



**Mogale City**

*Local Municipality*

# FINANCIAL MISCONDUCT POLICY

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**ABBREVIATIONS/ACRONYMS**

Except if otherwise stated in this policy, the following abbreviations or acronyms will represent the following words:

CFO	- Chief Financial Officer
COO	- Chief Operations Officer
EM	- Executive Manager
MCLM	- Mogale City Local Municipality
MFMA	- Municipal Finance Management Act, 2003, No. 56 of 2003
MPAC	- Mogale City Local Municipality's Municipal Public Account Committee
MM	- Municipal Manager/Accounting Officer
SAPS	- South African Police Services
SLA	- Service Level Agreement
SMME	- Small, Medium, Micro-sized Enterprises
MSA	- Municipal Systems Act, 2000, No. Act 32 of 2000
Structures Act	- Municipal Structures Act, 1998, Act No 117 of 1998
RPOBA	- Remuneration of Public Office Bearers Act, Act No. 20 of 1998
Policy	- Policy on Financial Misconduct
MBRR	- Municipality Budget Rules and Regulations

## DEFINITIONS

Except if otherwise indicated the following definitions will apply:

**“Accounting Officer”** is the Municipal Manager and the administrative head of the municipality.

**“Bribery”** involves the promise, offering or giving of a benefit to a municipal official or councillor by a service provider, contractor, or consultant.

**“Conflict of interest”** is the undesirable situation in which an individual is able to receive personal benefit from actions or decisions made in their official capacity.

**“Corruption”** in legal terms is defined as using public resources for private gain. “An act done with intent to give some advantage inconsistent with official duty and the rights of others”.

**“Councillor”** means member of municipal council of MCLM.

**“Extortion”** is defined as the misuse of power. In the Municipality, extortion refers to using positions of power to obtain financial rewards and force people to give up money by threat of violence.

**“Executive Mayor”** is defined as the political head of the Municipality.

**“Financial Misconduct”** means any misappropriation, mismanagement, waste, or theft of the finances of a municipality, and includes any form of financial misconduct specifically set out in Sections 171 and 172 of the Municipal Financial Management Act No. 56 of 2003

**“Financial Offence”** means a financial misconduct that is punishable by law.

**“Fraud”** according to South African law is defined as “the unlawful and intentional making of a misrepresentation which causes actual prejudice, or which is potentially prejudicial to another”.

**“Misappropriation and Embezzlement”** in a municipality means that funds that were allotted for a specific project or development is used for the personal enrichment of the municipal official or councillor in question.

“**Official**”, in relation to MCLM, means:

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

“**Political Office Bearer**” means the speaker, executive mayor, as referred to in the Municipal Structures Act.

“**Senior Manager**” has the meaning assigned to it in Section 56/7 of the Municipal Systems Act No. 32 of 2000

“**Theft**” is defined as the illegal practice of taking municipal property or money without permission and legal authorisation.

“**Vote**” means one of the main segments into which a budget of a municipality is divided for the appropriation of money for the different department 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.

## 1 INTRODUCTION

In terms of Section 62 of the Municipal Finance Management Act No. 56 of 2003 (herein referred to as “MFMA”), the Accounting Officer is responsible for managing the financial affairs of Mogale City Local Municipality (MCLM) and he/she must, for this purpose, inter alia:

Take all reasonable steps to ensure:

- 1.1. That any financial misconduct and losses are prevented.
- 1.2. That disciplinary or, when appropriate, criminal proceedings are instituted against any official or councillor of MCLM who has allegedly committed an act of financial misconduct or an offence in terms of Chapter 15 of the MFMA; and
- 1.3. That the municipality has and maintains effective, efficient, and transparent systems of financial, risk management and internal control.

Mogale City Local Municipality’s Financial Misconduct Policy (herein after referred to as the/this Policy) has been created to successfully implement a regularised framework for the various actions that constitute financial misconduct. It will also outline the proceedings and penalties if any Municipal Official or Councillor conducts any of the actions that constitute financial misconduct.

