

# BEYERS NAUDE LOCAL MUNICIPALITY

## POLICY ON MANAGEMENT OF UNAUTHORISED, IRREGULAR, FRUITLESS AND WASTEFUL EXPENDITURE

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## 1. PREAMBLE

Management of the municipality is responsible for the managing all areas of the municipality and in so doing, they must put in place policies and procedures to achieve smooth and efficient running of the municipality. The internal controls put in place must ensure:

- adherence to policies and procedure in areas of the municipality
- safeguarding of municipal assets
- prevention and detection of fraud and error
- accuracy and completeness of accounting records
- timely preparation of reliable financial and other important data to run the municipality

The policy on the management of unauthorised, irregular, fruitless and wasteful expenditure represents an internal control mechanism to prevent and manage occurrence of unauthorised, irregular, fruitless and wasteful expenditure within a municipality.

Effective systems of internal control around budget management assist in avoiding occurrence of unauthorised, irregular, fruitless and wasteful expenditure. This can be achieved through implementation of budget blocking mechanisms, in-year monitoring reporting which serves as early warning, etc. Also enforcement of compliance to SCM policies and other applicable laws and regulations assist in the prevention of irregular expenditure

## **2. OBJECTIVES OF THE POLICY**

The main objectives of this policy are to:

- provide measures to identify unauthorised, irregular or fruitless and wasteful expenditure;
- provide frameworks to avoid any irregular expenditure or any fruitless and wasteful expenditure;
- provide recovery of irregular expenditure or any fruitless and wasteful expenditure;
- provide for reporting framework on any irregular expenditure or any fruitless and wasteful expenditure.

This policy guideline 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.

## **3. LEGAL FRAMEWORK**

The procedure for the management of unauthorised, irregular, fruitless and wasteful expenditure is dealt with extensively in section 32 of the Municipal Finance Management Act No. 56 of 2003 (herein referred to as “the Act”). The paragraphs relating to section 32 are detailed in the relevant topics contained in this policy.

Also the Act gives mandate to the Mayor of the municipality in terms of section 29 (1) to authorise unforeseeable and unavoidable expenditure for which no provision was made in the approved budget (only in cases of emergency or other exceptional circumstances).

Furthermore, in terms of section 62 of the Municipal Finance Management Act, the accounting officer is responsible for managing the financial affairs of the municipality and he/she must, for this purpose, take all reasonable steps to ensure that:

- d) unauthorised, irregular, fruitless and wasteful expenditure and other losses are prevented; and
- e) 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.

#### **4. DEFINITIONS AND INTERPRETATION**

The definitions provided in this policy are intended to assist in coherent expression and interpretation of this policy in order to ensure seamless implementation hereof.

##### **4.1 Unauthorised Expenditure**

**“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.

#### **4.2 Irregular Expenditure**

***“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.
  - i. 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 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.

#### **4.3 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.

#### **4.4 Overspending**

“**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 (8 %) 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.

#### **4.5 Vote**

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.

#### **4.6 Political Office Bearer**

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.

#### **4.7 Official of the municipality**

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.

#### **4.8 Senior Manager**

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.

## **5. EXPENDITURE REGULATION FRAMEWORK**

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

- 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
- a) within the limits of the amounts appropriated for the different votes in an approved budget.

Furthermore, in terms of section 11(1) 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.

