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WESTERN CAPE

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**Research Paper Topic: Changing the traditional role of the Auditor General: Is the  
Public Audit Amendment Act constitutional?**

**Keywords:** Auditor General, Chapter 9 Institutions, Public Audit Act, Public Audit  
Amendment Act

**DECLARATION**

I, Henrico Mario Alkaster, do hereby declare that the dissertation titled ‘*Changing the traditional role of the Auditor General: Is the Public Audit Amendment Act constitutional?*’ is my original work. All the sources used were properly acknowledged by means of references. I herewith further certify that this paper has not been submitted for another degree or to any other institution of higher learning.

Signed.....

Date.....

Supervisor: Professor Nico Steytler

Signature.....

Date.....



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## DEDICATION

*I dedicate this paper to my parents (Sophia and Derick Alkaster) and to my beautiful daughter, Olivia Grace Alkaster.*



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## List of Abbreviations

AA	Accounting Authority
AO	Accounting Officer
AG	Auditor General
AGSA	Auditor General of South Africa
BC	British Comptroller
CFO	Chief Financial Accountant
IOSAI	International Organisation of Supreme Audit Institutions
MFMA	Municipal Finance Management Act
MIR	Material Irregularity Regulations
MM	Municipal Manager
MSA	Municipal Structures Act
NA	National Assembly
PAA	Public Audit Act
PAAA	Public Audit Amendment Act
PP	Public Protector
SAI	Supreme Audit Institutions
SCOAG	Standing Committee on the Auditor General



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# Chapter 1: Introduction

## 1.1 Problem Statement

The majority of South Africa's 257 municipalities are in a dire state as evidenced by the recent reports of the Auditor-General (AG).<sup>1</sup> The Minister of Cooperative Governance and Traditional Affairs revealed that only 7 percent of the country's 257 municipalities are classified as well-functioning insofar as they are capable of carrying out their tasks adequately.<sup>2</sup> From the remaining municipalities, the Minister pointed out that 87 municipalities (31 percent) are 'frankly dysfunctional' meaning that service delivery in these municipalities is poor or at times non-existent because of poor governance, inadequate financial management, and poor accountability mechanisms.<sup>3</sup> The recent assessment of the Minister further confirms the 2016/17 municipal audit findings of the Auditor-General, Kimi Makwetu, who found that:

despite his office's constant and insistent advice and caution to those charged with governance and oversight about administrative lapses since 2013, there has been no significant positive change towards credible results.<sup>4</sup>

Of the 257 audit municipalities, only 33 municipalities (13 percent) managed to produce quality financial statements and performance reports, and complied with all key legislation, thereby receiving a clean audit. Furthermore, the Consolidated General Report revealed that irregular

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<sup>1</sup> Auditor-General of South Africa *Consolidated General Report on Local Government Audit Outcomes MFMA 2016-2017* (2018a) 2-3.

<sup>2</sup> Ministry of Cooperative Governance and Traditional Affairs Republic of South Africa: *COGTA Budget Vote Speech Local Government is Everybody's Business* (2018) 5 available at [http://www.cogta.gov.za/cgta\\_2016/wp-content/uploads/2018/05/COGTA-BUDGET-VOTE-SPEECH-15-MAY-2018-NATIONAL-ASSEMBLY-3.pdf](http://www.cogta.gov.za/cgta_2016/wp-content/uploads/2018/05/COGTA-BUDGET-VOTE-SPEECH-15-MAY-2018-NATIONAL-ASSEMBLY-3.pdf) (accessed 11 November 2019).

<sup>3</sup> COGTA (2018) 5. See also De Visser J & Steytler N *Confronting the State of Local Government: The 2013 Constitutional Court Decisions* (2016) VI *Constitutional Court Review 2*.

<sup>4</sup> Auditor-General South Africa, 'Auditor-general laments lack of accountability as he releases declining local government audit results' (2018b) 1 available at <http://www.agsa.co.za/Portals/0/Reports/MFMA/201617/Media%20Release/2016%20-17%20MFMA%20Media%20Release.pdf?ver=2018-05-23-082131-353> (accessed June 5 2019).

expenditure<sup>5</sup> increased by 75 percent from R16.2 billion in the previous year to R28.4 billion.<sup>6</sup> Fruitless and wasteful expenditure, defined as ‘any expenditure made in vain that could have been avoided had reasonable care been exercised’<sup>7</sup> amounted to R1.5 billion. This is a 71 percent increase from the previous year.<sup>8</sup> The AGSA report found non-compliance with important governance laws and regulations in 86 percent of municipalities and highlighted such non-compliance as one of the main reasons for the high levels of financial mismanagement and corruption.<sup>9</sup> The AGSA highlighted that the financial statements and performance reports submitted by local governments were of poor quality. Only 22 percent of the financial statements submitted did not have material-misstatements.<sup>10</sup> Consequently, the performance reports of at least 62 percent of the municipalities did not reflect the true state of affairs of the implicated municipalities, were tainted with material flaws and were thus deemed not credible.<sup>11</sup>

It is against this background that Parliament in 2018, in terms of section 188(4) of the Constitution,<sup>12</sup> promulgated the Public Audit Amendment Act (PAAA).<sup>13</sup> The PAAA which was initiated by the Standing Committee of the Auditor-General (SCOAG), seeks to give more powers to the AGSA, in particular the power to make legally binding recommendations. The objective of the PAAA is to compel municipalities to implement the recommendations of the

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<sup>5</sup> Section 1 Municipal Finance Management Act 56 of 2003 defines ‘irregular expenditure’ as ‘expenditure, other than unauthorised expenditure, incurred in contravention of or that is not in accordance with a requirement of any applicable legislation, including, section 1 Public Finance Management Act (PFMA) 1 of 1999.

<sup>6</sup> Auditor-General (2018) 2.

<sup>7</sup> Section 1 Local Government Municipal Finance Management (MFMA) Act 56 of 2003.

<sup>8</sup> Auditor-General (2018) 7.

<sup>9</sup> Auditor-General (2018) 4.

<sup>10</sup> Section 1 (g) Public Audit Amendment Act (PAAA) defines ‘material irregularity’ as ‘any non-compliance with, or contravention of, legislation, fraud, theft or a breach of a fiduciary duty identified during an audit performed under this Act that resulted in or is likely to result in a material financial loss, the misuse or loss of a material public resource or substantial harm to a public sector institution or the general public’.

<sup>10</sup> Auditor General (2018) 3.

<sup>11</sup> Auditor General (2018) 3.

<sup>12</sup> Constitution of the Republic of South Africa, 1996.

<sup>13</sup> Public Audit Amendment Act (PAAA) 5 of 2018.

AGSA and as a result transform the current state of financial mismanagement at the local level of government, by stopping the unprecedented amount of unauthorised and wasteful expenditure of taxpayers' money. The PAAA, as will be discussed in Chapter 2, drastically changed the traditional role of the AGSA. For example, the office of the South African Auditor General (AGSA) which originates from the English finance system was mainly mandated to act as a watchdog over the executive and to assist Parliament in performing its oversight role over the executive, by holding it accountable for any financial wrongdoing or non-compliance with the law.<sup>14</sup> Similar to many Anglophone countries, the traditional role of the AGSA is merely to assist Parliament or in the case of municipalities, the municipal council in overseeing the executive, particularly by assessing whether the executive has spent public funds in compliance with the law. In other words, the Anglophone AG, by tradition only gives advice or opinions that are not legally binding. Nevertheless, these opinions and reports enables the legislature to perform its oversight role, and exposes poor governance and corrupt practices.<sup>15</sup> Moreover, the audit reports of the AG are available to the public and are subject to further scrutiny by the media. The audit reports are thus, an important mechanism that enhances accountability and transparency which informs the public on how public money is being spent. The audit reports inform and assist citizens to ultimately hold political parties and leaders to account when they cast their votes at the ballot box, by voting the elected officials or party out of power.

Whereas the reports and opinions of the AG are imperative for the purpose of accountability and transparency, practice has shown, as previously mentioned, that the majority of municipalities in South Africa fail to implement, or at times, ignore the recommendations of

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<sup>14</sup> Hatchard J *Combating Corruption: Legal Approach to Supporting Good Governance and Integrity in Africa* (2014) 71.

<sup>15</sup> Steytler N 'The "financial constitution" and the prevention and combatting of corruption: A comparative study of Nigeria, South Africa and Kenya' (2017) Unpublished Paper 27.

the AG leading to a continuation of financial mismanagement and a recurrence of the same audit findings. To address this, Parliament exercised its legislative powers in terms of section 188(4) of the Constitution by amending the PAA to empower the AGSA to make legally binding decisions and to take remedial actions. The question is then whether or not the amendments will pass constitutional muster. This research paper will interrogate the PAAA to establish the answer to this crucial legal question.

## **1.2 Research Question**

The PAA was established in terms of the Constitution to regulate and prescribe the duties of the AGSA in accordance with the wording of the Constitution. The PAAA seeks to confer new powers to the AGSA which will drastically change the power and functions of the AGSA from its traditional role as a mere ‘watchdog’ over the state coffers to a ‘protector’ of the state coffers. It is argued that the amendments to the traditional role of the AGSA by PAAA are urgently needed to address rampant corruption and financial mismanagement at the local government level. The changes are needed in order for municipalities to implement the recommendations of the AGSA, which can improve the financial management of municipalities. However, there are concerns that the PAAA transformed the role and functions of the AGSA so drastically that it will be inconsistent with what the drafters of the Constitution envisioned the role of the AGSA should be.

Therefore, the main research questions which the paper seeks to answer are:

- 1.) Whether the amendments the PAAA seeks to bring, that is, granting the AG executive powers, are constitutional?
- 2.) If so, will they contribute to transforming the current state of financial mismanagement, and corruption at local government?

### **1.3 Argument**

This paper argues that the amendments to the powers of the AGSA contained in the PAAA, are constitutional and consistent with the constitutional mandate of Chapter 9 institutions and with recent court judgments. In addition, taking into consideration the founding values of the Constitution, in particular, the rule of law, accountability, and transparency, it is argued that the PAAA will pass constitutional muster since it strengthens constitutional democracy. In answering the question whether the PAA will contribute to transforming the current state of financial mismanagement, the paper argues that the amendments contained in the PAAA will contribute to the reform of the current state of financial mismanagement and governance structures of municipalities. Furthermore, the implementation of the PAAA will lead to a more efficient local government in the execution of its constitutional mandate. The PAAA will also allow municipalities to industriously perform their powers and functions as envisaged by the Constitution. Furthermore, it is argued that the amendments to the PAA will improve financial management of municipalities as the amendments will promote strict compliance with the law, due process, greater accountability, and transparency. It is further argued that the PAAA is likely to contribute towards creating an effective, robust system of local government.

### **1.4 Literature Review**

Although there is vast literature on the powers and functions of the AGSA and on building a financially viable government, there is, however, no academic literature on the PAAA in relation to the research question. Hence, the paper will draw on the literature published on public expenditure and on the AGSA under the PAA. Moreover, the paper will draw inferences from the literature published on the British Auditor General (British AG), currently, the British National Audit Act<sup>16</sup> explicitly empowers the British Comptroller (BC) and British AG to

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<sup>16</sup> National Audit Act 44 of 1983.

report directly to the British Parliament. However, in practice the BC and the British AG report through the Public Accounts Committee rather than directly to Parliament.<sup>17</sup> On the other hand, in the Francophone system, the role of the AG is performed by a *cour des comptes* (court of accounts) which forms part of the judiciary and hence, does not report to Parliament.<sup>18</sup> It follows therefore, that with the recent promulgation of the PAAA, the AGSA will move away from the traditional role of the British AG, closer to the Francophone system where any decisions taken by the AG are legally binding.