## 2 OBJECTIVE

This policy details financial misconduct in a broad sense including fraud, bribery, conflict of interest, theft, and embezzlement. This policy further sets out legal and criminal procedures to be followed when dealing with financial misconduct of all Councillors and Officials within the Municipality’s employ.

This policy aims to, amongst other things, ensure that:

- a. Financial Misconduct is detected, processed, recorded, and reported in a timely manner.
- b. Officials and Councillors have a clear and comprehensive understanding of the procedures they must follow when addressing financial misconduct.
- c. MCLM’s resources are managed in compliance with the MFMA, the municipal regulations and other relevant legislation; and

- d. All municipal officials and councillors are aware of their responsibilities in respect of financial misconduct.

### **3 LEGISLATIVE FRAMEWORK**

The following enabling legislation sets the precedent for the Financial Misconduct Policy:

- a. The Constitution of the Republic of South Africa, 1996, Act No 108 of 1996.
- b. The Public Finance Management Act, 1999, Act No. 1 of 1999
- c. The Municipal Finance Management Act, 2003, No 56 of 2003.
- d. The Remuneration of Public Office Bearers Act.
- e. Municipal Systems Act, 2000, Act No 32 of 2000.
- f. Government Gazette 37699: Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings, 30 May 2014.
- g. The Prevention and Combating of Corrupt Activities Act (PCCAA), Act 12 of 2004.
- h. Mogale City Local Municipality Disciplinary Code Policy.
- i. Labour Relations Act No. 66 of 1996 as amended.
- j. South African Local Government Main Collective Agreement; and
- k. Any other legislation, regulation or circular that may impact this policy.
- l. Mogale City Local Municipality's Approved Policies,
- m. Mogale City Local Municipality's By-Laws

### **4 APPLICATION OF THIS POLICY**

This policy applies to all Municipal Officials, Councillors and Political Office Bearers of MCLM. This policy should be read in conjunction with the following legally binding documents of MCLM:

- a. Delegations of Authority.
- b. The Code of Conduct.
- c. Breach of the Code of Conduct for Municipal Staff Members; and
- d. Breach of the Code of Conduct for Councillor.

Officials and Councillors must ensure Financial Misconduct is prevented. In cases where financial misconduct has occurred, it should be detected and reported in a timely manner.

## 5 VARIOUS FORMS OF FINANCIAL MISCONDUCT

### 5.1. Fraud

Fraud is defined, in South African Law, as the unlawful and intentional making of a misrepresentation which causes prejudice. Legally the loss, damage or harm occurring from fraud does not necessarily have to take place for criminal proceedings to follow. If fraud just had the potential to take place, it would constitute as fraud. In the Municipal setting at Mogale City Local Municipality, fraud can be presented (but not limited to) in as follows:

- a. Service providers taking instructions from municipal officials or councillor to charge higher prices for the municipal procurement of goods and services so that the municipal official or councillor can gain the surplus profits.
- b. Municipal officials charging for services that are traditionally offered for free by the Municipality, so that they can gain the additional money for personal use.
- c. Municipal officials that procure goods at the Municipality's expense for personal consumption or for their family members.

### 5.2. Theft/Larceny

Theft/larceny refers to any municipal official or councillor who is found guilty of stealing:

- a. from the municipal cash-flow.
- b. assets that belong to the municipality; and
- c. illegally using Municipal property without paying for it.

This section of the policy aims to curb the financial theft at the Revenue and Credit Control Divisions, where theft is prominent; here there is access to incoming cash-flow that is not being banked daily. However, it is not limited to these divisions as all municipal officials and councillors have access to municipal resources. If these resources are removed from the municipality for personal use, it will be viewed as theft. It will also be regarded as theft if any Municipal official or councillor uses municipal property, without paying for it, for their own personal gain.

