

**POLICY ON UNAUTHORIZED, IRREGULAR, FRUITLESS AND  
WASTEFUL EXPENDITURE AND THE ENFORCEMENT OF  
PROPER FINANCIAL MANAGEMENT THROUGH DISCIPLINARY  
AND CRIMINAL PROCEEDINGS  
(ADOPTED BY COUNCIL ON 29 May 2015)**

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**THEMBELIHLE**

**LOCAL MUNICIPALITY  
PLAASLIKE MUNISIPALITEIT  
U-MASIPALA WASEKUHLENI**

**POLICY ON UNAUTHORIZED, IRREGULAR, FRUITLESS AND WASTEFUL EXPENDITURE AND THE ENFORCEMENT OF PROPER FINANCIAL MANAGEMENT THROUGH DISCIPLINARY AND CRIMINAL PROCEEDINGS**

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## **1. Introduction**

Municipalities are organs of state within the local sphere of government that collect monies from the public in the form of rates, taxes, levies, surcharges, duties and service charges, receive grants from national and provincial government and borrow for capital expenditure or bridging finance for short term purposes. These resources are appropriated by Council for the purpose of fulfilling its powers and functions, primarily to deliver services, in accordance with their mandate as set out in sections 151,153 and 156 of the Constitution.

In terms of section 4(2) (a) of the Municipal Systems Act (MSA) the council has a duty to use the resources of the municipality in the best interest of the local community. This duty is extended to individual councillors through the Code of Conduct for Councillors which states that a councillor must:

- i. “perform the functions of office in good faith, honestly and in a transparent manner, and
- ii. at all times act in the best interests of the community and in such a way that the credibility and integrity of the municipality are not compromised.”

In terms of section 62 of the Municipal Finance Management Act No. 56 of 2003 (herein referred to as “the Act”), the accounting officer is responsible for managing the financial affairs of the municipality and he/she must, for this purpose, inter alia:

- (a) take all reasonable steps to ensure that:
  - unauthorised; and
  - irregular; and
  - fruitless and wasteful expenditure; and
  - other losses are prevented; and
- (b) ensure that disciplinary or, when appropriate, criminal proceedings are instituted against any official of the municipality who has allegedly committed an act of financial misconduct or an offence in terms of Chapter 15 of the Act.

This policy is aimed at providing the accounting officer with an overview of legislation pertaining to unauthorised, irregular, fruitless and wasteful expenditure and the recovery of same where applicable.

## **2. Restriction on the incurring of expenditure**

Section 15 of the Act provides that a municipality may, except where otherwise provided therein, incur expenditure only -

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- a) in terms of a budget approved by the council or by a provincial or the national executive following an intervention in terms of section 139 of the Constitution and also an annual budget as revised by an adjustments budget in terms of section 28 of the Act; and
- b) within the limits of the amounts appropriated for the different votes in an approved budget.

### **3. Withdrawal of money from a municipal bank**

In terms of section 11(3) of the Act, money may be withdrawn from a bank account of the municipality without appropriation (without further budget approval) in terms of an approved budget for the following purposes:

- a) to defray expenditure authorised in terms of section 26 (4) which provides that, until a budget for the municipality is approved, funds for the requirements of the municipality may, with the approval of the MEC for local government, be withdrawn from the municipality's bank accounts subject to certain conditions and restrictions;
- b) to defray unforeseeable and unavoidable expenditure authorized by the mayor in emergency or other exceptional circumstances in terms of section 29 (1) of the Act and the council's applicable policy;
- c) in the case of a bank account opened in terms of section 12 of the Act for relief, charitable and trust purposes, to make payments from such account but only by or on the written authority of the accounting officer acting in accordance with decisions of the council and for the purposes for which, and subject to any conditions on which, the fund was established or the money in the fund was donated;
- d) to pay over to a person or organ of state money received by the municipality on behalf of that person or organ of state, including money collected by the municipality on behalf of that person or organ of state by agreement or any insurance or other payments received by the municipality for that person or organ of state;
- e) to refund money incorrectly paid into a bank account;
- f) to refund guarantees, sureties and security deposits;
- g) for cash management and investment purposes in accordance with the cash and investment policies of the municipality;
- h) to defray increased expenditure in terms of section 31 of the Act which relates to the shifting of funds between multi-year appropriations;
- i) for such other purposes prescribed under the Act.

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## **4. Defining concepts**

**“Unauthorised expenditure”** is incurred by the municipality otherwise than in accordance with section 15 or 11 (3), and includes -

- a) overspending of the total amount appropriated in the municipality’s approved budget;
- b) overspending of the total amount appropriated for a vote in the approved budget;
- c) expenditure from a vote unrelated to the department or functional area covered by the vote;
- d) expenditure of money appropriated for a specific purpose, otherwise than for that specific purpose;
- e) spending of an allocation of money made to the municipality by the national government from revenue raised nationally contrary to the condition(s) of such allocation or an allocation of money to a municipality in terms of a provincial budget;
- f) a grant by the municipality otherwise than in accordance with the Act.

Essentially, “unauthorised expenditure” includes overspending on the total amount of the budget, overspending on a vote, the incurring of expenditure unrelated to a vote and the incurring of expenditure for a purpose other than the approved purpose.

It should be noted that “unauthorised expenditure” excludes “irregular” expenditure. Unauthorised expenditure is expenditure that has not been budgeted for, expenditure that is not in terms of the conditions of an allocation received from another sphere of government, municipality or organ of state and expenditure in the form of a grant that is not permitted in terms of the Municipal Finance Management Act (Act No. 56 of 2003). Unauthorised expenditure is accounted for as an expense in the Statement of Financial Performance and where recovered, it is subsequently accounted for as revenue in the Statement of Financial Performance.

With reference to MFMA section 1(b) – a municipality’s operational and capital budgets are divided into ‘votes’ which represent those components of the budget that have amounts appropriated for the financial year, for different departments or functional areas. The Municipal Budget and Reporting Regulations (MBRR) prescribe the structure and formats of municipal budgets, including votes, in Tables A1 to A10. Votes are informed by Table A3 (Budgeted Financial Performance: revenues and expenditure by municipal vote) and Table A5 (Budgeted Capital Expenditure by vote, standard classification and funding). Budget Table A4 (Budgeted Financial Performance: revenue and expenditure) by implication is approved by the council and as such must also be taken into consideration when determining unauthorised expenditure. In other words, when considering unauthorised expenditure from an operating budget both Table A3 and A4 (read in conjunction with the supporting table SA1) of the MBRR would have to be considered. Overspending must also be determined in relation to each of the votes on both the operational

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budget and the capital budget. Where Council has approved a virement policy that allows the accounting officer to make limited shifts of funds between votes, must also be taken into account.

With reference to MFMA section 1(c) – funds appropriated in a vote for a department may not be used for purposes unrelated to the functions of that department. In other words, an accounting officer or other official may not use funds allocated to one department for purposes of another department or for purposes that are not provided for in the budget. Where a Council has approved a virement policy, shifts made in accordance with that policy may be allowed, and must be taken into account when reviewing such expenditure.