**6. PROCEDURE FOR MANAGING UNAUTHORISED, IRREGULAR, FRUITLESS AND WASTEFUL EXPENDITURE**

- a) Where unauthorised, irregular or fruitless and wasteful expenditure is identified and discovered, it must be recorded in the appropriate register and the Municipal Manager or his/her delegate must immediately report in writing to the Mayor, MEC for Cooperative Governance and Traditional Affairs, the Provincial Treasury and the Auditor-General as follows:
- i. any unauthorised, irregular or fruitless and wasteful expenditure incurred by the municipality;
  - ii. whether any person is responsible or under investigation for such unauthorised, irregular or fruitless and wasteful expenditure; and
  - iii. the steps that have been taken to recover or rectify such expenditure; and prevent a recurrence of such expenditure.
- b) The Municipal Manager must take appropriate steps in terms of section 32(2) of the MFMA which states that the municipality must recover unauthorised, irregular or fruitless and wasteful expenditure from the person liable for that expenditure **unless** that expenditure:
- i. in the case of unauthorised expenditure – is 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
  - ii. 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.
- c) If the amount is irrecoverable, the Council may write-off the debt in terms of Municipality's Write-off policy and applicable legislation and regulations
- d) The amounts written off in terms of write-off policy and applicable legislation and regulations must be disclosed in the Annual Financial Statements of the municipality.
- e) The register must be updated accordingly according to the various outcomes of the above processes (Annexure A).
- f) The mayor shall, in emergency or other exceptional circumstances, authorize unforeseeable and unavoidable expenditure for which no provision was made in an approved budget. Such expenditure shall not exceed thresholds as stipulated in the municipality's Budget and Reporting Policy; and must be reported by the mayor to the municipal council at its next meeting; and must be appropriated in an adjustments budget which must be passed within 60 days after the expenditure was incurred.
- g) If the adjustment budget in which the unforeseeable and unavoidable expenditure was appropriated is not passed within 60 days after the

expenditure was incurred, such expenditure shall be regarded as unauthorised and must be dealt with in the above mentioned procedures.

**7. MEASURES TO MINIMISE OR AVOID THE IRREGULAR, UNAUTHORISED, FRUITLESS AND WASTEFUL EXPENDITURE**

In order for the municipality to avoid or reduce irregular, unauthorised, fruitless and wasteful expenditure, management must, within their individual areas of responsibility, ensure that:

- a) The provisions of the MFMA, Municipal Systems Act, Municipal Structures Act, DoRA, PPPFA and other applicable legislations are complied with to the extent applicable to them, including any delegations made and instructions to exercise any powers or perform any duties; and
- b) SCM policies, procedures and regulations are effectively implemented
- c) All budget, revenue and expenditure related policies are effectively implemented
- d) They do not intentionally disregard their duties and responsibilities or carry them out negligently;
- e) Due care and diligence is exercised in all their decisions. They must receive all relevant information and use common business sense;
- f) They act ethical, rationally and reasonably in the best interest of the municipality;
- g) The funds are spent in accordance with the budget and for purposes intended for
- h) Expenses are reduced if the expected revenues are less than projected
- i) Ongoing monitoring of financial affairs of the municipality (i.e. revenues and expenditure) is performed through the in-year monitoring, section 71 and 72 reports
- j) Timeous budget reviews to identify the risk of over or under spending as well under collection of revenues
- k) Timeous processing of creditors payments (i.e. within 30 days of receipt of invoice) to avoid interests and penalties
- l) Sound financial management principles are applied;

- m) They act immediately, effectively, efficiently and economically at all times to reduce losses;
- n) They take appropriate action (including disciplinary action) where necessary;
- o) The process of financial management and internal controls is carried out at all times;
- p) The municipal liabilities, assets and resources are safeguarded and properly managed;
- q) The financial and other resources are used effectively, efficiently, economically and transparently;
- r) Effective and appropriate steps are taken to proactively prevent irregular, unauthorised, fruitless and wasteful expenditure as well as under collection of revenues due

## **8. REMUNERATION OF MUNICIPAL OFFICIALS AND COUNCILLORS**

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 municipality 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.

It should be further noted that the municipality is obliged to recover any irregular expenditure from municipal officials and 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 municipal officials and councillors concerned.

## **9. DISCLOSURE REQUIREMENTS**

In terms of section 124 (1) of the MFMA, the notes to Annual Financial Statements must include particulars of:

- a) salaries, allowances and benefits of political office-bearers and councillors of the municipality, whether financial or in kind, including a statement by the accounting officer whether or not those salaries, allowances and benefits are within the upper limits of the framework envisaged in section 219 of the Constitution. (*Read in conjunction with the remuneration of Public Office Bearers Act, 1998 (No 20 of 1998)*).
- b) the salaries, allowances and benefits of the municipal manager, the chief financial officer, and every senior manager should be shown for that position and should include salaries of other officials who acted in that position during the year under review.