This Policy aligns itself with *MCLM's Financial Turnaround Strategy* as this now places stricter measures on all municipal officials and councillor that commit any form of financial misconduct. Zero-tolerance will be entertained for municipal officials and councillors who have been found guilty of theft/larceny at the Municipality's expense.

### **5.3. Conflict of Interest**

Conflict of interest can be identified when any municipal official or councillor has multiple interests, financial or otherwise, one of which is corrupt and is motivated by self-interest. There is an evident clash between the municipal official or councillor's self-interest and the interest of the Municipality and the public. Conflict of interest undermines trust within the municipality as it interferes with the basic ethical principle of treating everyone with fairness and equality.

Conflict of interest will be applicable, and therefore constitute as financial misconduct, in the following circumstances:

- a. Any municipal official or councillor procures goods and services from suppliers and service providers that they know on a personal basis, despite other service providers being more cost effective or having a product of higher quality to supply at a lesser price.
- b. Municipal officials or councillors face a vote on property/land use issues that affect their own holdings.
- c. When municipal officials or councillors grant benefits to companies whereby the municipal official or councillor holds stock or shares.
- d. When municipal officials or councillors grant benefits to non-profit organisations or non-government organisations whereby the municipal official or councillor is a member.

Municipal officials and councillors should abstain from decision making in any area that may constitute as conflict of interest and will be regarded as financial misconduct if found to be true after investigation.

### **5.4. Bribery and Extortion**

Bribery refers to when municipal officials or members of council are privately offered any financial compensation or compensation in the form of a valuable item in exchange for favours done for the person presenting this offer. Extortion is the same as bribery with the exception of threatening to inflict harm on any individual (or family member of that individual) who does not pay a bribe.

Bribery and Extortion will be applicable in the following circumstances:

- a. If a traffic inspector accepts any form of unauthorised gratification from a traffic offender in exchange for not issuing the offender a ticket.
- b. In the case where a legal staff withhold Service Level Agreements (SLA's) from developers until they are offered unauthorised gratification.
- c. In a case where bulk services are unjustly not approved as officials expect unauthorised gratification.
- d. In a case where tenders are only offered to service providers if they pay municipal officials or councillors a percentage of their profits.
- e. If a driver's license inspector accepts any form of unauthorised gratification to pass someone during their driver's license test; and
- f. If any municipal official or councillor uses intimidation tactics and threatens to harm any individual, or family member of said individual, if they do not offer the municipal official or councillor financial gratification or any other requested benefit.

The Prevention and Combating of Corrupt Activities Act (PCCAA), Act 12 of 2004 lays out the legislative framework in dealing with the illegalities of bribing. Part 3, Section 10, of the Act deals with the "offences in respect of corrupt activities relating to receiving or offering unauthorised gratification". This part of the Act reads as follows:

*Offences of receiving or offering of unauthorised gratification by or to party to an employment relationship:*

*Any person –*

- a. *Who is party to an employment relationship and who, directly or indirectly, accepts or agrees or offers to accept from any other person any unauthorised gratification, whether for the benefit of that person or for the benefit of another person; or*
- b. *Who, directly or indirectly, gives, or agrees, or offers to give any person who is party to an employment relationship any unauthorised gratification, whether for the benefit of that party or for the benefit of another person,*

*In respect of that party doing any act in relation to the exercise, carrying out or performance of that party's powers, duties, or functions within the scope of that party's employment relationship, is guilty of the offence of receiving or offering unauthorised gratification.*

The rules and regulations listed in the legislation above will be used if any municipal official or public office bearer is found guilty of extortion and/or requesting for or accepting a bribe.

### **5.5. Misappropriation/Embezzlement of Municipal Funds**

Misappropriation (or embezzlement) refers to the fraudulent appropriation of funds or property that is entrusted in a Municipal Official's care but is actually owned by the Municipality.