With reference to MFMA section 1(d) – in addition to appropriating funds for a department’s vote, the Council may also appropriate funds for a specific purpose within a department’s vote, for example, for specific training initiatives or a capital project. Funds that have been designated for a specific purpose or project may not be used for any other purpose.

With reference to MFMA section 1(e) – the items referred to in the definition of ‘allocation’ are national and provincial conditional grants to a municipality and other ‘conditional’ allocations to the municipality from another municipality or another organ of state. Any use of conditional grant funds for a purpose other than that specified in the relevant conditional grant framework is classified as unauthorised expenditure.

With reference to MFMA section 1(f) – section 67 of the MFMA regulates the transfer of municipal funds to organizations and bodies outside government. In terms of this section, a municipality may only provide grants to organizations and NOT individuals. Therefore any grant to an individual is unauthorised expenditure, unless it is in terms of the municipality’s indigent policy or bursary scheme.

Therefore, valid expenditure decisions can only be made by council in terms of a budget or an adjustments budget. It follows that only the council may authorise instances of unauthorised expenditure and council must do so through an adjustment budget. This principle is further reiterated in section 32(2)(a)(i) of the MFMA read with regulation 25 of the MBRR which states that unauthorised expenditure must be authorised by the municipality in an adjustments budget that is approved by the municipal council. This is the rationale for the provisions in regulation 23(6) of the MBRR which provides the legal framework for the authorisation of unauthorised expenditure.

**“Expenditures that are NOT classified as unauthorised expenditure”**

Given the definition of unauthorised expenditure, the following are examples of expenditures that are NOT unauthorised expenditure:

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- a) Any over-collection on the revenue side of the budget as this is not an expenditure; and
- b) Any expenditure incurred in respect of:
  - (i) any of the transactions mentioned in section 11(1)(a) to (j) of the MFMA;
  - (ii) re-allocation of funds and the use of such funds in accordance with a council approved virement policy;
  - (iii) overspending of an amount allocated by standard classification on the main budget Table A2 (Budgeted Financial Performance: revenue and expenditure by standard classification), as long as it does not result in overspending of a 'vote' on the main budget Table A3 (Budgeted Financial Performance: revenue and expenditure by municipal vote) and Table A4 (Budgeted Financial Performance: revenue and expenditure (read in conjunction with supporting Table SA1) of the MBRR; and
  - (iv) overspending of an amount allocated by standard classification on the main budget Table A5 (Budgeted Capital Expenditure by vote, standard classification and funding) of the MBRR so long as it does not result in overspending of a 'vote' on the main budget Table A5.

**“Unauthorised expenditure on non-cash items”**

Such expenditure relates to debt impairment, depreciation, asset impairment, transfers and grants as appropriated in Table A4 (Budgeted Statement of Financial Performance: revenue and expenditure) of the MBRR.

Although these expenditures are considered non-cash items as there is 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. In this regard Table A4 (Budgeted Statement of Financial Performance: revenue and expenditure) must be read in conjunction with supporting Table SA1 of the MBRR.

**“Unforeseen and unavoidable expenditure”**

Unforeseen and unavoidable expenditure is discussed in section 29 of the MFMA and reads as follows:

- a) The mayor of a municipality may in emergency or other exceptional circumstances authorise unforeseeable and unavoidable expenditure for which no provision was made in an approved budget.
- b) Any such expenditure—

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- i. must be in accordance with any framework that may be prescribed;
- ii. may not exceed a prescribed percentage of the approved annual budget;
- iii. must be reported by the mayor to the municipal council at its next meeting; and
- iv. must be appropriated in an adjustments budget.

c) If such adjustments budget is not passed within 60 days after the expenditure was incurred, the expenditure is unauthorised and section 32 applies.

The framework referred to in section 29(2)(a) of the MFMA is prescribed in chapter 5 of the MBRR, and contained in regulation 71 and 72. The following shall apply:

- i. the amount the mayor authorised as unforeseen and unavoidable expenditure exceeds the monetary limits set in regulation 72 of the MBRR, the amount in excess of the limit is unauthorised;
- ii. the reason for the mayor authorising the unforeseen and unavoidable expenditure does not fall within the ambit of regulation 71(1) of the MBRR, the expenditure is unauthorised;
- iii. the reason for the mayor not authorising the unforeseen and unavoidable expenditure falls outside the ambit of regulation 71(2) of the MBRR, the expenditure is unauthorised; and
- iv. the council does not appropriate the expenditure in an adjustments budget that is passed within 60 days after the expenditure was incurred, the expenditure is unauthorised.

**“Irregular expenditure”** occurs in the following circumstances:

- a) Where the expenditure concerned is incurred by the municipality or a municipal entity in contravention of, or that is not in accordance with, a requirement of the Act, and which has not been condoned in terms of section 170 thereof. In terms of section 170 of the Act, National Treasury may, on good grounds, approve a departure from a treasury regulation or from any condition imposed in terms of the Act. Non-compliance with a regulation made in terms of section 168 or with a condition imposed by the National Treasury in terms of the Act may, on good grounds shown, also be condoned by the National Treasury.
- b) Expenditure incurred by the municipality or a municipal entity 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 by the municipality in contravention of, or that is not in accordance with, a requirement of the Public Office-Bearers Act, 1998 (Act No. 20 of 1998); or
- d) Expenditure incurred by the municipality or municipal entity in contravention of, or that is not in accordance with, a requirement of the supply chain management policy of the



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municipality or entity 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".

The accounting officer may, in terms of section 36(1)(b) of the Municipal Supply Chain Management Regulations, ratify any minor breaches of the procurement processes by an official or committee acting in terms of delegated powers or duties which are purely of a technical nature. The accounting officer must record the reasons for any deviations and report them to the next meeting of the council or board of directors in the case of a municipal entity, and include same as a note to the annual financial statements.

Irregular expenditure is expenditure that is contrary to the Municipal Finance Management Act (Act No. 56 of 2003), the Municipal Systems Act (Act No. 32 of 2000), the Remuneration of Public Office Bearers Act (Act No. 20 of 1998) or is in contravention of the municipality's supply chain management policy. Irregular expenditure excludes unauthorised expenditure. Irregular expenditure is accounted for as expenditure in the Statement of Financial Performance and where recovered, it is subsequently accounted for as revenue in the Statement of Financial Performance.

**A "vote"** means one of the main segments into which a budget of a municipality is divided for the appropriation of money for the different departments or functional areas of the municipality and which specifies the total amount that is appropriated for the purposes of the department or functional area concerned.

