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RESOLVING INHERENT STATUTORY FAULT LINES IN THE COMBAT OF CORRUPTION AND MALFEASANCE IN THE LOCAL GOVERNMENT SECTOR

Adv Gary Birch* & Dr Andreas Karsten**

ABSTRACT

Allegations of maladministration, fraud, corruption, and serious malpractice in South African municipalities require the involvement of multiple government entities. Investigations of councillors and municipal officials are often hindered by fragmentation of mandates and legislation dealing with the investigation of corruption and malfeasance.

The statutory fault lines identified by the authors, if not responsibly managed, can cause specific misconduct or criminal acts to not be thoroughly investigated. It is with the shortcomings and segregated nature of investigation of allegations related to municipalities in mind, that this research paper seeks to examine the various codified statutes that mandate the investigation of corruption in local government. In conclusion, the authors propose a more efficient, enhanced and cooperative approach to investigate allegations, amongst the various investigation bodies/actors when investigating corruption in municipalities.

Keywords: *Corruption, Maladministration, Fraud, Anti-corruption, Malfeasance, Serious Malpractice, Municipalities, South Africa*

* LLB (University of Cape Town), BSc(Hons) Environmental Science (University of KwaZulu-Natal), BSc Environmental & Geographical Sciences and Ocean & Atmospheric Sciences. (University of Cape Town) Director: Specialised Support, Department of Local Government, Western Cape Government, 8th floor, Waldorf Building, 80 St George's Mall, Cape Town 8001. ORCID: 0009-0004-6591-1099.

** LLB (University of South Africa), Advanced Cert Labour Relations (Potchefstroom University CHE), HDip Tax Law (University of Johannesburg), LLM Tax Law (University of South Africa), LLD (North West University) Deputy Director: Specialised Support, Department of Local Government, Western Cape Government, 8th floor, Waldorf Building, 80 St George's Mall, Cape Town 8001, ORCID: 0000-0003-2936-9402.

1. INTRODUCTION

During a keynote discussion at the Trialogue Business in Society Conference 2019, former Constitutional Court judge, Albie Sachs, discussing the “horrible levels of corruption” in South Africa remarked that:

The Constitution, the Judiciary and our Chapter 9 institutions enable a nation of free people working together, at times working to protect people against ourselves, confronting transgression ... toward dignity for all and security for all.¹

Although Chapter 9 of the Constitution serves as validation of the element of precautionary constitutionalism woven into our Constitution, to anticipate the “negative consequences of improper influence and the corrupt exercise of power”,² it does not serve as a silver bullet to prevent corruption. Hence the importance of investigations into *ex post facto* corruption and remedial consequences, where the exercising of responsible or good powers³ have failed and preventive measures have proved insufficient, remains primary.

With corruption frequently labelled as a crime against the South African people and equally considered a betrayal of our democracy,⁴ recent years has proven cataclysmic to the South African Government, especially from a corruption perspective.⁵ In recent years, some non-governmental organisations (NGOs) have identified the most common forms of corruption at municipal level as including bribery (28 per cent), procurement irregularities (24 per cent), employment irregularities (11 per cent), abuse of power (9 per cent), and the

1 Smook W & Ntoane K (2019) “South African Constitution is Ubuntu Writ Large, Helping Quell Corruption” *Triologue*, available at <https://trialogue.co.za/south-african-constitution-is-ubuntu-writ-large-helping-quell-corruption/> (accessed 16 September 2024).

2 Cachalia F (2019) “Precautionary Constitutionalism, Representative Democracy and Political Corruption” 9(1) *Constitutional Court Review* 45 – 79 at 50 – 51.

3 Cachalia (2019) at 50.

4 South African Government (2022) “President Cyril Ramaphosa: Response to the Commission of Inquiry into Allegations State Capture, Corruption and Fraud in the Public Sector”, available at <https://www.gov.za/news/speeches/president-cyril-ramaphosa-response-commission-inquiry-allegations-state-capture> (accessed 16 September 2024) at 2.

5 Glasser MD & Wright J (2020) “South African Municipalities in Financial Distress: What Can be Done?” 24 *Law Democracy & Development* 413 – 441 at 436.

embezzlement of funds (8 per cent) in the workplace.⁶ While corruption represents an attack on governance institutions and further undermines the values of our Constitution, money stolen from the State also directly affects resources that should have been used to improve the livelihoods of its citizens.

Likewise, from a local government perspective, the importance of modern democracies' readiness to hold state actors accountable and combat corruption in the public sector together with the efficient use of public funds by municipalities, being the arm of government closest to the people, is vital to prevent service delivery protests and vandalism of state infrastructure.⁷

Notwithstanding the identification of the illicit outflow of money associated with state capture,⁸ the ongoing looting of state coffers in the local government domain remains relentless and increased to unprecedented levels during the preceding financial years.⁹ This was further exacerbated by irregular expenditure in the 2022/23 municipality audits under the Local Government: Municipal Financial Management Act 56 of 2003 (MFMA). This is however even further overshadowed by the material financial losses in municipalities for the reporting period between 1 April 2019 to 1 January 2024.¹⁰ Hereto, the latest Consolidated General Report on Local Government Audit Outcomes 2023 – 24 confirms that, from 1 April 2019, when the recording of material irregularities commenced, to 31 December 2024, more than 446 material irregularities were identified across 131 municipalities and nine municipal entities.¹¹

6 Corruption Watch (August 2021) "Corruption Watch Local Government Sectoral Report: South Africa Needs Clean Hands" at 8, available at <https://www.corruptionwatch.org.za/wp-content/uploads/2021/08/CW-local-govt-sectoral-report-August2021.pdf> (accessed 5 December 2025).

