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Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: A309/2017

Before: The Hon. Mr Justice Binns-Ward

The Hon. Ms Justice Davis (Acting)

Hearing: 30 November 2018

Judgment: 6 February 2019

In the matter between:

MARTIN NOEL PIETERSEN

Appellant

and

THE STATE

Respondent

JUDGMENT

DAVIS, AJ (BINNS-WARD, J concurring):

Introduction

1. This appeal arises from the conviction of a municipal accounting officer in respect of various statutory offences in terms of the Local Government: Municipal Finance Management Act 56 of 2003 ("the MFMA").

2. The appellant was tried in the Oudtshoorn Regional Court on five counts of contravening the MFMA when he occupied the position of municipal manager and accounting officer of the Oudtshoorn Municipality ("the Municipality"). It was alleged in the charge sheet that during the period between 24 August 2010 and July 2011 the appellant contravened the following sections of the MFMA:

2.1s 173(1)(a)(i)¹ read with s 61(2)(b)², in that he deliberately or in a grossly negligent way used the position or privileges of accounting officer for personal gain or to improperly benefit another person, namely Ian Kenned and/or IBR Consultants ("the first count");

2.2s 173 (1)(a)(i)³ read with s 62(1)⁴, in that he deliberately or in a grossly negligent way failed to manage the financial administration of the Municipality and to take all reasonable steps to ensure that:

2.2.1 the resources of the Municipality were used effectively, efficiently and economically; and/or

¹ Section 173(1)(a)(i) of the Local Government: Municipal Finance Management Act 56 of 2003 ("the MFMA") provides that:

"173(1) The accounting officer of a municipality is guilty of an offence if that accounting officer -
(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 (l)."

² Section 61(2)(b) of the MFMA provides that "An accounting officer may not use the position or privileges of, or confidential information obtained as, accounting officer for personal gain or to improperly benefit another person."

³ See note 1.

⁴ Section 62(1) of the MFMA reads as follows in relevant part:

"62(1) 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) that full and proper records of the financial affairs of the municipality are kept in accordance with any prescribed norms and standards;
- (c) that the municipality has and maintains effective, efficient and transparent systems –
 - (i) of financial and risk management and internal control; and
 - (ii) of internal audit operating in accordance with any prescribed norms and standards;
- (d) that unauthorised, irregular or fruitless and wasteful expenditure and other losses are prevented;
- (e) ...
- (f) that the municipality has and implements -
 - (iii) ...
 - (iv) a supply chain management policy in accordance with Chapter 11."

2.2.2 full and proper records of the financial affairs of the municipality were kept in accordance with any prescribed norms and standards; and/or

2.2.3 the Municipality had and maintained effective, efficient and transparent systems of financial risk management and internal control and/or of internal audit operating in accordance with any prescribed norms and standards; and/or

2.2.4 unauthorised, irregular or fruitless and wasteful expenditure and other losses were prevented; and/or

2.2.5 the Municipality had and implemented a supply chain management policy in accordance with Chapter 11 of the MFMA {"the second count"}:

2.3s 173(1)(a)(i)⁵ read with s 65(2)(a)⁶, in that he deliberately or in a grossly negligent way failed to take all reasonable steps to ensure that the Municipality had and maintained an effective system of expenditure control, including procedures for the approval, authorisation, withdrawal and payment of funds {"the third count"}:

2.4s 173(1)(a)(i)⁷ read with s 65(2)(i)⁸, in that he deliberately or in a grossly negligent way failed to take all reasonable steps to ensure that the Municipality's supply chain policy referred to in s 111 of the MFMA was implemented in a way that was fair, equitable, transparent, competitive and cost-effective {"the fourth count"}:

2.5s 173 (1)(a)(iii)⁹ of the MFMA, in that he deliberately or in a grossly negligent way failed to take all reasonable steps to prevent unauthorised, irregular or fruitless and wasteful expenditure {"the fifth count"}.

⁵ See note 1.

⁶ Section 65(2)(a) of the MFMA stipulates that "The accounting officer must for the purposes of [the management of the expenditure of the municipality] take all reasonable steps to ensure that the municipality has and maintains an effective system of expenditure control, including procedures for the approval, authorisation, withdrawal and payment of funds."

⁷ See note 1.

⁸ Section 65(2)(i) of the MFMA provides that "The accounting officer must for the purposes of [the management of the expenditure of the municipality] take all reasonable steps to ensure that the municipality's supply chain management policy referred to in section 111 is implemented in a way that is fair, equitable, transparent, competitive and cost-effective."

