



PUBLIC PROTECTOR
SOUTH AFRICA

Accountability • Integrity • Responsiveness

FUNDING FIASCO IN THE FREE STATE

REPORT NO:19 of 2011/12

**Report on an investigation into the alleged unlawful
and unconstitutional funding of political
parties by the Moqhaka Local Municipality
in the Free State Province**





INDEX

Executive summary.....4

1. INTRODUCTION.....7

2. THE COMPLAINT8

3. BACKGROUND9

4. THE POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR TO INVESTIGATE THE COMPLAINT LODGED AGAINST THE MUNICIPALITY..... 10

5. THE INVESTIGATION 10

5.1 Methods of gathering evidence 11

5.1.1 Correspondence..... 11

5.1.2 Documentation 11

5.1.3 Legislation and other prescripts..... 11

5.1.4 Jurisprudence and other authorities considered 12

5.1.5 Reports of the Auditor-General..... 12

6. THE LEGAL FRAMEWORK 12

6.1 Funding of political parties..... 12

6.2 The status of municipalities and the objects of local government 13

6.3 Governance structure of municipalities..... 14

6.4 Expenditure of municipalities and the transfer of funds to bodies outside of government 14

6.5 The role of the accounting officer of a municipality 16

6.6 The role of the chief whip (council whip)..... 18

7. ANALYSIS OF THE EVIDENCE AND INFORMATION OBTAINED 18

DURING THE INVESTIGATION..... 18

7.1 Common cause 18

7.2 The explanation provided by the former Municipal Manager..... 19

7.3 Correspondence between the political parties and the Council Whip.....20



7.4	Mr Duma’s further response in terms of due process	21
8.	EVALUATION OF THE EVIDENCE AND INFORMATION OBTAINED	22
	DURING THE INVESTIGATION.....	22
9.	THE PROVISIONAL REPORT OF THE PUBLIC PROTECTOR	27
10.	KEY FINDINGS.....	27
11.	REMEDIAL ACTION	28
12.	MONITORING.....	28

Executive summary

- (i) *FUNDING FIASCO IN THE FREE STATE* is the report of the Public Protector in response to a complaint that was lodged with her office on 2 June 2009 in connection with the alleged unlawful funding of political parties by the Moqhaka Local Municipality (the Municipality) in the Free State Province.
- (ii) It was alleged that the former Municipal Council approved a grant of R500 000 to the political parties represented in the Council for the purposes of “*electioneering*” in respect of the 2009 national elections and that such approval and the subsequent related payments made, were unlawful and unconstitutional.
- (iii) From the investigation it transpired that the Municipal Council of the Municipality indeed approved the grant of R500 000 on 30 September 2008 and that an amount of R398 105 was paid to the said political parties, although the veracity of the latter could not be determined with certainty.
- (iv) It was also found that neither the Constitution, 1996, nor any national legislation authorized or empowered municipalities to make financial grants to political parties.
- (v) There was no indication in the evidence and information obtained during the investigation that the Municipal Council and the former Municipal Manager properly considered and applied the relevant provisions of the Constitution and the Local Government: Municipal Finance Management Act, 2003 (MFMA) when it was resolved to award the grant and to make the associated payments. The decision of the Council appears to have been informed only by information that other municipalities had also made such awards.
- (vi) The political parties that benefitted from the grant were unjustly enriched by the unauthorised and fruitless and wasteful expenditure incurred by the municipality. It is the responsibility of the Municipal Manager to recover the amounts unlawfully paid to the political parties in order to remedy the loss of public funds.

(vii) It is in the interest of proper governance in the public sector that the political parties involved refund the municipality with the payments that were unlawfully made to them.

(viii) The key findings of the Public Protector made from the investigation are the following:

- (a) The awarding of a grant of R500 000 by the former Municipal Council to political parties was unlawful, unconstitutional and therefore invalid;
- (b) The payment of the grant further constituted unauthorised and fruitless and wasteful expenditure;
- (c) The approval by the former Municipal Council of the grant and the payment in respect thereof as authorised by the former Municipal Manager as the accounting officer, constituted maladministration;
- (d) The former Municipal Manager failed in his fiduciary responsibilities in terms of the MFMA by not advising the Municipal Council that the awarding of the grant was unlawful, a fact that he could have determined with reasonable ease. Instead, he relied on his incorrect interpretation of the Constitution and the MFMA and his view that no law exists that prohibits municipalities from funding political parties. He therefore failed to act in the best interests of the Municipality and his conduct was inconsistent with the duties assigned to him in terms of the MFMA, was improper and amounted to maladministration.