7 Mamokhere J & Kgobe FKL (2023) "Service Delivery Protests in South African Municipalities: Trends, Factors, Impacts and Recommendations" *10 Social Sciences and Education Research Review* 49 – 59 at 49.

8 The Presidency, Republic of South Africa (2023) *Progress Report on the Implementation of the President's Response to the State Capture Commission*, available at <https://www.thepresidency.gov.za/progress-report-implementation-presidents-response-state-capture-commission> (accessed 16 September 2024).

9 Auditor-General South Africa *Consolidated General Report on Local Government Audit Outcomes* (2022), (2023), (2024) and (2025).

10 Auditor-General South Africa *Consolidated General Report on Local Government Audit Outcomes* (2024) at 86.

11 Auditor-General South Africa *Consolidated General Report on Local Government Audit Outcomes* (2025) at 134.

It is therefore with the above extent of material irregularities, that inadvertently signal the increase in maladministration, fraud, corruption and any other serious malpractice in municipalities in mind, that the authors seek to review the legislative framework that regulates current mandates to combat corruption and malfeasance in the local government sector. A better understanding also needs to be obtained on how the current legislation, in context of the different mandates afforded to investigation bodies/actors, might inhibit or prevent role-players from addressing the full extent of the wrongdoing and how a collaborative approach to investigating malpractice and offenses in municipalities stand to reduce financial irregularities, ensure sound financial management and sustainable good governance practices in municipalities.

2. UNDERSTANDING THE CONSTITUTIONAL MANDATE TO FIGHT CORRUPTION AND MALFEASANCE IN MUNICIPALITIES

The importance of the accountability of both officials and public representatives serving in local government structures is seen in Chapter 7¹² and Chapter 10¹³ of the Constitution. Section 152(1)(a) of the Constitution confirms the objective to deliver democratic and accountable government for local communities and section 195(1)(f) of the Constitution affirms the responsibility of public administration to be accountable. These constitutional prescripts provide for the foundational threshold of what the constitutional aspirations in the public sector should represent.

The responsibility of municipalities to account in terms of their constitutional objectives was recently emphasised in the judgment of *Member of the Executive Council for Local Government, Environmental Affairs and Development Planning, Western Cape Province v Central Karoo District Municipality* wherein Allie J confirmed that:

When a public office bearer dishes out largesse, it has the potential to lead to the creation of client / patron relationships. Clientelism in the public sector has the potential to foster corruption and ought to be discouraged. It is

12 The Constitution of the Republic Of South Africa 1996, Chapter 7 Local Government.

13 The Constitution of the Republic Of South Africa 1996, Chapter 10 Public Administration.

therefore imperative that Respondents account for the use of funds in furtherance of the Municipality's objectives.¹⁴

3. CODIFIED STATUTES AND REGULATED ACTORS FROM A SOUTH AFRICAN LAW PERSPECTIVE THAT MANDATES THE INVESTIGATION OF CORRUPTION IN LOCAL GOVERNMENT

The precise investigative mandates of the different constituted investigative actors like government departments, investigation bodies and law enforcement agencies, are derived from a plethora of different pieces of legislation. The various statutes that empower the mandates of these investigative bodies and government departments will now be discussed in the context of the authority and powers to investigate corruption and malfeasance.

Codified statutes from a South African law perspective that mandate the investigation of corruption in local government *inter alia* include: the Systems Act,¹⁵ the MFMA,¹⁶ the Western Cape Monitoring and Support of Municipalities Act,¹⁷ the Special Investigation Units and Special Tribunals Act,¹⁸ the Public Protector Act,¹⁹ the Public Audit Act,²⁰ the Prevention and Combating of Corrupt Activities Act,²¹ and the Prevention of Organised Crime Act.²² Likewise, the most prominent actors identified in the above legislation include the various Members of the Executive Council (MECs) responsible for Local Government, the Provincial Treasuries and Provincial Departments, the Special Investigating Unit, the Auditor-General of South Africa, the Public Protector, the Directorate for Priority Crime Investigation, and the National Prosecuting Authority. These entities, together with the governing legislation, will now be discussed to clarify their respective mandates, the legislative framework compelling them to enforce those mandates, and how this collectively contributes to the broader

14 *Member of the Executive Council for Local Government, Environmental Affairs and Development Planning, Western Cape Province v Central Karoo District Municipality* (4567/2024) [2024] ZAWCHC 150 (3 June 2024) para 52.

15 Local Government: Municipal Systems Act 32 of 2000.

16 Local Government: Municipal Finance Management Act 56 of 2003.

17 The Western Cape Monitoring and Support Act 4 of 2014.

18 Special Investigating Units and Special Tribunals Act 74 of 1996.

19 The Public Protector Act 23 of 1994.

20 The Public Audit Act 25 of 2004.

21 The Prevention and Combating of Corrupt Activities Act 12 of 2004.

22 The Prevention of Organised Crime Act 121 of 1998.

objective of investigating allegations of corruption and malfeasance in local government. This discussion will also identify the positive attributes of each actor, highlight any potential duplication of efforts, and examine probable statutory fault lines that could hinder the expeditious conclusion of investigations.

