KWAZULU-NATAL
PROVINCIAL GOVERNMENT
REPUBLIC OF SOUTH AFRICA

Inspiring New Hope

Unpacking MFMA Circular 68 as amended and its implications on Consequence Management

30 July 2026

Chief Directorate: Municipal Finance

TABLE OF CONTENT

PART 1

Unauthorized, irregular, fruitless & wasteful expenditure UIFW and Non-compliance with legislation

eful expenditure

IRREGULAR EXPENDITURE

It is important to note that UIFWE investigations are based on investigating the following:

- **<u>Irregular expenditure</u>** focuses on the expenditure, *excluding unauthorized expenditure*, incurred by a municipality or municipal entity in contravention of, or **that is not in accordance with**, a requirement of MFMA, SCM Regulations or SCM Policy of a municipality **<u>during</u>** the “procurement process” as opposed to incurring the expenditure (receipt of an invoice);
- However, in the case of contract management, it focuses on the reasons why the expenditure was incurred without a valid contract between the municipality and the service provider;

UNATHORISED EXPENDITURE

- **Unauthorised expenditure** focuses on overspending of votes or expenditure not authorised in the municipality's budget or expenditure not in line with the conditions of a grant.
- Such overspending should not have been avoided through an adoption of the **main adjustment budget of 28 February**; or
- **Special adjustment budget** to approve any unforeseen or unavoidable expenditure in terms of s29 of the MFMA; and
- **Special adjustment budget** to approve a roll-over should be tabled by 25 August.
- **Special adjustment budget** to approve previous year's unauthorised expenditure disclosed in the Audited AFS in a process of Annual Report Tabling in terms of s127(2) of the MFMA, MBBR s23(6)(b) & MFMA Circular 63 and 68

FRUITLESS & WASTEFUL EXPENDITURE

- **Fruitless and wasteful expenditure** focuses on expenditure incurred in vain that could have been avoided;
- Fruitless and wasteful expenditure **must fulfil both** the conditions in the definition, namely, that it was made in vain and it would have been avoided had reasonable care been exercised;

*"**Reasonable care**" is defined as:*

✓ Applying **due diligence** (careful application, attentiveness, caution) to ensure that the probability of a transaction, event or condition not being achieved as planned is being managed to an acceptable level.

*"**In vain**" is defined as:*

✓ A transaction, event or condition which was undertaken **without value** or substance and which did not yield any desired results or outcome.

DEVIATIONS: EMERGENCIES

In terms of Section 36 of the SCM Regulations, it is clear that the expenditure items that qualify as deviations in terms of and meeting the requirements of *S36 cannot also be classified as irregular expenditure as there is no contravention of legislation*, SCM policy of the municipality or Treasury Regulations.

Valid **Deviations include some of the following**:

- ***Emergency cases*** are those where immediate action is necessary in order to avoid a dangerous or risky situation or misery. Emergency cases include any situations which may arise from natural disasters, riots, fire, etc. and are considered life-threatening.
- ***Urgent cases*** are those where early delivery is of critical importance and the invitation of competitive bids is either impossible or impractical. Urgent cases include any unforeseen needs that require timeous resolution. *An example may be the procurement of plastic shelters for victims of storm damage*.

DEVIATIONS: EMERGENCIES

Unforeseen and unavoidable expenditure is discussed in **section 29** of the MFMA and reads as follows, to be read with **s71(1) of MBRR**:

(1) 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.

(2) Any such expenditure—

(a) must be in accordance with any framework that may be prescribed;

(b) may not exceed a prescribed percentage of the approved annual budget as per **section 72 of MBRR**;

(c) must be reported by the mayor to the municipal council at its next meeting; and

(d) must be appropriated in an adjustments budget.

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

DEVIATIONS: EMERGENCIES

An emergency is an **unforeseen** or **unavoidable expenditure,** if delayed might result to the following:

i) financial loss to the municipality;

ii) disruption or suspension, or serious threat to the continuation, of a basic municipal service;

iii) lead to loss of life or serious injury or significant damage to property; or

iv) obstruct the municipality from instituting or defending the legal proceedings on an urgent basis

NB: refer to MBRR s71(2)

DEVIATIONS: EMERGENCIES

However **Section 71(2) of the MBRR** <u>**specifically excludes**</u> the following:

a) items considered by the council but not included in the annual budget or adjustment budget of the municipality;

b) During the financial year, is required for:

   i) price increases for goods and services;
   ii) new municipal services or functions;
   iii) the extension of municipal services or functions;
   iv) the appointment of personnel; and
   v) allocating discretionary appropriations to any vote

c) Would contravene any existing municipal policies;