(ix) The Public Protector concluded that the appropriate remedial action that is to be taken, as envisaged in section 182(1)(c) of the Constitution, is the following:

- (a) The Municipal Manager of the Municipality to take urgent steps to recover the unauthorised and fruitless and wasteful expenditure incurred in terms of

the grant from the political parties who benefitted from it, within 90 days of the date of the issuing this report; and

- (b) The Executive Mayor of the Municipality to take urgent steps to ensure that Councillors of the Municipality are made aware of the contents of this report, the relevant provisions of the Constitution and the MFMA referred to, within 30 days of the date of the issuing of this report.

REPORT ON AN INVESTIGATION INTO THE ALLEGED UNLAWFUL AND UNCONSTITUTIONAL FUNDING OF POLITICAL PARTIES BY THE MOQHAKA LOCAL MUNICIPALITY IN THE FREE STATE PROVINCE

1. INTRODUCTION

1.1 *Funding Fiasco in the Free State* is a report of the Public Protector, in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).

1.2 The report is submitted to

1.2.1 The Minister of Co-operate Governance and Traditional Affairs;

1.2.2 The Member of the Executive Council responsible for Corporate Governance, Traditional Affairs and Human Settlements of the Free State Provincial Government (MEC);

1.2.3 The Speaker of the Moqhaka Local Municipal Council; and

1.2.4 The Executive Mayor of the Moqhaka Local Municipality (the Municipality).

1.3 Copies of the report are also distributed to:

1.3.1 Mr W Doman MP of the Democratic Alliance, the complainant in this matter;

1.3.2 The Auditor-General of South Africa;

1.3.3 The Municipal Manager of the Municipality; and

1.3.4 Mr V Duma, the former Municipal Manager of the Municipality.

- 1.4 The report represents the outcome of an investigation by the Public Protector of a complaint relating to the alleged unlawful and unconstitutional funding of political parties by the Municipality in 2009.

2. THE COMPLAINT

- 2.1 On 2 June 2009, the Public Protector received a complaint from Mr W Doman MP, alleging that the former Moqhaka Municipal Council resolved in 2008 to make an amount of R500 000 available to political parties, proportionally to their representation in the Council, for “*electioneering*” in respect of the national election held in 2009. He also alleged that political parties were informed that if they did not accept the proportional payment, their share would be divided among the other represented political parties.
- 2.2 According to Mr Doman, the Democratic Alliance accepted the payment of the proportional amount allocated to it, but kept it in trust “*pending a decision whether such payment is legal or not.*”
- 2.3 The Public Protector was requested by the Democratic Alliance to investigate the matter, to make a finding on the lawfulness of the relevant resolution of the Municipal Council and to recommend whether the Municipality had to be refunded with the amounts paid, if appropriate.
- 2.4 Mr Doman contended that in terms of section 236 of the Constitution, only the National Government has the authority to make funds available for election purposes. He further submitted that the reference in the relevant resolution of the Municipal Council to “*in strengthening participatory, democracy as provided for in the Systems Act*” was totally out of context.

3. BACKGROUND

3.1 The former Municipal Council of the Municipality approved the 2008/2009 Municipal Adjustment Budget on 30 September 2008.

3.2 The Adjustment Budget determined, *inter alia*, the following

“In strengthening participatory democracy as provided for in the Systems Act an amount of R500 000 in the Council Whip Vote for elections to be apportioned per councilor representation. Other municipalities have already made provision for this in their respective budgets.”

