation:

- (a) Bid documents;
- (b) bid proposals;
- (c) minutes of meetings of Tender Committees;
- (d) description of the work;
- (e) the contract price;
- (f) preference points claimed;
- (g) tender evaluation points awarded;
- (h) the price of the tender used for comparative purposes;
- (i) the name and address of the successful tenderer;
- (j) record of the reasons for awarding the contract to that tenderer;
- (k) record of the reasons why any tenderers were rejected;

²⁵³ *Legalbrief Today*, 7 June 2011.

- (l) the procurement procedure used;
- (m) letters of appointment;
- (n) contracts;
- (o) completion Reports; and
- (p) reports of payments made.

The documents listed above are the most relevant documents that municipalities and other institutions are supposed to keep as their records. From these documents, the Public Protector can easily ascertain if there is a *prima facie* case of maladministration or abuse of power. Furthermore, he or she can also subpoena and question key witnesses and thus access information also from private persons or bodies in the case of investigating fronting or conflict of interests. There is no limitation to the documents that the Public Protector may request except the documents that are protected by privilege. In that case, a person who claims privilege with respect to certain documents must prove in court that such documents are protected by privilege.



6.6 Remedies for maladministration in municipal procurement

As noted earlier, the Constitution and PPA empower the Public Protector to take 'appropriate remedial action' if he or she finds evidence of maladministration during his or her investigations. However, the Constitution and the PPA do not define 'appropriate remedial action'. When taking appropriate remedial action, the Public Protector cannot usurp the functions of another institution. He or she cannot review and set aside the decision to award a tender but he or she can recommend to the municipal manager to cancel the contract. If the Public Protector cancels the contract on his or her own, he or she would be usurping the functions of the courts. The Public Protector as a public body is constrained by the principle that he or she may not exercise any power and may not perform any function beyond those conferred by law. The exercise of public power must comply with the Constitution and the doctrine of legality.²⁵⁴ While the Public Protector cannot cancel a contract, it should be in its power to approach the courts for an order to that effect or to refer criminal conduct to the SAPS.

²⁵⁴ See *Affordable Medicines Trust and Others v Minister of Health and Others*, 2006 (3) SA 247 (CC) 273.

6.7 Practice of the Public Protector with regard to procurement

The investigations conducted by the Public Protector in the past clearly show that this office can and have investigated maladministration, fraud and/or corruption in respect of municipal procurement. The first example is found in a Report by the Public Protector on an investigation into complaints relating to the improper awarding of tenders by municipalities in the Limpopo and North-West provinces, titled *10 Municipalities, 28 Contracts, and a Politician*.²⁵⁵ The Public Protector was approached by Mr I Kekana (the Head of Communications in the Limpopo Province of the Congress of the People) and Mr E Roets (the National Chairperson of AfriForum Youth) to investigate allegations that the awarding of tenders to SGL Engineering Projects (SGL) by nine municipalities in the Limpopo Province and one municipality in the North-West Province, was irregular. The complaints lodged with the Public Protector were based on a newspaper report which suggested that the aforesaid municipalities had improperly awarded tenders to SGL, due to the political influence of Mr Julius Malema, the erstwhile President of the African National Congress Youth League, who had an interest in SGL. The Public Protector examined the complaints and compiled a Report. The Report contains the following:

- (a) The sources of information utilised during the investigation;
- (b) information obtained from bid proposals, CIPRO, the Engineering Council of South Africa, and the Construction Industry Development Board (CIDB);
- (c) the company profile of SGL;
- (d) registration with the Engineering Council of South Africa;
- (e) registration with the CIDB;
- (f) the information and evidence obtained from municipal officials and witnesses;
- (g) the legal framework regulating the procurement of goods and services by municipalities;
- (h) reports of the Auditor-General;
- (i) the information obtained from the records of CIPRO and the tender documents of the municipalities pertaining to the interests of Mr Malema in SGL;

²⁵⁵ Public Protector, *Report on an investigation into complaints relating to the improper awarding of tenders by municipalities in the Limpopo and North-West provinces (undated)*.

- (j) the general compliance with the SCM policies of the municipalities investigated with the MFMA and the SCM Regulations and the minimum competency requirements of SCM staff;
- (k) conclusions; and
- (l) findings, recommendations and monitoring.