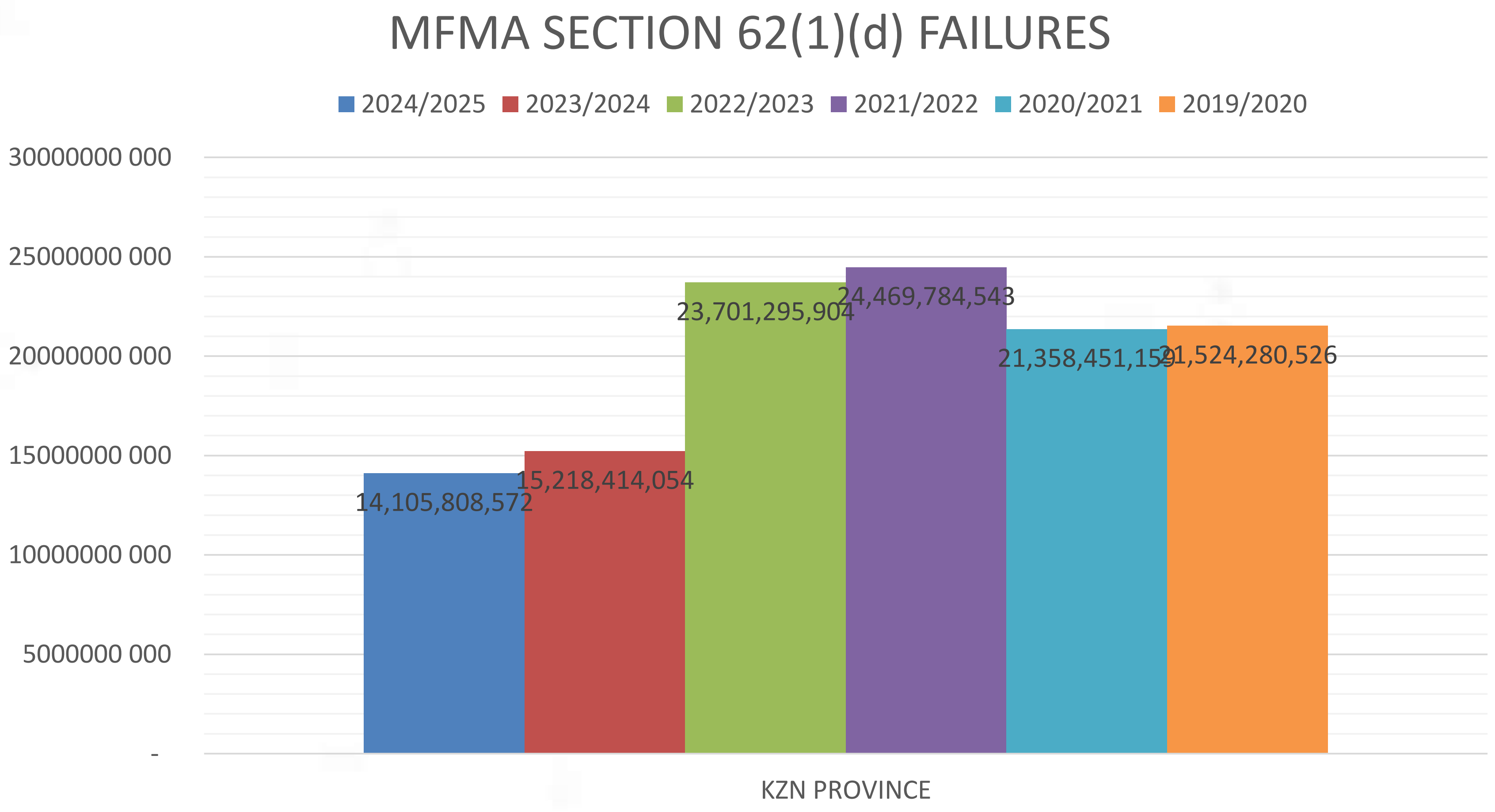
d) Is intended to ratify irregular or fruitless & wasteful expenditure

PART 2

Unauthorized, irregular, fruitless & wasteful expenditure (UIFW) as at 30 June 2025