3.3 On 4 February 2009, the former Council Whip of the Municipality, Mr J Mareka, wrote to all the political parties represented in the Municipal Council and stated that:

“Political parties are hereby reminded of the Council resolution dated 30 September 2008 per Item 353(2)(a)(vi) regarding allocation (sic) made to Political (sic) in the budget for an amount of R500 000 which is distributed proportionally to parties in Council using the following formula:

PARTY	PERCENTAGE	AMOUNT
ANC	76%	R 380 000
DA	10%	R 50 000
APC	6%	R 30 000
FF Plus	6%	R 30 000
ACDP	2%	R 10 000

Parties are therefore requested to submit their programmes at the Office of the Council Whip for processing the necessary payment once various service providers in relation to the Electioneering (sic) work have been identified. ”

4. THE POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR TO INVESTIGATE THE COMPLAINT LODGED AGAINST THE MUNICIPALITY

4.1 Section 182(1) of the Constitution provides that the Public Protector has the power:

4.1.1 *“To investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;*

4.1.2 *To report on that conduct; and*

4.1.3 *To take appropriate remedial action.”*

4.2 In terms of section 6(4) of the Public Protector Act, the Public Protector shall be competent to investigate, on his or her own initiative or on receipt of a complaint, *inter alia*, any alleged-

4.2.1 maladministration in connection with the affairs of government at any level; and

4.2.2 Abuse or unjustifiable exercise of power or unfair, capricious, discourteous or improper conduct or undue delay by a person performing a public function.

4.3 The complaint of unlawful and unconstitutional conduct made against the Municipality, fall within the jurisdiction and powers of the Public Protector.

5. THE INVESTIGATION

The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act.

5.1 Methods of gathering evidence

5.1.1 Correspondence

Correspondence between the Public Protector and:

5.1.1.1 Mr Doman, the complainant;

5.1.1.2 The former Municipal Manager of the Municipality, Mr M V Duma;

5.1.1.3 The Municipal Manager of the Municipality, Mr S M Mqwathi; .and

5.1.1.4 The former Speaker of the Moqhaka Municipal Council, Mr M J Mohapi.

5.1.2 Documentation

The following were analysed and perused:

5.1.2.1 Relevant minutes of meetings of the Municipal Council; and

5.1.2.2 Documentation, including internal correspondence, provided by the Municipal Manager and the former Municipal Manager during the investigation.

5.1.3 Legislation and other prescripts

The relevant provisions of the following legislation were considered and applied, where appropriate;

5.3.1.1 The Constitution;

5.3.1.2 The Local Government: Municipal Structures Act, 1998.

5.3.1.3 The Local Government: Municipal Systems Act, 2000;

5.3.1.4 The Local Government: Municipal Finance Management Act, 2003 (MFMA); and

5.3.1.5 The Public Funding of Represented Political Parties Act, 1997.

5.1.4 Jurisprudence and other authorities considered

5.1.4.1 The judgment of the Constitutional Court in the matter of *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*¹; and

5.1.4.2 A research document entitled: *STUDY INTO THE FUNCTIONALITY OF MUNICIPAL GOVERNANCE ARRANGEMENTS* by De Visser, Steytler and May².

5.1.5 Reports of the Auditor-General

5.1.5.1 The contents of Reports of the Auditor-General on the financial statements and performance information of the Moqhaka Local Municipality for the years ended 30 June 2009 and 30 June 2010, were considered.

6. THE LEGAL FRAMEWORK

6.1 Funding of political parties

6.1.1 Section 236 of the Constitution provides that “*to enhance multi-party democracy, national legislation must provide for the funding of political parties participating in*

¹1999 (1) SA 374 (CC)

²<http://www.communitylawcentre.org.za/clc-projects/local-government/publications/municipal-administration/PoliticalAdminInterface.pdf/>- study conducted for the South African Local Government Association

national and provincial legislatures on an equitable and proportional basis.”
(emphasis added)

6.1.2 The national legislation envisaged by section 236 of the Constitution was enacted in the form of the Public Funding of Represented Political parties Act, 1997, which provides for the establishment of the Represented Political Parties’ Fund to be credited with, inter alia, **moneys appropriated by Parliament**.

6.1.3 The said Fund is controlled by the Independent Electoral Commission. In terms of section 5 of the Act, every political party is entitled to be allocated moneys from the Fund for any financial year that it is represented in the National Assembly or a Provincial Legislature or in both. The moneys so allocated to a political party may be used for any purposes compatible with its functioning as a political party in a modern democracy.