**"Overspending"** occurs in the following circumstances:

- a) where the operational or capital expenditure incurred by the municipality during a financial year exceeds the total amount appropriated in that year's budget for operational or capital expenditure, as the case may be;
- b) in relation to a vote, in the event of expenditure exceeding the amount appropriated for that vote; or
- c) where expenditure pending the approval of the budget of the municipality exceeds the amount permissible in terms of section 26(5) of the Act. In terms of this sub-section, funds withdrawn from a municipality's bank accounts in terms of sub-section (4) may be used only to defray current and capital expenditure in connection with votes for which funds were appropriated in the approved budget for the previous financial year and any withdrawal may not, during any month, exceed eight per cent of the total amount appropriated in that approved budget for current expenditure, which percentage must be scaled down proportionately if revenue flows are not at least at the same level as the previous financial year and exceed the amount actually available.

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**“Fruitless and wasteful expenditure”**

The Act defines “fruitless and wasteful expenditure” as expenditure that was made in vain and would have been avoided had reasonable care been exercised. Fruitless and wasteful expenditure is expenditure that was made in vain and would have been avoided had reasonable care been exercised. Fruitless and wasteful expenditure is accounted for as expenditure in the Statement of Financial Performance and where recovered, it is subsequently accounted for as revenue in the Statement of Financial Performance.

**5. Recovery of unauthorised, irregular, fruitless and wasteful expenditure**

Section 32 (2) of the Act provides that the municipality must recover unauthorised, irregular or fruitless and wasteful expenditure from the person liable for that expenditure unless that expenditure is:

- a) in the case of unauthorised expenditure, authorised in an adjustments budget or certified by the council, after investigation by a council committee, as irrecoverable and written off by the council; and
- b) in the case of irregular or fruitless and wasteful expenditure, is after investigation by a council committee, certified by the council as irrecoverable and written off by the council.

**6. Role of council committee**

In terms of section 74 the Municipal Budget and Reporting Regulations contained in Government Notice 393 of 17 April, 2009, a council committee appointed to investigate the recoverability or otherwise of any unauthorised, irregular or fruitless and wasteful expenditure must consider –

- a) the measures already taken to recover such expenditure;
- b) the cost of the measures already taken to recover such expenditure;
- c) the estimated cost and likely benefit of further measures that can be taken to recover such expenditure; and
- d) submit a motivation explaining its recommendation to the council for a final decision.

The municipal manager must provide the committee concerned with such information it may require for the purpose of conducting a proper investigation.

The aforesaid committee may only comprise councillors and should not include political office bearers of the municipality. At least 3 councillors are required to constitute a committee.

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It should be noted that the council is required by resolution to certify that the expenditure concerned is considered irrecoverable and that it should be written off. This power may not be delegated by the council.

An audit committee established in terms of section 166 of the Act is not precluded from assisting the appointed committee with its deliberations.

**7. Writing off of unauthorised, irregular, fruitless and wasteful expenditure is no excuse in criminal and disciplinary proceedings**

In terms of section 32 (5) of the Act, the writing off of any unauthorised, irregular or fruitless and wasteful expenditure as irrecoverable, is no excuse in criminal or disciplinary proceedings against a person charged with the commission of an offence or a breach of the Act relating to such unauthorised, irregular or fruitless and wasteful expenditure.

**8. Liability of political office bearers for unauthorised expenditure**

Without limiting liability in terms of the common law or other legislation, a political office-bearer of the municipality is, in terms of section 32(1)(a) of the Act, liable for unauthorised expenditure if that office-bearer either knowingly or after having been advised by the accounting officer that the expenditure concerned is likely to result in unauthorised expenditure, instructed an official of the municipality to incur such expenditure.

The Act defines a “political office-bearer” as the speaker, mayor or a member of the executive committee of a municipality elected, designated or appointed in terms of a specific provision of the Municipal Structures Act, 1998.

**9. Liability for unauthorised expenditure deliberately or negligently incurred**

Section 32 (1) (b) (c) and (d) of the Act provides that, without limiting liability in terms of the common law or other legislation:

- a) the accounting officer is liable for unauthorised expenditure deliberately or negligently incurred by him or her, subject to section 32 (3). The accounting officer accordingly incurs liability for unauthorised expenditure deliberately or negligently incurred unless he / she informs the council or the mayor, as the case may be, in writing that a decision which has been taken, if implemented, is likely to result in unauthorised expenditure;

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- b) any political office-bearer or official of the municipality who deliberately (intentionally) or negligently (failed to take adequate care) committed, made or authorised an irregular expenditure, is liable for that expenditure; or
- c) any political office-bearer or official of the municipality who deliberately or negligently made or authorised a fruitless and wasteful expenditure is liable for that expenditure.

An “official” of the municipality has a wider meaning than an employee or staff member of the municipality and includes -

- a) an employee of a municipality;
- b) a person seconded to the municipality to work as a member of the staff of the municipality; or
- c) a person contracted by a municipality to work as a member of the staff of the municipality otherwise than as an employee.

## **10. Reporting of unauthorised, irregular or fruitless and wasteful expenditure**

Section 32 (4) of the Act requires the accounting officer to promptly inform the mayor, the MEC for local government and the Auditor-General, in writing, of -

- a) any unauthorised, irregular or fruitless and wasteful expenditure incurred by the municipality;
- b) whether any person is responsible or under investigation for such unauthorised, irregular or fruitless and wasteful expenditure; and
- c) the steps that have been taken -
  - i. to recover or rectify such expenditure; and
  - ii. to prevent a recurrence of such expenditure.

## **11. Reporting of irregular expenditure, theft and fraud**

Section 32 (6) of the Act obliges the accounting officer to report to the South African Police Service all cases of alleged -

- a) irregular expenditure that constitute a criminal offence; and
- b) theft and fraud that occurred in the municipality.

The council must, in terms of section 32(7) of the Act and through the mayor, take all reasonable steps to ensure that all cases of irregular expenditure incurred as a result of a criminal offence, theft and fraud are reported to the South African Police Service if -

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- a) the charge is against the accounting officer; or
- b) the accounting officer failed to comply with section 32(6) (referred to above) of the Act.

## **12. Remuneration of councillors and irregular expenditure**

Section 167 (1) of the Act provides that a municipality may remunerate its political office-bearers (speaker/mayor) and members of its political structures (councillors), but only -

- a) within the framework of the Remuneration of Public Office-Bearers Act, 1998 (Act No. 20 of 1998), setting the upper limits of the salaries, allowances and benefits for those political office-bearers and members; and
- b) in accordance with section 219 (4) of the Constitution.

Section 167(2) of the Act provides that any remuneration paid or given in cash or in kind to a person as a political office-bearer or as a member of a political structure of a municipality otherwise than in accordance with sub-section (1), including any bonus, bursary, loan, advance or other benefit, is an irregular expenditure, and the municipality -

- a) must, and has the right to, recover that remuneration from the political office-bearer or member concerned; and
- b) may not write-off any expenditure incurred by the municipality in paying or giving that remuneration. It should be noted that the Government Notice increasing the upper limits of the salary and allowances of councillors normally contains the following preamble:

*“The salary and allowances of a member of a municipal council is determined by that municipal council by resolution of a supporting vote of a municipality of its members, in consultation with the member of the Executive Council responsible for local government in the province concerned, having regard to the upper limits as set out hereunder, the financial year of municipal councils, and the affordability of municipal councils to pay within the different levels of remuneration of councillors”.*

For purposes of implementing this Government Notice, “in consultation with” means that municipalities will require the concurrence of the member of the Executive Council responsible for local government in the province concerned.”