4. CURRENT LOCAL GOVERNMENT ACTORS MANDATED TO INVESTIGATE ALLEGATIONS OF MALADMINISTRATION, FRAUD, CORRUPTION OR ANY OTHER SERIOUS MALPRACTICE

4.1 Schedule 1 of the Systems Act

A central mechanism in terms of local government statutes, available to MEC's responsible for local government, to combat corruption and malfeasance in municipalities includes investigations initiated in terms of the Code of Conduct for Councillors (the "Code").²³ However, this mechanism offers limited prospects to properly investigate corruption in municipalities as this mechanism only applies in relation to the conduct of councillors. The MEC's powers to initiate such an investigation are also limited to circumstances when a Municipal Council does not discharge its obligations in terms of the Code.²⁴ Albeit important to regulate the conduct of councillors in the local government domain, a broader catch-all provision for investigating allegations of corruption and malfeasance is found in section 106 of the Systems Act.

4.2 Section 106 of the Systems Act

Provincial investigations in the local government domain are authorised under the Systems Act. Hereto, section 106 of the Systems Act allows for the relevant MEC, in the related province, to investigate aspects that involve maladministration, fraud, corruption or any other

23 Act 32 of 2000, Schedule 1.

24 De Visser J (2006) *Local Accountability: Enforcing the Code of Conduct for Councillors*, Paper presented at 2006 Democracy Development Programme Annual Conference on Local Government, available at <https://dullahomarinstitute.org.za/multilevel-govt/publications/enforcing-the-code-of-conduct-for-councillors.pdf> (accessed 16 September 2024) 1 – 13 at 9.

serious malpractice.²⁵ Any investigation in context of section 106 is however qualified on the premise that the MEC must have reason to believe that maladministration, fraud, corruption or any other serious malpractice has occurred or is occurring in a municipality in the province.²⁶

The ambit of a section 106 investigation can include consideration of allegations of maladministration, fraud, corruption or any other serious malpractice, though the specific scope of the allegations that can be investigated in terms of section 106 has been a subject of dispute. Previously, in the judgment pertaining to the *City of Cape Town v Premier, Western Cape* the Western Cape High Court confirmed the effect of section 106 of the Systems Act is to investigate only crimes such as fraud and corruption in relation to a municipality.²⁷

This limited interpretation was however later corrected by the Supreme Court of Appeal (SCA) in the matter of *MEC Responsible for Local Government, Western Cape v Matzikama Local Municipality*.²⁸ In this matter, the Provincial Minister appealed the initial decision of the Western Cape High Court, to gain clarity pertaining whether section 106 of the Systems Act, authorises the Provincial Minister to also initiate an investigation into criminal conduct other than fraud or corruption, as previously excluded by the High Court in the matter of the *City of Cape Town v Premier of the Western Cape*.²⁹ In the context of this judgment, the SCA confirmed that section 106(1) of the Systems Act cannot be interpreted to cover only crimes of fraud and corruption to the exclusion of other crimes like theft. The Court concluded:

That means that we are of the view that City of Cape Town was wrongly decided in this respect. It follows that the high court in this matter erred in excluding from the investigation the theft allegations. The result is that the MEC's appeal on the merits must succeed.³⁰

25 Act 32 of 2000, sec 106.

26 Act 32 of 2000, sec 106(1).

27 *City of Cape Town v Premier of the Western Cape* 2008 (6) SA 345 (C) para 156.

28 *MEC Responsible for Local Government, Western Cape v Matzikama Local Municipality* 2023 (3) SA 521 (SCA) para 167.

29 *MEC Responsible for Local Government, Western Cape v Matzikama Local Municipality* (2023) para 2.

30 *MEC Responsible for Local Government, Western Cape v Matzikama Local Municipality* 2023 (3) SA 521 (SCA) para 2.

Notwithstanding the wider interpretation afforded by the SCA, section 106 investigations are specific in terms of the MEC's mandate afforded by the Systems Act, of which any aspect *ultra vires* of the provision provided, cannot be investigated. Notwithstanding a matter falling outside of the section 106 ambit, the related provincial government cannot mechanically turn a blind eye to irregular and unlawful conduct that relates to the commissioning of a crime, hence provincial entities must facilitate referrals to the relevant authorities, to investigate the same. Unfortunately, there is no national formalised framework governing the referral, reporting or sharing of information obtained during investigations conducted by the various investigative bodies/actors. In absence of this valuable nexus, this could result in valuable evidence obtained during investigations not being utilised effectively. Even worse, this could cause another investigative body duplicating expenses by investigating and collecting evidence that is already available.

Evident from the regulatory powers afforded in terms of the process, the MEC's recourse or redress afforded in terms of section 106 findings is also very narrow and limited to the municipality being obliged to institute disciplinary proceedings against the person or persons implicated in the report.³¹ However other than the aforementioned recourse, statute does not allow for any other remedial action to be executed by the MEC, other than to recommend a provincial intervention to the Provincial Executive for the municipality failing to comply with its executive obligations. This, together with the trend of Municipal Councillors and senior officials being implicated in the investigations, underscores the need for the referral of evidence or findings to other bodies.³² It follows that the referral of section 106 investigation reports to law enforcement bodies will greatly speed up criminal investigations.³³

There are currently no formal referral channels pertaining to allegations which could be more appropriately investigated by other investigation bodies and no formal coordinating channels with other law enforcement bodies to ensure cases referred between law

31 Section 106(6) of the Local Government: Municipal Systems Act 32 of 2000.

32 De Visser J *et al* (2020) *Combating Corruption in Local Government in the Western Cape: Final Field Research Report for Western Cape Department of Local Government*, available at <https://dullahomarinstitute.org.za/multilevel-govt/publications/30092020-combating-corruption-in-local-government-in-the-western-cape-final-with-exec-summary-and-2-logos.pdf> (accessed 16 September 2024) 1 – 85 at 10.