6.1.4 No legislative provision was made for the funding of political parties represented in municipal councils.

6.2 The status of municipalities and the objects of local government

6.2.1 Section 151(3) of the Constitution provides that: *“a municipality has the right to govern, at its own initiative, **the local government affairs** of its community, **subject to national and provincial legislation**, as provided for in the Constitution.”* (emphasis added)

6.2.2 The objects of local government are, in terms of section 152(1) of the Constitution, to:

6.2.2.1 Provide democratic and accountable government for local communities;

6.2.2.2 Ensure the provision of services to communities in a sustainable manner;

6.2.2.3 Promote social and economic development;

6.2.2.4 Promote a safe and healthy environment; and

6.2.2.5 Encourage the involvement of communities and community organisations in the matters of local government.

6.3 Governance structure of municipalities

6.3.1 Section 151(2) of the Constitution provides that the executive and legislative authority of a municipality is vested in its municipal council.

6.3.2 A municipal council must, in terms of section 19(1) of the Local Government: Municipal Structures Act, 1998, strive within its capacity to achieve the objectives set out in section 152 of the Constitution.

6.4 Expenditure of municipalities and the transfer of funds to bodies outside of government

6.4.1 Section 15 of the MFMA provides that municipalities may (but for exceptional circumstances) only incur expenditure, in terms of a budget approved by the municipal council and within the limits of amounts appropriated for the different votes in an approved budget.

6.4.2 A “vote” is defined by section 1 of the MFMA as:

- “(a) 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*
- (b) which specifies the total amount that is appropriated for the purposes of the department or functional area concerned.”*

6.4.3 When an annual budget is tabled by the mayor for approval, it must, in terms of section 17(3) of the MFMA, be accompanied by, *inter alia*, documentation containing the particulars of any proposed allocations or grants by the municipality to-

6.4.3.1 Other municipalities;

6.4.3.2 Any municipal entities and other external mechanisms assisting the municipality in the exercise of its functions or powers;

6.4.3.3 Any other organs of state;

6.4.3.4 Organisations outside of government, in accordance with the provisions of section 67.

6.4.4 A municipality may, in terms of section 28 of the MFMA, revise an approved budget through an adjustments budget. An adjustments budget may appropriate additional revenues and savings, correct errors in the annual budget and authorize unforeseeable and unavoidable expenditure within a prescribed framework. It may also provide for any other expenditure, within a prescribed framework.

6.4.5 Section 67(3) of the MFMA provides that the accounting officer of a municipality can only approve the transfer of funds to an organization or body outside the sphere of government if he/she is satisfied that the organization or body:

6.4.5.1 Has the capacity and has agreed:

- to comply with any agreement with the municipality;
- for the period of the agreement to comply with all reporting, financial management and auditing requirements as may be stipulated in the agreement;
- to report at least monthly to the accounting officer on actual expenditure against such transfer; and
- to submit its audited financial statements for its financial year to the accounting officer promptly;

6.4.5.2 Implements effective, efficient and transparent financial management and internal control systems to guard against fraud, theft and financial mismanagement; and

6.4.5.3 Has in respect of previous similar transfers complied with all the requirements of this section.

6.4.6 The accounting officer must furthermore, in terms of section 67(3), *“through contractual and other appropriate mechanisms enforce compliance”* with the requirements stated in paragraph 6.4.5 above.

6.5 The role of the accounting officer of a municipality

6.5.1 The municipal manager of a municipality is, in terms of section 60 of the MFMA, the accounting officer. This section further provides that it is the duty of the accounting officer to exercise the powers and functions assigned to him/her in terms of the Act and to provide guidance and advice on compliance with the Act to political structures, political office bearers and officials of the municipality.

6.5.2 The fiduciary responsibilities of the accounting officer of a municipality are provided for in section 61 of the MFMA, as follows

“(1) The accounting officer of a municipality must-

(a) act with fidelity, honesty, integrity and in the best interests of the municipality in managing its financial affairs;

(b) disclose to the municipal council and the mayor all material facts which are available to the accounting officer or reasonably discoverable, and which in any way might influence the decisions or actions of the council or the mayor;

(c) seek, within the sphere of influence of the accounting officer, to prevent any prejudice to the financial interests of the municipality.