Misappropriation and embezzlement will be applicable in the following circumstances:

- a. Municipal Officials and Councillors use municipal property for their own use or rent it out privately for their own financial gain.
- b. If a Municipal Official or Councillor takes money from petty-cash and use all or some of that money for their own personal expenditure; and
- c. Taking funds that has been budgeted for a specific purpose or project (especially in the case of social development/upliftment) and using it for other expenditure or projects; and
- d. Irregularly offering or giving anything of a material value to contractors, suppliers, or other persons providing services/goods to the Municipality.

If any Municipal Official or Councillor is accused and found guilty, after an investigation, of any of the above circumstances, he/she will be disciplined in terms of this Policy as they will have engaged in financial misconduct.

## **6 REPORTING ON FINANCIAL MISCONDUCT**

- 6.1. Any official or councillor must report an allegation of financial misconduct against-
  - a. the Accounting Officer, an Executive Manager, or the Chief Financial Officer, to the Municipal Council, the Provincial Treasury and the National Treasury; and
  - b. an official of a municipality other than its accounting officer, to that accounting officer.
- 6.2. The Executive Mayor or the Accounting Officer, must table an allegation referred to in 6.1 before the municipal council not later than seven days after receipt thereof or at the next sitting of the council.
- 6.3. The person to whom an allegation of financial misconduct has been reported in terms of 6.1 must ensure that the report is treated in a confidential manner.

- 6.4. This regulation must not be read as preventing a person from laying a criminal charge with the South African Police Service against any Councillor, or official of MCLM in relation to any conduct that may constitute an offence in terms of Part 2 of Chapter 15 of the Act.
- 6.5. An official against whom an allegation of financial misconduct is made must be given an opportunity to make written representation to the municipality as to why he or she should not be suspended, within seven days of being notified of the allegation.
- 6.6. All reporting procedures should be developed to ensure that all reporting is confidential and information should be treated confidentially, so that it does not put the person reporting the offence in an awkward or dangerous situation.

## **7. ESTABLISHING A DISCIPLINARY BOARD AND ITS FUNCTIONING**

- 7.1. In the event that financial misconduct needs to be investigated, the municipal council must establish a disciplinary board to investigate these allegations. The Board will also be responsible for monitoring the disciplinary proceedings of the accused.
- 7.2. The disciplinary board is an independent advisory body that assists the council with the investigation of allegations of financial misconduct and provide recommendations on further steps to be taken regarding disciplinary proceedings, or any other relevant steps to be taken.
- 7.3. A disciplinary board must consist of maximum five members appointed on a part- time basis by the council for a period not exceeding three years.
- 7.4. A member of a disciplinary board must-
  - a. be a natural person.
  - b. be a citizen or permanent resident of the Republic of South Africa and a resident in the province where the municipality is situated; and
  - c. not be disqualified under the reasons listed below in 7.5.
- 7.5. The following persons are disqualified from membership of a disciplinary board:
  - a. a person who has been convicted of an offence in terms of this regulation or any other legislation.
  - b. A person who was convicted of fraud or forgery, whether in the Republic or abroad.
  - c. A person who was dismissed on the account of misconduct and/or dishonesty.
  - d. The accounting officer of the municipality.
  - e. A political office bearer or a member of the board of directors; and

- f. A political office bearer in a political party.
- 7.6. A disciplinary board may consist of-
  - a. The head of the Internal Audit department.
  - b. One member of the Audit Committee of the municipality.
  - c. A senior manager from the Legal Division.
  - d. A representative of National or Provincial Treasury; and
  - e. Any other person as may be determined by the municipal council (if it does not conflict with 7.5).
- 7.7. If an official referred to in sub-regulation 7.6 a. or c. is implicated in the financial misconduct, the municipality may co-opt a senior manager in another unit, who does not have a conflict of interest.
- 7.8. If MCLM does not have sufficient capacity to establish a disciplinary board, a disciplinary board established by a district municipality or an equivalent provincial or national structure established for a similar purpose may, with approval of the district municipality or provincial or national structure, be used as a disciplinary board for the municipality.