Secondly, the AGSA, as the SAI, must produce financial audits and compliance audits with respect to all national and provincial departments, all municipalities,<sup>19</sup> all public entities and a host of other public institutions.<sup>20</sup> Woolman argues that the purpose of these audits is to ensure the proper use of public funds, provide critical information about how various arms of government are managing their budgets and to enable the legislature to exercise meaningful oversight over the executive.<sup>21</sup>

Gloeck suggests that before consideration can be given to the AGSA providing other services such as consulting and advising, the core business of the AGSA as envisaged by the Constitution demands first priority.<sup>22</sup> The Constitution stipulates that the core business of the AG is to provide independent assurances to the South African public that auditees have discharged their responsibilities within the given accountability framework. Furthermore, the wording of section 20(3)<sup>23</sup> indicates that it is optional for the AG to report on the efficient, and

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<sup>17</sup> See generally Bandy G *Financial Management and Accounting in the Public Sector* (2011).

<sup>18</sup> Steytler (2017) 5.

<sup>19</sup> Section 188(1) (b) Constitution; Section 4(1) PAA.

<sup>20</sup> Section 188(1) (c) Constitution; Section 4(2) PAA

<sup>21</sup> Woolman S & Schutte Y 'The Auditor General' in Woolman S & Bishop M (eds) *Constitutional Law of South Africa* 2 ed (2013) Ch 24B-2.

<sup>22</sup> Gloeck JD 'Advancing or retreating in the quest to improve public accountability and government auditing: The South African Draft Public Audit Bill' (2003) 4 *South African Journal of Accountability and Auditing Research*.

<sup>23</sup> PAA.

effective use of resources by its auditees.<sup>24</sup> Gloeck argues that although the AGSA receives almost absolute powers from the Constitution and the PAA, the lack of a strong accountability framework, however, ultimately threatens the independence of the AGSA.<sup>25</sup> Chapter 9 institutions are constitutionally mandated to strengthen our constitutional democracy by holding government officials and departments to account. Moreover, they have the powers to require answers or explanations from government officials and other actors.<sup>26</sup> Thus, it is imperative that the additional powers the PAAA confers to the AGSA should enhance accountability and transparency to strengthen municipal institutions in order to prevent corrupt practices. De Vos argues that secrecy is the enemy of accountability, thus Chapter 9 institutions are designed to ensure that public power is exercised in an open, transparent manner by revealing irregularities and corruption.<sup>27</sup>

Corruption in the public sector is a specific cultural attitude regarding the usurpation of public goods which results in the advancement of private gains and selfish interest, against the overall object of the government.<sup>28</sup> Furthermore, it is argued that corruption manifests easily in cases where institutions are poorly developed to hold leaders accountable for their actions as the institutional rules and processes are easily deviated from.<sup>29</sup> Chapter 9 institutions, such as the AGSA, are thus best equipped to expose unlawful and corrupt practices and to uncover the failures of the executive, the legislature and government officials.<sup>30</sup> However, Steytler argues that although there are some gaps in the constitutional architecture, the principal cause lies with

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<sup>24</sup> Gloeck (2003) 2.

<sup>25</sup> Gloeck (2003) 3.

<sup>26</sup> De Vos P 'Balancing independence and accountability: The role of Chapter 9 institutions in South Africa's constitutional democracy' in Chirwa D & Nijzink L (eds) *Accountable government in Africa: Perspectives from public law and political studies* (2012) 173.

<sup>27</sup> De Vos P (2012) 173.

<sup>28</sup> Dintwe S 'The [in] effectiveness of anti-corruption programmes in addressing public sector corruption: A corporative governance perspective' (2013) 48(4) *Journal of Public Administration* 553-4.

<sup>29</sup> Eicher S *Corruption in International business: The challenge of cultural and legal diversity* (2009) 8.

<sup>30</sup> De Vos (2012) 173.

the lack of political will and absence of respect for constitutionalism as a principle of governance.<sup>31</sup>

## **1.5 Chapter Outline**

This paper is divided into five chapters. Chapter 1 is the introductory chapter, which provides the problem statement, significance of the problem, research question, argument, literature review and the methodology of the paper. Chapter 2 deals with the traditional roles of the AGSA, and analyses the proposed amendments contained in the PAAA. Chapter 3 discusses the constitutionality of the proposed changes contained in the PAAA. Chapter 4 discusses the likely impact the amendments will have on financial management at local government. Lastly, chapter 5 deals with the conclusion and recommendations of this paper.

## **1.6 Research Methodology**

This paper will use a desktop study approach in answering the research questions, based on existing literature and investigating currently available data. In chapter 2 and 3, the paper focuses on primary sources such as the PAA and the PAAA and there will also be discussions of case law dealing with the constitutional mandate of chapter 9 institutions. Chapter 4 draws on secondary sources such as journal articles, and books relating to building a capable government. Chapter 5 will constitute the conclusion which will be a summary of all the chapters and will provide recommendations.

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<sup>31</sup> Steytler (2017) 4.



## Chapter 2: The Traditional Role of the Auditor General

### 2.1 Introduction

Financial reporting plays an integral part in enhancing transparency and accountability in the public sector to the extent that it informs the public about whether government is spending public money efficiently, and in accordance with the law. Auditing is one of the key mechanisms which is used to monitor and control income and expenditure within the public sector, and it gives the public a true indication of how government allocated and spent taxpayers' money. This chapter will provide an overview of the origins of supreme audit institutions (SAIs) and discuss the characteristics of two prominent public audit models. Furthermore, the chapter will outline the origin of the South African public finance system with particular reference to the office of the AG. Additionally, the chapter will discuss the legal framework regulating the AGSA. Lastly, the key amendments contained in the PAAA will be discussed to determine whether the proposed amendments will change the traditional role and function of the AGSA.

### 2.2 Overview on the Anglophone and Francophone Supreme Audit Institutions

Over the years a number of countries around the world have established external audit institutions to promote the proper and effective use of public funds and sound financial management. These audit institutions are today known as SAIs.<sup>32</sup> In 1953, the International Organisation of Supreme Audit Institutions (IOSAI) was established. The IOSAI is an international non-governmental and non-political organisation with over 195 members. As an organisation, IOSAI aims to improve external auditing around the world through creating

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<sup>32</sup> Department for International Development (DFID) 'Characteristics of different external audit systems' (2004) 1 available at <http://webarchive.nationalarchives.gov.uk/+/http://www.dfid.gov.uk/aboutDFID/organisation/pfma/pfma-externalaudit-briefing.pdf> (accessed 25 October 2018).

international standards and guidelines of external auditing for SAIs.<sup>33</sup> There are different models of SAIs; the three main auditing models are the Anglophone model (Westminster model), the Judicial or Napoleonic model (Francophone) and the Board or Collegiate model used by countries such as Germany, Netherlands, and Japan.<sup>34</sup> However, for the purpose of this study, the focus will only be on the two commonly used models in Africa, the Anglophone and the Francophone models.

### ***2.2.1 The Westminster Model***

The Westminster model is used by many of the Commonwealth countries, including South Africa. In the Westminster model, the traditional role of the SAI includes assisting Parliament in performing its oversight role over the executive, promoting a transparent public finance system and bolstering financial accountability. Steytler argues that the foundation of constitutional regulation of public expenditure in the Anglophone system is based on the basic principles of constitutionalism.<sup>35</sup> Steytler summarised four principles of public finance management in the Anglophone system accordingly: first, the raising and expenditure of funds is subject to democratic decision-making; secondly, the expenditure of funds is subject to limitations, including the separation of powers; thirdly, the raising and expenditure of funds is subject to the rule of law; and finally, the expenditure of funds should be for public developmental purposes.<sup>36</sup>

Western countries practicing democracy started establishing audit institutions as a central part of ensuring the supremacy of Parliament over the executive and bolstering public

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<sup>33</sup> DFID 'Working with Supreme Audit Institutions' (2005) 4 available at <http://siteresources.worldbank.org/EXTFINANCIALMGMT/Resources/313217-1196229169083/4441154-1196273114377/4444384-1196273135391/HowtoNoteWorkingwithSupremeAuditInstitutions.pdf> (accessed 25 October 2018).

<sup>34</sup> DFID (2005) 1.

<sup>35</sup> Steytler (2017) 2.

<sup>36</sup> Steytler (2017) 2.

accountability.<sup>37</sup> The first public audit was introduced in England, as a mechanism to bolster parliamentary control over national finances by monitoring public expenditure, with the enactment of the Exchequer and Audit Department Act in 1866.<sup>38</sup> The Act established the office of the Comptroller and the Auditor General, with the mandate to monitor and audit all state departments and report its findings to Parliament.<sup>39</sup> In the Westminster model of finance management, the British Comptroller (BC) was given two main functions, first to authorise the issue of public money to government from the Bank of England, having been satisfied that it was within the limits of what Parliament had voted and second to audit the accounts of all government departments and report to Parliament accordingly.<sup>40</sup> The BC is responsible for ensuring that there is money available before funds can be allocated for a specific project. Authority is thus given *before* expenditure. Thereafter, the BC oversees the expenditure of the allocated funds and the financial management of any established project by the executive. In contrast, the AG only performs its function *after* expenditure has already occurred.

In the 1896 *Kingston Cotton Mills* case, the English Court of Appeal delivered a landmark judgment which perfectly described the function and powers of auditors in the Anglophone financial system. In this case, Lord Justice Lopes delivered the following remarks:

It is the duty of an auditor to bring to bear on the work he has to perform that skill, care, and caution which a reasonably competent, careful, and cautious auditor would use. An auditor is not bound to be a detective, or, as was said, to approach his work with suspicion, or with a foregone conclusion that there is something wrong. He is a watchdog but not a bloodhound. Auditors must not be made liable for not tracking out ingenious and carefully laid schemes of

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<sup>37</sup> Kuma D 'The Comptroller and Auditor General in India' available at <http://www.preservearticles.com/2011100514673/essay-on-the-comptroller-and-auditor-general-of-india.html> (accessed 24 October 2018).

<sup>38</sup> Kuma (2018).

<sup>39</sup> Kuma (2018).

<sup>40</sup> Steytler (2017) 2.

fraud, when there is nothing to arouse their suspicion. So to hold would make the position of auditor intolerable.<sup>41</sup>

This decision has helped shape the role of the auditing profession and the mandate of the Anglophone AG. However, the problem is that in the 21<sup>st</sup> century many aspects of government structures and governing principles have changed, particularly in the financial world. This created a shift towards an increased demand for accountability and transparency in the public and private sector. To meet the demands of greater accountability and transparency in the public sector, the AG would have to act more like a bloodhound instead of a watchdog in order to curtail corruption and financial mismanagement in the public sector.

### **2.2.2 The Judicial or Napoleonic (Francophone) model**

The judicial or Napoleonic model originates from the French public finance management system, and is firmly rooted in the public finance system of Francophone countries as well as countries such as Turkey, Brazil, and Colombia.<sup>42</sup> The objects of the SAI in the Francophone model are similar to that of SAIs in the Westminster model, which is enhancing transparency, creating a sound public finance management system and bolstering financial accountability from the executive.<sup>43</sup> The fundamental difference is, however, that the auditing role of the AG is performed by a *cour des comptes* (court of accounts) which forms part of the judiciary. This means that the AG is not subject to the control of Parliament.<sup>44</sup> The court of accounts consequently has similar power to that of the judiciary and has the authority to make verdicts and hold public officials personally liable for any act of financial wrongdoing.

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<sup>41</sup> The Institute for Public Sector Accountability 'Municipal Auditor General a bloodhound not another watchdog' (2009) 9 available at <http://www.theipsa.org/articles/municipalauditorgeneral2.pdf> (accessed 11 July 2018).

<sup>42</sup> DFID (2005) 13.

<sup>43</sup> DFID (2005) 13.

<sup>44</sup> Steytler (2017) 5.

### 2.2.3 The History of the South African Auditor General

The AGSA has the same function as the British AG, which is to audit all public accounts, report its findings back to Parliament and thereby assist Parliament in performing its oversight role over the executive. However, the AGSA has not enjoyed any financial and administrative autonomy over the years, as it was subject to the control of the executive. During the apartheid regime, Parliament granted the executive veto powers on certain administrative matters relating to the audit office. The AGSA had to rely on the goodwill of the executive to cooperate with its office.<sup>45</sup> This paralysed the AGSA as the office was unable to produce objective reports without fear, favor, and prejudice.