It is clear from the above that when conducting the investigation in this matter, the Public Protector had all the necessary information at hand and had interviewed various key officials. The Auditor-General's report was also used during the investigation. The only problem that the Public Protector had was to prove that fraud or corruption did actually occur. This was probably due to various factors, such as, failure by the municipalities to keep proper records and/or that maybe there was actually no foul play in the award of those tenders. The Provincial Representative of the Auditor-General in Limpopo was also requested to assist in the investigation by providing reports of the Auditor-General on the financial statements and performance information of the nine municipalities located in the province, for the previous four financial years. The Public Protector made the following remarks about the Auditor-General:

The views of the Auditor-General underscore the observations made during the investigation relating to the lack of proper control over crucial procurement documents of some municipalities. The Auditor-General further stated in his General Report, that it was pleasing to note that the audit outcomes were generally reflective of a move in a positive direction. He emphasised that most of the matters reported in audit reports, including therefore the non-compliance with supply chain management prescripts that led to qualified audit reports, were historical or recurring issues. One of the main challenges identified in this regard was a general lack of capacity and skills to fully comply with the prescribed frameworks.²⁵⁶

The report from CIPRO did actually show that Mr Malema was a Director of SGL only at the time when three of the tenders under investigation were awarded to SGL by the respective municipalities concerned. Accordingly, the Public Protector found that there was no

²⁵⁶ Public Protector, *10 Municipalities, 28 Contracts and a Politician*, 69.

verifiable information or evidence that had been presented or that could be found as a result of the investigation that indicated that tenders were awarded to SGL as a result of improper influence due to friendships, comradeship, favouritism, nepotism, political affiliations, interference, or any other impropriety.²⁵⁷

Another example of irregular national procurement is the report titled "*Against the Rules Too*".²⁵⁸ This Report was the second and final report of the Public Protector in response to a complaint lodged in connection with the alleged improper procurement of the lease of office accommodation for SAPS in the Middestad Building in Pretoria and the Transnet Building in Durban. These complaints originated from a newspaper article alleging improper conduct and maladministration by the National Commissioner of Police and the Department of Public Works (DPW). The Public Protector does not state in her Report whether there was a formal complaint laid at her offices or whether she initiated investigation on her own initiative. The complaint related to the alleged non-compliance with the requirements of section 217 of the Constitution by SAPS and the DPW, and the alleged improper involvement of the National Commissioner of Police in the procurement of the leases of two buildings. The scope and method of this investigation were different from the investigation conducted in respect of the Limpopo municipalities. The former relates to failure to follow the procurement rules, whereas the latter relates to the improper award of tender to a certain company due to political influence. During investigations, officials from SAPS and the DPW conceded that with regard to the Transnet building lease, there was no legitimate urgency in procuring the lease, as it was known for approximately 18 months prior to the date of its expiry that a decision on alternative accommodation or the renewal of the lease had to be taken, and accordingly no reasonable explanation could be provided for the deviation from a prescribed tender process.²⁵⁹ The Public Protector found that SAPS failed to comply with section 217 of the Constitution, the relevant provisions of the PFMA, Treasury Regulations, and supply chain management rules and policies. This failure amounted to unlawful, improper conduct and maladministration. The Public Protector found further that the conduct of the National Commissioner of Police was in breach of the

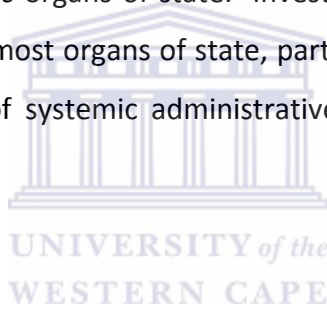
²⁵⁷ Public Protector, *10 Municipalities, 28 Contracts and a Politician*, 85.

²⁵⁸ Public Protector, *Against the Rules Too* (14 July 2011).

²⁵⁹ Public Protector, *Against the Rules Too*, 93.

duties and obligations incumbent upon him in terms of section 217 of the Constitution, section 38 of the PFMA and the relevant Treasury Regulations. These provisions require an accounting officer to ensure that goods and services are procured in accordance with a system that is fair, equitable, transparent, competitive and cost effective. The conduct in question was improper, unlawful and amounted to maladministration.²⁶⁰ As noted above, although only recommendations were made, they were indeed executed by the President, as he suspended the National Commissioner of Police and fired the Minister implicated.