33 De Visser *et al* (2020) at 10.

enforcement bodies including the SIU, DPCI, PP, AGSA and NPA are fully investigated, including the status on each matter, progress of investigations and related outcomes in relation to finalisation.

Furthermore, the potential for referrals based on section 106 reports is important, particularly in relation to the non-recovery of expenditure under section 32 of the MFMA. Hereto the limited capacity and willingness of municipalities to recover unauthorised, irregular or fruitless and wasteful expenditure from the person liable for that expenditure in terms of section 32 of the MFMA and the loss or damage suffered by it because of the deliberate or negligent unlawful actions as required by section 176 of the MFMA is another area of probable concern, highlighting the need for a collaborative and coordinated approach by investigation bodies/actors.³⁴

In South Africa, the only provincial legislation that caters specifically for section 106 investigations is the Western Cape Monitoring and Support of Municipalities Act.³⁵ In all other provinces, the Commissions Act,³⁶ with the necessary changes as the context may require or relevant Provincial Commissions Act's, apply to an investigation in terms of section 106 of the Systems Act.

4.3 The Western Cape Monitoring and Support of Municipalities Act

In relation to section 106 investigations, applicable provincial legislation can also be developed to give effect to the mandate afforded to provincial governments in terms of section 106 of the Systems Act. The Western Cape Monitoring and Support Act³⁷ is an example hereof; it was promulgated in 2014 with the objective to operationalise section 106 investigations in the province of the Western Cape and ensure the effective discharge of the Provincial Minister's obligations in terms of section 106(1) of the Systems Act.³⁸

Other auxiliary processes utilised in terms of the Western Cape Monitoring and Support Act, includes provisions for sharing information and knowledge regarding municipal powers

³⁴ Local Government: Municipal Finance Management Act (56 of 2003), Chap 15.

³⁵ Act 4 of 2014.

³⁶ Act 8 of 1947.

³⁷ Act 4 of 2014.

³⁸ Act 4 of 2014, Preamble.

and functions. The Act also allows for requests by municipalities for assistance, issuing of practice notes pertaining to improvement of systems, processes, procedure and best practice standards.³⁹

At the time of writing this article, the Western Cape Monitoring and Support of Municipalities Amendment Bill, 2023 was published for comment in the Provincial Gazette and an Amendment Bill taking into account the public comments received has been introduced into the Western Cape Provincial Parliament. The motivation behind the Amendment Bill is related to a move towards more pro-active measures for early detection and intervention in cases of municipal corruption and fraud, and instances where a municipality falls into distress.⁴⁰

The proposed amendments, as identified in the Amendment Bill, include enhanced access to municipal records during assessments or investigations, the provision of support officers to municipalities under specified circumstances, the establishment of proactive monitoring procedures to render better preventative support to municipalities, and the development of comprehensive processes for inspecting, securing and copying records in certain situations.⁴¹ The proposed codification of these processes will cause uniform operating procedures to be deployed during the assessment and investigative processes, including processes to secure and copy records so as to prevent evidence from being compromised or destroyed by implicated alleged perpetrators.

The Memorandum on the Objects of the Amendment Bill details that the advantages of early detection including the ability to prevent serious misconduct and corruption with the identification of patterns of behaviour that precede the occurrence of the wrongdoing.⁴² Other proactive measures include the provision of provincial support officers that can be designated to determine compliance with related obligations, identification of risks, advise

39 Act 4 of 2014, secs 2 – 4.

40 See Memorandum on the Objects of the Draft Western Cape Monitoring and Support of Municipalities Amendment Bill 2023 in the Province of the Western Cape: Provincial Gazette Extraordinary 8723: 24 February 2023, at 13.

41 Draft Western Cape Monitoring and Support of Municipalities Amendment Bill 2023, Preamble.

42 Memorandum on the Objects of the Draft Western Cape Monitoring and Support of Municipalities Amendment Bill 2023, Province of the Western Cape: Provincial Gazette Extraordinary 8723, 24 February 2023, at 13.

on improvements of processes and procedure to prevent corrupt activities and implementation of systems to detect fraud, corruption, maladministration and malpractices in municipalities.⁴³

Importantly, however, these amendments make further provision for unnecessary duplications of assessments and investigations wherein the Provincial Minister may refer an allegation to the South African Police Services (SAPS), a Chapter 9 institution, the Special Investigating Unit (SIU), or any other organ of state if he/she is of the opinion that it would be more appropriate for said allegation to be investigated by another body, to await the outcome thereof, before taking action in terms of section 106 of the Systems Act.⁴⁴

It follows that the Western Cape Monitoring and Support Act and its proposed amendments therefore stand to formalise or remedy previous legislative fault lines associated with current legislation where no formal framework or legislative requirement existed that regulated the referral to other law enforcement bodies. For example, given their close proximity to municipalities and their role in regulatory reporting, information databases held by MECs could significantly benefit other law enforcement agencies through proper collaboration. Likewise, MECs are often promptly informed of allegations by members of the public and whistle-blowers, therefore enabling them to timely share information with relevant law enforcement bodies. Other actors that include various legislated role-players will now also be discussed in context of probable answers to ensure the mitigation of statutory fault lines in the investigation of corruption and malfeasance in municipalities.