The above preamble has the effect that irregular expenditure will occur in the event of councillor salaries and allowances being increased prior to the consideration of a report thereon by the council on such adjustment, budgetary provision, affordability and the adoption of the required resolution. Irregular expenditure will also occur in the event of existing salaries and allowances being increased without prior consultation with the MEC for local government in the province.

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It should further be noted that the municipality is obliged to recover any irregular expenditure from councillors and that same cannot be written off as irrecoverable.

In the case of the overpayment of salaries and allowances, this recovery may be by way of set-off from subsequent similar payments due to the councillors concerned.

### **13. Irregular staff appointments**

- a) Section 66 (3) of the System Act provides that no person may be employed in a municipality unless the post to which he or she is appointed, is provided for in the staff establishment of the municipality as approved by the council.
- b) If a person is employed contrary to subparagraph (a), the decision to employ such person as well as the ensuing contract of employment between the parties is null and void and of no force or effect.
- c) Any person who takes a decision contemplated in subparagraph (a) knowing that such decision is unlawful, may be held personally liable for any irregular or fruitless and wasteful expenditure that the municipality may incur as a result of such invalid decision.

### **14. Enforcing proper financial management through disciplinary, criminal and civil proceedings**

The Act seeks to secure compliance with its provisions by creating both acts of misconduct, dealt with in disciplinary proceedings, and offences, which are prosecuted in criminal proceedings.

As pointed out above, section 62 (1)(e) of the Act provides that the accounting officer of a municipality is responsible for managing the financial administration of the municipality and he/she must, for this purpose, inter alia, take all reasonable steps to ensure that disciplinary or, when appropriate, criminal proceedings are instituted against any official of the municipality who has allegedly committed an act of financial misconduct or an offence in terms of Chapter 15. The accounting officer has discretionary power to institute criminal proceedings against the official concerned. No discretionary power exists with regard to the taking of disciplinary action. The final decision to institute criminal proceedings will, however, lie with state prosecuting authorities.

The taking of disciplinary action against an official who allegedly committed an act of financial misconduct is not a bar against the laying of a criminal charge based on the same facts and a criminal prosecution does not bar the municipality from instituting disciplinary action against such official.

The course of action to be adopted will depend on the seriousness of the alleged act of misconduct, the prevalence of such conduct in the municipality and the provisions of the council's

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fraud and anti-corruption policies. It is essential for a consistent approach to the taking of disciplinary action and the institution of criminal proceedings to be adopted and implemented.

***Disciplinary proceedings***

The Act defines specific acts of misconduct for accounting officers, chief financial officers', other senior managers or officials who have delegated powers or duties in the area of financial management.

Section 171(1) of the Act provides that an act of financial misconduct is committed by a municipal manager if he or she deliberately or negligently commits one of the following acts:

- a) contravenes any provision of the Act;
- b) fails to comply with a duty imposed on an accounting officer under the Act;
- c) makes, permits or instructs another municipal official to make an unauthorised, irregular, or fruitless and wasteful expenditure; or
- d) provides incorrect or misleading information in any document that must be supplied in terms of the Act to the mayor, the council, the Auditor-General, any other organ of state (such as the provincial treasury) or the public.

The chief financial officer also commits an act of misconduct when he or she deliberately or negligently fails to carry out any delegated duty, or contravenes or fails to comply with a condition of a delegated power or duty. A chief financial officer may not make, permit or instruct another municipal official to incur unauthorised, irregular, or fruitless and wasteful expenditure, or provide incorrect or misleading information to the accounting officer for incorporation into any written report which must be submitted to the mayor or the council, the Auditor-General, National Treasury, any other organ of state or be made public. Any of these acts constitute acts of misconduct. Similar acts of misconduct are created for senior managers and other officials exercising management responsibilities.

A "senior manager" is a manager referred to in section 56 of the Municipal Systems Act, namely a manager directly accountable to the municipal manager.

Once allegations of financial misconduct have been made against the accounting officer, the chief financial officer, a senior manager or any officials, the municipality (presumably the council as political structure) must cause the matter to be investigated. This duty does not arise where these allegations are frivolous (not serious), vexatious (without ground and aimed at causing annoyance or embarrassment), speculative or obviously unfounded. In the event that allegations are made against an official other than the accounting officer, the latter must oversee the investigation. If the accounting officer is the accused, the mayor bears the responsibility of overseeing the investigation.

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If the investigation reveals a prima facie case of financial misconduct, the municipality must institute disciplinary proceedings against the responsible officer in accordance with the systems and procedures referred to in section 67 of the Municipal Systems Act, read with Schedule 2 of that Act (the staff code of conduct) (in the case of the accounting officer, by the mayor and, in the case of other staff, by the accounting officer).

Section 67(1) of the Municipal Systems Act provides that a municipality, in accordance with applicable law and subject to any applicable collective agreement, must develop and adopt appropriate systems and procedures to ensure fair, efficient, effective and transparent personnel administration including those relating to disciplinary procedures. These systems and procedures apply to a person referred to in section 57 of this Act (i.e. managers directly accountable to the municipal manager), except to the extent that they are inconsistent with that person's employment contract.

Disciplinary action against an official on the grounds of financial misconduct will normally be undertaken in terms of the Disciplinary Procedure and Code of the South African Local Government Bargaining Council (the Disciplinary Code). This Code is not entirely suitable for disciplinary action against senior staff of a municipality and particularly the accounting officer. The fact that the municipality (the council) must cause alleged acts of misconduct by the accounting officer and senior managers to be investigated is in conflict with the provisions of the Code. In the absence of any contractual provisions in the employment contracts of these staff members regulating disciplinary matters, the provisions of the Code must, however, be applied.

Section 29 of the Municipal Performance Regulations for Municipal Managers and Managers directly accountable to Municipal Managers, 2006 contained in GN R805 of 1 August 2006 reads as follows:

*"29. The employer will be entitled to terminate the employee's employment contract for any sufficient reason recognized by law, provided that the employer must comply with its disciplinary code and procedures, in the absence of which the disciplinary code and procedures of the South African Local Government Bargaining Council will apply, as well as in accordance with the Labour Relations Act, 1995 (Act No. 66 of 1995)."*

The Disciplinary Procedure and Code must be read in conjunction with the Code of Conduct for Municipal Staff contained in Schedule 2 to the Municipal Systems Act and it is essential for charges of alleged financial misconduct to accurately describe the alleged transgressions.

The Disciplinary Code contains several acts of misconduct by staff which could constitute financial misconduct and it is possible to institute disciplinary action against an accounting officer and



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senior manager without reference to the acts of financial misconduct referred to in section 171(1) of the Act.