According to the Public Protector, the complaints that were brought to her offices during the 2009 / 2010 period highlighted serious challenges with regard to service delivery and adherence to good governance. There were also a considerable number of investigations regarding conduct failure mostly involving tender irregularities and abuse of power in the management of people in various organs of state. Investigations into service and conduct failure invariably proved that in most organs of state, particularly in local government, such failures were mere symptoms of systemic administrative and governance failures in the affected organs of state.²⁶¹



6.8 Conclusion

It is clear from the above discussion that the Public Protector can investigate maladministration in municipal procurement. It has also been established that the Public Protector has unlimited access to documents and that he or she may interview witnesses and search and seize documents. The examples of the investigations conducted show that the office of the Public Protector has all the necessary tools to investigate maladministration in municipal procurement effectively.

Although the Public Protector is supposed to be independent and to investigate without fear, favour or prejudice, there were instances in the past where one could not resist the temptation of alleging political bias. As it will appear from the circumstances in the example below, in the past there have been instances where the Public Protector was

²⁶⁰ Public Protector, *Against the Rules Too*, 126.

²⁶¹ Public Protector, *Annual Report (2009 – 2010)* 40.

neglecting the duty to investigate because the subjects of the investigation were very powerful politicians and a powerful political organisation. The example that is referred to is that of the then Public Protector being taken to court to review his report on what was called the “Oil-gate” saga. In *Public Protector v Mail and Guardian Ltd and others*²⁶² the *Mail & Guardian (M & G)* newspaper made various revelations regarding events and transactions involving public officials. The article led to the Public Protector being requested to conduct an investigation. At the end of the investigation, the Public Protector concluded that there had been no wrongdoing on the part of any of the various functionaries and entities concerned. That led to the *M & G* and other respondents approaching the High Court for review and setting aside of the Report and an order that the Public Protector investigate and report afresh. It was argued by the *M & G* that the Public Protector’s take on his investigatory powers had the effect of narrowing the scope of the complaints placed before him, and that in the end there was in truth no investigation of the substance of the various complaints. Even where the Public Protector purported to investigate the remnants with which he was left, the investigation was so scant as not to be an investigation at all. The High Court found in favour of the *M & G* and stated that there had been no proper investigation and accordingly the Report was set aside.²⁶³ On appeal the Supreme Court of Appeal confirmed the judgment of the High Court. This case clearly illustrates that the Public Protector was unwilling to properly investigate the “Oil-gate” saga due to superior political influence.

It is submitted that there is a lot that this institution can do to fight corruption in municipal procurement. Its unlimited powers to search and to investigate maladministration in municipalities make it one of the most effective institutions in investigating tender irregularities in municipalities. However, it is submitted that in order for the Public Protector to be more effective and to perform his or her functions without fear, favour or prejudice, there must be a strong political will on the part of those who hold power to comply with recommendations. It is encouraging to see that there is a change in the attitudes of politicians, and that they are starting to respect the independence of the Public

²⁶² [2011] JOL 27350 (SCA).

²⁶³ [2011] JOL 27350 (SCA) 58.

Protector. This has been shown by the recent investigations and reports of the Public Protector in relation to powerful ministers.



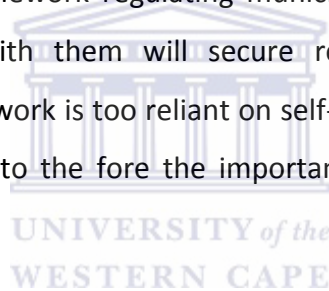
CHAPTER 7 - CONCLUSION AND RECOMMENDATIONS

7.1 Introduction

This study posed the question of how external institutions can play a role in monitoring and combatting procurement irregularities in municipalities. It first analysed the law relating to municipal procurement, and it then examined the ability of four main external institutions to fight maladministration in municipal procurement. This chapter has two objectives. First, it draws the key findings of this study together, and secondly, it provides recommendations, based on the findings, that may strengthen the fight against corruption and maladministration in municipal procurement.

7.2 Legal framework

There is an elaborate legal framework regulating municipal procurement. The rules are clear and strict compliance with them will secure regular procurement. However, compliance with the legal framework is too reliant on self-enforcement, which in practice is not forthcoming. This brought to the fore the important role of external institutions to assist in ensuring compliance.