With the demise of minority government and rising democracy, the apartheid government sought to bolster the capacity and independence of the AG by passing the Audit Arrangements Act.<sup>46</sup> The Act established an office of the AG outside of the public service, having its own revenue fund and the Act reassigned the overall supervision of the office of the AG to an oversight body known as the Audit Commission, which consisted mainly of Members of Parliament.<sup>47</sup>

### 2.3 Constitutionalisation of the Auditor-General's Office

The office of the AG was for the first time given constitutional protection in the Interim Constitution of 1993.<sup>48</sup> In order to regulate the powers and functions of the AG in line with the Interim Constitution, Parliament in 1995 passed the Auditor-General Act.<sup>49</sup> Both the aforementioned Acts were abolished by the Public Audit Act (PAA), to align the legislative

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<sup>45</sup> Parliament of the Republic of South Africa 'Reporting of the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions' (2007) 68 available at <https://www.sahrc.org.za/home/21/files/Reports/Report%20of%20the%20Ad%20Hoc%20Committee%20of%20chapter%209.%202007.pdf> (accessed 26 October 2018).

<sup>46</sup> Audit Arrangements Act 122 of 1992.

<sup>47</sup> Parliament of the Republic of South Africa (2007) 68.

<sup>48</sup> Section 191(1) of the Constitution of the Republic of South Africa Act 200 of 1993.

<sup>49</sup> Auditor-General Act 12 of 1995.

framework with the 1996 Constitution and to strengthen the financial and administrative role of the Auditor-General.<sup>50</sup>

## 2.4 The Constitutional Mandate of the Auditor-General

The Constitution establishes the office of the AGSA and gives it special status by making it a Chapter 9 institution.<sup>51</sup> As one of the constitutionally enshrined Chapter 9 institutions, the AGSA is a state institution that is mandated to protect and strengthen South Africa's constitutional democracy. The AGSA has a constitutional duty to safeguard the principles of constitutionalism, which includes regulating state power, by enhancing accountability, transparency and respect for the rule of law. Unlike the other state institutions that support constitutional democracy,<sup>52</sup> Woolman and Schutte once noted that the office of the AGSA predated both the Interim and Final Constitution.<sup>53</sup> By virtue of being a Chapter 9 institution, the Constitution requires the AGSA to be impartial and to execute its constitutional mandate and functions without fear, favour or prejudice.<sup>54</sup> The Constitutional Court in *President of the Republic of South Africa v South African Rugby Football Union*, noted that the Final Constitution is:

committed to establishing and maintaining an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public. The importance of ensuring that the administration observes fundamental rights and acts both ethically and accountably should not be understated. In the past, the lives of the majority of South Africans were almost entirely governed by labyrinthine administrative regulations which, amongst other things, prohibited freedom of movement, controlled access to housing, education and jobs and which were implemented by a bureaucracy hostile to fundamental rights or accountability. The constitutional goal [of ensuring that the administration observes

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<sup>50</sup> Parliament of the Republic of South Africa (2007) 69.

<sup>51</sup> Section 181(1)(e) Constitution.

<sup>52</sup> Section 181(1) of the Constitution provides for the creation of the Public Protector; the Human Rights; the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; the Commission for Gender Equality; the Auditor-General and the Electoral Commission.

<sup>53</sup> Woolman & Schutte (2013) ch24B 2.

<sup>54</sup> Section 181(2) Constitution.

fundamental rights and acts both ethically and accountably] is supported by a range of provisions in the [Final] Constitution . . . [including the establishment of] the Auditor-General whose responsibility it is to audit and report on the financial affairs of national and provincial State departments and administrations as well as municipalities.<sup>55</sup>

The observation above confirms that the primary role of the AGSA is to strengthen the country's democracy by enabling oversight, accountability and ensuring good governance in the public sector through auditing, which also bolsters public confidence in state institutions.

More specifically, the Constitutional Court in the *First Certification* judgment related that

the Auditor-General is to be the watch-dog over the government. However, the focus of the office is not inefficient or improper bureaucratic conduct, but the proper management and use of public money...<sup>56</sup>

To this end, section 188 of the Constitution outlines the functions of the AGSA. It includes functions such as 'auditing and reporting on accounts, preparing financial statements and the management of all state departments' in the national, provincial and local spheres of government. Additionally, where the AGSA finds evidence of financial mismanagement, corruption, or non-compliance with legislation it has the authority to make 'advisory recommendations' which are not legally binding.

The PAA was enacted to give effect to section 188(4) of the Constitution. The PAA provides the legislative framework which regulates the office of the AGSA in the execution of its constitutional mandate. In terms of section 181(5) of the Constitution, and in accordance with section 3(d) of the PAA, the AGSA is accountable to the National Assembly (NA). Furthermore, in terms of section 10 of the PAA, the AGSA is legally obligated to report on its activities and performance of its functions to the National Assembly. Section 10(3) of the PAA

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<sup>55</sup> *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (CCT16/98) [1999] ZACC 11 paras 133–134.

<sup>56</sup> *Certification of the Constitution of the Republic of South Africa, 1996* (CCT 23/96) [1996] ZACC 26 para 164.

establishes the Standing Committee on the Auditor General (SCOAG) which is tasked with overseeing the performance of the AGSA on behalf of the NA.

The office of the AGSA is constitutionally ‘empowered to audit and report on the accounts and financial management of all spheres of government and other statutory and non-statutory bodies.’<sup>57</sup> Every municipality and municipal entity is obligated to prepare annual financial statements for each financial year.<sup>58</sup> The annual financial statements must fairly present the state of affairs of the municipality, and its management of revenue and expenditure, including an assessment of the municipality’s assets and liabilities.<sup>59</sup>

The Municipal Manger (MM) of every municipality is statutorily obligated as the accounting officer, to prepare and submit an annual financial statement reflecting the financial affairs of the municipality to the AGSA.<sup>60</sup> The MM as the head of the municipal administration plays an integral part in the functioning of a municipality especially in relation to revenue collection and expenditure.<sup>61</sup> Thus, the MFMA has entrusted the MM to prepare and present the annual financial statement to the municipal council and to the AGSA. Thereafter, the AGSA is obligated to audit all financial statements received and submit the audited reports to the MM within three months after receiving them.<sup>62</sup> Section 20 of the PAA requires audit reports to reflect at least an opinion or conclusion on:

- (a) whether the annual financial statements of the auditee fairly present, in all material respects, the financial position at a specific date and results of its operations and cash flow for the period which ended on that date in accordance with the applicable financial framework and legislation;
- (b) the auditee’s compliance with any applicable legislation relating to financial matters, financial management and other related matters; and
- (c) the reported information relating to the performance of the auditee against

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<sup>57</sup> Section 188(1)(a) - (c) Constitution.

<sup>58</sup> Section 122 (1) MFMA.

<sup>59</sup> Section 122 (1) (a) MFMA.

<sup>60</sup> Section 122 (1) (a) MFMA.

<sup>61</sup> Section 122 (1) (a) MFMA.

<sup>62</sup> Section 126 (3) MFMA.



predetermined objectives.

Before the amendments to the PAA, the AGSA's primary functions flowed from section 20 of the PAA. The AGSA audits reflect the overall financial management of its auditees and whether the auditees prudently utilised their resources and complied with the prescribed law in the execution of their duties. Section 20 of the PAA further expects that the AGSA audit must include recommendations to the auditees on how to prevent losses and improve financial management of municipal funds. It must however be noted that the recommendations are not legally binding on auditees, which resulted in auditees not adhering to the recommendations given by the AGSA and this caused a recurrence of the same audit findings.

## **2.5 The Amendments**

Parliament adopted the Public Audit Amendment Act (PAAA) in response to the financial mismanagement and rampant corruption in the public sector, particularly within municipalities. The PAAA seeks to bolster the powers of the office of the AGSA, by granting the AGSA the power to take remedial action where municipalities failed to adhere to the AGSA recommendations. The PAAA empowers the AGSA to hold accounting officers (AOs) personally liable if they do not comply with the remedial action taken by the AGSA and if the AO fails to recover any wasteful, irregular and fruitless expenditure. Furthermore, by granting the AGSA powers to take remedial action, it makes the AG's recommendations legally binding and compulsory for the auditees to implement. However, if any auditee disputes the remedial action or certificate of debt, he/she can approach the courts to have the remedial action or certificate of debt set aside. The PAAA further introduces a number of changes which seek to enhance the efficiency, and independence of the AGSA. The remaining part of this paper will focus on the key amendments which ultimately changed the traditional role of the office of the AGSA.

## 2.6 Conclusion

It is evidenced by the financial mismanagement and corruption reflected in the recent audit findings of the AGSA that the changes which the PAAA seeks to bring are much needed. However, it is clear that the implementation of the PAAA will fundamentally change the function of the AGSA, moving away from the traditional role in the Anglophone model. The amendments transform the AGSA to more closely resemble the Francophone *cour des comptes* model, as the AGSA will no longer only act as a watch dog without teeth over state coffers. The amendments confer upon the AGSA some characteristics of the Francophone model, by empowering the AGSA to hold officials directly accountable for failure to perform their statutory duties, and not implementing the recommendations of the AGSA. The next chapter will critically analyse the key amendments which changed the traditional role of the AGSA and the constitutionality thereof.



## Chapter 3: Constitutionality of the Public Audit Amendment Act

### 3.1 Introduction

The foundation of South Africa's constitutional vision is to make a 'decisive break from the unchecked abuse of state power and resources that were institutionalised during the apartheid era', by limiting the extent of government's powers.<sup>63</sup> To achieve this goal the drafters of the South African Constitution enshrined accountability, the rule of law and the supremacy of the Constitution as values of South Africa's constitutional democracy.<sup>64</sup> This chapter will focus on the constitutionality of changing the traditional role of the AGSA. The chapter will analyse the amendments proposed in the PAAA, analyse how it will be implemented, and compare the office of the AGSA to another Chapter 9 institution, namely the Public Protector (PP). In comparing the legal framework and function of the AGSA to that of the PP, the chapter will conduct a detailed analysis of the case of *Economic Freedom Fighters v Speaker of the National Assembly and Others (Nkandla case)* to strengthen the argument. Lastly, the chapter will discuss the constitutional interpretive framework of the Public Audit Amendment Act.

### 3.2 The Amendments Introduced by the PAAA

As previously discussed, the main reason behind the enactment of the PAAA is to promote fiscal accountability, particularly within municipalities. The recurrence of the same audit findings every year, and the increase in irregular, fruitless and wasteful expenditure has left the AGSA frustrated.<sup>65</sup> With many municipalities ignoring the recommendations of the AGSA, the hands of the AGSA are tied by the limits of his statutory powers under the PAA, to the extent that the recommendations of the AG can simply be ignored because they are not legally binding.<sup>66</sup> It is for these reasons that Parliament amended the PAA. The amendments of the

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<sup>63</sup> *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (CCT 143/15; CCT 171/15) [2016] ZACC 11 (*Nkandla case*) para 1.

<sup>64</sup> Section 1(a)-(c) Constitution.

<sup>65</sup> The Auditor-General (2018b).

<sup>66</sup> The Auditor-General (2018b).

PAA are primarily directed at two key role players in the functioning of a municipality, namely the accounting officer (AO) and the accounting authority (AA). Accordingly, it would be necessary to discuss first, the powers and functions of these two central role players in order to properly understand the impact of the amendments.

### **3.3 Determining the Roles of the Accounting Officer, Accounting Authority and Chief Financial Officer**

#### **3.3.1 *The Accounting Officer***

In terms of section 60 of the MFMA the municipal manager (MM) is the AO of the municipality. The MM as the head of the municipal administration must abide by the policy directions of the municipal council.<sup>67</sup> Moreover, as the AO of the municipality, the MM is responsible for all financial matters (including income, expenditure, assets and liabilities).<sup>68</sup> Additionally, section 68 of the MFMA, requires the MM as the AO, to assist the mayor in performing the budgetary functions assigned to the latter. The MFMA requires the MM to provide administrative support to the mayor, and to provide or otherwise facilitate the provision of resources and information necessary for the performance of those functions.<sup>69</sup> Furthermore, the MFMA stipulates that the MM is responsible for implementing the municipal budget adopted by the municipal council.<sup>70</sup> The MM must take all reasonable steps to ensure that the spending of funds is in accordance with the adopted budget. The Municipal Systems Act further bestows on the MM an array of functions, including implementing the Municipal Integrated Development Plan, giving advice to the political structures within the municipality, overseeing municipal employees and implementing the decisions of the municipal council.<sup>71</sup> Consequently, the MM has a vital role in the municipality because he or she is responsible for

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<sup>67</sup> Section 55 Municipal Systems Act (MSA) 32 of 2000.