***Criminal proceedings***

Certain acts committed by councillors, the chief financial officer, senior managers and other officials are deemed to constitute criminal conduct. The seriousness of these offences is apparent from the fact that any offence in terms of section 173 of the Act carries a prison sentence of up to five years or an appropriate fine determined in terms of applicable legislation.

A wide array of conduct is subject to criminal sanction.

- (1) The accounting officer of a municipality is guilty of an offence if he or she -
- a) deliberately or in a grossly negligent way -
    - i. contravenes or fails to comply with a provision of section 61 (2) (b), 62 (1), 63 (2) (a) or (c), 64 (2) (a) or (d) or 65 (2) (a), (b), (c), (d), (f) or (i);
    - ii. fails to take reasonable steps to implement the municipality's supply chain management policy referred to in section 111;
    - iii. fails to take all reasonable steps to prevent unauthorised, irregular or fruitless and wasteful expenditure; or
    - iv. fails to take all reasonable steps to prevent corruptive practices -
      - (aa) in the management of the municipality's assets or receipt of money; or
      - (bb) in the implementation of the municipality's supply chain management policy;
  - b) deliberately misleads or withholds information from the Auditor-General on any bank accounts of the municipality or on money received or spent by the municipality; or
  - c) deliberately provides false or misleading information in any document which in terms of a requirement of this Act must be -
    - (aa) submitted to the Auditor-General, the National Treasury or any other organ of state; or
    - (bb) made public.

Three elements of the above offences require closer attention. Firstly, the actus reus (the voluntary and wrongful act or omission that constitutes the physical components of a crime) can either be an act or an omission. An "act" consists of a direct contravention of a legal provision, while an 'omission' consists of the failure to comply with a positive duty imposed by statute. In proving the actus reus, there must be evidence that, for example, a municipality did not have or

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maintain "a management, accounting and information system that accounts for the assets and liabilities of the municipality". This is an objective assessment. The second element of the offence is the establishment of a causal link between any action or omission by the accounting officer and the objective state of affairs. It must be shown that the officer either acted contrary to a provision or failed to take all reasonable steps required by a provision. Once the actus reus elements have been established, the mens rea must be proved; the action or omission must either have been deliberate or the result of gross negligence.

Given the high premium placed on the supervisory roles of the Auditor-General, the National Treasury and the province, the deliberate misleading or withholding of information from them, has been criminalised. The accounting officer may not deliberately mislead or withhold information from the Auditor-General on any municipal bank account or on money received or spent. Likewise, the accounting officer may not deliberately provide false or misleading information in any document which must be submitted to the Auditor-General, the National Treasury, or any other organ of state, or made public.

***Civil proceedings***

Losses or damages suffered by the municipality because of an act committed or omitted by an official constitutes a debt owing to the municipality and must be recovered from such an official if that official is liable in law.

The accounting officer must determine the amount of the loss or damage and, in writing, request that official to pay such amount within 30 days or in reasonable instalments. If the official fails to comply with the request, the matter must be handed to the municipality's attorneys for the recovery of the loss or damage plus accrued interest through civil process.

**15. Offences by councillors**

In terms of section 173(4) of the Act, a councillor is guilty of an offence if he or she-

- a) deliberately influences or attempts to influence the accounting officer, the chief financial officer, a senior manager or any other official of the municipality to contravene a provision of the Act or to refrain from complying with a requirement of this Act;
- b) interferes in the financial management responsibilities and functions assigned in terms of the Act to the accounting officer of the municipality or delegated to the chief financial officer of the municipality in terms of the Act;
- c) interferes in the financial management responsibilities and functions assigned in terms of the Act to the accounting officer of a municipal entity under the sole or shared control of the municipality; or

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- d) interferes in the management or operational activities of a municipal entity under the sole or shared control of the municipality.

**16. Criminal sanctions - councillors, senior managers and other officials**

Councillors and officials of the municipality are also subject to criminal sanctions if they:

<b>Section</b>	<b>Offence</b>
79	Deliberately or in a grossly negligent* way contravene or fail to comply with a condition of a delegation of power.
173(5)(a)	Deliberately or in a grossly negligent way impede an accounting officer from complying with a provision of the Act.
173(5)(b)	Deliberately or in a grossly negligent way give incorrect, untrue or misleading information material to an investment decision relating to borrowing by the municipality.
173(5)(b)	Illegally withdraw money from a municipal bank account.
173(5)(d)	Fail to disclose material information when the municipality borrows money.
173(5)(e)	Interfere in the supply chain management system.
173(5)(f)	Provide false or misleading information for the purposes of any document which must in terms of a requirement of the Act be submitted to the council, mayor or accounting officer, the Auditor-General, the National Treasury or be made public.

\* Gross negligence is a conscious and voluntary disregard of the need to use reasonable care, which is likely to cause foreseeable grave injury or harm to persons, property, or both. It is conduct that is extreme when compared with ordinary negligence, which is a mere failure to exercise reasonable care.

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## **17. Civil liability of municipality, structures, office bearers municipality, structures, office bearers and officials**

The Act exempts municipalities, their political structures, office-bearers or officials from civil liability for any loss or damage resulting from the exercise of any power or the performance of any function in terms of the Act, provided same was done in good faith. Without limiting liability in terms of the common law or other legislation, a municipality may recover from its political office bearers and officials, any loss or damage suffered by it because of their deliberate or negligent unlawful actions when performing a function of office.

## **18. Process to be followed when dealing with unauthorised, irregular, fruitless and wasteful expenditure**

### **18.1 Unauthorised expenditure**

In considering authorisation of unauthorised expenditure, council must consider the following factors:

- a) Has the matter been referred to Council for a determination and decision?
- b) Has the nature, extent, grounds and value of the unauthorised expenditure been submitted to Council?
- c) Has the incident been referred to a council committee for investigation and recommendations?
- d) Has it been established whether the accounting officer or official or public office bearer that made, permitted or authorised the unauthorised expenditure acted deliberately or in a negligent or grossly negligent manner?
- e) Has the accounting officer informed Council, the mayor or the executive committee that a particular decision would result in an unauthorised expenditure as per section 32(3) of the MFMA?
- f) Are there good grounds shown as to why an unauthorised expenditure should be authorised? For example:
  - i. the mayor, accounting officer or official was acting in the best interests of the municipality and the local community by making and permitting unauthorised expenditure;
  - ii. the mayor, accounting officer or official was acting in good faith when making and permitting unauthorised expenditure; and
  - iii. the municipality has not suffered any material loss as a result of the action.

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In these instances, the council may authorise the unauthorised expenditure. If unauthorised expenditure is approved by council, there would be no further consequences for the political office-bearers or officials involved in the decision to incur the expenditure.

**18.2 Adjustments budgets to authorise unauthorised expenditure**

Section 15 of the MFMA provides that a municipality may incur expenditure only in terms of an approved budget. This is confirmed by section 32(2)(a)(i) of the MFMA that provides that council may only authorise unauthorised expenditure in an adjustments budget.