⁹ Section 173(1)(a)(iii) of the MFMA provides that:

"173(1) The accounting officer of a municipality is guilty of an offence if that accounting officer-

(a) deliberately or in a grossly negligent way

(iii) fails to take all reasonable steps to prevent unauthorised, irregular or fruitless and

3. The appellant, who was legally represented throughout his trial, pleaded not guilty to the charges. He was convicted on all counts on 7 December 2016 and sentenced on 31 March 2017 to a term of five years' imprisonment; all counts being taken together for purposes of sentence. The appellant appeals against his conviction with the leave of the court *a quo*.

4. The charges arose out of the appellant's appointment of IBR Consultants ("IBR")¹⁰ to act as service providers to the Municipality on the strength of a deviation from the requirements of the Municipality's Supply Chain Management Policy which the State maintains was unlawful, and payments made to IBR which were said to amount to unauthorised, irregular or fruitless and wasteful expenditure. One Ian Kenned ("Ian Kenned"), a former municipal manager of Stellenbosch Municipality, was the sole member of IBR.

5. In terms of s 111 read with s 112 of the MFMA a municipality is obliged to have and implement a supply chain management policy that is fair, equitable, transparent, competitive, cost-effective and compliant with the prescribed regulatory framework for municipal supply chain management. On 25 October 2007¹¹ the Oudtshoorn Municipality adopted a Supply Chain Management Policy ("the SCM Policy") which is identically worded in all material respects to the Municipal Supply Chain Management Regulations promulgated by the National Treasury in terms of the MFMA in GN 868 of 2000 dated 30 May 2005 ("the SCM Regulations").

6. Regulation 19 of the SCM Regulations stipulates that a municipality may procure goods or services above a transaction value of R 200 000 (inclusive of VAT) and long term contracts¹² only through a competitive bidding process. Furthermore, no requirement for goods or services above an estimated transaction value of R 200 000 may deliberately be split into parts or items of a lesser value merely for the sake

wasteful expenditure."

¹⁰ It appears from IBR invoices forming part of the record that IBR was registered under company registration number 2010/02/0915/23, which suggests that IBR was incorporated as a (Pty) Ltd.

¹¹ At that time the appellant was the municipal manager of Oudtshoorn Municipality. He was instrumental in putting the SCM Policy in place.

¹² A 'long term contract' is defined in s 1 of the SCM Regulations to mean 'a contract with a duration period exceeding one year'

of procuring the goods or services otherwise than through a competitive bidding process. Regulation 12 provides that when determining transaction values, a requirement for goods or services consisting of different parts or items must as far as possible be treated and dealt with as a single transaction.

7. In terms of Regulation 35 an accounting officer of a municipality may procure consulting services, taking into account Treasury guidelines. A contract for the supply of consultancy services must be procured through a competitive bidding process if the value of the contract exceeds R 200 000 or the duration of the contract exceeds one year.

8. Section 36 of the SCM Policy, which is based on Regulation 36, deals with deviations from, and ratifications of minor breaches of, the prescribed procurement processes. It reads as follows:

"36 (1) The accounting officer may

(a) dispense with the official procurement processes established by this policy and procure any required goods or services through any convenient process, which may include direct negotiations, but only -

(i) in an emergency

(ii) if such goods or services are produced or available from a single provider only;

(iii) for the acquisition of special works of art or historical objects where specifications are difficult to complete;

(iv) acquisition of animals for zoos and/or nature and game reserves; or

(v) in any other exceptional case where it is impractical or impossible to follow the official procurement processes; and

(b) 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.

(2) The accounting officer must record the reasons for any deviations in terms of sub- paragraphs (1)(a) and (b) of this policy and report them to the next meeting of the council and include as a note to the annual financial statements."

9. When the appellant appointed IBR to act as consultants to the Municipality, he purported to do so by way of a deviation in terms of s 36 of the SCM Policy. The validity or otherwise of this deviation lies at the heart of the State's case. If the appointment of IBR was a valid exercise of the appellant's power to deviate from the requirements of the SCM Policy, the charges relating to irregular expenditure and failure to implement supply chain management policy cannot be sustained. If, however, the deviation were unlawful and invalid, that would mean that there was a violation of supply chain management policy which resulted in irregular expenditure,¹³ and if the appellant acted deliberately or in a grossly negligent way in regard to the deviation, he would be criminally liable under the MFMA for his violation of the SCM Policy and any resultant irregular expenditure.