<sup>68</sup> Sections 61, 62, 63, 64 and 65 MFMA.

<sup>69</sup> Section 68 (1) (a) MFMA.

<sup>70</sup> Section 68 MFMA.

<sup>71</sup> Section 55 MSA.

liaising with the municipal council, implementing the policies adopted by the municipal council, and ensuring efficient service delivery.

### **3.3.2 *The Accounting Authority***

Section 1 (a) of the PAAA states that the ‘accounting authority’ is a body or a person defined as such in the Public Finance Management Act (PFMA).<sup>72</sup> The PFMA does not explicitly stipulate who is the AA of a municipality. Section 49 of the PFMA, states that an AA is a board or controlling entity of an institution. The Constitution vests executive and legislative powers in the municipal council.<sup>73</sup> This means that the power to pass by-laws, municipal budgets and policies that governs the entire municipal organisation vests in the municipal council.<sup>74</sup> It is thus argued that the municipal council is the AA, the municipal council is effectively the controlling entity governing the municipal organisation.

### **3.3.3 *Chief Financial Officer***

The municipal council, as the AA usually delegates financial responsibility to the relevant office in the administration, which is responsible for the financial management of municipalities. In terms of section 81 (1) of the MFMA, the Chief Financial Officer (CFO) is administratively in charge of the Budget and Treasury of a municipality. The CFO has an indispensable function to assist the MM with his or her financial management duties, for example, in relation to the preparation of budgets, financial reporting, and developing and maintaining internal control policies and procedures.<sup>75</sup> In terms of section 81(1) of the MFMA, the CFO’s tasks are as follows:

- (1) The chief financial officer of a municipality-
- (a) is administratively in charge of the budget and treasury office;

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<sup>72</sup> Public Finance Management Act 1 of 1999 (PFMA).

<sup>73</sup> Section 151 (2) Constitution.

<sup>74</sup> Section 151 (2) Constitution. See also *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (CCT7/98) [1998] ZACC 17 paras 41-2.

<sup>75</sup> Section 81 (1) MFMA.

- (b) must advise the accounting officer on the exercise of powers and duties assigned to the accounting officer in terms of this Act;
- (c) must assist the accounting officer in the administration of the municipality's bank accounts and in the preparation and implementation of the municipality's budget;
- (d) must advise senior managers and other senior officials in the exercise of powers and duties assigned to them in terms of section 78 or delegated to them in terms of section 79; and
- (e) must perform such budgeting, accounting, analysis, financial reporting, cash management, debt management, supply chain management. Financial management, review and other duties as may in terms of section 79 be delegated by the accounting officer to the chief financial officer

As a consequence, the CFO plays a critical role in the implementation and management of financial reforms within municipalities in accordance with the direction provided by the MM. Furthermore, the CFO has the authority to sub-delegate some of his or her responsibilities to other officers in the Municipal Budget and Treasury Office. In terms of section 77 of the MFMA, the CFO is part of top management and reports to the MM.

### **3.4 Amendment of Section 5 of the PAA**

Sections 3 and 4 of the PAAA transform the AGSA function from merely reporting on financial affairs of government, to enforcing compliance with the AGSA recommendations. Section 3 and 4 PAAA effectively make the AGSA the custodian of State coffers, by empowering the AGSA to take remedial action and hold municipal officials to account for any financial wrongdoing.

#### ***3.4.1 Section 3 of the Public Audit Amendment Act***

Section 3 PAAA inserts subsections (1A) and (1B) into section 5 of the PAA. They read as follows:

- (1A) The Auditor-General may, as prescribed, refer any suspected material irregularity identified during an audit performed under this Act to a relevant public body for investigation, and the relevant public body must keep the Auditor-General informed of the progress and the final outcome of the investigation.

(1B) The Auditor-General has the power to— (a) take any appropriate remedial action; and (b) issue a certificate of debt, as prescribed, where an accounting officer or accounting authority has failed to comply with remedial action, as set out in Part 1A of this Chapter.<sup>76</sup>

Unlike section 5 of the PAA, the new subsections (1A) and (1B) of the PAAA empower the AGSA to refer any suspected material irregularities to a relevant public body for investigation, and empower the AGSA to take remedial action.

### ***3.4.2 Referrals for Suspected Material Irregularities***

Section 1 (g) of the PAAA defines material irregularity as follows:

Material irregularity means any non-compliance with, or contravention of, legislation, fraud, theft or a breach of a fiduciary duty identified during an audit performed under this Act that resulted in or is likely to result in a material financial loss, the misuse or loss of a material public resource or substantial harm to a public sector institution or the general public.

If the AGSA discovers any material irregularity while conducting an audit, he or she must notify the AO or AA of that municipality, and provide them with the relevant detailed information pertaining to the material irregularity that was discovered.<sup>77</sup> If the AO or AA fails or refuses to make the written reply, the AGSA can make its findings of material irregularity final, and assume that the AO or authority failed to take appropriate measures to address the material irregularity.<sup>78</sup> The AGSA then has the discretion after taking all factors into account, to refer the material irregularity to a public body for investigation.<sup>79</sup>

Importantly, the AGSA must decide which public body will be best suited to conduct the investigation, and must submit the referral in writing. The referral must include all the details of the suspected material irregularity and any supporting documentation that can assist the

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<sup>76</sup> Section 3 PAAA.

<sup>77</sup> Regulation 3 of the Public Audit Act, 2004 (Act No. 25 of 2004): Material Irregularity Regulations (MIR).

<sup>78</sup> Reg 3 (3) MIR.

<sup>79</sup> Reg 4 MIR.

investigation.<sup>80</sup> Should the AGSA decide to refer any suspected material irregularity to a relevant public body for further investigation, the AGSA is obligated to serve notice of the investigation on the AO and AA, explaining to the latter why the matter was reported for further investigation.<sup>81</sup> The public body to whom the AGSA has referred the matter, must in writing send an acknowledgment of receipt of the referral and inform the AGSA if the matter does not fall within its mandate to conduct the investigation, or if they have the capacity and resources to conduct the investigation.<sup>82</sup> Moreover, if they can conduct the investigation, they must indicate so and include the date on which the investigation will commence, furthermore, it must, in writing, inform the AGSA of any delays in the investigation and when the investigation is completed notify him of the outcome thereof.<sup>83</sup>

### ***3.4.3 Appropriate Remedial Action***

Section 4 of the PAAA inserts two new provisions- sections 5A and 5B - which specifically grant the AGSA the power to enforce compliance with its recommendations by taking appropriate remedial action. Section 5A empowers the AGSA to take appropriate remedial action and section 5B empowers the AGSA to issue a certificate of debt in the name of the MM who failed to comply with the remedial action prescribed by the AGSA. The insertion of these two new provisions will fundamentally change the role of the AGSA by conferring upon the AGSA, powers to take remedial action and to issue a certificate of debt. Moreover, subsection (1B) empowers the AGSA to take any appropriate remedial action and to enforce compliance with the remedial action, by issuing a certificate of debt where an accounting officer or AA has failed to comply with the remedial action.<sup>84</sup>

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<sup>80</sup> Reg 5 (3) MIR.

<sup>81</sup> Reg 5 (4) MIR.

<sup>82</sup> Reg 5 (5) MIR.

<sup>83</sup> Reg 6 MIR.

<sup>84</sup> Section 3 PAAA.



Sections 3 and 4 of the PAAA seek to enhance prudent budgetary and expenditure control of state funds. Section 3 and 4 of the PAAA empower the AGSA to issue directives to the relevant AO or AA responsible for income and expenditure control, to recover any financial losses to the state, the failure to do so will result in personal liability. In other words, the aforementioned sections seek to punish AOs for failure to perform their fiduciary obligation to take adequate steps to recover financial losses incurred by the State.

Section 5A (2) of the PAA (as amended) provides the following:

‘If the accounting officer or accounting authority has failed to implement the recommendations contained in the audit report referred to in subsection (1), the Auditor-General must take appropriate remedial action to address the failure to implement the recommendations.’

Section 4 of the PAAA provides that the AGSA must first make recommendations. The AGSA is required to follow up on whether auditees, in the case of the AO or AA have complied or otherwise implemented his recommendations. Section 5A provides specifically that:

The Auditor-General must, within a reasonable time after the issuing of an audit report in terms of section 20, follow up on whether the accounting officer or accounting authority has implemented the recommendations contained in the audit report relating to any material irregularity, within the time-frame stipulated in the audit report.

In other words, after completing an audit, the AGSA is required to follow up within a reasonable time to establish whether the MM honoured the recommendations by implementing them.<sup>85</sup> The remedial action will be directed to the MM as he or she is responsible for managing municipal income and expenditure. The remedial action will act as a remedy for any financial mismanagement discovered by the AGSA in the annual audits. For example, remedial action can take the form of an instruction to improve expenditure control, tenders, supply chain management or for the recovery of any financial loss incurred by a municipality. Consequently,

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<sup>85</sup> Section 4 PAAA; section 5A (1) PAA.

where any material irregularity resulted in a financial loss to the municipality, the remedial action will include a directive to the MM to recover such loss from the responsible person.<sup>86</sup>

After the AGSA has made recommendations, there must be a follow-up date. It is clear from section 4, amendment 5A (1) PAA that the legislature has failed to provide a specific time-frame within which this follow-up should be done. The wording of the section, however, seems to suggest that the AGSA will stipulate the timeframe attached to his audit report, which will indicate the time period or date when the follow up will happen.<sup>87</sup> The legislature failed to take the opportunity to create legal certainty by not including a specific time-frame or otherwise providing at least the minimum period for the auditees to implement the recommendations of the AGSA. Failure on the part of MM to implement the recommendations of the AGSA prior to the AGSA follow-up date has significant legal consequences because the AGSA has the authority to take appropriate, legally binding remedial action. Hence, the legality of the imposing remedial action by the AGSA could be challenged by an auditee on the basis that the auditees were not aware of the specific time-frame within which the remedial action should be implemented.

The AGSA is legally obligated to take appropriate remedial action upon discovering that the MM has not implemented the AGSA recommendations.<sup>88</sup> The legislature did not provide a specific definition of what appropriate remedial action entails, which causes further legal uncertainty. The failure to specifically define the scope of the remedial action gives the AGSA broad powers, and leaves the provision vulnerable to be challenged in a court of law on the basis that the remedial action may be beyond the constitutional mandate of the AGSA. Section 5A (2) of the PAAA empowers the AGSA to enforce his recommendations, by making

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<sup>86</sup> Section 4 PAAA; section 5A (3) PAA.

<sup>87</sup> Section 4 PAAA; section 5A (1) of the PAA.

<sup>88</sup> Section 4 PAAA; section 5A (2) of the PAA.

remedial action legally binding. The failure of the MM to comply or otherwise implement this will result in the MM incurring personal liability, as the MM is responsible for managing the income and expenditure of municipal funds.

Section 5A (3) sets out the final step in issuing remedial action as follows:

[w]here a material irregularity resulted in a financial loss to the State, and the accounting officer or accounting authority failed to implement the recommendations contained in the audit report referred to in subsection (1), the remedial action taken by the Auditor-General in terms of subsection (2) must include a directive to the accounting officer or accounting authority to determine the amount of the loss, if not yet determined, and to recover such loss as required in terms of any applicable legislation, from the responsible person.