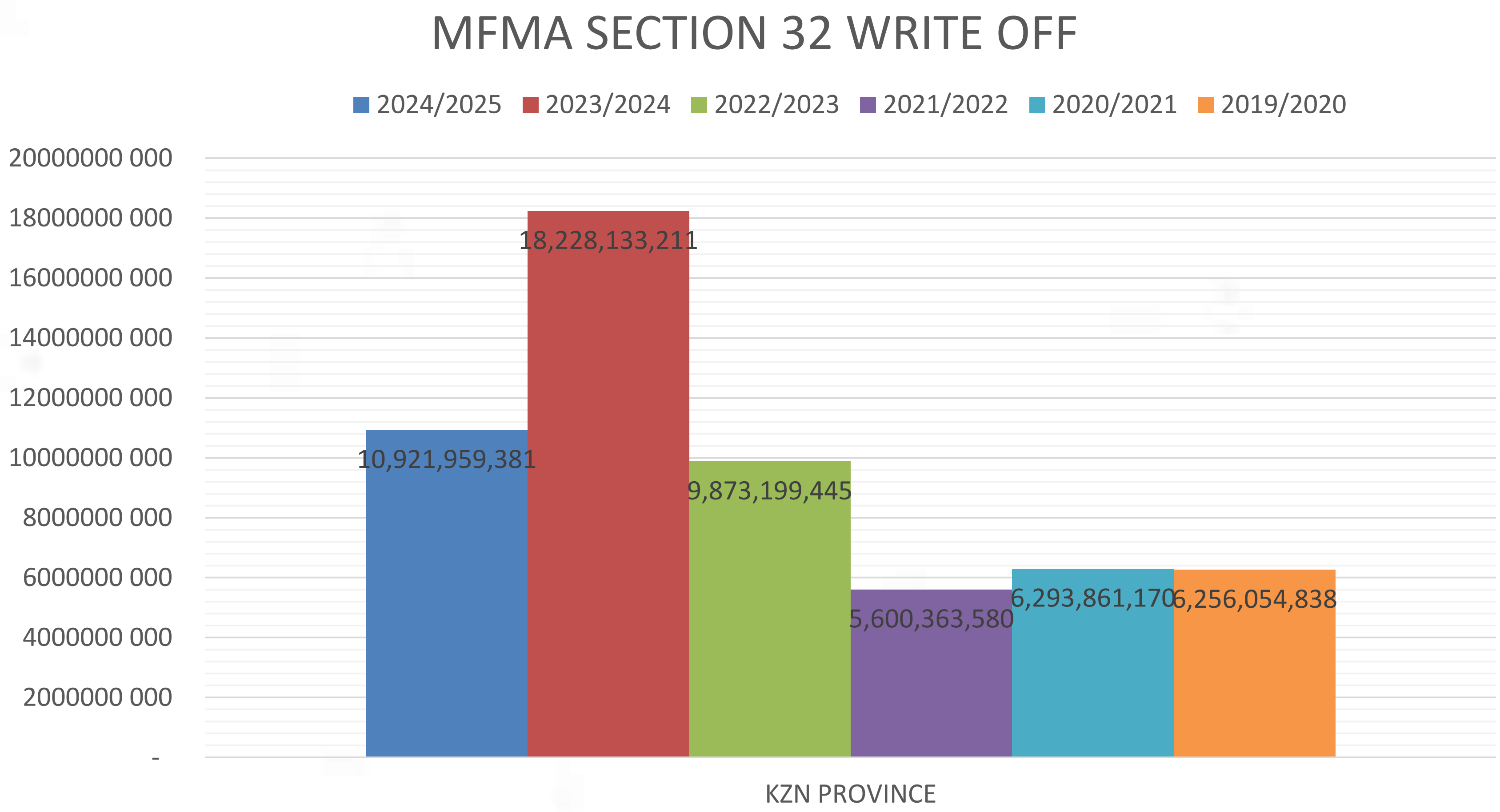
KWAZULU-NATAL PROVINCE
COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS
REPUBLIC OF SOUTH AFRICA

NON-IMPLEMENTATION OF SECTION 62(1)(d) IN KZN



Taken from S131 Reports

IMPLEMENTATION OF SECTION 32 IN KZN



Taken from S131 Reports

PART 3

Role of Senior Management in preventing and implementing recommendations on UIFWE

, fruitless & wasteful expenditure

GENERAL FINANCIAL MANAGEMENT FUNCTIONS

ACCOUNTABILITY

- It can be defined as not what one needs to do, but also what one does not do, for which they are accountable for.
- It cannot be delegated or transferred vertically or downwardly (towards a lower level) as it resides with the person accountable with authority.

RESPONSIBILITY

- It can be defined as the state or fact of having a duty to deal with something or of having control over something/someone.
- It can be delegated or transferred vertically or downwardly and a binding duty or action arises from it.

GENERAL FINANCIAL MANAGEMENT FUNCTIONS

General Financial Management Functions - MFMA – s62(1)(d) & (f)(iv) read with s65(2)(i):

- The Accounting officer is supposed to **take all reasonable steps to ensure that unauthorised, irregular or fruitless and wasteful expenditure** and other **losses are prevented**; and a **supply chain management policy** is strictly implemented
- The Accounting officer is *supposed to take all reasonable steps* to ensure that unauthorised, irregular or fruitless and wasteful expenditure and other losses are *prevented*; and **a supply chain management policy is strictly implemented in a way that is fair, equitable, transparent, competitive and cost-effective;**
- Among the issues that have been raised by The Auditor General under **Expenditure Management** in various Audit Reports of the municipalities is the general failure to implement the above sections.