(2) An accounting officer may not

- (a) *act in a way that is inconsistent with the duties assigned to accounting officers of municipalities in terms of this Act; or*
- (b) *use the position or privileges of, or confidential information obtained as, accounting officer for personal gain or to improperly benefit another person.” (emphasis added)*

6.5.3 Section 62(1) of the MFMA provides that *“the accounting officer of a municipality is responsible for managing the financial administration of the municipality, and must for this purpose **take all reasonable steps to ensure –***

- (a) *that the resources of the municipality are used effectively, efficiently and economically;*
- (b) *.....*
- (c) *.....*
- (d) ***that unauthorised, irregular or fruitless and wasteful expenditure and other losses are prevented;”***

6.5.4 In terms of section 171 *“the accounting officer of a municipality commits an act of financial misconduct if that accounting officer deliberately or negligently –*

- (a) *contravenes a provision of this Act;*
- (b) *fails to comply with a duty imposed by the provision of this Act on the accounting officer of a municipality;*
- (c) *makes or permits, or instructs another official of the municipality to make, an unauthorised, irregular or fruitless and wasteful expenditure;*
or
- (d) *.....”*

6.5.5 Allegations of financial misconduct by the accounting officer must be investigated by the municipality and if warranted, disciplinary steps must be taken against him/her.

6.6 The role of the chief whip (council whip)

- 6.6.1 In their *STUDY INTO THE FUNCTIONALITY OF MUNICIPAL GOVERNANCE ARRANGEMENTS*³, De Visser, Steytler and May described the role of the chief whip of a municipality as follows:

“The chief whip is not a statutory organ within the municipality; it does not feature in the legislation. It has, however, been given statutory and financial status in the policy framework for full-time councillors in that, depending on the municipality’s size, a ‘council whip’ may be remunerated on a full time basis.

The chief whip, which exercises functions as part of the functioning of the council, must be distinguished from the party whips, which operate as party functionaries only. Chief whips generally are there to assist the Speaker in enforcing discipline among councillors and ensure the efficient management of council meetings and committee systems. The governance role of the chief whip in the municipality exists on the basis of the fact that the council may delegate powers to a councillor.”

7. ANALYSIS OF THE EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

7.1 Common cause

- 7.1.1 It is not in dispute that the Municipal Council approved payment of an amount of R 500 000 as a grant to the political parties represented in the Council in, September 2008. The amount was to be proportionally divided according to the representation of each party and was meant to assist the political parties in “electioneering” in respect of the 2009 national elections.

³ <http://www.communitylawcentre.org.za/clc-projects/local-government/publications/municipal-administration/PoliticalAdminInterface.pdf/> study conducted for the South African Local Government Association

7.2 The explanation provided by the former Municipal Manager

- 7.2.1 In his initial response to the complaint, dated 3 July 2009, the former Municipal Manager, Mr M V Duma, indicated that the awarding and payment of the grant to the relevant political parties was justified in terms of section 151(3) of the Constitution⁴
- 7.2.2 He conceded that section 236 of the Constitution⁵ only applied to political parties represented in the national and provincial governments, but expressed the view that there is no legislation prohibiting local municipalities from funding political parties at their own initiative.
- 7.2.3 Mr Duma further relied on section 67 of the MFMA⁶, which, according to him, *“makes provision for funding of organizations and bodies outside of government, in this section, political parties are not excluded.”*
- 7.2.4 Reference was also made to sections 28 and 65 of the MFMA as the legislation in terms of which the expenditure was authorized. Section 28 deals with municipal adjustment budgets and section 65 with expenditure management. However, Mr Duma failed to explain the application of these provisions under the circumstances.
- 7.2.5 The details of the payments made to the political parties by the Municipality were provided by Mr Duma, as follows:

⁴ See paragraph 6.2.1 above

⁵ See paragraph 6.1.1 above

⁶ See paragraph 6.4.5 above

POLITICAL PARTY	AMOUNT PAID
African National Congress:	R 275 655.21
Democratic Alliance	R 70 000
African People's Convention	R 22 450
African Christian Democratic Party	R 10 000
Freedom Front Plus	R 20 000
Total	R 398 105.21

7.2.6 However, it could not be determined with certainty from the bank statements of the Municipality provided by Mr Duma, how the total amount paid was calculated in respect of certain political parties. According to handwritten notes made on the statements, service providers to political parties were paid directly from the bank account of the Municipality as part of the grant payment that was approved by the Municipal Council.