The final step before taking appropriate remedial action will require the AGSA to issue a directive to the MM, who is responsible for the implementation of the remedial action. The remedial action is a remedy for any material irregularity discovered during the annual audits conducted by the AGSA. For example, it can be a directive to improve expenditure control, tenders, supply chain management or for the recovery of any financial loss of a municipality. Consequently, where any material irregularity resulted in a financial loss to the municipality, the remedial action will then include a directive to the MM to recover the loss from the responsible person.<sup>89</sup>

### **3.5 Failure to Comply with Specific Remedial Action**

Before the AGSA issues a certificate of debt, the PAAA seeks to ensure due process, by giving effect to the *audi alteram partem*<sup>90</sup> common law principle which gives the relevant AO or AA an opportunity to make representation to state their case.<sup>91</sup> Regulation 13 of the MIR further

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<sup>89</sup> Section 4 PAAA; section 5A (3) PAA.

<sup>90</sup> In the case of *Psychological Society of South Africa v Qwelane and Others* (CCT226/16) [2016] ZACC 48, the phrase '*audi alteram partem*' was described as follows: '[i]t satisfies the individual's desire to be heard before he is adversely affected; and it provides an opportunity for the repository of the power to acquire information which may be pertinent to the just and proper exercise of the power'.

<sup>91</sup>Section 4 PAAA; section 5B (5) PAA.

provides that when determining whether to issue the certificate of debt, the AGSA must serve notice on the AO or AA, informing them that he is considering issuing a certificate of debt. Furthermore, the AGSA must provide reasons for issuing the certificate of debt as well as the specific amount.<sup>92</sup> The AGSA is also required to invite the AO or AA or any individual members of the AA, to submit written representation on to the matter, within 20 days after issuing the notice.<sup>93</sup> The written representation may include any documentation relevant to the material irregularity or which has not been previously submitted to the AGSA.<sup>94</sup>

If the AO or any member of the AO, fails to submit written representation, then the AGSA may proceed with issuing the certificate of debt on the basis that there is no objection to it.<sup>95</sup> If written representation was submitted, then the AGSA is required to inform the relevant person of the outcome of the representation, indicating whether the AGSA will still proceed with issuing a certificate of debt and if so, and the reasons why.<sup>96</sup> If the AGSA still intends to issue a certificate of debt after considering written representation, then the AGSA must in writing, invite the relevant person to make oral representations to an advisory committee established by the AGSA and the written notice must include the time, date and place where the hearing will take place.<sup>97</sup>

The advisory committee, will be established and remunerated by the AGSA.<sup>98</sup> The advisory committee must be chaired by a person who is in possession of a law degree, and must further consist of registered accountants and any other person deemed necessary by the AGSA.<sup>99</sup> The hearing of the oral representation must be conducted in terms of applicable law and the rules

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<sup>92</sup> Reg 13 (b) MIR.

<sup>93</sup> Reg 13 (d) MIR.

<sup>94</sup> Reg 14 (a) MIR.

<sup>95</sup> Reg 14 (b) MIR.

<sup>96</sup> Reg 15 (1) MIR.

<sup>97</sup> Reg 15 (2) MIR.

<sup>98</sup> Reg 16 MIR.

<sup>99</sup> Reg 16 (2) MIR.

of natural justice, the AGSA is also obligated to provide members of the advisory committee with all the relevant information pertaining to the matter.<sup>100</sup> Any member appearing before the advisory committee has a right to legal representation at his or her own expense.<sup>101</sup> In the event that any person implicated is invited to make oral representation, and such person fails or refuses to appear in front of the advisory committee, then the advisory committee must compile a report advising the AGSA that the person has abandoned his/her, right to make oral representation and that the certificate of debt can be issued.

The AGSA must then submit a copy of the certificate of debt to the municipal council, which will thereafter be responsible to collect the amount specified on the certificate of debt from the MM. Similarly, if the AGSA finds that the mayor or any member of the AO is responsible for a ‘material irregularity’ the AGSA will assign the task to the AA to enforce and recover the lost funds as stipulated in the certificate of debt. Additionally, the amendments place an obligation on the municipal council, to regularly inform the AGSA of the progress made in relation to the debt recovery. The effect of the certificate of debt is to act as a sanction if the MM or the CFO fails to implement the remedial action imposed by the AGSA.

### **3.6 Constitutional Interpretation Framework**

This section will determine whether the new powers conferred on the AGSA by the PAAA will pass constitutional muster. This is an important question because the Constitutional Court in the *Affordable Medicines Trust and Others v Minister of Health* remarked that:

The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution.<sup>102</sup>

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<sup>100</sup> Reg 17 MIR.

<sup>101</sup> Reg 17 (4) MIR.

<sup>102</sup> *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3 para 48 to 49.

This entails that all organs of state are constrained by the doctrine of legality.<sup>103</sup> Moreover, this requires that all organs of state may exercise no powers or function beyond what is conferred to them in terms of the Constitution and the law. Therefore, it is of paramount importance to establish whether the legislature acted within the confines of the Constitution when it promulgated the PAAA.

The amendments in section 4 of the PAAA bestow upon the AGSA powers similar to those of the Public Protector (PP),<sup>104</sup> thereby bestowing on the AGSA the authority to take remedial action where material irregularities have been discovered by the AGSA.<sup>105</sup> The main difference between the constitutional framework of the AGSA and the PP is that the Constitution explicitly bestows on the PP the power to take remedial action but not the AGSA.

In order to determine whether the amendments to the PAA will pass constitutional muster, it is important to first establish what type of interpretive approach will be adopted. Secondly, it will require analysing the legal framework of the AGSA to determine whether the PAAA is consistent with the constitutional framework of the PAAA. Thus, it is necessary to analyse and compare the constitutional framework of the AGSA and the PP to establish whether it is constitutionally permissible for the AGSA to take remedial action.

### **3.7 Interpreting Section 188(4) of the Constitution**

It is important to note that section 188, which regulates the powers of the AGSA does not explicitly confer on the AGSA the power to take remedial action. Section 188 of the Constitution provides that:

- (1) The Auditor-General must audit and report on the accounts, financial statements and financial management of—
  - (a) all national and provincial state departments and administrations;

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<sup>103</sup> *Fedsure* para 49.

<sup>104</sup> Section 182(1) (c) Constitution.

<sup>105</sup> Section 4 PAAA; section 5A PAA.

- (b) all municipalities; and
  - (c) any other institution or accounting entity required by national or provincial legislation to be audited by the Auditor-General.
- (2) In addition to the duties prescribed in subsection (1), and subject to any legislation, the Auditor-General may audit and report on the accounts, financial statements and financial management of—
- (a) any institution funded from the National Revenue Fund or a Provincial Revenue Fund or by a municipality; or
  - (b) any institution that is authorised in terms of any law to receive money for a public purpose.
- (3) 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.
- (4) The Auditor-General has the additional powers and functions prescribed by national legislation.

Importantly, section 188(4) provides that ‘the Auditor-General has the additional powers and function prescribed by national legislation.’ The Constitution does not explicitly deny the AGSA the power to take appropriate remedial action and leaves the possibility open for the AGSA to be given these powers by national legislation. However, proponents of a strict and literal interpretation of the Constitution should argue to the contrary, averring that such power could not be afforded to the AGSA as section 188 makes no mention of remedial action.

However, the Constitutional Court in the *First Certification Judgment*,<sup>106</sup> remarked that the Constitution must not be interpreted with technical rigidity.

The constitutional principles must be applied purposively to give expression to the commitment “to create a new order” based on “a sovereign and democratic constitutional state” in which “all citizens” are “able to enjoy and exercise their fundamental rights and freedoms. The constitutional provisions must therefore be interpreted in a manner which is conducive to that objective of this ruling, any interpretation of any provision which might impede the realisation of this objective must be avoided.”<sup>107</sup>

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<sup>106</sup> *Certification* case 26 para 161.

<sup>107</sup> *Certification* case paras 34-5.

Therefore, it is argued that section 188 (4) of the Constitution must be purposefully interpreted in accordance with key constitutional values such as accountability, transparency, and the rule of law in conjunction with the preamble of Chapter 9 institutions. This would mean that the amendments contained in the PAAA will pass constitutional muster insofar as it will strengthen South Africa's constitutional democracy and the aforementioned values.

### 3.8 Comparing the AGSA with the Office of the Public Protector

The PP like the AGSA is also a chapter 9 institution empowered by the Constitution to investigate public officials for any unethical conduct. The drafters of the Constitution established the PP with the objective of preventing the abuse of state power by public officials. First, the PP was created with the intention of being an ombudsman-type institution to investigate and report on maladministration and other similar maladies within government with the aim of ensuring ethical governance.<sup>108</sup> The PP 'is thus, one of the most invaluable constitutional gifts to our nation in the fight against corruption, unlawful enrichment, prejudice and impropriety in state affairs and for the enhancement of good governance.'<sup>109</sup>

In the *Public Protector v Mail and Guardian Ltd & others* case,<sup>110</sup> Nugent JA stressed the importance of the office of the PP by describing the PP as:

'[an] indispensable constitutional guarantee', stating that 'it provides what will often be the last defence against bureaucratic oppression, and against corruption and malfeasance in public office which is capable of insidiously destroying the nation'.<sup>111</sup>

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<sup>108</sup> Bishop M and S Woolman in 'Public Protector' in Woolman S and Bishop M (eds) *Constitutional Law of South Africa* (2 ed) (2013) 24A 1-2.

<sup>109</sup> *Nkandla* para 52.

<sup>110</sup> *The Public Protector v Mail & Guardian Ltd and Others* (2011 (4) SA 420 (SCA)) [2011] ZASCA 108 para 6 (*Mail and Guardian* case).

<sup>111</sup> *Mail and Guardian* case para 6.

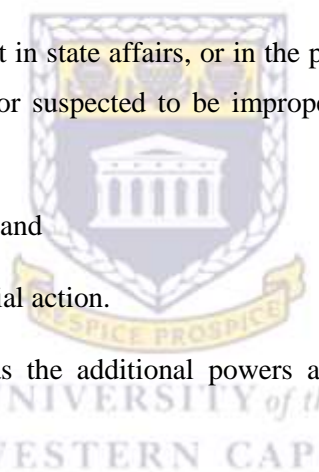


It is for these reasons the Constitution explicitly confers on the PP the power to take appropriate remedial action to enforce the rights and values of the Constitution.<sup>112</sup>

### **3.8.1 The Nature of the Public Protector's Remedial Action**

As mentioned above, the Constitution specifically mentions that the PP has the power to take remedial action,<sup>113</sup> whereas the Constitution is silent on the power of the AGSA to take remedial action. The powers of the PP are set out in section 182 of the Constitution, which states that:

The Public Protector has the power, as regulated by national legislation—

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- (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
  - (b) to report on that conduct; and
  - (c) to take appropriate remedial action.
- (2) The Public Protector has the additional powers and functions prescribed by national legislation.
  - (3) The Public Protector may not investigate court decisions.
  - (4) The Public Protector must be accessible to all persons and communities.
  - (5) Any report issued by the Public Protector must be open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report is kept confidential.

It is important to note that before the *Nkandla* judgement, it was accepted that the PP can take appropriate remedial action, but there was legal uncertainty about the binding nature of the PP's remedial action. The established view was that, apart from the Independent Electoral Commission, chapter 9 institutions are merely there to assist Parliament in performing its oversight role over the executive. Therefore, there was no legal weight behind its

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<sup>112</sup> Section 182(1) (c) Constitution.

<sup>113</sup> Section 182(1) (c) Constitution.

recommendations which were regarded as not being binding. However, this view was found to be incorrect by the Supreme Court of Appeal in the *Democratic Alliance v South African Broadcasting Corporation Limited (SABC case)*.<sup>114</sup>

### 3.8.2 SABC Case

Upon receiving numerous complaints of maladministration at the SABC, the PP initiated an investigation into the internal affairs of the SABC. The investigation revealed many irregularities at the SABC. However, the core issues were corporate governance deficiencies and most importantly the irregular appointment of the Chief Operating Officer (COO) Mr Hlaudi Motsoeneng, and illegal salary increases.<sup>115</sup> Subsequently, the PP took appropriate remedial action which recommended disciplining Mr Motsoeneng, urgently appointing a new COO and recovering public money which was spent irregularly.<sup>116</sup> The board of the SABC, however, ignored the recommendations of the PP and hired a law firm to assist them with their own investigation which cleared Mr Motsoeneng of any wrong doing and allowed the board to proceed in appointing Mr Motsoeneng permanently.<sup>117</sup> Thus, the court had to determine whether the recommendations of the PP are binding or not.