Sections 28(c) and 28(g) of the MFMA, read together with regulations 23(1), 23(2), 23(4) and 23(6) of the MBRR, discusses when council may authorise unauthorised expenditure in an adjustments budget. This can be addressed in three different adjustments budgets as follows:

- a) Adjustments budget for unforeseen and unavoidable expenditure: An adjustments budget to allow council to provide ex post authorisation for unforeseen and unavoidable expenditure that was authorised by the mayor in terms of section 29 of the MFMA must be tabled in council at the “first available opportunity” or within the 60 days after the expenditure was incurred (see section 29(3) of the MFMA). Should either of these timeframes be missed, the unforeseen and unavoidable expenditure must be treated in the same manner as any other type of unauthorised expenditure, and may still be authorised in one of the other adjustments budgets process described below.
- b) Main adjustments budget: In terms of regulation 23(6)(a) of the MBRR, council may authorise unauthorised expenditure in the adjustments budget which may be tabled in council “at any time after the mid-year budget and performance assessment has been tabled in the council, but not later than 28 February of the current year”. Therefore unauthorised expenditure that occurred in the first half of the current financial year may be authorised by council in this adjustments budget. Where unauthorised expenditure from this period is not identified or investigated in time to include in this adjustments budget, it must be held over to the following adjustments budget process noted below.
- c) Special adjustments budget to authorise unauthorised expenditure: In terms of regulation 23(6)(b) of the MBRR, council may authorise unauthorised expenditure in a special adjustments budget tabled in council when the mayor tables the annual report in terms of section 127(2) of the MFMA. This special adjustments budget “may only deal with unauthorised expenditure from the previous financial year which the council is being requested to authorise in terms of section 32(2)(a)(i) of the Act.” This special adjustments budget therefore deals with:
  - i. unauthorised expenditure that occurred in the first half of the previous financial year that was not included in the main adjustments budget or that was included but referred back for further investigation or further information;

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- ii. unauthorised expenditure that occurred in the second half of the previous financial year, and
- iii. any unauthorised expenditure identified by the Auditor-General during the annual audit process.

The timing of this special adjustments budget requires:

- i. the municipality to report all the unauthorised expenditure in its annual financial statements (thus ensuring transparency regarding its performance with implementing the budget);
- ii. the Auditor-General to audit the municipality's disclosure of its unauthorised expenditure and to add any further unauthorised expenditure identified in the audit process; and
- iii. sufficient time (but also places a time limit) for instances of unauthorised expenditure to be properly investigated before being presented to council for a decision on whether or not to authorise it; the investigation is normally done by a council committee.

### **18.3 Recovery of unauthorised expenditure**

All instances of unauthorised expenditure must be recovered from the liable official or political office-bearer, unless the unauthorised expenditure has been authorised by council in an adjustments budget.

Once it has been established who is liable for the unauthorised expenditure, the accounting officer must, in writing, request that the liable official or political office-bearer pay the amount within 30 days or in reasonable instalments. If the person fails to comply with the request, the matter must be handed to the municipality's legal division for the recovery of the debt through the normal debt collection process.

### **18.4 Irregular expenditure**

In terms of section 32(2)(b) irregular expenditure may only be written-off by Council if, after an investigation by a council committee, the irregular expenditure is certified as irrecoverable. In other words writing-off is not a primary response, it is subordinate to the recovery processes, and may only take place if the irregular expenditure is certified by Council as irrecoverable, based on the findings of an investigation.

With reference to (a) as defined, - in terms of section 170 of the MFMA, only the National Treasury may condone non-compliance with a regulation issued in terms of the MFMA or a condition imposed by the Act itself. The municipal Council therefore has no power in terms of the MFMA to

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condone any act of non-compliance in terms of the MFMA or any of its regulations. The treatment of expenditure associated with the non-compliance is therefore the responsibility of the Council and is elaborated on page 10.

With reference to (b) as defined – there is no provision in the MSA that allows for a contravention of the Act to be condoned. Nevertheless, should a municipality wish to request that an act of non-compliance with any provision of the MSA be condoned, then the accounting officer should address the request to the Minister of Co-operative Governance and Traditional Affairs, who is responsible for administering the MSA. The resultant expenditure should however be dealt with in terms of section 32(2) of the MFMA.

With reference to (c) as defined – there is no provision to allow irregular expenditure resulting from a contravention of the Public Office-Bearers Act to be condoned. This is consistent with section 167(2) of the MFMA, which provides that such irregular expenditure cannot be written-off and must be recovered from the political office-bearer concerned.

With reference to (d) as defined – a council may condone a contravention of the council approved SCM policy or a by-law giving effect to such policy, provided that the contravention, is not also a contravention of the MFMA or the SCM regulations, in which case (a) applies and then only National Treasury can condone a contravention of the SCM regulations. Any such requests must be accompanied by a full motivation and submitted to [mfma@treasury.gov.za](mailto:mfma@treasury.gov.za) for consideration.

Once the Accounting Officer or Council becomes aware of any allegation of irregular expenditure, such allegation may be referred to the municipality's own Internal Audit Unit or any other appropriate investigative body for investigation, to determine whether or not grounds exist for a charge of financial misconduct to be laid against the official liable for the expenditure.

#### **18.5 Ratification of minor breaches of the procurement process**

In terms of regulation 36(1)(b) of the Municipal Supply Chain Management Regulations, the supply chain policy of a municipality may allow the accounting officer to ratify any minor breaches of the procurement processes by an official or committee acting in terms of delegated powers or duties which are purely technical in nature. Where a municipality's supply chain management policy does not include this provision the accounting officer cannot exercise this ratification power. It is important to note that the accounting officer can only rely on this provision if the official or committee who committed the breach had the delegated authority to perform the function in terms of the municipality's adopted System of Delegations, which must be consistent with the MFMA and its regulations. The process to deal with minor breaches of the SCM policy is contained in a flowchart, refer to (Annexure B).

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Note that the accounting officer may only ratify a breach of process, and not the irregular expenditure itself, which means that the 'irregular' expenditure will still remain irregular. The responsibility to ratify the actual irregular expenditure vests with the Council and processes to deal with such matters are outlined in section 32(2) of the MFMA read together with Regulation 74 of the MBRR.

Regulation 36(2) of the SCM regulations states that the accounting officer must record the reasons for any deviations and report to the next Council meeting, and disclose this expenditure in a note to the annual financial statements. The emphasis is on recording the "reasons for any deviations and the associated expenditure".

All breaches of a municipality's SCM policy will result in irregular expenditure, in the event that expenditure is incurred; the monetary value of this irregular expenditure is not relevant. The issue of whether the breach is minor or material relates to the nature of the breach and the intent of those responsible for the breach; not to the monetary value thereof.

In terms of regulation 36 of the SCM Regulations, the accounting officer is responsible for deciding whether a particular breach of procurement processes is minor or material. In exercising this discretion the accounting officer must be guided by:

- a) the specific nature of the breach: is it simply technical in nature, not impacting in any significant way on the essential fairness, equity, transparency, competitiveness or cost effectiveness of the procurement process?
- b) the circumstance surrounding the breach: are the circumstances justifiable or, at least, excusable?
- c) the intent of those responsible for the breach: were they acting in good faith?
- d) the financial implication as a result of the breach: what was the extent of the loss or benefit?