GENERAL FINANCIAL MANAGEMENT FUNCTIONS

Delegations to Senior Management and other Officials

- In terms of section 79 and section 106 of the MFMA, the Accounting Officer may delegate certain powers or authority of his functions;
- In a nutshell, delegation is the assignment of decision-making responsibility to a subordinate, thereby authorising him/her to exercise his/her delegated authority.
- The subordinate is held responsible for the way in which he/she exercises his/her delegated authority but **the person** or **institution** that delegated the authority **remains accountable**.

The Municipal Systems Act as well as the *Municipal Finance Management Act* define delegation as follows:

- "…in relation to a duty, includes an instruction to perform the duty, and 'delegate' has a corresponding meaning."

The Municipal Structures Act defines delegation as:

- "…in relation to a duty, includes an instruction to perform the duty."

GENERAL FINANCIAL MANAGEMENT FUNCTIONS

Senior managers and other officials of municipalities

In terms of Section 78(1)(a)-(c) of the Municipal Finance Management Act, the Senior Management of a municipality and each official of a municipality exercising financial management responsibilities **must take all reasonable steps** within their respective areas of responsibility to ensure:

- that the system of financial management and internal control established for the Municipality is carried out diligently;
- that the financial and other resources of the Municipality are utilised effectively, efficiently, economically and transparently;
- **that any Unauthorised, Irregular or Fruitless and Wasteful Expenditure and any other losses are prevented**.

GENERAL FINANCIAL MANAGEMENT FUNCTIONS

Senior managers and other officials of municipalities

- The Accounting Officer delegates expenditure management to the Chief Financial Officer who will initiate the process of dealing with the unauthorised, irregular or fruitless and wasteful expenditure;

- Hence, as part of complying with section 62(1)(d) of the MFMA, the accounting officer may delegate the task setting-up and maintain a Register of Unauthorised, Irregular, Fruitless and Wasteful Expenditures to the CFO.

Financial misconduct by municipal officials

General Financial Management Functions - MFMA – s171 and 173

- **Section 171(1)(c)** of the MFMA, the Accounting Officer of a municipality **is committing an offense** if he **deliberately** or **negligently** *fails to take all reasonable steps to prevent* unauthorised, irregular or fruitless and wasteful expenditure;
- **Section 173(1)(a)(iii)** of the MFMA states, the Accounting Officer of a municipality **is guilty of an offence** if that accounting officer **deliberately** or **in a grossly negligent** way *fails to take all reasonable steps to prevent* unauthorised, irregular or fruitless and wasteful expenditure.

PART 4

Legislative Framework in Investigating UIFW & Relevant Court Cases on Consequence Management

LEGISLATIVE FRAMEWORK: MFMA S32

(1) Without limiting liability in terms of the common law or other legislation—

(a) a political office-bearer of a municipality is liable for unauthorised expenditure if that office-bearer knowingly or after having been advised **by the accounting officer** of the municipality that the expenditure is likely to result in unauthorised expenditure, instructed an official of the municipality to incur the expenditure;

(b) the accounting officer is liable for unauthorised expenditure deliberately or negligently incurred by the accounting officer, subject to subsection (3);

(c) any political office-bearer or official of a municipality who deliberately or negligently committed, made or authorised an irregular expenditure, is liable for that expenditure; or

(d) any political office-bearer or official of a municipality who deliberately or negligently made or authorised a fruitless and wasteful expenditure is liable for that expenditure.

MFMA Circular 68 asserts that “*Liability should not be imposed automatically, but once deliberate or negligent conduct is established, recovery becomes a statutory obligation rather than a discretionary choice*”.

LEGISLATIVE FRAMEWORK: MFMA S32(1)

“**deliberate conduct**”:-

- Means intentional conduct that results in UIFWE, including instances where the person knew the applicable legal requirement or control and proceeded regardless;
- Not dependent on proof of fraud or corruption; the test is simply whether the *conduct was intentional* or *carried out with conscious recklessness regarding compliance;*
- Conscious disregard of warnings, legal advice, audit findings, or prescribed controls;

LEGISLATIVE FRAMEWORK: MFMA S32(1)

“**Negligent conduct**”:-

- Applying an objective test, it arises when an official fails to exercise the degree of care, skill, and diligence that could reasonably be expected from a “reasonable person” in that position, *it does not require intention*;
- Involves omitting to perform basic tasks like ascertain the availability of budgetary provision prior to incurring expenditure;
- Failing to verify compliance with prescribed supply chain management requirements;
- Disregarding foreseeable risks, or neglecting to take reasonable and necessary steps to avert a loss that was reasonably foreseeable;
- Basically, it assesses what a reasonable official would have done in similar circumstances in the relevant role and delegation level, irrespective whether or not they subjectively believed the decision was beneficial, *good faith does not override liability if negligence is established*.