## **8. INVESTIGATION OF FINANCIAL MISCONDUCT**

Investigations will be conducted on allegations of financial misconduct to ensure that the allegation has substance and whether there is sufficient ground for disciplinary actions.

- 8.1. On receiving a report containing allegations of financial misconduct, and if the accounting officer or municipal council confirms that this is a case of financial misconduct, the matter should be referred to the disciplinary board should within 7 days to conduct a preliminary investigation.
- 8.2. The disciplinary board must conduct the preliminary investigation to assess the allegations and recommend to council whether there are sufficient grounds to pursue full investigation and thereafter follow criminal proceedings.
- 8.3. If, during the preliminary investigation, the disciplinary board finds the allegations to be untrue or frivolous, the investigation must be terminated immediately.
- 8.4. If, during the preliminary investigation, the disciplinary board finds the allegations to be true, a full investigation must be conducted by:
  - a. The disciplinary board; or

- b. A council appointed individual that has expertise on the issue and is not a municipal employee and does not present any form of conflict of interest; or
  - c. A council appointed team of investigators that has expertise on the issue and is not a municipal employee and does not present any form of conflict of interest.
    - i. The team of investigators can include: any person that has expertise on the issue and is not an employee of MCLM; an official from the department for local government; and an official from national or provincial treasury.
    - ii. If a team of investigators are appointed, they will need to submit recommendations, relating to the allegations of financial misconduct, to the Executive Mayor or accounting officer within 30 days.
- 8.5. National or Provincial Treasury can call for an investigation if the municipality fails to investigate for financial misconduct.
- 8.6. The municipality must develop terms of reference for the investigation in the form of an SLA which indicates legislated timeframes and output specifications.
- 8.7. If the disciplinary board advises the municipal council to pursue the investigation, and the municipality does not comply with the recommendation, the disciplinary board has the right to ask National or Provincial Treasury to intervene on the matter.
- 8.8. After the full investigation has been completed, the investigator must:
- a. Compile a full report on the investigation.
  - b. Present the report, with all findings and recommendations to the Executive Mayor and Accounting Officer.
  - c. Inform the Speaker of Council that the report has been submitted; and
  - d. Send a copy of the report to National and Provincial Treasury.
- 8.9. This report must be tabled at the next Council meeting following the report's finalisation.
- 8.10. If the findings and recommendations are rejected by the Municipal Council, reasons behind the rejection should be submitted to the disciplinary board within 5 days of the council sitting.
- 8.11. If the findings and recommendations are accepted but not implemented, the investigator has the right to report the non-action to national and provincial treasury and request intervention.
- 8.12. In a case where the disciplinary board recommends disciplinary proceedings for the alleged offender, the municipal council, by way of resolution, must institute these proceedings:

- a. In the case of a senior manager, in compliance with the Local Government Disciplinary Codes and Procedures for Senior Managers Regulations as found in the Municipal Systems Act; or
  - b. In the case of a Municipal Official or Councillor (not senior manager), in accordance with the applicable collective bargaining agreement concluded in the bargaining council established for municipalities.
- 8.13. If an alleged transgressor is found guilty of financial misconduct after investigation, he/she will be dismissed immediately from MCLM's employ and will not be allowed to be re-employed at any municipality in South Africa for a period of 10 years.