The judgment of the court *a quo*

10. As mentioned, the court *a quo* found the appellant guilty on all five counts. The magistrate found that the appellant was not a credible witness and that the State witnesses were all satisfactory. She neglected, however, to analyse the requirements of each of the statutory offences with which the appellant was charged and to consider whether the evidence adduced by the State satisfied the particular requirements of the statutory provisions underpinning each of the charges.

11. For instance, she omitted to deal in her judgment with the definitions of unauthorised, irregular and fruitless and wasteful expenditure in terms of the MFMA, which are crucial to the second and fifth counts. She also failed to appreciate that expenditure which would otherwise be unauthorised can be rectified in terms of an adjustment budget duly passed in accordance with the MFMA.

12. In addition, the judgment contains a number of factual misdirections and is replete with sweeping statements and inferences which do not meet the second leg

¹³ The MFMA's definition of irregular expenditure includes "expenditure incurred by s municipality ...in contravention of, or that is not in accordance with, a requirement of the supply chain management policy of the municipality ... and which has not been condoned in terms of such policy... , but excludes expenditure by a municipality which falls within the definition of 'unauthorised expenditure'."

of the well-known test for drawing inferences in *R v Blom*.¹⁴

13. No useful purpose would be served by cataloguing the various errors and misdirections in the judgment of the court a *quo*. They will be referred to below, where necessary, in the course of dealing with the various counts.

Application to receive new documentary evidence on appeal

14. Before turning to merits of the appeal it is appropriate first to deal with the application by the appellant to introduce additional documentary evidence before the court on appeal. The application was opposed by the State.

15. The documents sought to be introduced were the following:

15.1 Oudtshoorn Municipality representation letter to the Auditor General of South Africa CC the Auditor General") dated 15 June 2011;

15.2 Oudtshoorn Municipality Annual Financial Statements for the year ended 30 June 2011;

15.3 Oudtshoorn Municipality Annual Report on Deviations from July 2010 to 30 June 2011;

15.4 The Report of the Auditor General on Oudtshoorn Municipality for the year ended 30 June 2011;

15.5 Minutes of a meeting of the Financial Services Portfolio Committee of Oudtshoorn Municipality held on 8 September 2011;

15.6 Memorandum dated 3 February 2011 addressed by the Municipal Manager to the Chief Financial Officer of Oudtshoorn Municipality requesting approval to overspend the professional services vote and rectify the expenditure by means of an adjustment budget.

16. The test for adducing further evidence on appeal is well-established. The

¹⁴ In *R v Blom* 1939 AD 188 at 202- 203 it was held that:

"In reasoning by inference there are two cardinal roles of logic which cannot be ignored: (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn. (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."

requirements are that a) there should be a reasonably sufficient explanation for why the evidence was not lead at the trial; b) there should be a *prima facie* likelihood of the truth of the evidence and c) the evidence should be materially relevant to the outcome of the trial.¹⁵

17. The third of these requirements presents an insurmountable obstacle for the appellant for the reasons which follow.

18. The representation letter to the Auditor General, although dated 15 June 2011, is for the year ended 30 June 2010, as opposed to 2011, and therefore has no bearing on the charges faced by the appellant, which related to the year ended 30 June 2011.

19. The Municipality's Annual Financial Statements for 2011 are sought to be introduced into evidence because they refer to expenditure of R 2 082 093.00 in respect of the IBR deviation and contain a statement that, "*All the deviations were ratified by the Municipal Manager and reported to Council.*"

20. The Annual Report on Deviations from July 2010 to 30 June 2011 is sought to be introduced because it purportedly shows compliance with s 36(2) of the SCM Policy, which requires that the reasons for deviations be recorded and reported to council at the next council meeting and included as a note to the annual financial statements.

21. The introduction into evidence of the documents referred to in the preceding two paragraphs would take the matter no further. In the first instance, a municipal council merely performs an oversight function in respect of deviations. As a matter of law it cannot, by purportedly "ratifying" or "approving" a deviation, cure an unlawful deviation which does not comply with supply chain management requirements. It is therefore irrelevant that the deviation was reported to the council and referred to in the annual financial statements. In the second instance, the Annual Report on Deviations from July 2010 to 30 June 2011, far from proving compliance with s 36(2)

¹⁵ See *S v de Jager* 1965 (2) SA 612 (A) at 613 C - D; *S v Ndweni and Others* 1999 (4) SA 877 (SCA)

of the SCM Policy, actually shows that the requirements of that section were not complied with because the deviations were only reported to council on 22 June 2011 whereas the SCM Policy required that all deviations be reported to council at the next council meeting. Therefore the IBR deviation should have been reported to council at the next quarterly council meeting after 26 August 2010 when the deviation memorandum was signed.