LEGISLATIVE FRAMEWORK: MFMA S32

(2) A municipality **must recover** unauthorised, irregular or fruitless and wasteful expenditure from the person liable for that expenditure **unless** the expenditure—

(a) in the case of unauthorised expenditure, is—

(i) authorised in an **adjustments budget**; or

(ii) certified by the municipal 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.

Council Committee as envisaged by MBRR Section 74
Entity to investigate the recoverability in terms of MBRR Section75
Revised MFMA Circular 68

SCA Judgement: Mbambisa & others vs Nelson Mandela Bay Metro

- **In summary**, this appeal was concerning the meaning and effect of ss 32 and 176(1) of the Local Government: Municipal Finance Management Act 56 of 2003 (MFMA).

- It is common ground that service provider was appointed **without a public tender process** and in breach of the Municipality's Supply Chain Management Policy (the SCM policy); and that pursuant to the impugned appointment, the **Municipality paid** the following amounts to Erastyle: R5 263 179.89, R1 390 800 and R984 197.21 (the unlawful payments).

SCA Judgement: Mbambisa & others vs Nelson Mandela Bay Metro

- Therefore, the decisions were made without a competitive bidding process and constitute the incurrence of irregular expenditure as defined in the MFMA.

- The Municipality alleged that since the procurement of Erastyle's services was unlawful, *there was no legal basis for the unlawful payments made to it*; most importantly, **it did not provide services to the value of R7 638 177.10**; consequently, it was **unjustifiably enriched** to that extent at the Municipality's expense.

SCA Judgement: Mbambisa & others vs Nelson Mandela Bay Metro

- However, despite admitting that the appointment was challenged, the service provider denied that it was unlawful;
- It also admitted **receipt of the unlawful payments** but pleaded that these were received after it had submitted invoices to the Municipality for services rendered, and that the Municipality had benefited from those services..
- However, **the forensic investigation revealed that invoices had been over-inflated**, for example, an invoice from the service provider was submitted for payment of R5.2 million, whereas **the value of the work allegedly done was only R2 million**, **this was the testimony provided in court by the investigators**, while **the defendants elected not to testify and challenged the testimony given by the employer in court.**

SCA Judgement: Mbambisa & others vs Nelson Mandela Bay Metro

- One of the official prepared memoranda in which he **intentionally**, alternatively **negligently**, represented to the Municipality that the queried appointment was lawful; and
- That there were exceptional circumstances that justified dispensing with an official procurement process (deviation); that service provider could be appointed directly and its contract value could be increased (variation).
- These misrepresentations induced the Municipality to make the unlawful payments to service provider and **caused it to suffer loss**, **despite that there is overwhelming evidence that proper advices given were deliberately ignored**.

SCA Judgement: Mbambisa & others vs Nelson Mandela Bay Metro

- *[23]* ***The High Court held*** *that s 32 of the MFMA creates a statutory claim for the recovery of unauthorised, irregular or fruitless and wasteful expenditure from the official liable for such expenditure, as a penalty, and not as damages. It found that* ***s32 constitutes a self-standing claim based*** *on the jurisdictional requirements contained in that provision; and that a municipality is statutorily obliged to recover unauthorised, irregular or fruitless and wasteful expenditure from the persons specified in s 32. Whether a municipality receives value for such expenditure, the court held, is not a relevant factor and no preconditions are set for its recovery.*

SCA Judgement: Mbambisa & others vs Nelson Mandela Bay Metro

- [30] **In the SCA**, the defendants submit that the High Court erred in holding that s 32 of the MFMA is a self-standing penalty provision in terms of which the municipality is obliged to recover the full extent of the prescribed expenditure from the relevant official, regardless of whether the Municipality has sustained any loss or damage, and irrespective of the extent of such loss.
- Such an interpretation, *so the defendants submit*, is neither purposive nor contextual, and disregards the general scheme and purpose of the MFMA. It would also be inconsistent with the Constitution and result in an absurdity.

SCA Judgement: Mbambisa & others vs Nelson Mandela Bay Metro

- [31] Section 32, it is submitted, does not refer to a penalty and it *would be unconscionable and discriminatory to impose such a penalty on a municipal official in circumstances where the municipality has suffered no loss or damage*.
- [32] The defendants contend that the recovery of unauthorised, irregular or fruitless and wasteful expenditure from the person liable in s 32, *must be interpreted to mean that officials are 'legally answerable' or accountable*. It does not mean that municipal officials are *financially liable* for that expenditure. This interpretation, the defendants say, is reasonable and sensible.