The court examined the purpose of the office of the PP and held that it is to ensure an effective public service that upholds professional ethics of a high standard and performs its duties effectively.<sup>118</sup> Furthermore, the Court concluded that ‘it would be naive to assume that organs of state and public officials, found by the [PP] to have been guilty of corruption and malfeasance in public office, will meekly accept [these] findings and implement the remedial action’.<sup>119</sup> The Court ultimately interpreted the constitutional framework of the PP

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<sup>114</sup> *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* (393/2015) [2015] ZASCA 156 para 53.

<sup>115</sup> *DA v SABC* para 6.

<sup>116</sup> *DA v SABC* para 9.

<sup>117</sup> *DA v SABC* para 9.

<sup>118</sup> *DA v SABC* para 26.

<sup>119</sup> *DA v SABC* para 44.

purposefully, through the lens of the values of the Constitution such as accountability, rule of law and transparency and the objectives of chapter 9 institutions to draw a conclusion. The Court held that the remedial action taken by the PP cannot be ignored without reasonable justification, and to interpret it differently would be inconsistent with the constitutional scheme of the PP and it would undermine the Constitution.<sup>120</sup> However, the judgment still left uncertainty as to what will constitute justifiable grounds to ignore the recommendations of the PP and whether government and state institutions should indeed have the discretion to decide whether or not to implement remedial action.

### **3.8.3 The Binding Nature of the PPs Remedial Action –Nkandla Judgment**

The *Nkandla* judgment settled the uncertainty in no uncertain terms. Therefore, this section will analyse the *Nkandla* judgment to support the argument that the amendments of the PAAA are in line with the powers and objectives of chapter 9 institutions and are indeed constitutional.

#### **3.8.3.1 Remedial Action taken by the Public Protector**

In the *Nkandla* case, the Public Protector executed her constitutional mandate set out in section 182, by investigating allegations of improper conduct and irregular expenditure relating to the ‘security upgrades’ which were made by the former President, Jacob Zuma, at his Nkandla residence.<sup>121</sup> The investigation by the PP was initiated against the backdrop of several members of the public lodging complaints with the PP concerning the aforementioned security upgrades at the former President’s Nkandla residence.<sup>122</sup>

Consequently, the PP concluded that several of the improvements were non-security features which amounted to an ‘undue benefit or unlawful enrichment’ to him and his family.<sup>123</sup> The

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<sup>120</sup> *DA v SABC* para 52.

<sup>121</sup> *Nkandla* para 2.

<sup>122</sup> *Nkandla* para 5.

<sup>123</sup> *Nkandla* para 6.

PP concluded in her report<sup>124</sup> that the President failed to comply with some of his constitutional and ethical duties by ‘knowingly deriving an undue benefit from the irregular deployment of state resources.’<sup>125</sup> Consequently, upon the conclusion of the PP’s report that the President was enriched by the non-security features, the PP executed her power in terms of section 182(1) (c) of the Constitution to take remedial action. The remedial action suggested by the PP reads:

The President is to:

- Take steps, with the assistance of the National Treasury and the SAPS, to determine the reasonable cost of the measures implemented by the [Department of Public Works] DPW at his private residence that do not relate to security, and which include [the] visitors’ centre, the amphitheatre, the cattle kraal and chicken run and the swimming pool.
- Pay a reasonable percentage of the cost of the measures as determined with the assistance of the National Treasury, also considering the DPW apportionment document.
- Reprimand the Ministers involved for the appalling manner in which the Nkandla Project was handled and state funds were abused.
- Report to the National Assembly on his comments and actions on this report within 14 days.<sup>126</sup>

Acting in accordance with section 8 of the Public Protector Act,<sup>127</sup> the PP submitted the report to the President and the National Assembly (NA) for them to assist with the implementation of the remedial action in alignment with their constitutional responsibilities to hold the President and the executive accountable.<sup>128</sup> However, both the President and the NA failed to perform their constitutional duties by not implementing remedial action. In response, the NA established two ad hoc committees to investigate and examine the PP’s report as well as other

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<sup>124</sup> *The Public Protector Secure in Comfort: Report on an Investigation into Allegations of Impropriety and Unethical Conduct Relating to the Installation and Implementation of Security Measures by the Department of Public Works and in Respect of the Private Residence of President Jacob Zuma at Nkandla, KwaZulu-Natal Province* (March 19 2014) Report No 25 of 2013/2014.

<sup>125</sup> See sections 83, 96, 181 and 182 Constitution.

<sup>126</sup> Public Protector (2014) para 11.

<sup>127</sup> Public Protector Act 23 of 1994.

<sup>128</sup> *Nkandla* para 3.

reports.<sup>129</sup> Both committees vindicated the President from liability. Consequently, the NA decided to absolve the President from liability.<sup>130</sup>

The Economic Freedom Fighters (EFF) were left frustrated with the outcome and the former President's complete disregard of the remedial action prescribed by the PP, hence they instituted an application to the Constitutional Court. The application asked for an order to the following effect:

- Affirming the legally binding effect of the PP's remedial action;
- Directing the President to comply with the PP's remedial action;
- Declaring that both the President and the National Assembly acted in breach of their constitutional obligations.<sup>131</sup>

### **3.8.3.2 Ruling of the Court and the Ratio Decidendi**

The Court was asked to make a ruling on a number of issues, but this paper shall only focus on the following rulings the court made:

(a) based on the supremacy of our Constitution, the rule of law and considerations of accountability, the President should be ordered to comply with the remedial action taken by the Public Protector by paying a reasonable percentage of the reasonable costs expended on non-security features at his private residence;

(e) the Public Protector's constitutional powers to take appropriate remedial action must be clarified or affirmed.<sup>132</sup>

In making its judgment relating to the legal nature of the power of the PP to take remedial action, the Court started by looking at the purpose and constitutional mandate of the PP. The Court remarked that the PP is a Chapter 9 institution, which was created to strengthen South

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<sup>129</sup> The first ad hoc Committee was formed to consider the President's report along with all other reports (produced by Special Investigation Unit, Public Protector, Joint Standing Committee on Intelligence and the Task Team). The second ad hoc Committee was formed to consider the Minister of Police's report.

<sup>130</sup> *Nkandla* para 3.

<sup>131</sup> *Nkandla* para 13.

<sup>132</sup> *Nkandla* para 4.

Africa's constitutional democracy.<sup>133</sup> The PP plays a crucial role in monitoring good governance and protecting the public from any conduct by the government that could result in any impropriety or unfairness.<sup>134</sup> The PP is consequently central to the fight against corruption in South Africa.<sup>135</sup> The Court further pointed out that given the history of marginalisation of a large part of the population in South Africa, institutions such as the PP are created to give a voice to the poor and marginalised and to give them recourse against the abuse of state power.<sup>136</sup>

The Court further held that in order to strengthen the constitutional democracy of South Africa there must be 'zero-tolerance for the culture of impunity; the prospects of good governance are duly enhanced by accountability; the observance of the rule of law; and respect for every aspect of our Constitution.'<sup>137</sup> Chief Justice Mogoeng noted that if by design, the remedial action taken by the PP did not have any binding effect, then it is incomprehensible how the PP can effectively execute its constitutional mandate and strengthen South Africa's constitutional democracy.<sup>138</sup>

The Court concluded that the wording of section 182(1) (c), which bestows on the PP the power to take appropriate remedial action, would be inconsequential if anybody against whom it is taken is free to ignore it 'willy-nilly.'<sup>139</sup> Moreover, it would be inconsistent with the need for an independent, impartial and dignified PP tasked to strengthen South Africa's constitutional democracy.<sup>140</sup> Therefore, the Court ruled that it would be inconsistent with the language, context, and purpose of section 181 and 182 of the Constitution to interpret these sections to

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<sup>133</sup> Section 181 Constitution.

<sup>134</sup> *Nkandla* para 52.

<sup>135</sup> *Nkandla* para 52.

<sup>136</sup> *Nkandla* para 52.

<sup>137</sup> *Nkandla* para 54.

<sup>138</sup> *Nkandla* para 56

<sup>139</sup> *Nkandla* para 67.

<sup>140</sup> *Nkandla* para 67.

mean that PP powers to take remedial action can be undermined by merely providing a rational basis for doing so.<sup>141</sup> However, the Court noted that remedial action is always open for judicial scrutiny and can be set aside by a court of law if it is legally flawed.<sup>142</sup>

### 3.9 Significance of the Judgment for the AGSA

The Constitutional Court emphasised the significant role that chapter 9 institutions play in South Africa's constitutional democracy, in protecting the public from the abuse of state power by elected officials. Although the *Nkandla* case dealt with the binding nature of the remedial action taken by the PP, it can also be related to the AGSA as they both are chapter 9 institutions with a similar mandate. The Court concluded that 'when remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness.'<sup>143</sup> The Court held that remedial action may not be ignored, only a court of law can set it aside. Thus, if the government or any state institution is of the view that the remedial action is unjust, they can approach the courts and have it set aside.

The review cannot be made in terms of PAJA but in accordance with the principle of legality. This decision was made in *Minister of Home Affairs v The Public Protector*,<sup>144</sup> where Plasket AJA held:

I have concluded that the constitutional and statutory powers and functions vested in the Public Protector to investigate, report on and remedy maladministration are not administrative in nature and so are not reviewable in terms of s6 of the PAJA. This being so, the Public Protector's exercise of her core powers and functions is reviewable on the basis of the principle of legality that stems from the founding constitutional value of the rule of law.<sup>145</sup>

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<sup>141</sup> *Nkandla* para 70.

<sup>142</sup> *Nkandla* para 71.

<sup>143</sup> *Nkandla* para 71.

<sup>144</sup> *Minister of Home Affairs and Another v Public Protector of the Republic of South Africa* (308/2017) [2018] ZASCA 15 (*Home Affairs* case).

<sup>145</sup> *Home Affairs* case para 56.

Therefore, in light of this ruling and the specific emphasis placed on the important role that chapter 9 institutions play in enhancing accountability, transparency and respect for the rule of law, it could be argued that the AGSA has the power to take appropriate remedial action.

### **3.10 Prerequisites for Passing Constitutional Muster**

The wording of section 188 of the Constitution, which sets out the constitutional framework of the AGSA, does not explicitly confer on the AGSA the power to take remedial action. However, it does make provision for bestowing additional powers in relation to the powers and functions of the AGSA which will be conferred by the legislature. The newly promulgated PAAA, however, explicitly confers on the AGSA the power to take remedial actions. Thus, in order to determine if the amendments to the PAA pass constitutional muster, it has to be interpreted through the lens of the aforementioned section, including using the preamble of chapter 9 institutions and relevant case law.

### **3.11 Will the Amendments Strengthen South Africa's Constitutional Democracy?**

The preamble of the Chapter 9 of the Constitution states that the objective of the institutions listed therein, is to strengthen South Africa's constitutional democracy.<sup>146</sup> For the amendments to the PAA to pass constitutional muster, one of the key prerequisites is that they should strengthen South Africa's constitutional democracy. The cornerstone of a democratic society is that the people elect the government to govern on their behalf, which creates a principle-agent relationship where the citizens give their elected officials a mandate to carry out. The agents (politicians) have a duty to act in the best interests of the citizens and the state as a whole, by using national resources and national finances prudently.

In the South African context, it is argued that municipalities have failed to act in the best interests of the citizens and failed to use the national resources and finances prudently, based

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<sup>146</sup> Section 181 Constitution.



on the audit reports of the AGSA over the years. Moreover, it could be argued that the effective use of State coffers and resources is imperative for the functioning of the country and to enable the government to execute its constitutional mandate such as providing basic services. Therefore, the rampant corruption in government is a direct onslaught on the nation's constitutional democracy. The PAAA was enacted as a direct response to rampant corruption in government and it is seeking to recover lost state resources and to hold the culprits personally liable for their wrongdoing. Hence, it could be argued in light of the aforementioned that the objectives of the amendments of the PAAA will strengthen South Africa's constitutional democracy and enhance accountability, transparency and the rule of law.