5. OTHER LEGISLATED ACTORS INVESTIGATING ALLEGATIONS RELATED TO MUNICIPALITIES

5.1 Provincial Treasuries and Provincial Departments of Local Government

The Constitution requires provincial governments to monitor municipal performance, and to promote the development of municipal capacity. Accordingly, the duty on provincial

43 Memorandum on the Objects of the Draft Western Cape Monitoring and Support of Municipalities Amendment Bill 2023 at 15.

44 Memorandum on the Objects of the Draft Western Cape Monitoring and Support of Municipalities Amendment Bill 2023 at 15.

government to monitor, support and strengthen the ability of municipalities to manage their own affairs, exercise their powers and perform their functions⁴⁵ stands to protect the autonomous nature of municipalities, namely to develop its own ability to execute its executive obligations and function independently.

The Constitution and national legislation also envisage, in limited circumstances, interventions impeding municipal autonomy. This includes, among other things, section 106 investigations and section 139 of the Constitution interventions. These obligations could, incidentally so, include to resolve corruption and malfeasance in municipalities, that is Chapter 4 of the MFMA, more specifically section 27(5) of the Act confirms that: “The provincial executive may intervene in terms of the appropriate provision of section 139 of the Constitution, if a municipality cannot or does not comply with a provision of this Chapter, including a provision relating to process.”⁴⁶

It is therefore, with the above cited obligation of the provincial government in mind, also its duty to consider, prevent and rectify any unlawful conduct, including corruption and malfeasance on the part of municipalities as envisaged in terms of Chapter 4 of the MFMA, that the provincial executive is similarly duty bound to consider intervening in appropriate circumstances in terms of section 139 of the Constitution, to address failures to fulfil executive obligations. It therefore follows that section 139 of the Constitution also, to this extent, provide for the combatting of corruption and eradicating malfeasance in local government.

The role and value of provincial treasuries and provincial local government departments must not be underestimated in relation to its close proximity to municipalities, due to its co-operative nature and regulatory reporting. This includes MFMA section 71 reports, MFMA section 72 reports, annual reports, concurrence in terms of appointment of senior managers, reporting in terms of its annual financial statements, draft budgets, adjustment budgets, annual budgets, reports in terms of the staff regulations and reporting of unauthorised, irregular, fruitless and wasteful expenditure. Provincial governments hold valuable

⁴⁵ The Constitution of the Republic of South Africa, 1996, sec 154(1).

⁴⁶ See the Local Government: Municipal Finance Management Act 2004, Chap 4, for more information in terms of the related circumstances that can trigger intervention.

information in fulfilment of their constitutional obligations to support and monitor municipalities, therefore, this information further needs to be shared, where appropriate, with other law enforcement actors to ensure formal collaboration and sharing of resources.

5.2 Special Investigating Unit

Another statute that allows for investigations into allegations of maladministration, fraud, corruption or any other serious malpractice includes the Special Investigating Units and Special Tribunals Act (SIU ACT)⁴⁷ which allows for the establishment of the Special Investigating Unit (SIU) and Special Tribunals.

The mandate of the SIU includes the investigation of serious malpractices or maladministration related to the administration of state institutions, state assets, and public funds, as well as any conduct that may seriously harm the public interest.⁴⁸ The SIU is, however, also empowered to institute and conduct civil proceedings in any court of law which significantly extends its reach to address wrongdoings in municipalities.⁴⁹

These extensive powers to conduct investigations permit the SIU to investigate allegations related to municipalities of the following nature: serious maladministration, improper or unlawful conduct, the unlawful appropriation or expenditure of public money or property, and any unlawful, irregular, or unapproved acquisitive acts, transactions, measures, or practices involving state property.⁵⁰

Their mandate also covers intentional or negligent loss of public funds, damage to public property, and specific offences related to state affairs as outlined in the Prevention and Combating of Corrupt Activities Act, particularly those committed in connection with any state institution.⁵¹ Depending on the framework determined by its terms of reference contained in a specific proclamation referred to in section 2(1) of the SIU Act, the SIU can investigate allegations, collect evidence pertaining investigations proclaimed, and institute

47 Act 74 of 1996.

48 Act 74 of 1996.

49 Act 74 of 1996.

50 Act 74 of 1996, sec 2(2)(a) – (d).

51 Act 74 of 1996, sec 2(2)(e) – (f).

and conduct civil proceedings in a special tribunal or any court of law.⁵² These special tribunals enhance the mandate of the SIU, allowing for the recovery of damages or losses and the prevention of potential future damages or losses to state institutions.⁵³

During an investigation of any matter by the SIU, wherein the evidence indicates the commission of an offence, the SIU must refer the same to the NPA. This therefore saliently obligates a synergy and sharing of resources and information between these bodies.⁵⁴ As part of its investigations, the SIU may also recover fees and expenses from the related state institution, more specifically

for anything done in terms of this Act in respect of that State institution or a State institution identified by that State institution, together with legal costs relating to the institution and conducting of civil proceedings in terms of this Act, and interest.⁵⁵

In the matter of the *Special Investigating Unit and Another v Duneco CC*,⁵⁶ a Tribunal established in terms of section 2(1) of the SIU Act considered a matter that involved the decision to purchase personal protection equipment. The Tribunal decided that the decision taken by implicated parties, to purchase personal protection equipment, be declared irregular and invalid, based on the doctrine of legality.⁵⁷ The Tribunal held that the officials involved in the purchasing of the equipment were personally liable for the payment of the irregular expenditure incurred.⁵⁸ It follows that the procedure followed by the Tribunal is invaluable in context of municipalities, especially the speedy processing and expedited recovery of state funds, without having to resort to civil or criminal courts to process same.