SCA Judgement: Mbambisa & others vs Nelson Mandela Bay Metro

- *[56] **The SCA found that*** **Section 32**, construed in the context of that section as a whole and the wider context of the MFMA, **makes it clear that the place and function of s 32 is to create personal liability on the part of municipal officials in "particular circumstances"**. The meaning conveyed by the wording of s 32 is clear and unambiguous.
- **Liability arises as soon as an official intentionally or negligently incurs** unauthorised, irregular, and fruitless and wasteful expenditure: **s 32 is not conditional upon a municipality sustaining loss or damage**.
- A **municipality might benefit from a service procured in contravention of a SCM policy**, but the **expenditure incurred in obtaining that service remains irregular expenditure**, recoverable under s 32(2)…**loss or damage to a municipality is not a prerequisite for its recovery**.

SCA Judgement: Mbambisa & others vs Nelson Mandela Bay Metro

- *[56] **The SCA found that*** **Section 32**, construed in the context of that section as a whole and the wider context of the MFMA, **makes it clear that the place and function of s 32 is to create personal liability on the part of municipal officials in particular circumstances**. The meaning conveyed by the wording of s 32 is clear and unambiguous.
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- A **municipality might benefit from a service procured in contravention of a SCM policy**, but the **expenditure incurred in obtaining that service remains irregular expenditure**, recoverable under s 32(2)…**loss or damage to a municipality is not a prerequisite for its recovery**.

UIFWE REPORTING

(4) The accounting officer must promptly inform the mayor, the MEC for local government in the province 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 by the municipality;

 (i) to recover or rectify such expenditure; and

 (ii) to prevent a recurrence of such expenditure

UIFWE REPORTING

Circular 68 provides a guideline to the effect that:-

- The accounting officer or the Mayor should, *as good practice*, refer UIFWE incident reports directly to MPAC for recovery investigation *by no later than the fifth working day of the month following the month in which the UIFWE was identified*, the question that needs to be answered is at what point is UIFWE deemed identified?
- If identified through compiling the UIFWE Register, it means it may be sent directly to MPAC without it being first presented to the Municipal Council or MEC for Local Government and the AG on a quarterly basis as envisaged by MFMA section 32(4); or
- If identified only after it has been reported to the Mayor, it means it may be sent directly to MPAC after the Council date.

UIFWE REPORTING

Section 105 Notice of 2019 issued by KZN provides a guideline that:-

- The municipality must compile UIFWE on a monthly basis but submit to MEC for Local Government on a quarterly basis, after 10 working days of each quarter;
- This allows the municipality to align UIFWE processes with its Section 52 processes as the use of word "promptly" was deemed impractical to operationalize;
- Ensuring that such UIFWE reports should first be presented to the Council prior to sending them to other Stakeholders so the Council retains its oversight on such processes; and
- Ensuring that MPAC, as a Council Committee, always deal with matters flowing from Council as required by **MSA section 79A(3)(e)**.

UIFWE DISCLOSURE NOTES

- At year end, the Annual Financial Statements must comply with s125(2)(d) of the MFMA which provides that "*The notes to the annual financial statements of a municipality must disclose the following:*
  - *particulars of any material losses; and*
  - *any material irregular or fruitless and wasteful expenditures";*
  - any *material unauthorised expenditure*, that occurred during the financial year; and
- Whether these are recoverable; and/or
  - any criminal or disciplinary steps have been taken as a result of such losses; or
  - such unauthorized;
  - Irregular; or
  - fruitless and wasteful expenditures; and
  - any material losses recovered or written off." (refer to Annexure D Updated Guidelines on UIFW)

Disciplinary or Criminal Proceedings

(5) The writing off in terms of subsection (2) of any UIFW as irrecoverable is *no excuse in criminal* or *disciplinary proceedings* of person charged with the commission of an offence or breach of MFMA;

(6) The Accounting Officer must report to the South African Police Services all cases of alleged-

(a) irregular expenditure that constitutes criminal offense;

(b) theft and fraud occurred in the municipality

(7) The Council of the Municipality must take all reasonable steps to ensure that all cases referred to in subsection (6) are reported to the SAPS, if-

(a) the charge is against the Accounting Officer; or

(b) the Accounting Officer fails to comply with that subsection

Disciplinary or Criminal Proceedings

- In a case the accounting officer is implicated in the UIFWE or neglect to make the requisite SAPS referral, the Municipal Council must take all reasonable steps to ensure that:-
  - the Mayor lodges the report with SAPS without delay, by virtue of the power of delegation.
  - This dual-layered mechanism safeguards the integrity of municipal finances and ensures that criminal conduct is reported to law enforcement.

Joint and several liability

In the context of UIFWE recovery, decision-making within municipalities is often collective or sequential in that:

- instructions may *originate* at the **political level**,
- be implemented by **senior management**, and
- be *processed* by operational officials.