7.3 External institutions

The role of the National Treasury, the Provinces, the Auditor-General, and the Public Protector was examined, asking the question whether they are able to combat maladministration and corruption in municipalities.

It was argued that these institutions are not always equipped to fight corruption in municipalities, in that, despite all the monitoring measures which have been put in place, enforcement measures remain inadequate.

7.3.1 The National Treasury

The study has shown that the National Treasury plays a very important role in setting an appropriate regulatory framework. It has also been shown that in order to give effect to its supervisory role, the National Treasury monitors and assesses compliance with the procurement rules through reports that are obtained routinely or at its request.

The study has shown that another role of the National Treasury is to support municipalities for them to comply with the procurement rules. It does so by providing training to officials who are involved in the day to day operation of the supply chain management, and also by issuing guidelines, and Practice Notes in order to ensure that municipalities comply with the law and court judgments. One of the most significant measures taken by the National Treasury was issuing the Competency Regulations which prescribe minimum qualifications for all senior municipal officials as well as those officials who are involved in the supply chain management of the municipality. This will ensure that all SCM officials have the necessary competency and skill to enforce procurement rules.

It has been shown that there are two measures that the National Treasury can take to penalise municipalities when they fail to follow the procurement rules. These are stopping transfer of funds to a municipality and barring of corrupt service providers. However, these enforcement mechanisms are seldom or never used. In the case of placing corrupt tenderers on the Register, it has hardly been used due to the lack of clear guidelines relating to the process of getting the information from the courts to the National Treasury.

It was argued that, while the barring of corrupt service providers may exclude them, its provisions do not contain direct enforcement mechanisms against corrupt municipal officials. This mechanism can only discourage service providers and not corrupt municipal officials.

In conclusion, it was submitted that the National Treasury plays a very important regulatory role in attempting to reduce corruption in municipal procurement; but its powers are limited and it cannot act decisively against corrupt municipal officials. To enhance the role

of the National Treasury, it is suggested that the municipality must submit to the National Treasury information about all court cases brought against service providers or their directors arising from their dealings with municipalities. This will ensure that the National Treasury monitors progress and the subsequent outcome of those cases in order to regularly update its Register for corrupt service providers.

7.3.2 The provinces

It has been argued in Chapter 4 that although the Constitution and the Systems Act allow for monitoring, they do not provide provinces with ready remedies to correct maladministration in the tender process. Provinces can do much to monitor compliance with the procurement rules but they cannot act upon their findings of irregularities and fraud. They monitor through routine reports and also on an individualised basis. The MEC for Local Government is empowered to establish mechanisms, processes and procedures to monitor municipalities in the province.²⁶⁴ The MEC may also request any information that may reasonably be required. This is an important monitoring tool for the province in that the Systems Act gives the MEC the right of access to information. The Systems Act also empowers the MEC to order investigation if he or she has a reason to believe that maladministration, fraud, corruption or any other serious malpractice has occurred or is occurring in a municipality.²⁶⁵ However, the challenge is what can the MEC do with the information if there is evidence of maladministration, fraud and/or corruption?

It has been shown that provinces do not have powers to take direct remedial action against municipal officials who do not follow the procurement rules. The study has shown that intervention in terms of section 139(1) is not possible against municipal officials who fail to follow the procurement rules because, proper procurement decisions are administrative obligations which fall outside the intervention powers of section 139(1) which, is limited to executive obligations. It is therefore recommended that the scope of section 139(1) of the Constitution must be clarified in legislation and must be broadened so as to include

²⁶⁴ Section 105(1) Systems Act.

²⁶⁵ Section 106(1) Systems Act.

administrative failure in order to enable the province to intervene in instances where municipalities are failing or have failed to adhere to procurement rules.

7.3.3 The Auditor-General

The Auditor-General plays an important role in monitoring municipal procurement. It has been shown that while this institution has powers to audit and investigate fraud and corruption in the field of procurement. Its framework and methodology are designed in such a way that the Auditor-General can easily identify irregular activity by following a paper trail. There are, however, distinct limits to its powers to detect fraud and corruption. Moreover, its powers are limited to revealing corruption and not acting upon it.