From a legislative and procedural perspective, the SIU enjoys extensive investigative powers, this maintains parallel investigative relationships, and likewise facilitates referrals between the SIU, NPA, DPCI, and SAPS. For example, in this regard, the SIU has already concluded a memorandum of understanding (MoU) with the NPA, as previously noted.

52 Act 74 of 1996, sec 4(1)(a) – (c).

53 Act 74 of 1996, sec 4(1)(c)(i).

54 Act 74 of 1996, sec 4(1)(d).

55 Act 74 of 1996, sec 5(1)(b).

56 *Special Investigating Unit and Another v Duneco CC* (WC/05/22) [2023] ZAST 9 (23 June 2023).

57 *Special Investigating Unit v Duneco CC* [2023] para 25.

58 *Special Investigating Unit v Duneco CC* [2023] para 56.

Notwithstanding, certain statutory shortcomings remain and need to be remedied to bridge the statutory divide regulating the law enforcement landscape.

First, based on its mandate, the SIU may only conduct an investigation once a proclamation has been issued by the President.⁵⁹ Second, although the SIU is empowered to recover its costs from a municipality or any other organ of state referring a matter to it, this equally may deter direct referrals from other organs of state like COGTA, as it could be held liable for the investigation costs. Furthermore, the SIU's limited direct access to municipal data and information prior to the issuance of a proclamation underscores the need for more formalised collaboration with municipalities and provincial COGTAs. Lastly, the jurisdiction of the SIU Tribunal is restricted to civil disputes arising from an SIU investigation. In this regard, improved collaboration, or the formalisation of a national framework for collaboration between law enforcement agencies, could, given the SIU's extensive investigative powers and capacity for speedy recovery, significantly benefit other role-players, if properly implemented.

Another example relates to the statutory referral procedure pertaining to Public Protector and section 106 reports, which could potentially expand the jurisdiction of the SIU Tribunal to make orders envisaged in section 8(2) of the SIU Act in relation to investigations conducted by other investigative bodies. This would also allow for the sharing of investigation reports with the MEC responsible for COGTA to facilitate monitoring, implementation, and support to municipalities.

5.3 The Auditor-General

Similar to other Chapter 9 institutions, the constitutional mandate of the Auditor-General South Africa (AGSA) is to strengthen our constitutional democracy.⁶⁰ To this extent, the AGSA must account for the auditing and reporting on accounts, financial statements and financial management of all national and provincial state departments and administrations, including

59 Special Investigating Units and Special Tribunals Act 74 of 1996, sec 2(1).

60 The Constitution of the Republic of South Africa, 1996, sec 181(1)(e).

municipalities.⁶¹ As part of the constitutional mandate, the AGSA must inspire performance, accountability, transparency and institutional integrity in local government.⁶² It is with this in mind that the mandate of the AGSA, will inevitably, include the monitoring and evaluation of expenditure in local government, but more notably for purposes of this article, any noncompliance with, or contravention of, legislation, fraud, theft or a breach of a fiduciary duty which constitute a material irregular expenditure.⁶³

With the amendment of the Public Audit Act, the mandate of the AGSA extended to include the identification and reporting of material irregularities which include fraud, theft and non-compliance.⁶⁴ This increased the ability of the AGSA to monitor and identify irregularities in the local government sector and also enforce compliance and take action if accounting officers don't execute the remedial action⁶⁵ required, for example by issuing a certificate of debt when the municipality failed to implement the remedial action.⁶⁶

A material irregularity is defined as

any noncompliance 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.⁶⁷

For purposes of collaboration, the AGSA now has the powers to refer related suspected material irregularities identified to a relevant public body for investigation, of which the body must keep the AGSA informed in relation to progress and the final outcome of the investigation.⁶⁸ Other benefits include annual audit capacity of the AGSA, related follow ups and lastly monitoring and evaluation of material irregular expenditure in local government.

61 The Constitution of the Republic of South Africa, 1996, sec 188(1).

62 Auditor-General South Africa (2024) *Consolidated General Report on Local Government Audit Outcomes 2022-23*, available at https://www.parliament.gov.za/storage/app/media/OISD/Reports/Auditor_General/2024/august/28-08-2024/MFMA_Report_2022-23_FINAL.pdf (accessed 16 September 2024) at 3.

63 The Public Audit Amendment Act 5 of 2018, sec 5(1A).

64 Act 5 of 2018.

65 Act 5 of 2018, sec 5A.

66 Act 5 of 2018, sec 5(1B). See also sec 5B.

67 Definition of "material irregularity" in terms of the Public Audit Amendment Act 5 of 2018.

68 Act 5 of 2018, sec 5(1A).

The amendment to Public Audit Act remedied the previous regulatory fault line where no formal provision was dedicated to collaboration between the AGSA and other law enforcement bodies.⁶⁹ Notwithstanding the progress made to date, the slow implementation of issuing of debt certificates and the limited cooperation and coordination between investigation bodies and AGSA need improvement.

5.4 The Public Protector

Another Chapter 9 institution which exerts extensive relevance relating to accountability in the local government domain, is the Office of the Public Protector (PP).