In such cases, municipalities must consider the principle of joint and several liability when determining UIFWE recovery.

This is a departure from Pietersen case where the High Court, despite having established that the political office-bearers had instructed the Accounting Officer to make the appointment but only the AO was sentenced where a jail-term of two years was imposed against him.

Joint and several liability

- In applying joint and several liability, municipalities must first **establish three elements through a proper investigation**:-
  - First, the specific instance of UIFWE must be **identified** and **quantified**;
  - Second, the individuals whose conduct contributed to the UIFWE must be identified; and
  - Third, it must be established that each such person **acted deliberately** or **negligently** and that their conduct had a causal link to the UIFWE.

- The principle of joint and several liability must also be applied together with labour law and due process requirements.

- In summary, where two or more political office-bearers or officials deliberately or negligently contributed to the same instance of UIFWE, municipalities may hold them jointly and severally liable for the resulting expenditure

- Disciplinary proceedings must still assess individual misconduct, and recovery through salary deductions must comply with applicable labour legislation.

UIFWE recovery from suppliers, former employees and councillors

OFFICIALS & COUNCILLORS]

- A former employee or councillor may still be pursued where their conduct caused the expenditure.
- Resignation, retirement, or expiry of a contract does not extinguish liability.
- Political office-bearers and officials who deliberately or negligently committed, made, or authorised UIFWE.

SUPPLIERS

- Where irregular expenditure results from supplier misconduct, such as misrepresentation, bid manipulation, or participation in an unlawful award, the municipality may pursue recovery based on contract law, unjust enrichment, delict, fraud, or anti-corruption legislation;
- A municipality may set aside an irregular contract and recover payments where the supplier knowingly participated in the irregularity.

UIFWE recovery from suppliers, former employees and councillors

OFFICIALS & COUNCILLORS]

- Recovery from former employees and councillors may proceed through civil action, acknowledgement-of-debt agreements, or other lawful means, having carefully considered the cost-benefit exercise of doing so guided by S74(1) of MBRR.
- While employment termination may limit internal disciplinary or deduction mechanisms, it does not remove the municipality's right to institute civil recovery proceedings.

SUPPLIERS

- It may also claim damages where fruitless and wasteful expenditure arose from defective performance, penalties, or avoidable interest caused by the supplier.;
- A municipality may set aside an irregular contract and recover payments where the supplier knowingly participated in the irregularity.

PART 5

Prescription of historical UIFWE balances

Prescription of Historical Debt

- Carrying historical UIFWE balances for extended periods due to failure to detect UIFWE timeously, delays in MPAC investigation.
- Moreover, where UIFWE *recovery is contemplated on a completed investigation* in terms of section 32(2) of the MFMA, municipalities must also consider the impact of the Prescription Act 68 of 1969.
- Prescription does not determine whether the expenditure was unlawful but whether or not the municipality may still lawfully recover the debt from the person liable.
- If a UIFWE debt has prescribed, recovery from the original debtor is no longer legally enforceable, even though the expenditure remains correctly classified as UIFWE.

Prescription of Historical Debt

- Prescription does not begin merely when expenditure is incurred, suspected, recorded in the UIFWE register, or reported for compliance purposes;

- However, it begins once the municipality has sufficient factual knowledge to institute recovery proceedings, including the identification of the person responsible and the causal link between that person's conduct and the UIFWE amount.

- Municipalities must therefore actively monitor prescription from the point at which the minimum recoverable facts are known after finalizing and adoption of investigation report(s) by the Council.

PART 6

Liability of functionaries exercising powers and functions in terms of MFMA

Consequence Management – MPAC INVESTIGATIONS

MFMA: S176 (1)

No municipality or any of its political structures, political office-bearers or officials, no municipal entity or its board of directors or any of its directors or **officials**, and no other organ of state or person exercising a power or performing a function in terms of this Act, ***is liable in respect of any loss or damage*** resulting from the exercise of that power or the performance of that function ***in good faith***.

MFMA: S176 (2)

Without limiting liability in terms of the common law or other legislation, a municipality ***may recover*** from a political office-bearer or official of the municipality, and a municipal entity may recover from a director or official of the entity, any loss or damage suffered by it because of the **deliberate** or **negligent unlawful actions** of that political office-bearer or official when performing a function of office.