The accounting officer would have to consider the merits of each breach of the procurement processes and take a decision as to whether it should be classified as a minor or material breach.

Note that this category only covers breaches of procurement processes in the municipality's SCM policy and not breaches of other legislation or regulations.

It is important to emphasise that, in terms of the regulation 36 of the SCM Regulations, only the accounting officer can consider the ratification of minor breaches of procurement processes that are purely of a technical nature.

It is advisable that the accounting officer implement appropriate processes in the municipality's SCM policy to investigate the nature of the breach so that an informed decision on corrective



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action can be made. In the event that a breach falls outside the classification of a minor breach, the accounting officer cannot follow the remedy contained in regulation 36 (1) (b).

The MFMA and the SCM regulations do not specify what these processes should be, however, it is recommended that Council investigate the nature of the breach through its Internal Audit Unit or any other investigation body and adopt corrective action as recommended by the Audit Committee.

The SCM regulation 36(2) specifies a separate process for reporting the ratification of minor breaches to council, after they have been ratified by the accounting officer. The findings of any investigation must be reported to the accounting officer for consideration when making a decision in this regard. It is important to maintain documentary evidence for audit purposes

**18.6 Disciplinary charges for irregular expenditure**

If, after having followed a proper investigation, the council concludes that the political office-bearer or official responsible for making, permitting or authorising irregular expenditure did not act in good faith, then the municipality must consider instituting disciplinary action and/or criminal charges against the liable person/s.

If the irregular expenditure falls within the ambit of the above description, then the council, mayor or accounting officer (as may be relevant) must institute disciplinary action as follows:

- a) Financial misconduct in terms of section 171 of the MFMA: in the case of an official that deliberately or negligently:
  - i. contravened a provision of the MFMA which resulted in irregular expenditure; or
  - ii. made, permitted or authorised an irregular expenditure (due to non-compliance with any of legislation mentioned in the definition of irregular expenditure);
- b) Breach of the Code of Conduct for Municipal Staff Members: in the case of an official whose actions in making, permitting or authorizing an irregular expenditure constitute a breach of the Code; and
- c) Breach of the Code of Conduct for Councillors: in the case of a political office-bearer, whose actions in making, permitting or authorizing an irregular expenditure constitute a breach of the Code. This would also include instances where a councillor knowingly voted in favour or agreed with a resolution before council that contravened legislation resulting in irregular expenditure when implemented, or where the political office-bearer improperly interfered in the management or administration of the municipality.

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**18.7 Criminal charges arising from an act of irregular expenditure**

If, after following a proper investigation, the council concludes that the official or political office-bearer responsible for making, permitting or authorising an instance of irregular expenditure acted deliberately or negligently, then the Council must institute disciplinary procedures and lay criminal charges against the liable official or political office-bearer.

The irregular expenditure was the result of a breach of the definition of irregular expenditure it must be considered in terms of section 173 of the MFMA.

**18.8 Recovery of irregular expenditure**

All instances of irregular expenditure must be recovered from the liable official or political office-bearer, unless the expenditure is certified by the municipal council, after investigation by a council committee, as irrecoverable and is written off by the council. In other words, the expenditure that is written off is therefore condoned.

Irregular expenditures resulting from breaches of the Public Office-Bearers Act is an exception in that the irregular expenditure must be recovered from the political office-bearer to whom it was paid, who might not have been responsible for making, permitting or authorising the irregular expenditure.

Once it has been established who is liable for the irregular expenditure, the accounting officer must in writing request that the liable political office-bearer or official pay the amount within 30 days or in reasonable instalments. If the person fails to comply with the request, the matter must be recovered through the normal debt collection process of the municipality.

**18.9 Fruitless and wasteful expenditure**

The processes to respond appropriately to fruitless and wasteful expenditure are similar to the following three processes outlined for irregular expenditure:

- a) disciplinary charges against officials and political office bearers;
- b) criminal charges against officials and political office-bearers; and
- c) recovery of the fruitless and wasteful expenditure from the liable persons.

The description of the categories of irregular expenditure in the above three instances can be applied directly to fruitless and wasteful expenditure. The difference is that fruitless and wasteful expenditure can arise in any circumstance and is not dependent on non-compliance with any legislation.

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Council should follow section 32(2)(b) of the MFMA when dealing with instances of fruitless and wasteful expenditure.

**18.10 Register of unauthorised, irregular, fruitless and wasteful expenditure**

All instances of unauthorised, irregular, fruitless and wasteful expenditures must be reported to the mayor, the MEC for local government in the province, the Auditor-General, disclosed in the annual report, and to council as required by section 32(4) and 74 of the MFMA. This disclosure will assist in addressing challenges relating to expenditure control and transparent reporting in order to strengthen accountability.

The introduction of a 'register' to capture unauthorised, irregular, fruitless and wasteful expenditure will ensure that financial management in municipalities is improved, resulting in better audit outcomes.

All municipalities need to do all they can to prevent prohibited expenditures. The accounting officer also needs to make sure that the municipality has proper processes in place to record and manage prohibited expenditures, should they occur. Therefore, as part of complying with section 62(1)(d) of the MFMA, the accounting officer (who may delegate the task to the chief financial officer) must set-up and maintain a Register of Unauthorised, Irregular, Fruitless and Wasteful Expenditures.

Annexure A sets out the minimum information that should appear in such a Register. Municipalities are free to add more detail should they deem this necessary. The aim of the Register is also to serve as a tool for recording all unauthorised, irregular, fruitless and wasteful expenditures and for tracking progress in dealing with the consequences flowing from such expenditures until all the issues that gave rise to the expenditures are properly resolved in accordance with the legal framework.

Municipalities are required to implement a register of unauthorised, irregular, fruitless and wasteful expenditure from 1 July 2013, for all transactions falling within this category and ensure it is updated on a continuous basis. This information will allow management to address such matters more thoroughly and within appropriate timeframes.