### **3.12 Constitutionality of the Amendments to the PAA**

One of the major obstacles to changing the traditional role of the AGSA is that the amendments are inconsistent with the constitutional architecture of the AGSA which does not explicitly bestow on the AGSA the authority to take remedial action. However, the Constitution does mention that the AGSA can have additional powers conferred to it by the legislature. Moreover, these additional powers must be consistent with the purpose of the AGSA, constitutional values and recent case law. The Constitution requires the government to use state resources and finances prudently and to the benefit of the public.<sup>147</sup> Thus, the state must adhere to the values of transparency, accountability and the rule of law at all times to ensure that public resources are used prudently.

The Constitutional court in *Glenister* held the following:

Endemic corruption threatens the injunction that government must be accountable, responsive and open; that public administration must not only be held to account, but must also be governed by high standards of ethics, efficiency and must use public resources in an economic and effective manner. As it serves the public, it must seek to advance development and service to the public. In relation to public finance, the Constitution demands budgetary and expenditure

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<sup>147</sup> Section 195 Constitution.

processes underpinned by openness, accountability and effective financial management of the economy. Similar requirements apply to public procurement, when organs of State contract for goods and services.<sup>148</sup>

The Court made it clear that weak public expenditure control and corruption threatens South Africa's constitutional democracy. In the case of *South African Association of Personal Injury Lawyers v Heath* the court remarked that if corruption and maladministration go unchecked it shall pose a serious threat to our democratic state.<sup>149</sup> Thus, placing an obligation on the government to take reasonable measures to enhance fiscal prudence and eradicate corruption in the public sector, will strengthen South Africa's Constitutional democracy. The amendments to the PAA are a direct response to the rampant corruption taking place throughout all spheres of government and organs of state. The amendments to section 5 of the PAA must be interpreted purposefully, through the lens of the constitutional values of accountability, transparency and the rule of law and the objectives of chapter 9 institutions. The amendments to section 5 bestow on the AGSA the power to conduct performance audits, and to enforce compliance with his recommendations by taking remedial action. Consequently, it could be argued that the values of transparency and accountability will be enhanced if the AGSA conducts performance audits that will entail the evaluation of the effectiveness of all spheres and departments of government. The Constitution requires that the government should work with public resources and finances prudently, and in an ethical manner.<sup>150</sup> In *President of the Republic of South Africa v South African Rugby Football Union*, the Constitutional Court held that the Final Constitution is:

committed to establishing and maintaining an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public. The

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<sup>148</sup> *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) paras 176-77.

<sup>149</sup> *South African Association of Personal Injury Lawyers v Heath and Others* (CCT27/00) [2000] ZACC 22 para 4.

<sup>150</sup> Section 195 Constitution.

importance of ensuring that the administration observes fundamental rights and acts both ethically and accountably should not be understated.<sup>151</sup>

Consequently, by granting the AGSA powers to take appropriate remedial action to hold AOs personally liable, will create an environment of professionalism and high regard for ethics within the public sector and ensure that State funds will be used prudently. Therefore, a strong argument can be made that the amendments follow the spirit and purport of the Constitution and do not encroach on the doctrine of separation of powers. It will be a constitutional obligation on all spheres of government to co-operate with the AGSA and respect its remedial action. Unlike the Francophone model, in which the AG is part of the judiciary and can deliver verdicts, the AGSA is subject to Parliament's scrutiny and its findings are subject to judicial review.<sup>152</sup>

### 3.13 Conclusion

The Constitutional court in the *Nkandla* case emphasised the significant role that Chapter 9 institutions play within South Africa's constitutional democracy. The AGSA and the PP ensure that government uses public resources prudently and discharges its functions ethically to the benefit of all citizens. Accordingly, the Court concluded in *Nkandla*, that given the significant role the PP plays in South Africa's democracy, government has a constitutional obligation to respect and cooperate with the PP. Currently, municipalities do not adhere to the recommendations and opinions of the AGSA, hence the recurrence of the same audit findings every year by the AGSA. An inference can be drawn from the arguments made in the *Nkandla* judgment, which provided the PP with the power to take appropriate remedial action in order for the government to adhere to the remedial action taken by the PP. Importantly, the court emphasised that it will be in line with the objectives of chapter 9 institutions for the remedial

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<sup>151</sup> 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC) at paras 133–34.

<sup>152</sup> *Affordable Medicines* para 48.

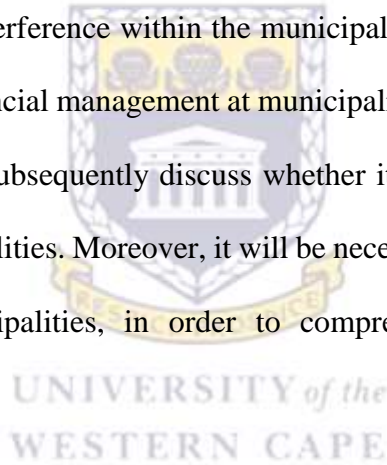
action taken by the PP to be legally binding, and it is essential for the promotion of accountability which ultimately strengthens our constitutional democracy. The same argument could be applied to the PAAA, as the amendments ultimately seek to enhance accountability, transparency and the rule of law. As a result, if the PAAA is interpreted in accordance with section 188(4) of the Constitution, purposefully through the lens of the values of accountability, transparency and the rule of law it will pass constitutional muster. However, that does not necessarily mean that the PAAA will be effective if implemented or that it will adequately address the issues of corruption and maladministration within local government. The following chapter will evaluate the PAAA and address some of its shortcomings.



## **Chapter 4: Will the Amendments to the Public Audit Act be Effective in Curbing Financial Mismanagement?**

### **4.1 Introduction**

Having established in Chapter 3 that the amendments are indeed consistent with the Constitution, it is necessary to critically analyse the amendments in order to determine whether the amendments will indeed be an effective method of enforcing compliance with the recommendations of the AGSA and enhance accountability. The real question is whether the amendments address the pertinent issues facing local government such as corruption, lack of accountability and political interference within the municipal administration and whether the amendments will improve financial management at municipalities. Therefore, this chapter will analyse the amendments and subsequently discuss whether it will be effective in addressing the core issues facing municipalities. Moreover, it will be necessary to discuss the political and administrative arm of municipalities, in order to comprehend the implications of the amendments.



### **4.2 The Governance Structure of Municipalities**

To understand the legal nature and intrinsic governance structure of municipalities, it is important to note that the local sphere of government is the only sphere where there is no clear separation of powers. The Constitution vests both legislative authority and executive power in the municipal council.<sup>153</sup> Moreover, it is important to note that municipalities consist of two governing arms, a political arm, which is the municipal council headed by the mayor, and an administrative arm, which is headed by the municipal manager.<sup>154</sup>

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<sup>153</sup> Section 151 (2) Constitution.

<sup>154</sup> Section 1 (b) (i) Municipal Systems Act 32 of 2000.

The Municipal Structures Act (Structures Act) provides for two types of municipal executive systems namely the executive committee system and the executive mayoral system.<sup>155</sup> In an executive committee system, political parties and interests that are represented in the council are represented on the executive committee of the council. The system is based on the guiding principle of proportionality or, at least, fairness by ensuring proportional representation.<sup>156</sup> In the executive mayoral system, council elects a mayor, and the mayor establishes a mayoral committee comprising of councillors. The main difference between the two systems is that the mayoral committee does not have to report to the municipal council but to the mayor.

On one hand, the municipal council, can as a final resort, remove the executive mayor or a member of the executive committee from the municipal council.<sup>157</sup> The municipal council must adopt a system of delegation to delegate certain powers to the municipal executive or to the administrative side of a municipality. Ultimately, the mandate and power to govern vests in the municipal council. On the other hand, the municipal executive exercises powers delegated to it by the council which remains ultimately responsible for the exercise of those delegated powers. Therefore, the executive must abide by the system of delegations when making decisions that will have a legally binding effect on the municipality.

Moreover, the Constitution and legislation requires the municipal council to exercise its constitutional autonomy and mandate in accordance with the cornerstone values of the Constitution such as, respect for the rule of law and accountability.<sup>158</sup> The municipal council is responsible for implementing disciplinary proceedings against all municipal councillors and municipal officials including the MM if they are suspected of contravening the core values of good governance. Furthermore, the mayoral or executive committees of municipalities must

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<sup>155</sup> See section 44, 56 of the Structures Act 117 of 1998.

<sup>156</sup> Steytler N & De Visser J *Local Government Law of South Africa* (2007) ch 3.

<sup>157</sup> De Visser J 'Chapter 5: The municipal executive' in De Visser J (eds) *Local Government Law and Policy* (Unpublished chapter), 18.

<sup>158</sup> Section 152(1)(a)-(b) Constitution.

account to the municipal council about policy adoptions and implementation and the manner in which revenue is collected and spent.

#### **4.3 Practical Implementation and Critique of the Amendments**

Section 5B PAA, provides that where a Municipal Manager (MM) fails to adhere to the remedial action taken by the AGSA, the AGSA has the authority to issue a certificate of debt to the MM. The legal consequences of the certificate of debt are that the MM is required to pay the amount specified in the certificate of debt to the municipality.<sup>159</sup> As a consequence, the effect of the certificate of debt is to enforce accountability by holding the MM personally liable for his/her failure to recover lost municipal funds as specified in remedial action taken by the AGSA. The certificate of debt seeks to act as a deterrent to MMs who fail to implement the prescribed remedial action. If the AGSA decides to issue a certificate of debt, he is obliged to submit a copy of the certificate of debt to the municipal executive authority, which will thereafter be responsible to collect the amount specified in the certificate of debt from the MM.<sup>160</sup> Additionally, the amendments place an obligation on the municipal executive authority to regularly inform the AGSA about the progress made in relation to debt recovery.<sup>161</sup>

It must be noted that the amendments do not mention what will happen in the event that the municipal executive authority refuses to cooperate with the AGSA or fails to recover the debt from the MM as specified in the certificate of debt. This omission creates legal uncertainty and undermines the purpose of the amendments. Firstly, the wording of section 5B does not indicate whether the issuing of the certificate of debt by the AGSA to the executive authority amounts to remedial action. It is important to ascertain whether section 5B refers to a mere recommendation or a legally binding instruction. Moreover, if it is not part of the remedial

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<sup>159</sup> Section 4 PAAA, section 5B (1) PAA.

<sup>160</sup> Section 4 PAAA, section 5B (2) PAA.

<sup>161</sup> Section 4 PAAA, section 5B (3) PAA.

action, the executive authority can simply refuse to adhere to it, as it is non-binding in nature. However, given the fact that one of the key objectives of the amendments is to enhance accountability, it is most likely that the intention of the legislature is that the certificate of debt shall be binding in nature.

Secondly, the legislature failed to mention what will happen if the executive authority cooperates with the AGSA but fails to recover the money from the MM, as specified in the certificate of debt. Moreover, in the event the executive authority fails to recover lost money from the MM, it will seriously undermine the purpose and effectiveness of the amendments and result in a revenue shortfall and a waste of tax payers' money.

It is clear from the wording of section 5A that the legislature's intention was to put the legal obligation on the MM to recover lost municipal money, bearing in mind that the MM is the accounting officer of the municipality and is thus responsible for revenue collection and expenditure,. It is thus important to note that even though the MM and municipal council enjoy statutory powers to delegate certain functions, the amendments fail to indicate whether the MM or the municipal council may delegate their duties in terms of the PAAA to recover lost money. The amendments also fail to refer or provide an alternative person to implement remedial action, in the event that the AGSA finds that the MM is directly responsible for material irregularities which have resulted in a financial loss to the municipality. The amendments are also silent on what will happen if the MM and municipal executive are both found to be in breach of their constitutional and statutory duties, which will render them unable to conduct these functions required by the AGSA. The recent reports released by the AGSA indicate that material irregularities amount to billions. Consequently, a certificate of debt issued by the AGSA may not be able recover the lost funds from the AO or AA member as it would be beyond their means. In this regard, it is argued that a certificate of debt will be practically



inefficient to recover lost funds. Therefore, greater emphasis should have been placed on expenditure control mechanisms to proactively ensure municipal funds are spent prudently.