The mandate of the PP includes powers to investigate any conduct in relation to maladministration in connection with the affairs of government at any level, or pertaining the public administration in government, including at local government, where it is alleged or suspected to be inappropriate or to result in any impropriety or prejudice.⁷⁰

The powers of the PP also include the reporting of its findings and the taking of appropriate remedial action.⁷¹ Under these circumstances, the PP generally issues a formal report, with the related findings and remedial action to be taken.⁷² It follows that the powers of the PP are therefore wide-ranging in terms of the statutory action that can be taken, including referrals, intervention letters,⁷³ making binding findings/recommendations and the issuing of remedial action.

To this extent, the Apex Court endorsed the binding nature of the PP's recommendations in the matter of *Economic Freedom Fighters v Speaker of the National Assembly; Democratic*

69 Act 5 of 2018, sec 5(1A).

70 The Constitution of the Republic of South Africa, 1996, sec 182(1)(a).

71 The Constitution of the Republic of South Africa, 1996, sec 182(1)(b) and (c).

72 Public Protector South Africa (2023) *Annual Report 2022/23* at 12.

73 "An intervention refers to action taken by the Public Protector in terms of section 6(4)(b)(ii) of the Public Protector Act, 1994 before, during or after an investigation to communicate clear and simple observations of the cause of problems experienced as well as proposed or required improvements to the processes of a public body or authority, to address any systematic problems or trends identified (as opposed to substantive Public Protector's findings into the merits of a complaint and remedial action as envisaged in section 182(1)(b) and (c) of the Constitution)." Public Protector South Africa (2023) at 13.

Alliance v Speaker of the National Assembly.⁷⁴ The wide mandate of the PP and its crucial role in ensuring oversight and accountability has been noted by our courts.⁷⁵

Given its ability to exert its powers and implement appropriate remedial measures, the PP is a good illustration of how the characteristic gaps in combatting of corruption and malfeasance in the local government sector through improved collaboration with investigative actors can be bridged. In addition to the current practices within the PP, the creation of a national investigative framework and formalising the procedure for referrals can enhance the important mandate performed by the PP. Similar to previous actors the sharing of investigation reports that involve Municipalities with MECs responsible for COGTA could facilitate improved implementation through proper monitoring and support.

5.5 The Directorate for Priority Crime Investigations (DPCI)

The mandate of the DPCI is to prevent, combat and investigate national priority offences and offences referred to in Chapter 2 and section 34 of the Prevention and Combating of Corrupt Activities Act 12 of 2004.⁷⁶ Hereto the DPCI follows a multi-faceted approach that includes three strategic areas: serious corruption, serious commercial crime and serious organised crime.⁷⁷

These investigations also relate to investigations of serious corruption and serious commercial crimes in municipalities. The DPCI investigates criminal conduct identified during forensic investigations conducted in terms of section 106 of the System Act. These cases include matters in municipalities pertaining to amongst others fraud and contravention of MFMA, defeating the ends of justice, theft, forgery, uttering and money laundering,

74 *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 580 (CC) at 11.

75 *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* (2016).

76 The South African Police Service Act 68 of 1995, sec 17D.

77 DPCI (31 May 2022) "Presentation to the Portfolio Committee on Cooperative Governance and Traditional Affairs (COGTA) on the Status of Criminal Cases Opened in terms of Section 106 of the Local Government: Municipal Systems Act: Free State Province: Presented by the National Head of the Directorate for Priority Crime Investigation (DPCI) Lieutenant General (Dr/Adv) SG Lebeya (SOEG)", available at https://static.pmg.org.za/220614PRESENTATION_BY_DPCI_TO_COGTA-_FREE_STATE_-_MUNICIPAL_INVESTIGATIONS.pdf (visited at 16 September 2024) 1 – 49 at 3.

amounting to hundreds of millions of Rands of losses investigated.⁷⁸ However, based on their primary mandate relating to priority crimes, the DPCI often lack, or have limited, experience and specialised skills in investigating offences relating to local government, and such matters are often subject to lengthy timeframes in concluding criminal investigations. Proper collaboration can however prove decisive and improve its ability to ensure speedy conclusion of criminal investigation with section 106 reports and other reports of investigation bodies. Finally, the DPCI also stands to benefit from the creation of a national investigative framework to formalise collaboration with other public bodies, namely to formalise procedure for referrals, report back on referrals, and to expedite recovery and enforcement.

5.6 The National Prosecuting Authority

The National Prosecuting Authority (NPA) derives its mandate from section 179 of the Constitution. Section 179(2) expressly empowers the NPA to institute criminal proceedings.⁷⁹ The mandate of the NPA as outlined in the Constitution is to institute and conduct criminal proceedings on behalf of the State and carry out any necessary functions incidental to instituting and conducting such criminal proceedings.⁸⁰ These, amongst others, include cases pertaining to fraud and corruption in municipalities. For example, in the Free State province, the NPA successfully executed various orders in relation to municipal cases, including:

12 Freezing orders (8 preservations and 4 restraints) to the value of R390,3m ... the largest restraint ... in the amount of R340m; will remain pending outcome of criminal trial ... 9 forfeitures and confiscations to the value of R7,99m ... Recoveries to the amount of R7,9m with R7,88m returned to municipalities and R25k paid to the Criminal Assets Recovery Account.⁸¹

78 DPCI (31 May 2022) "Presentation to the Portfolio Committee on Cooperative Governance and Traditional Affairs (COGTA) on the Status of Criminal Cases Opened in terms of Section 106 of the Local Government: Municipal Systems Act: Free State Province: Presented by the National Head of the Directorate for Priority Crime Investigation (DPCI) Lieutenant General (Dr/Adv) SG Lebeya (SOEG)", available at https://static.pmg.org.za/220614PRESENTATION_BY_DPCI_TO_COGTA- FREE STATE - _MUNICIPAL_INVESTIGATIONS.pdf (visited at 16 September 2024) 1 – 49 at 6.