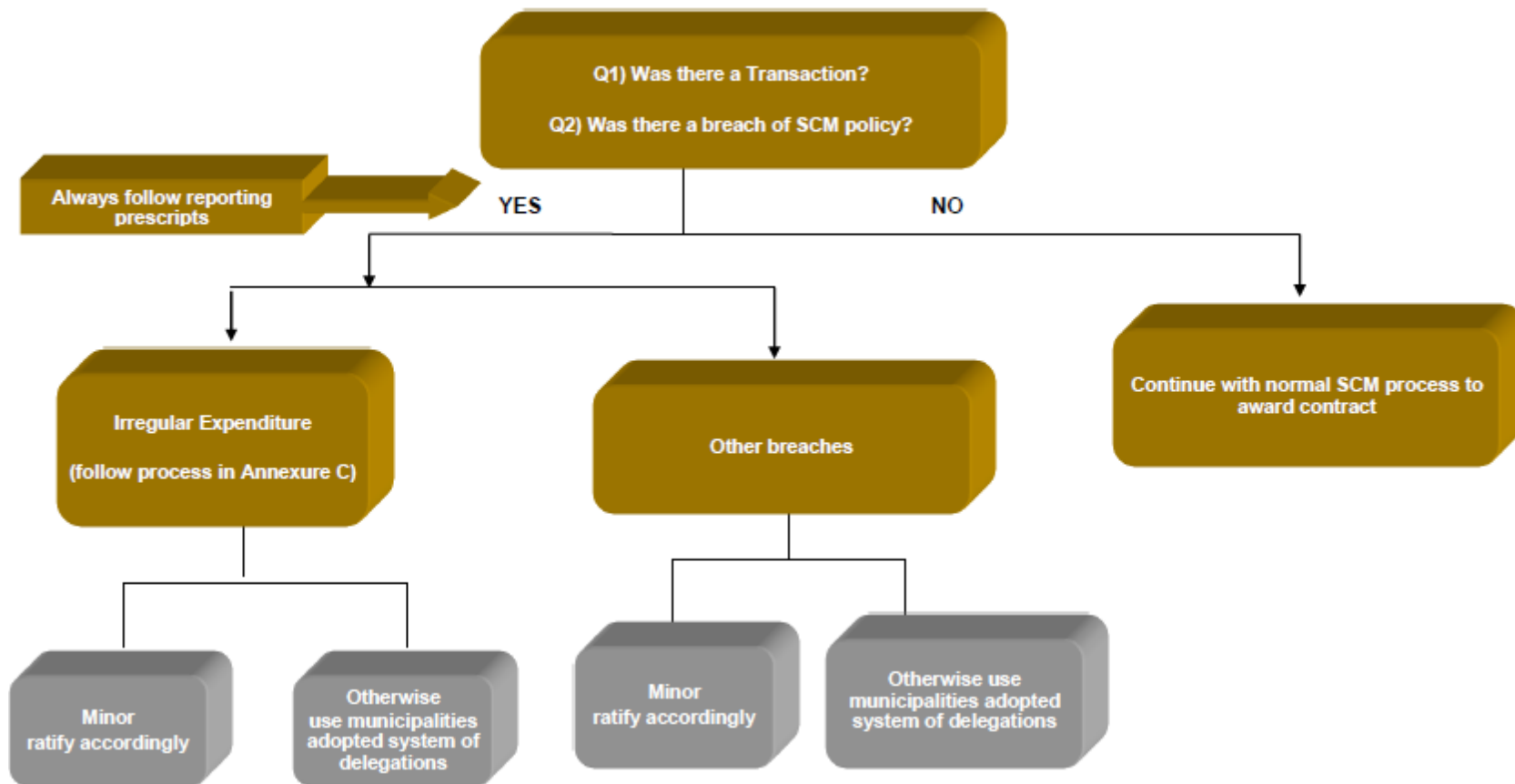


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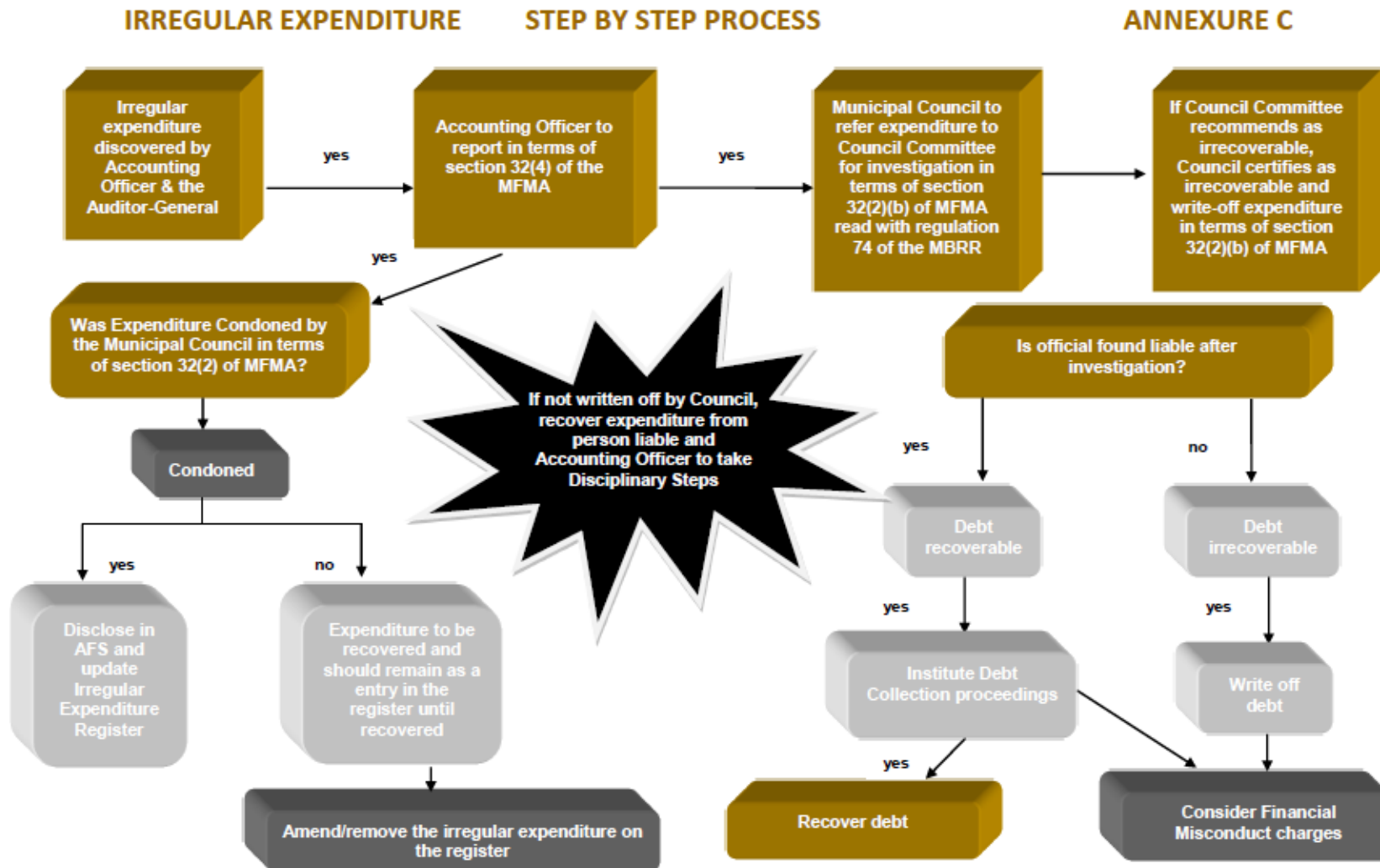
**SCM REGULATION 36 (1)(B)**

**ANNEXURE B**



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**IRREGULAR EXPENDITURE - ACCOUNTING FRAMEWORK**

**ANNEXURE D**

