

BREEDE VALLEY
Municipality Munisipaliteit U Masipala wase



WORCESTER ▾ RAWSONVILLE ▾ DE DOORNS ▾ TOUWS RIVER



Managing Deviations, & Prevent Irregular, Fruitless & Wasteful Expenditure



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Raymond Esau

Constitutional Obligations on Local Government Official

Section 195(1)(a) demands a '**high standard of professional ethic must be promoted and maintained**';

Section 195(1)(b): '**efficient, economic and effective use of resources must be promoted**';

Section 195(1)(d), public administrators must provide services '**impartially, fairly, equitably and without bias**'.

Section 217, procure goods & services – system which is **fair, equitable, transparent, competitive and cost-effective**

Section 237 : 'All **constitutional obligations must be performed diligently and without delay**'



PROCESSING...

CC: Modderklip Boerdery

[48]. ... “I am mindful of the fact that **those charged with** the provision (service) face **immense problems**.

Confronted by intense competition for scarce resources from people forced to live in the bleakest of circumstances, **the situation of local government officials can never be easy.**

The progressive realisation of access to (service), as promised in the Constitution, **requires careful planning and fair procedures made known in advance to those most affected. Orderly and predictable processes are vital.**



Prohibited Expenditure

Supreme Court of Appeal (SCA):

1. Millennium Waste (2008)
2. Moseme Road (2010) &
3. All Pay (2013)

“[21] There will be few cases ...in which flaws in the process of public procurement cannot be found, particularly where it is scrutinised intensely....

A fair process does not demand perfection and not every flaw is fatal....

It would be gravely prejudicial to the public interest if the law was to invalidate public contracts for inconsequential irregularities.”

*“considerations of **pragmatism and practicality**’ were relevant in the exercise of the discretion”*

Prohibited Expenditure

Constitutional Court: All Pay 1 (2014):

1. **No room for a relaxed approach** to the procedural requirements of public procurement tenders.
2. The proper approach is to establish, factually, whether an irregularity occurred.
3. The irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA
4. Under the Constitution there is **no reason to conflate procedure and merit.**

Prohibited Expenditure

Constitutional Court: All Pay 1 (2014):

1. S 6(2)(b) of PAJA also requires that the non-compliance must be of a **material nature**
2. Materiality: “**compliance with the statutory provisions viewed in the light of their purpose**”.

Prohibited Expenditure

NT MFMA Circular 68 (2013)

- Def: **Unauthorised Expenditure**, means any expenditure incurred by a municipality otherwise than in accordance with section 15 or 11(3), and includes—....
- Def: of **Irregular expenditure** (a) to (d) also starts with: expenditure incurred by a municipality in **contravention**...;
- Def: “**fruitless and wasteful expenditure**” means expenditure **that was made** in vain and could have been avoided had reasonable care been exercised;

Fruitless and Wasteful Expenditure

NT MFMA Circular 68 (2013)

Def: “**fruitless and wasteful expenditure**” means expenditure **that was made** in vain and could have **been avoided had reasonable care been exercised**;

Kondome uit China veels te klein, kla Zimbabwiërs

Kondome wat uit China ingevoer word, is te klein vir jong Zimbabwiërs, sê David Parirenyatwa, dié land se minister van gesondheid.

Hy het ondernemings in Zimbabwe uitgedaag om kondome te vervaardig wat “geskik is vir Zimbabwiërs”.

Dit sal ook help om buitelandse valuta te bespaar, het hy op

die bekendstelling van ’n organisasie vir die bekamping van MIV/vigs gesê, berig *NewsDay*.

Parirenyatwa doen ’n beroep op private maatskappye om betrokke te raak by die stryd teen MIV/vigs.

Volgens New Zimbabwe.com is minstens 109,4 miljoen kondome in 2016 in Zimbabwe versprei.

– News24



Foto ter illustrasie.