79 The Constitution of the Republic of South Africa, 1996, sec 179(2).

80 The Constitution of the Republic of South Africa, 1996, sec 179(2).

81 NPA (2022) "Briefing to Select Committee on COGTA, Status of Municipal Cases, Free State Division", available at https://static.pmg.org.za/Final_Select_Committee_on_COGTA-_Briefing_on_FSD_Municipal_Matters_14_June_2022.pdf (accessed 16 September 2024) 1 – 14 at 13.

The formalisation of another parallel investigative relationship and referrals from the SIU to the NPA has been seen with the signing of a Memorandum of Understanding (MoU) between the NPA, the DPCI and the South African Police Services.⁸² Hereto the objectives of the MoU *inter alia* include:

- a) the establishment of a formal working methodology to manage cases referred by the SIU to the NPA and the NPA to the SAPS/ DPCI;
- b) adopting and implementation of reporting mechanisms;
- c) ensuring that cases referred by the SIU to the NPA and NPA to the DPCI, be investigated; and
- d) development of a common database in respect of all SIU matters, including the status on each matter, progress pertaining to investigations and related outcomes in relation to finalisation.⁸³

Some of the challenges experienced by the NPA, include the technical and voluminous nature of the evidence, the specialised nature of procurement prosecution and specialised skills required from investigators and prosecutors.⁸⁴ Witnesses are often employees of municipalities who are reluctant to cooperate during investigations due to fear of reprisal and victimisation.⁸⁵ Other challenges relate to complicit officials destroying evidence to avoid investigation and related prosecution and the workload proving onerous to investigators due to the voluminous nature of the work required.⁸⁶

6. COLLABORATIVE APPROACH TO INVESTIGATING MALPRACTICE AND OFFENCES IN MUNICIPALITIES

Specific to the above section, which sought to compare in a rudimentary manner the different law enforcement bodies, mandates, benefits and shortcomings, the authors are of the opinion that legislative reforms should be considered to facilitate resolving the current inherent statutory fault lines in combating corruption and malfeasance. Investigation bodies should furthermore consider entering into cooperative protocols and agreements to develop

82 SIU (2024) "Annual Performance Plan, 2023/2024" 1 – 81 at 44.

83 SIU (2024) at 44.

84 NPA (2022) at 14.

85 NPA (2022) at 14.

86 NPA (2022) at 14.

a formal working methodology and national investigative framework to collaborate on cases, formalise procedures for referrals, report back on referrals, recovery of funds and enforcement, and outcomes once finalised.

This will enable the proper co-ordination of multiple investigative functions and overlapping mandates as well as avoiding duplication of investigations. Likewise, any coordinated formal framework and cooperation between investigative bodies will also enhance the provincial governments' capacity and ability to monitor implementation of all investigative reports and support municipalities to perform their functions.

It follows that proper coordination and collaboration are also likely to see improved ratios pertaining to the recovery of funds and enhanced governance practices being implemented.

The rationale, in relation to the suggestion that a formal working methodology and national investigative framework be developed, is that this would permit the establishment of provincial collaboration committees to be mandated to discuss allegations, best practices, the nature of allegations and engage on the referral of matters to the most appropriate body to investigate the specific allegations in light of the specific powers of the different investigation bodies.

These provincial committees can, equally, be utilised to feedback into the existing Local Government Anti-Corruption Forum (LGACF) steering committee, which is a national oversight committee with the SIU, NPA, HAWKS, COGTA and Provincial COGTAs as members. The PP and AGSA aren't currently members of the LGACF, but it is recommended that they be included in the Provincial Committees.

7. CONCLUSION

In light of the review undertaken of specific statutes that mandate the investigation of allegations into municipalities by investigative bodies/actors, it is clear that there is a significant overlap in their investigation mandates, of which each hold their own strengths and limitations.

This is further negatively affected by the inherent fault lines created by the fragmented nature of the current suite of anti-corruption and local government legislation used to

address corruption and malfeasance in municipalities. The legislative methodology must therefore be enforced through the formalising of a collaborative legislative framework to produce a cooperative model to be used for formal collaboration between investigative bodies/actors.

Finally, based on the above assessment, the authors are of the view that the current fragmented nature of the legislation framework requires a revised formal working methodology that would see better collaboration between investigative bodies/actors. This can be done with the creation of a national investigative framework with provincial substructures and a focus on enhanced development of improved collaboration, for example with the creation of provincial collaboration committees to enhance the transfer and referral of matters to the most appropriate investigation bodies to deal with allegations. These, inter alia, should include mandatory requirements such as the submission of copies of all section 106 reports to the AGSA; the formalisation of regular collective meetings with investigative bodies; and the creation of a national investigative framework to enhance collaboration between the suite of anti-corruption statutes and the regulated actors. Such a framework should formalise procedures for referrals, feedback on referrals, recovery processes, and enforcement mechanisms. Further legislative reforms are also required to prevent duplication of investigations, including the introduction of a formal working methodology for inter-agency collaboration on cases, as well as the adoption and implementation of standardised reporting mechanisms.