SCA Judgement: Mbambisa & others vs Nelson Mandela Bay Metro

[54] The defendants' reliance on s 176(1) of the MFMA is misplaced and can be dealt with briefly. ***Section 176(1) protects, amongst others, a municipality and its officials against liability to third parties, for loss or damage that results from the bona fide exercise of a power or the performance of a function under the MFMA****. In terms of s 176(2), a municipality is authorised to recover loss or damage it suffered from the official concerned, where that loss or damage has been caused* ***deliberately or negligently****. Such loss obviously excludes the expenditure contemplated in s 32, which the municipality is obliged to recover in terms of that provision.*

SCA Judgement: Mbambisa & others vs Nelson Mandela Bay Metro

[55] Section 176(1) ***has nothing to do with the recovery of unauthorised, irregular or fruitless and wasteful expenditure from municipal officials****: it merely underscores the fact that s 32 is a self-standing provision aimed at the recovery of such expenditure…****a municipality might benefit from a service procured in contravention of a SCM policy****, but* ***the expenditure incurred in obtaining that service remains irregular expenditure, recoverable under s 32(2****).*

SCA Judgement: Mbambisa & others vs Nelson Mandela Bay Metro

- In summary, *it is my assessment*, that, since the evidence provided in court was never challenged by the employees, that is, **payments done for work never performed the Council never resolved to write off the expenditure in terms of MFMA section 32(2)**, this led to the Court only exploring part, not the entirety, of section 32(2) where it provides or prescribes that *"the municipality **must recover UIFWE** from the person liable for that expenditure",*

- *However,* the **proviso** of the same section ***"unless the expenditure…"*** was not considered since no evidence was led suggesting that the Council ever exercised its legislative powers to write off as irrecoverable the expenditure concerned.

SCA Judgement: Mbambisa & others vs Nelson Mandela Bay Metro

- Moreover, the evidence provided in court was never challenged by the employees, that is, *payments based on over-inflated invoices for work not done (loss suffered)*, and *failure to challenge employer's evidence proving intention, alternatively negligence while ignoring all guidance provided*; and

- The fact that the Council never investigated this matter in order to resolve to write off the expenditure in terms of MFMA section 32(2), *which can only be done if there is no loss suffered by the municipality*, this led to the Court only exploring part, not the entirety, of section 32(2) where it provides or prescribes that *"the municipality* ***must recover UIFWE*** *from the person liable for that expenditure",*

PART 6

TIMING OF CRIMINAL AND DISCIPLINARY PROCESS

CASE LAWS ON IMPLEMENTING CONSEQUENCE MANAGEMENT

PARTIES INVOLVED	NATURE OR TIMING OF THE CASE	COURT RULING
Van Eyk v the Minister of Correctional Services (2005, 6 BLLR 639)	The employee was charged with fraud almost two years after the fraudulent transactions allegedly took place	The court ruled that the disciplinary charges had fallen away
Duiker Mining LTD v CCMA and others (2003, 6 BLLR 550)	Delayed or Late charging of employee(s)	Labour Court agreed that the bringing of disciplinary charges should not be delayed unnecessarily.
Riekert v CCMA and others (2006, 4 BLLR 353)	Delayed or Late charging of employee(s)	Labour Court found that the fact that the employer had allowed an unreasonable and unnecessary time delay between the discovery of the alleged infraction and the laying of charges against the employee.
Mbambisa & others vs Nelson Mandela Bay Metro	Delayed or Late charging of employee(s)	SCA found that the High Court was correct in holding that the issue of undue delay is irrelevant to a claim under section 32 of the MFMA
Stokwe v Member of the Executive Council: Department of Education, Eastern Cape and others [2018] ZACC 3	Investigate allegations of financial misconduct in the municipality or municipal entity and to monitor the institution of disciplinary proceedings against an alleged transgressor	Constitutional Court ruled that an inordinate delay in finalising disciplinary action may lead to a dismissal being procedurally unfair as it found that the procedural fairness of the dismissal should be based on the principle that discipline should be prompt and fair

Matters for considerations

- ✓ **Each case is judged on its own merits and it is important to read and understand the entire case in order to have full understanding why the court in a particular manner. Most importantly, the issue of unreasonable delay is always based on when the employer become aware of the allegations based on prima facie evidence showing that there is a case to answer.**

CONCLUSION

Based on the information shared in this presentation, the following can be concluded:

a. Senior Management and Officials of the Municipality have a collective role to prevent UIFW expenditure based on relevant systems of delegations, failure to implement strong internal controls may result to some or all of them to be held jointly or severally liable for the expenditure incurred;

b. This is mainly due to the fact that culpability investigations are conducted to determine who is responsible or at fault for an incident or event that resulted in damages or loses. The investigation focuses on identifying any breaches of duty or responsibility and analyzing the evidence to determine legal culpability, which may give rise to criminal or disciplinary actions proceedings where the investigator will have to give evidence in court or tribunal.

c. Municipalities must familiarize with the content of the **Revised MFMA Circular 68 of April 2026** in order to start applying MFMA section 32 and 176 as pronounced by the Court on recoverability and culpability investigations to ensure that liability is properly apportioned to the relevant officials, political office bearers and service providers through conducting proper investigations.

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THANK YOU