Prohibited Expenditure

NT MFMA Circular 68 (2013)

- Def: **expenditure incurred**...; (Dictionary, Thesaurus. Legal & Accounting)
 - Expenses are incurred, when the legal obligation to pay them arises
- Therefore **incur** in context of expenditure not synonym for “paid” or payment made;
- Expenditure may therefore be **incurred** even if its not physically paid / or **was not made**
- Legislature use same words to have same meaning in a piece of legislation... different words used have different meaning – **Incur cannot mean was made**

Prohibited Expenditure

NT MFMA Circular 68 (2013)

- Def: “**Unauthorised Expenditure**”, means any expenditure incurred by a municipality otherwise than in accordance with section 15 or 11(3), and includes—....
- “**Non cash items**” *inter alia* relates to debt impairment, depreciation, asset impairment, transfers and grants as appropriated
- “Although these ...non-cash items ...**no transaction with any service provider or supplier, an under provision** during the budget compilation process is a **material misstatement of the surplus or deficit position** of the municipality.
- This could be the result of **poor budgeting or financial management**, or unknown events that gave rise to the asset and debt impairment after the adoption of the budget.”

Irregular Expenditure

NT MFMA Circular 68 (2013)

- Def of Irregular expenditure (a) to (d) also starts with: **expenditure incurred** by a municipality in **contravention**...;