7.3 Correspondence between the political parties and the Council Whip

7.3.1 The Democratic Alliance responded to the letter of the Council Whip referred to in paragraph 3.3 above, on 20 February 2009 and queried the manner in which the “*election grant*” was calculated. According to this letter, it had to be calculated as follows:

“ANC- 38 Councillors= 76% = R380 000

DA- 7 Councillors = 14% = R 70 000

APC- 2 Councillors = 4% =R 20 000

FF+ - 2 Councillors = 4% =R 20 000

ACDP - -1 Councillor = R 10 000”

7.3.2 It was further indicated that the Democratic Alliance was “*not certain of the limitations or the prescribed methods of Electioneering, (sic) if any, that are required or have been identified.*”

7.3.3 On 25 February 2009, the Democratic Alliance submitted a breakdown of “election expenses to be incurred by the Democratic Alliance Moqhaka Caucus” totaling R 69 965-00, to the Council Whip and requested to be informed when the cheque would be ready for collection. It was noted that the “election expenses” related to posters, banners, T-shirts advertisements, telephone costs etc.

7.3.4 The Freedom Front Plus also submitted an estimation of “election expenses” to the Council Whip on 24 February 2009. Its breakdown also included posters, telephone costs, office accommodation, etc. The total amount was R 33 650-00.

7.4 Mr Duma’s further response in terms of due process

7.4.1 The former Municipal Manager, Mr M V Duma, was informed, on 2 November 2010, of the likelihood that the Public Protector might make an adverse finding against him in respect of his compliance with his responsibilities in terms of the MFMA relating to the expenditure incurred by the Municipality in respect of the grant awarded to political parties, referred to in this report.

7.4.2 Mr Duma was afforded an opportunity, in terms of section 7(9) of the Public Protector Act, to respond, which he did on 30 November 2010.

7.4.3 In his response, Mr Duma stated that:

“It is very correct that Moqhaka Local Municipality Council (sic) resolved amongst others, to allocate an amount of R500 000 proportionally to political parties represented in the Municipal Council for electioneering which mainly focused on the ID campaign to encourage community members to take (sic) ID document.

The ID campaign was part of both National and Provincial Government programme (sic) which as a municipality we were equally bound to support by allocating necessary resources for parties to hold meetings and encourage community members to take (sic) or register for the ID document.”

7.4.4 Mr Duma emphasized that as the accounting officer of the Municipality, he complied with the relevant provisions of the MFMA.

8. EVALUATION OF THE EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

8.1 Section 151 of the Constitution determines the status of municipalities. It provides that a municipality has the right to govern, on its own initiative, the **local government affairs** of its community. The governance of municipalities is however, **subject to national and provincial legislation, as provided for in the Constitution. It therefore has to adhere to the principle of legality.**

8.2 In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*⁷ the Constitutional Court considered the meaning and application of the principle of legality in respect of the constitutional dispensation of different spheres of government. The Court held that:

“It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law”. (emphasis added)

8.3 The Municipality could therefore only have awarded a grant of R500 000 of its funds to political parties, if this was within the powers conferred upon it by law.

8.4 The powers and functions of a Municipality are to be found in the Constitution and national legislation.

8.5 Section 236 of the Constitution is very specific in determining that national legislation must provide for the funding of political parties participating in national and provincial legislatures. The Public Funding of Represented Political parties

⁷ 1999(1)SA374(CC) at [58]