When performing an audit, the Auditor-General has access to all the records, documents or any information of the municipality which reflect or may elucidate its business, financial results, financial position or performance. A paper trail or lack thereof can lead to inconsistencies which can be identified during a normal audit. It has been shown that the Auditor-General can also identify when there is a conflict of interest. It was argued that the Auditor-General has limitations to its detecting powers. It cannot easily detect rigging and fronting without conducting a forensic investigation. This is because of the fact that rigging may not be readily apparent from available documents. Moreover, rigging is more likely to occur during the first stage of the bidding process which involves, *inter alia*, planning, choice of the procurement method, specifying the requirements, choice of contract type, and preparation of bidding documents. An audit is a process in which the Auditor-General checks compliance with the systems or internal control of public institutions, and it is not a forensic investigation. This also applies on fronting. The Auditor-General cannot detect fronting without conducting a forensic investigation on companies that are doing their business with municipalities.

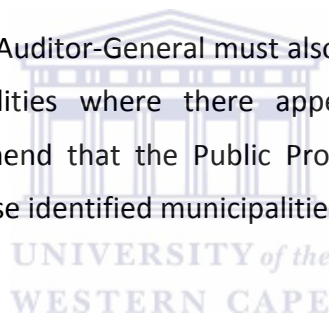
The study has also shown that although the Auditor-General has power to audit and report on the accounts, financial statements and functional management of all municipalities, the Constitution and the Public Audit Act do not empower the Auditor-General to take remedial action against municipalities that fail to comply, other than to report to the relevant legislature that has a direct interest in the audit and to make the report public. The

functionality of the Auditor-General depends on how the other institutions use the information detected by the Auditor-General during the audit.

Based on these views, the study concluded that additional powers should be given to the Auditor-General in order for it to be more effective in combatting fraud and corruption. These powers must include, *inter alia*, the ability to liaise directly with the office of the Special Investigative Unit or SAPS in instances where it is clear that there is criminal conduct.

It is therefore recommended that a provision must be made to oblige the Auditor-General to lay criminal charges in instances where it can be shown that there was corruption and/or fraudulent activity. As things stand now, the Public Audit Act, the MFMA and the Systems Act do not oblige the Auditor-General to lay any criminal charge. The Auditor-General can only report criminal acts to the relevant legislatures and these do not have power to act decisively against corrupt municipal officials.

It is also recommended that the Auditor-General must also be empowered to identify in the audit report all the municipalities where there appears to be material breach of procurement rules and recommend that the Public Protector must conduct on its own initiative investigations to all those identified municipalities.



7.3.4 The Public Protector

The study has shown that the powers of the Public Protector are sufficient to investigate improper conduct and maladministration in municipal procurement. Its unlimited powers of search and to investigate maladministration in municipalities make it one of the most effective institutions in investigating tender irregularities in municipalities.

It has been shown that the investigations conducted by the office of the Public Protector in the past clearly show that it can investigate maladministration, fraud and/or corruption in municipal procurement. It has been argued that although the Public Protector is supposed to be independent and to investigate without fear, favour or prejudice, there have been instances in the past where one could not resist the temptation of alleging political bias. However, recent events have shown that there is a change in the attitude of Public Protector in that it tackled senior political figures head on. Moreover, politicians are

starting to respect the independence of the Public Protector. This has been shown by the recent investigations and reports of the Public Protector in relation to the Minister of Public Works and the Minister of Co-operative Governance and Traditional Affairs, which resulted in those ministers being fired by the President on the basis of the recommendations of the Public Protector.

It was argued that the Public Protector is not very effective in fighting corruption in municipal procurement because it cannot take any direct remedial action against municipalities, other than to report to the relevant authorities, recommending action. It is therefore submitted that this institution can be more effective in fighting corruption in municipal procurement if additional powers are afforded to it. It is therefore recommended that the Public Protector must be obliged to initiate investigations on all the municipalities that are identified by the Auditor-General in the audit report.

7.4 Conclusion

It is submitted that the prevalence of corruption in connection with municipal procurement is not due to lack of an elaborate legal and regulatory framework. It is partly due to lack of intervention mechanisms by external institutions. In order for corruption to be minimised, additional powers should be given to these institutions.

This study has also shown that these institutions are dependent on each other. In order for the National Treasury and the Province to know and act against corrupt municipalities, they need information. Such information must be provided by the Auditor-General through the audit report. The Public Protector is also empowered to have access to the information held by municipalities. He or she can also request a copy of the audit report, either from municipalities themselves or from the Auditor-General. If these institutions can work in a co-ordinated manner, corruption can be minimised significantly.

Word count: 28 986

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