- *“Transaction or an event may trigger irregular expenditure,*
- *However; a municipality **only identify irregular expenditure when a payment is made,***
- *In other words, the recognition of irregular expenditure will be linked to a financial transaction.”*

Irregular Expenditure

s1 MFMA def: Irregular Ex

- means
- (a) expenditure **incurred** in **contravention** of, or that is not in accordance with, a requirement of **this Act**, and **which has not been condoned in terms of section 179**;
 - (b) expenditure **incurred** in **contravention** of, or that is not in accordance with, a requirement of the **Municipal Systems Act**, and which has **not been condoned** in terms of that Act;
 - (c) expenditure **incurred** in **contravention** of, or that is not in accordance with, a requirement of the Public Office-Bearers Act; or
 - (d) expenditure **incurred** in **contravention** of, or that is not in accordance with, a **requirement of the supply chain management policy** of the municipality or any of the municipality's by-laws giving effect to such policy, and which has **not been condoned** in terms of **such policy** or by-law,

but excludes expenditure by a municipality which falls within the definition of “unauthorised expenditure”

Irregular Expenditure

s1 MFMA def: Irregular Ex

means

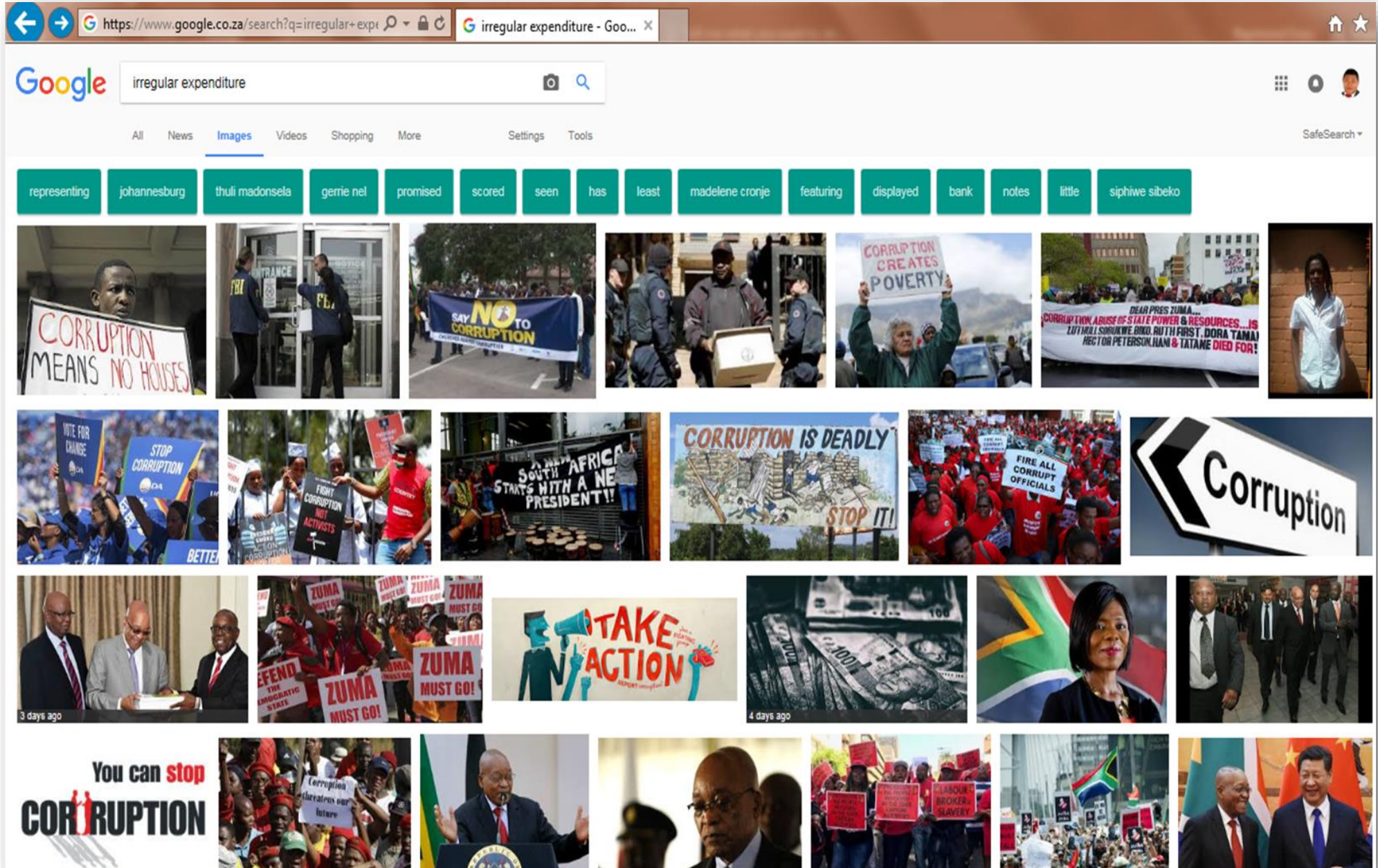
(d) expenditure **incurred** in **contravention** of, or that is not in accordance with, a requirement of **this Act**, and **which has not been condoned in terms of section 179**,