Furthermore, in terms of section 125 (2) (d) of the MFMA, the notes to Annual Financial Statements must include particulars of:

- i. 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;
- ii. any criminal or disciplinary steps taken as a result of such losses or such unauthorised, irregular or fruitless and wasteful expenditure; and
- iii. any material losses recovered or written off

## **10. ACCOUNTING STANDARDS**

In terms of the prevailing accounting standards (i.e. IAS 1), expenses should be recognised once a decrease in an asset or an increase in a liability has arisen that can be measured reliably. Therefore expenses should not only be recognised once a payment is affected. Expenses should be recognised simultaneously with the recognition of an increase in liabilities or a decrease in assets.

## 10.1 Unauthorised Expenditure

**“Unauthorised expenditure”** is recognised as an asset in the Statement of Financial Position until such time as the expenditure is either approved, recovered from the responsible person or written off as irrecoverable in the Statement of Financial Performance.

### Accounting entries relating to Unauthorised expenditure:

#### ***If the unauthorised expenditure relates to the current financial year:***

If any expenditure meets the definition of unauthorised expenditure (after an investigation):

DR	Other debtors - Unauthorised expenditure	XXX	
CR	Unauthorised expense account Or The relevant expenditure account		XXX

A current asset is created on the statement of financial position, and the expenditure is “reversed” and presented on the Statement of Financial Performance as ‘Add back unauthorised expenditure’.

#### ***Unauthorised expenditure is approved:***

DR	Unauthorised expenditure approved	XXX	
CR	Other debtors - Unauthorised expenditure		XXX

Because the expenditure was approved, it is removed (credited) from the current asset that was created and included under unauthorised expenditure approved.

## 10.2 Irregular Expenditure

**“Irregular expenditure”** is accounted for as expenditure in the Statement of Financial Performance. If the expenditure is not condoned it is treated as an asset until it is recovered or written off as irrecoverable. When the expenditure is recovered, it is subsequently accounted for as revenue in the Statement of Financial Performance.

### **Accounting entries relating to Irregular expenditure:**

***If the irregular expenditure relates to the current financial year and was NOT condoned in the current year:***

DR	Other debtors – irregular expenditure	XXX	
CR	Expenditure		XXX

A current asset is created on the statement of financial position, and the expenditure is “reversed” against the relevant expenditure item.

***Upon receipt of the funds from the responsible official:***

DR	Account	XXX	
CR	Other debtors – irregular expenditure		XXX

***If the Council / Accounting Officer provide approval for the write-off of the debt or part thereof:***

DR	Thefts and losses (Expense item)	XXX	
CR	Other debtors – irregular expenditure		XXX

### 10.3 Fruitless and Wasteful Expenditure

**“Fruitless and Wasteful expenditure”** is recognised as an asset in the Statement of Financial Position until such time as the expenditure is recovered from the responsible person or written off as irrecoverable in the Statement of Financial Performance.

**Accounting entries relating to Fruitless and Wasteful expenditure:**

***If the fruitless and wasteful expenditure relates to the current financial year:***

If any expenditure meets the definition of fruitless & wasteful expenditure (after investigation):

DR	Other debtors – Fruitless & Wasteful expenditure	XXX	
CR	Fruitless & Wasteful expense account or relevant expenditure account		XXX

A current asset is created on the statement of financial position, and the expenditure is “reversed” on the statement of financial performance as ‘Add back fruitless and wasteful expenditure’.

***Fruitless and wasteful expenditure - recovered***

When the department receives the funds from the responsible official:

DR	Bank account	xxx	
CR	Other debtors - Fruitless and Wasteful expenditure		xxx

## 11. REPORTING FRAMEWORK

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.