#### **4.4 Will the Amendments be Effective in Turning around Municipalities not Receiving Unqualified audits?**

The Department of Cooperative Governance and Traditional Affairs (COGTA), has revealed that in 2017, 24 municipalities were under administration and 87 municipalities around the country out of 257 municipalities were dysfunctional or in financial distress.<sup>162</sup> The COGTA depicts municipalities crippled by poor financial management. Some of the reasons for the dysfunction and financial distress are the inability of some municipalities to collect revenue, municipal debt, failing infrastructure, financial mismanagement, as well as dysfunctional councils.<sup>163</sup> These statistics paint a gloomy picture of the state of municipalities and indicate a worsening situation.<sup>164</sup>

The PAAA aims to empower the AGSA to change the current state of financial mismanagement at local government. It is yet to be seen whether the amendments will improve governance and financial management within municipalities. The amendments mainly seek to compel senior officials to perform their statutory functions as required by law, as the amendments will compel the MM and the municipal council to perform better oversight and act against officials guilty of wrongdoing. For the most part, one may argue that the issuing of a certificate of debt may serve as a deterrent. However, it is important to note that the AGSA only investigates after the fact, thus the amendments are without proactive measures that can

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<sup>162</sup> Evans S '24 municipalities now under administration' *News24* (18 November 2018) available at <https://www.news24.com/SouthAfrica/News/24-municipalities-now-under-administration> (accessed 1 December 2018).

<sup>163</sup> Evans (2018).

<sup>164</sup> Evans (2018).

act as a deterrent against corrupt officials. It must be noted that even though the amendments will require the municipal council to hold officials accountable, a lack of political will within government and factors such as one-party dominance within municipal councils might undermine its enforcement.

The amendments in the PAAA, however, are not enough to fix the systemic culture of fraud and corruption present at municipalities. The recent reports of the AGSA reveal that municipalities are losing billions of municipal funds due to wasteful, fruitless and irregular expenditure. To remedy the current state of affairs there is a need to enhance good governance at municipalities and adequate measures to recover lost funds. The amendments in the PAAA introduce measures to legally compel the MM to recover lost funds whereby failure to adhere to remedial action will result in the MM being held personally liable. Given that the primary objective of the amendments is to recover lost municipal funds and improve oversight and accountability at municipalities, it is thus important to determine the effectiveness of the amendments based on these objectives.

The legislature failed to involve alternative organs of state to assist the AGSA and municipalities in enforcing compliance with the remedial action taken by the AGSA. Most notably, the legislature failed to make use of provinces' constitutional duties of monitoring and supporting municipalities.<sup>165</sup> Provinces are constitutionally obligated to promote the development of local government capacity, and to assist municipalities in performing their functions and managing their own affairs.<sup>166</sup> Furthermore, the Constitution has also conferred on provinces the power intervene in municipalities if there is a total breakdown in the functioning of a municipality.<sup>167</sup> Moreover, if provincial executives do not or cannot

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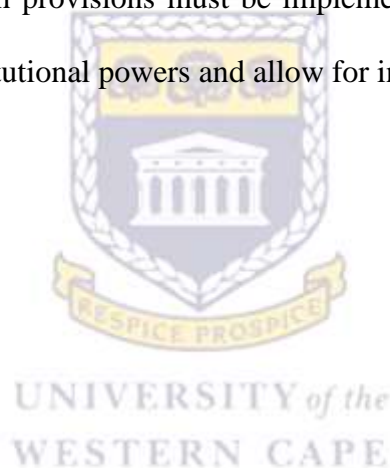
<sup>165</sup> Section 155 (6) Constitution.

<sup>166</sup> Section 155 (6) (b) Constitution.

<sup>167</sup> Section 139 Constitution.

adequately perform their intervention function, then the national executive must intervene.<sup>168</sup>

The provincial government is best placed to support municipalities in implementing the remedial action taken by the AGSA, and in holding municipalities accountable, because it is closer to municipalities. Importantly, where the municipality disregards the remedial action taken by the AGSA, the provincial government can intervene within that municipality to ensure compliance with the remedial action taken by the AGSA. Some could argue that the aforementioned, would result in an encroachment on the autonomy of municipalities. However, it would be consistent with the provincial government's constitutional duty to perform oversight over municipalities. Thus, such provisions must be implemented within the confines of the provincial government's constitutional powers and allow for intervention as a last resort only.



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<sup>168</sup> Section 139 (7) Constitution.

## Chapter 5: Conclusion and Recommendations

### 5.1 Introduction

The recent audit findings leading up to the 2016/2017 annual audit, conducted by the AGSA, indicates that municipal finances are being misused. The rampant corruption and complete disregard for the rule of law at local government have led to a decline in clean audits from municipalities. The AGSA has grown increasingly frustrated by municipalities not implementing its recommendations. Consequently, the fact that municipalities are not adhering to the recommendations of the AGSA has led to the recurrence of poor audit outcomes annually. The recent audit reports produced by the AGSA have led to the public losing trust in government and their elected leaders, due to rampant corruption and the financial mismanagement of the public's money. This has led to calls from the academic and civil sector to confer additional powers on the AGSA, which will enable the AGSA to enforce compliance with his recommendations and to hold public office-bearers accountable for financial mismanagement.

Against the backdrop of increasing pressure to curb rampant corruption at local government and the recurrence of poor audit outcomes by the AGSA, Parliament responded by adopting the PAAA. The PAAA introduced a number of amendments seeking to strengthen the power of the AGSA, however, this paper only focused on the amendments which drastically changed the traditional role of the AGSA. This paper focused on whether the amendments will indeed change the traditional role of the AGSA, and if so whether the changes will pass constitutional muster and be effective in changing financial management at municipalities.

Local government is one of the most important spheres of government, as they are responsible for the realisation of various provisions in the Bill of Rights into realisation by delivering basic services to communities. Municipalities are also constitutionally mandated to develop

communities and improve the lives of the most vulnerable and disenfranchised people in society. Thus, sound financial management is of paramount importance for municipalities to protect their autonomy and execute their constitutional mandate.

Parliament should be commended for intervening and responding to the current state of municipal finances by amending the PAA. The changes the PAAA introduces are much needed and are likely to improve accountability at municipalities. However, the vagueness of certain amendments and the omission of crucial measures will prevent the amendments in the PAAA from achieving its objectives and may fail to resolve some of the pertinent issues which municipalities are currently facing.

## **5.2 Did the Amendments Change the Traditional Role of the AGSA?**

South Africa inherited the British finance model on public expenditure. The traditional role of the British AG was only to audit organs of state and government departments and report to Parliament on its audit findings, for the latter to seek their enforcement. The South African Constitution conferred on its AGSA similar powers to those of the British AG, which are to audit and assist national, provincial and local legislatures in performing oversight function over their respective executives. The AGSA function includes reporting to Parliament on the performance of the executive. It was argued throughout this paper that the amendments will change the traditional constitutional role of the AGSA, by empowering the AGSA to take remedial action and to hold auditees accountable for financial wrongdoing.<sup>169</sup> The AGSA would no longer be a mere watchdog over public funds to assist Parliament in performing its oversight function, but would have the power to make binding recommendations and take remedial action. It is concluded that the amendments do not amount to a drastic change *per se* from the traditional Anglophone model to that of the Francophone model.<sup>170</sup> In the

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<sup>169</sup> Chapter 2, para 2.7.

<sup>170</sup> Chapter 2, para 2.7.

Francophone model, the AG is part of the judiciary and has the power to hand out verdicts. The amendments in the PAAA do not make the AGSA part of the judiciary or empower the AGSA to hand out verdicts and sentences, but the AGSA is subject to the courts. Thus, to argue that the AGSA is evolving away from its traditional Anglophone model to the Francophone model is legally flawed, as the AGSA will not form part of the judiciary as the AG in the Francophone model does.

### **5.3 Are the Amendments in the PAAA Constitutional?**

The amendments seek to make the AGSA recommendations legally binding on auditees specifically municipalities, by empowering the AGSA to take remedial action where auditees fail to implement the recommendations of the AGSA. This amendment raised constitutional issues as it seems to deviate from the constitutional mandate of the AGSA which is to audit and assist Parliament in performing its oversight role over the executive. However, section 188 of the Constitution, which establishes the AGSA, makes provision for amending the powers of the AGSA by legislative means. It is therefore concluded that the amendments should pass constitutional muster, as they are made through legislation and will ultimately strengthen our constitutional democracy.

### **5.4 Will the Amendments in PAAA be Effective in Improving the Financial Management of Municipalities?**

One of the primary objectives of the amendments in the PAAA is to recover lost municipal funds, however, the amendments do not contain effective recovery measures, and make no provision for preventative measures to ensure prudent financial management. Furthermore, the ambiguity of the amendments could result in confusion on how the PAAA should be implemented, and how the remedial action and certificate of debt will function.

## 5.5 Conclusion

The MM's role is of paramount importance for the functioning of a municipality, hence the MM's appointment, function and duties are extensively regulated by legislation. In order for a municipality to execute its constitutional mandate,<sup>171</sup> which is to provide services to communities in a sustainable manner, it is imperative for municipalities to be fiscally prudent and use their resources in a sustainable manner. The MM is responsible for the functioning and financial management of the municipal administration. Therefore, it makes logical sense for the amendments in the PAAA to threaten the MM with personal liability for any financial loss suffered by the municipality if the MM fails to execute his statutory and fiduciary duty towards the municipality. Furthermore, one of the important objectives of the amendments is to compel the MM to adhere to the remedial action taken by the AGSA, especially in relation to taking reasonable steps to recover any financial loss suffered by municipalities. However, the amendments in the PAAA are ambiguous and are silent on many important issues, which creates legal uncertainty and ineffectiveness. Thus, the amendments may fail to bring about the much-needed changes necessary to improve the financial management of municipalities, as they do not provide proper mechanisms to deter financial mismanagement or to promote the recovery of state resources from those who are responsible for financial wrongdoing.

## 5.6 Recommendations

Firstly, to ensure that the remedial action and the certificate of debt are effectively executed, the legislature should involve the provincial governments to monitor and assist municipalities in implementing the remedial action and certificate of debt. This would be well within the provincial sphere's constitutional mandate, which is to monitor and provide support to

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<sup>171</sup> Section 152 Constitution.

municipalities in line with the values of cooperative government set out in chapter 3 of the Constitution.

Secondly, legislative measures are needed to allow for a controller of the budget. The AGSA only performs his auditing function after municipal expenditure has occurred, which results in the AGSA only performing damage control after financial mismanagement instead of preventing it. Having a controller of the budget would ensure that before money is allocated to a particular cause that the required money is available and the allocation and expenditure thereof are in compliance with relevant laws and policies.

Thirdly, a municipal treasury independent from the MM is needed. This will ensure that there is no undue interference and intimidation from the municipal council and administration in instances of financial mismanagement. Moreover, an independent municipal treasury will ensure that municipal finances are managed in an unbiased manner, and properly advise the municipal council and the MM on fiscal policies and regulations. This must be coupled with the need to professionalise the senior management of municipalities in order to transform the financial state of municipalities. There is a growing need to professionalise the local government sector, especially after the then Finance Minister, Nhlanhla Nene, stated that over 50 percent of the MMs and CFOs in the country lack the necessary competence and qualifications for the positions that they hold.<sup>172</sup>

Lastly, to bring about a radical change in municipal finance management, there has to be an appetite and political will to adhere to the rule of law. Laws, regulations and policies can only be effective if they are respected and implemented, the biggest test that the PAAA will face is

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<sup>172</sup> Davis G 'Nene: more than half of municipal managers, CFOs not properly qualified for jobs' (2018) available at <https://ewn.co.za/2018/09/19/nene-more-than-half-of-municipal-managers-cfos-not-properly-qualified-for-jobs> (accessed 10 November 2019).



whether municipalities will indeed respect the PAAA and implement it. This will ultimately determine the effectiveness of the PAAA.



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