c./ d...

- **s1. This Act meaning... Include regulations**

(d) expenditure **incurred** in **contravention** of, or that is not in accordance with, a requirement of the **supply chain management policy** of the municipality or any of the municipality's by-laws giving effect to such policy, and which has **not been condoned** in terms of **such policy** or by-law,

Google Image Search: Irregular Expenditure



S32 Political office bearer, AO, municipal official liable for prohibited expenditure if **deliberately or negligent**

S32(2) municipality must recover irregular unless after investigation by council committee certified as irrecoverable and written off.

S176(1) liability of functionaries not liable if in **good faith**

S176(2) municipality must recover if **deliberately or negligent**

NT MFMA Circular 68 (2013): Def: Expenditure incurred in contravention

EXPENDITURE

S32

- Council &
- Council Committee

S32(2)

- Recover U.I.F&W expenditure unless:

S32(2)(b)

- I.E after investigation by a council committee, certified by the council as irrecoverable & written off by the council.

CONTRAVENTION

S170

- National Treasury

S170(2)

- (2) Non-compliance ...may be condoned by the NT

C68

- Requests + full motivation submitted to NT

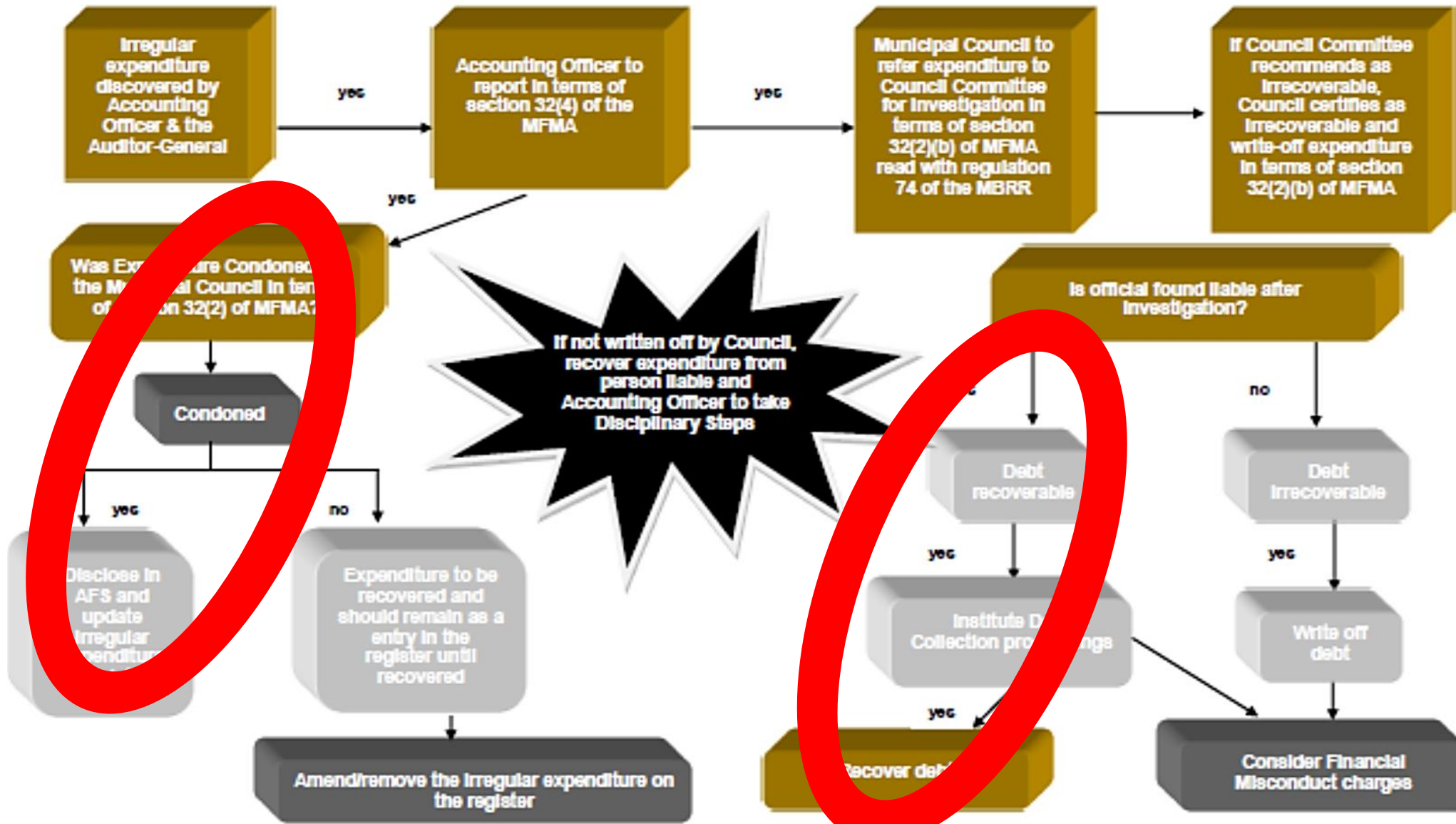
Irregular Expenditure

NT MFMA Circular 68 (2013)

IRREGULAR EXPENDITURE

STEP BY STEP PROCESS

ANNEXURE C



Prohibited Expenditure

Once prohibited expenditure occur the following actions are triggered:

1. A municipal committee must **investigate & consider** the expenditure; (Sec32(2)(b) & Reg 74);
2. After the investigation the S32(2) Com / MPAC **recommend** to council to either:
 - a. **certify** the expenditure **as irrecoverable**, and I so that council must **write off** the expenditure; OR
 - b. That the expenditure must be **recovered** and from whom. S32(2)
3. ONLY National Treasury can **condone** the expenditure (if contravention of SCM Regs or MFMA); S170(2) (Circular 68)

Prohibited Expenditure

Once prohibited expenditure occur the following actions are triggered:

4. The municipal manager must **discipline** officials responsible (if applicable);
 - a. If the responsible official is the MM or a Senior Manager, Council must institute disciplinary measures. If the person responsible is a councillor, the Speaker and Council deal with it in terms of Item 13 and 14 of Code of Conduct for Councillors.
 - b. Disciplinary steps does not have to wait for findings of S32 committee. In fact, it cannot, if you check the timeframe as per the Disciplinary Code or Disciplinary Regs.**
5. The municipal manager lay **criminal charges** with SAPS if the act constitute a possible criminal offence.