- Act, 1997 does not provide the funding of political parties participating in municipal councils.
- 8.6 Reliance was placed during the investigation on the provisions of section 67 of the MFMA for justifying the payment made by the Municipality to the respective political parties. It is, however, clear from the provisions of this section that it relates to the transferring of funds in terms of an agreement under circumstances where there has to be reporting on the expenditure, financial management and proper auditing. The grant payment referred to in this report was, to the contrary, not made in terms of an agreement and none of the requirements of section 67 were applied in respect thereof.
- 8.7 Reference was also made to sections 28 and 65 of the MFMA, which do not in any way authorise municipalities to make financial awards to political parties. As far as adjustment budgets are concerned, the principle that expenditure can only be incurred in terms of a prescribed framework applies. Municipalities can therefore only adjust its budgets within the legal prescripts that also apply to annual budgets.
- 8.8 The former Municipal Manager contended that the payment was lawful as there was no legislation prohibiting municipalities from making financial contributions to political parties. As indicated above, his argument is, with respect, in direct contrast with the constitutional principle of legality and inconsistent with the Constitutional Court's pronouncement in the *Fedsure* case, referred to above.
- 8.9 Although he conceded that the financial award to the political parties concerned was made for the purposes of "*electioneering*" in the national election, Mr Duma indicated that the focus was supposed to have been on encouraging members of the community to obtain identity documents to enable them to vote. It is, however, clear that this message was never conveyed to the political parties as their breakdown of expenditure on which the proportional grant payments were made, were based on promotional material, stationary, office accommodation,

- staff, etc. No reference was made to the so-called '*Identity Document Programme*'.
- 8.10 The approval by the Municipality of a grant to be paid to the political parties represented in the Municipal Council had no direct bearing on the local government affairs of its community, as envisaged by section 151(3) of the Constitution.
- 8.11 The approval and payment of the grant was not authorized by the Constitution and any of national legislation regulating the powers and functions of municipalities.
- 8.12 The allocation of an amount of R500 000 in the 2008/9 Adjustments Budget of the Municipality under the Council Whip Vote, was inconsistent with the purpose and function of the Council Whip.
- 8.13 The grant was accordingly made in violation of legislation regulating the powers and functions of the Municipality and was unlawful. The expenditure that was incurred on the basis of the grant awarded by the Municipal Council was therefore also unlawful.
- 8.14 Section 2 of the Constitution provides that conduct that is inconsistent with the Constitution is invalid. As the decision to authorize the payment and the making thereof was unlawful and inconsistent with the Constitution, it was accordingly also invalid.
- 8.15 In terms of section 1 of the MFMA, a grant by a municipality otherwise than in accordance with the Act, amounts to unauthorised expenditure.
- 8.16 Fruitless and wasteful expenditure is defined by section 1 of the Act as "*expenditure that was made in vain and would have been avoided had reasonable care been exercised.*"

- 8.17 The expenditure incurred by the Municipality in terms of the grant paid to the political parties was unlawful and therefore constituted unauthorised expenditure. It also amounted to fruitless and wasteful expenditure as it would have been avoided if reasonable care was taken to ensure that the Municipality complied with the law in authorizing the expenditure of public funds.
- 8.18 There was no indication in the evidence and information obtained during the investigation that the Municipal Council and the former Municipal Manager properly considered and applied the relevant provisions of the Constitution and the MFMA when it was resolved to award the grant and to make the associated payment. The decision of the Council appears to have been informed only by information that other municipalities had also made such awards.
- 8.19 The former Municipal Manager did not act in compliance with his fiduciary responsibilities in terms of the MFMA as he failed to inform the Municipal Council that the awarding of the grant was unlawful, a fact that he could have determined with reasonable ease. Instead, he relied on his incorrect interpretation of the Constitution and the MFMA and his view that no law exists that prohibits municipalities from funding political parties. He therefore failed to act in the best interests of the Municipality and his conduct was inconsistent with the duties assigned to him in terms of the MFMA.
- 8.20 In terms of section 32 of the MFMA an accounting officer is liable for unauthorised expenditure incurred by him/her. It also provides that any political office-bearer or official of a municipality who deliberately or negligently made or authorized a fruitless and wasteful expenditure is liable for that expenditure.
- 8.21 It was noted that the Auditor-General of South Africa stated in his report on the financial statements of the Municipality for the year ended 30 June 2010 that:

“During the first half of 2009-10 financial year the municipality experienced a change in leadership at the accounting officer and chief financial officer levels in order to address leadership challenges that it had faced during the previous

financial years. These challenges included the following issues that contributed to the weaknesses in the financial environment and the ultimate audit outcome:

- *The previous accounting officer did not prioritise and take timely appropriate actions with regard to a lack of discipline in the finance and supply chain management directorate3s, resulting in non-compliance with applicable legislation and inadequate budget control measures. This in turn, resulted in irregular, fruitless and wasteful as well as unauthorised expenditure.⁸*
- *...*

8.22 Section 176(2) of the MFMA provides that:

“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, 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.” (emphasis added)

8.23 A municipality **must**, in terms of section 32(2), recover unauthorised, irregular or fruitless and wasteful expenditure from the person(s) liable for that expenditure.