Furthermore, 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 -

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

Furthermore, the Accounting Officer must, in terms of section 70 (1) of the Act, report in writing to the municipal council –

- a) any impending overspending of the municipality's budget
- b) any steps taken to prevent or rectify such overspending

## **12. LIABILITY FOR COMMITTING UNAUTHORISED, IRREGULAR, FRUITLESS AND WASTEFUL 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.

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;
- (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.

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.

### **13. CASES OF FINANCIAL MISCONDUCT**

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, 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 of the MFMA. 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 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.

#### **13.1 Investigations of alleged financial misconduct**

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 as it may require for the purpose of conducting a proper investigation. The aforesaid committee may only comprise at least 3 councillors who are required to constitute a committee and should not include political office bearers of the municipality.

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.

### **13.2 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.

In terms of section 171 (2), the chief financial officer also commits an act of misconduct when he or she deliberately or negligently:

- a) fails to carry out any delegated duty in terms of section 79 or 81 (1) (e);
- b) contravenes or fails to comply with a condition of a delegated power or duty;
- c) makes or permit or instruct another municipal official to incur unauthorised, irregular, or fruitless and wasteful expenditure;

- d) 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.

Also similar acts of misconduct as detailed in section 171 (2) are committed by senior managers and other officials exercising financial management responsibilities and to whom a power or duty was delegated in terms of section 79.

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.

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:

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

### **13.3 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. 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 -
  - i. submitted to the Auditor-General, the National Treasury or any other organ of state; or
  - ii. 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 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.

### **13.4 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.

### **13.5 Offences and Penalties**

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

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

<b>Sect.</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.

## **14. RESPONSIBILITY FRAMEWORK**

### **14.1 Development and Review**

The development and review of this policy remains the responsibility of the Finance Department. The review of this policy to be done annually except in extra-ordinary instances where circumstances may dictate a need to review the policy earlier.

### **14.2 Implementation and Monitoring**

The finance department has a responsibility of upholding the Policy on Management of Unauthorised, Irregular, Fruitless and Wasteful expenditure. The senior managers or Heads of Departments are responsible for adhering to the policy at all times.

The CFO must monitor and report on compliance to the policy to the Municipal Manager and the Council.

The Municipal Manager must take corrective / disciplinary actions to address any non-compliance to the policy.

The Council must monitor the implementation of the policy and also play an oversight role to ensure that all municipal officials adhere to the policy at all times.

### **14.3 Enforcement**

It is the responsibility of each Head of Department to ensure that all provisions of this policy are strictly adhered to at all times. It is also the duty of each municipal official to ensure that the policy is adhered to at all times.

## **15. INFORMATION AND EDUCATION**

A signed copy of this policy should be placed on the municipality's website under "policies" within 5 days after its tabling or approval by the council. A signed hard copy of the policy should be placed in a file of policies which must be placed in an appropriate location in each Department / section for easy access to the relevant departmental personnel.

All staff members should be made aware of the policy through workshops, information sharing sessions and provision of copies of the approved policy. All staff members should sign that they have received, read and understood the policy. New staff members to be inducted on the applicable policies of the municipality as detailed in the municipality's recruitment policy.

## **16. POLICY IMPLEMENTATION AND REVIEW DATES**

This policy replaces any other policy or Council resolutions as far as they may refer to unauthorised, irregular, fruitless and wasteful expenditure as defined in this policy.

Once approved or adopted by the Council the Policy on Management of Unauthorised, Irregular, Fruitless and Wasteful expenditure should form part of Municipal Manager's formal delegations and Financial Regulations of the BEYERS NAUDE Municipality.

The implementation of this policy takes effect from the date of approval by council and the policy must be reviewed within 12 months of its current date of effect or earlier if dictated by circumstances or any change to existing legislation.

## **17. POLICY APPROVAL**

This policy was approved by the Council resolution number \_\_\_\_\_  
dated \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_ and it will be effective from this  
day onwards until the next review.