## **9. CRIMINAL PROCEEDINGS**

- 9.1. Any person may report an allegation of a financial offence against:
- a. a councillor, to the Minister of Finance, and the Provincial MEC for Finance and Provincial MEC for Local Government.
  - b. the Speaker of a municipality, to Municipal Council; and
  - c. any other municipal staff member, to the Accounting Officer.
- 9.2. The allegations referred to in 9.1 (a) and (b) must be dealt with in terms of the Code of Conduct for Councillors in Schedule 1 of the Municipal Systems Act; and the allegations referred to in 9.1 (c) must be dealt with in terms of the Code of Conduct for Directors and Municipal Staff in Section 93L of the Municipal Systems Act.
- 9.3. Councillors and officials will be granted 5 working days to make a written submission if there is an alleged financial offence lodged against them.
- 9.4. Where any financial offence has occurred, the Accounting Officer must report the alleged offence to the South African Police Services (SAPS). In the event that the Accounting Officer is involved, the Municipal Council will report the alleged offence to SAPS.
- 9.5. If there is a likelihood of further financial losses for the Municipality, the Accounting Officer or municipal council should report the matter to SAPS with immediate effect and not await the completion of the investigation.
- 9.6. Where the financial offence is successfully prosecuted, the verdict and judgement must be reported to National Treasury together with: Mogale City Local Municipality's name printed; the full details of the convicted person; and the sanction that was imposed.
- 9.7. The public must have access to the reports regarding the outcome of investigations.

## **10. PREPARING AND TABLING INFORMATION DOCUMENTS ON ALLEGED FINANCIAL MISCONDUCT**

- 10.1. The Municipality must develop an information report on any alleged financial misconduct stating the following:
  - a. The name and position of the person in question.
  - b. A summary of facts and circumstances of the financial misconduct as well as the monetary value involved.
  - c. If any (and what) disciplinary steps have been taken and if not, reasons for not taking disciplinary actions; and
  - d. In the case of a financial offence, the case number issued by SAPS.
- 10.2. The information report must be finalised within 5 working days and, together with the investigation report, sent to:
  - a. The Executive Mayor.
  - b. The Accounting Officer.
  - c. The Provincial MEC for Local Government.
  - d. National Department of Local Government.
  - e. National and Provincial Treasury; and
  - f. The Auditor General of South Africa.
- 10.3. After receiving the document, the Executive Mayor must table the information document and investigation report at the next municipal council.
- 10.4. Any resolutions taken at the council should be reported to National and Provincial Treasury.
- 10.5. If the Executive Mayor or Accounting Officer is of the view that the alleged financial misconduct or financial offence may have a significant impact on the finances of the municipality, and that the funds need to be recovered from the alleged transgressor concerned, the Executive Mayor must request the Speaker of the municipal council to convene a special meeting of the council to discuss the recoverability of the funds in accordance with section 32 of the Act.
- 10.6. The municipality must report to the institutions listed in 10.2 (a-f) the following:
  - a. Any decision to issue or not issue disciplinary proceedings against the person allegedly guilty of financial misconduct.
  - b. The reasons for this decision.
  - c. The outcome of where disciplinary proceedings has been issued; and
  - d. Whether or not a charge has been laid against the accused with SAPS.
- 10.7. MCLM must report on all suspensions, disciplinary or criminal proceedings instituted in cases of financial misconduct in our annual reports.

- 10.8. The Municipality must establish and make public reporting procedures for persons to report allegations of financial misconduct on a confidential basis.
- 10.9. When establishing these procedures, the municipality must take into account its financial and administrative capacities.

## **11. PROTECTION OF OFFICIALS OR COUNCILLORS WHO HAVE REPORTED FINANCIAL MISCONDUCT**

If any official or councillor who has complied with this policy and as a result thereof has been subjected to intimidation, victimisation, and threats of violence, such official or councillor should immediately report such threats, victimisation or intimidation immediately to the Accounting Officer. If the Accounting Officer is implicated or guilty of making these threats, the Accounting Officer must be reported to the Executive Mayor.

The MM or Executive Mayor must immediately take appropriate action to ensure that protection of the official or councillor after receiving the above report. Where the nature of the threats warrants such action, the threats should be reported to SAPS by the official concerned, the MM or the Executive Mayor, where applicable.

## **12. EFFECTIVE DATE**

This policy will be effective upon adoption by Council.

## **13. REVIEW OF POLICY**

This policy must be reviewed and updated:

- a. Annually in line with the budget cycle and submitted with the budget policies; or
- b. Sooner if new legislation, regulation, or circulars are issued that will impact this policy.
- c. Should this Policy come into conflict with any Law or By-Law, the Law or By-Law will prevail.