Prohibited Expenditure

Once prohibited expenditure occur the following actions are triggered:

6. Financial Misconduct, consideration.

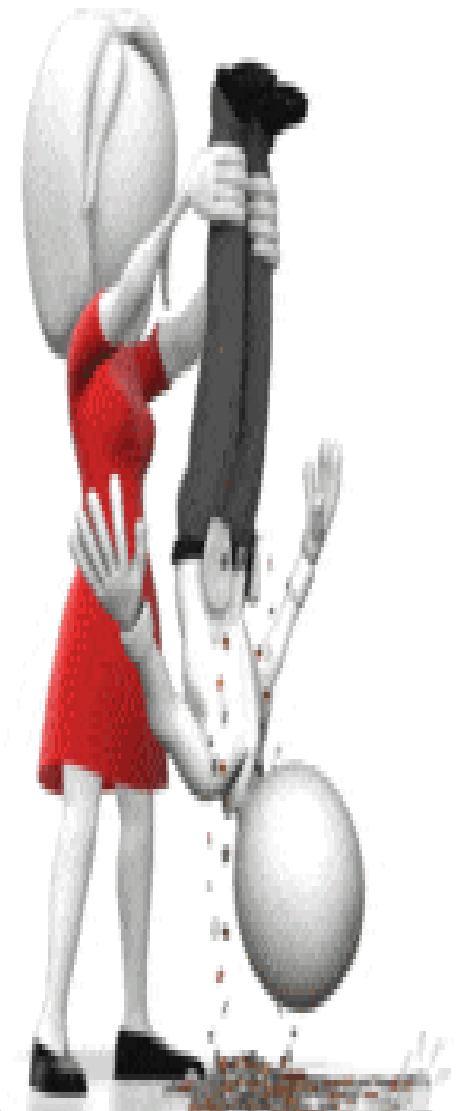
- S171(3)(c) makes it an act of misconduct once irregular expenditure is incurred by an official who had exercised financial management responsibilities and to whom a power or duty was delegated incur the irregular expenditure.
- In terms of the Financial Misconduct Regs the matter must be referred to a **Disciplinary Board**. The Regs sets out the Dis Board Composition that include persons outside the municipality.

S32(2)

- Recover Prohibited Expenditure

Maboza v Matjhabeng Local Municipality and Another JHB Labour Court on 23 November 2017:

- Municipality made deductions from the employees salary;
- The municipality sought to rely on its powers under s 32(2) of the MFMA, which requires it to recover unauthorised, irregular or fruitless and wasteful expenditure;
- **Court:**, ‘I have no option but to declare the **deductions made to be unlawful** as they were in **breach of s 34(1) of the BCEA** and accordingly must be refunded simply because they were unlawful, not because the municipality was not entitled to recover “



S32(2)

- Recover Prohibited Expenditure

8.5 DISCIPLINARY PROCEDURE COLLECTIVE AGREEMENT

‘The **determination** of the Presiding Officer **cannot be altered** by the Municipal Manager or any other governing structure of a municipality and shall be **final and binding** on the Employer and Employee, **subject to remedies permitted in law and this procedure.**’



Only NT to Condone Irregular Expenditure

WESTWOOD INSURANCE BROKERS v ETHEKWINI MUNICIPALITY

- Ethekwini Municipality, awarded a tender for the provision of **insurance for water loss** to a bidder who tendered **professional indemnity insurance**;
- KZN High Court held all municipal officials involved in the bid process must explain why they should not be liable for the cost,
- This included the municipal manager, all members of the BAC, all members of the BEC, legal manager, manager contracts, manager sanitation;
- Not a single employee offered an explanation
- But Ethekwini municipality seek application for leave to appeal against the judgment dated 5 April 2017 in terms of which the court granted a special order indemnifying Ethekwini against cost;
- Whose interests does Ethekwini represent in **applying for leave to appeal against a judgment that is entirely in its favour** and those of the people its officials are elected or appointed to represent?