8.24 The former Municipal Manager left the Municipality some time ago and the municipal council that approved the awarding of the grant was replaced after the local government elections in 2011.

8.25 As Mr Duma has left the Municipality, disciplinary action in respect of financial misconduct, as contemplated by section 171 of the MFMA, cannot be instituted against him.

8.26 The political parties that benefitted from the grant were unjustly enriched by the unauthorised and fruitless and wasteful expenditure incurred by the municipality.

⁸ See paragraph 70 of the Report

It is the responsibility of the Municipal Manager to recover the amounts unlawfully paid to the political parties in order to remedy the loss of public funds.

- 8.27 It is in the interest of proper governance in the public sector that the political parties involved refund the municipality with the payments that were unlawfully made to them.

9. THE PROVISIONAL REPORT OF THE PUBLIC PROTECTOR

- 9.1 The Public Protector issued a Provisional Report on the investigation to Mr Doman, the complainant and other relevant parties involved, on 17 November 2011.
- 9.2 The Provisional Report was distributed on the basis of confidentiality to provide the recipients with an opportunity to respond to its contents.
- 9.3 The recipients of the Provisional Report were requested to submit their responses thereto by 9 December 2011. However, no significant response was received by the Public Protector from any of the recipients of the Provisional Report.

10. KEY FINDINGS

The Public Protector's key findings are that:

- 10.1 The awarding of the grant by the Municipality to political parties, referred to in this report, was unlawful, unconstitutional and therefore invalid;
- 10.2 The payment of the grant further constituted unauthorised and fruitless and wasteful expenditure;

- 10.3 The approval by the Municipal Council of the grant and the payment in respect thereof as authorized by the former Municipal Manager as the accounting officer, constituted maladministration;
- 10.4 The former Municipal Manager failed in his fiduciary responsibilities in terms of the MFMA by not advising the Municipal Council that the awarding of the grant was unlawful, a fact that he could have determined with reasonable ease. Instead, he relied on his incorrect interpretation of the Constitution and the MFMA and his view that no law exists that prohibits Municipalities from funding political parties. He therefore failed to act in the best interests of the Municipality and his conduct was inconsistent with the duties assigned to him in terms of the MFMA, was improper and amounted to maladministration.

11. REMEDIAL ACTION

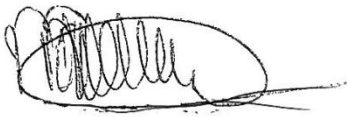
The remedial action that is taken, as envisaged by section 182(1)(c) of the Constitution, is the following:

- 11.1 The Municipal Manager of the Municipality to take urgent steps to recover the unauthorised and fruitless and wasteful expenditure incurred in terms of the grant from the political parties who benefitted from it, within 90 days of the date of the issuing this report; and
- 11.2 The Executive Mayor of the Municipality to take urgent steps to ensure that Councilors of the Municipality are made aware of the contents of this report, the relevant provisions of the Constitution and the MFMA referred to, within 30 days of the date of the issuing of this report.

12. MONITORING

The Municipal Manager of the Municipality is to:

- 12.1 Submit to the Public Protector an implementation plan in respect of the remedial action taken in paragraph 11 above within 30 days of the date of the issuing of this report; and
- 12.2 Submit a report to the Public Protector on the implementation of the remedial action referred to in paragraph 11 above within 90 days of the date of the issuing of this report.



ADV T N MADONSELA
PUBLIC PROTECTOR OF
THE REPUBLIC OF SOUTH AFRICA

Date: 24 April 2012

Assisted by:

Adv C H Fourie:

Executive Manager:

Good Governance and Integrity

Public Protector South Africa

Mr I Matlawe:

Senior Investigator:

Service Delivery

Public Protector South Africa