- **Definitions**

- **‘debt’** means the amount owed by the debtor as specified in the certificate issued by the Auditor-General in terms of section 5(1B)(b);
- **‘debtor’** means the —
 - (a) accounting officer; or
 - (b) accounting authority **or individual members** of the accounting authority, identified in the **certificate issued by the Auditor-General** in terms of section 5(1B)(b) as liable for the debt either individually or jointly and severally, as the case may be;”

Proposed amendments to S5:

- (1B) (a) The Auditor-General must recover from the responsible accounting officer, accounting officers, accounting authority or accounting authorities, as the case may be, any loss resulting from **unauthorised, irregular, fruitless and wasteful expenditure**, as defined in any applicable legislation relevant to the auditee, and any other losses suffered by the auditee, including—
 - (i) money due to the State, which has **not** been collected; or
 - (ii) money which has been improperly paid, if, in his or her opinion, a satisfactory explanation for the failure to recover the loss is not furnished, within the prescribed period, by the relevant accounting officer or accounting authority.
- (b) In the absence of a satisfactory explanation contemplated in paragraph (a), **the Auditor-General must issue a certificate in the prescribed form to the relevant accounting officer** or accounting authority specifying the amount due and the reason for the recovery.

(c) The amount specified on the certificate referred to in paragraph (b), subject to the provisions of paragraph (g), **constitutes a debt due to the State.**

(d) **The debtor must pay the debt to the Auditor-General within 180 days, or in accordance with any agreed timeframe, after receipt of the certificate referred to in paragraph (b).**

(e) Upon receipt of payment by the debtor, the Auditor- General must, as prescribed, deposit the money received into the National Revenue Fund or the Provincial Revenue Fund, as the case may be.

(f) *The Auditor- General may —*

(i) *where the debtor is entitled to a payment, other than remuneration, from an organ of state or an institution funded by public money, **subject to any written agreement between the Auditor-General and the debtor, recover the debt by way of a claim against such organ of state or institution;***

(ii) *where the debtor is entitled **to remuneration** from his or her employer, subject to any **written agreement** between the Auditor-General and the debtor and any **laws regulating the labour relations between** the debtor and the employer, recover the debt by way of a **claim against his or her remuneration in such instalments as agreed;** or*

(iii) ***institute civil proceedings to recover the debt from the debtor.***

(f) *The Auditor- General may —*

(i) *where the debtor is entitled to a payment, other than remuneration, from an organ of state or an institution funded by public money, **subject to any written agreement between the Auditor-General and the debtor, recover the debt by way of a claim against such organ of state or institution;***

(ii) *where the debtor is entitled **to remuneration** from his or her employer, subject to any **written agreement** between the Auditor-General and the debtor and any **laws regulating the labour relations between** the debtor and the employer, recover the debt by way of a **claim against his or her remuneration in such instalments as agreed;** or*

(iii) ***institute civil proceedings to recover the debt from the debtor.***

(g) A debtor aggrieved by the Auditor-General's decision to recover any loss contemplated in paragraph (a), may approach the **High Court** for a judicial review of the decision in terms of the **Promotion of Administrative Justice Act, 2000** (Act No. 3 of 2000).

- (i) In any proceedings for the recovery of a debt, the certificate issued in terms of paragraph (b) is **prima facie evidence of the facts**, the identity of the debtor or debtors and the debt due.
- (j) The Auditor-General may not, without the prior approval of the National Assembly, withdraw the certificate issued in terms of paragraph (b).”;

Deviations

EC High Court: Department of Economic Dev & Enviro Affairs v JGL Forensic Services:
Requirements for a deviations:

1. Must be valid & rational reasons to deviate;
 2. Deviation must be approved by the Accounting Officer;
 3. Reasons should be recorded and reported;
-
4. Requirements 1&2 above are peremptory-
 5. Requirement 3 ONLY administrative matter '- Non-compliance with which would not result in invalidity of the rational decision to deviate.

Prohibited Expenditure: Deviations

STEPS TAKEN TO PREVENT DEVIATIONS:

- Step 1. **Avoid deviations** – More complex procedure and forms than normal procurement i.e (advertise sole suppliers; BEC & BAC consider proposed deviations) – Annual tenders
- Step 2. If Cannot Avoid; **Comply** with SCM requirements to the **maximum extent possible**; Example: still get 3 quotes...; shorten time period;
- Step 3. Document reasons for deviations... include proof like **photo's** etc.



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Thank You