22. What was presented in the application as being the Auditor General's Report for the Municipality for 2011 is in fact only part of the report. It is an incomplete document. And the parts included contain portions which, far from assisting the appellant, are damning to his case. The Auditor General reported that, *"The accounting officer did not take reasonable steps to prevent unauthorised, irregular, fruitless and wasteful expenditure, as required by section 62(1)(d) of the MFMA"* and that, *"Management did not implement adequate monitoring controls over compliance to [sic] laws and regulations which resulted in various instances of non-compliance to the MFMA, Municipal SCM regulations and preferential policy framework act [sic] being identified."*

23. It goes without saying that the (incomplete) Auditor General's Report could not serve to alter the outcome of the trial.

24. The minutes of the meeting of the Financial Services Portfolio Committee of Oudtshoorn Municipality held on 8 September 2011 are sought to be introduced in order to prove that the council did in fact consider the Annual Report on Deviations referred to above and, presumably, to show that no irregularities were noted in respect of the IBR deviation.

25. As has already been stated, a municipal council cannot legally ratify or approve and unlawful deviation from the SCM Regulations. It merely exercises an oversight function and has the power to investigate and take further action in respect of suspect deviations. The fact that it has failed to do so does not justify an inference that the deviation was proper for the irregularity might simply have been undetected -

or overlooked - by the council.

26. The minutes of the Financial Services Portfolio Committee Minutes therefore have no bearing on the outcome of the trial.

27. Finally, the appellant's Memorandum to the CFO dated 3 February 2011 was before the court *aquo* as an exhibit and already forms part of the appeal record. The application to place it before the court on appeal as new evidence was obviously made in error.

28. In short, none of the documents sought to be introduced as new evidence are materially relevant to the outcome of the trial and could not serve to alter the result on appeal. The application to introduce further documentary evidence therefore falls to be dismissed. Indeed, counsel for the appellant essentially conceded as much when the foregoing problems with the application were raised by us with him during argument.

The deviation

29. It is convenient to commence with a consideration of the deviation, since, as mentioned, the validity or otherwise of the deviation was the crux of the State's case against the appellant. I shall begin by sketching the factual context.

30. The appellant had been suspended from his position as municipal manager in November 2008. He had challenged his dismissal and was subsequently reinstated pursuant to a settlement reached with the Municipality. He returned to work on 10 August 2010. It was common cause that political control of the municipality altered on 3 August 2010, shortly before the appellant returned to work, with the African National Congress (ANC) replacing the Democratic Alliance (DA) as the governing party.

31. It was also common cause that at the time a number of senior municipal officials had been suspended, or were facing suspension, for alleged transgressions uncovered in a forensic investigation and report done by one Barnard ("the Barnard

report") on misconduct on the part of municipal officials. An investigation was also under way by an Advocate Giliomee into alleged misconduct on the part of municipal councillors ("the Giliomee investigation"), which could have led to the suspension of a number of councillors, resulting in a hung council. The Barnard report and Giliomee investigation had been commissioned before the transfer of political control in the council and the appellant's return to work.

32. The appellant testified that on the day he returned to work at the Municipality he met with the speaker, the mayor, the chief whip and members of the mayoral committee, who briefed him on the status of municipal affairs. He was told that the whole of the senior black management of the municipality had either been suspended, or was facing suspension, for alleged transgressions, flowing from the Barnard report, and that nine or ten councillors were facing disciplinary proceedings arising out of the Giliomee investigation. There was a fear that if these councillors were suspended, there would be a hung council which could not take any decisions. The appellant was also told that Gilomee, had been appointed while the DA had been in control of the council, and was believed to be working for the DA and targeting councillors who were aligned to the ANC with a view to getting them dismissed.

33. The appellant stated that he was instructed by the speaker, the mayor and senior council members to stop Giliomee's investigation, and appoint a consultant who could *"independently investigate without a political motive"* to review the work done by Barnard and Giliomee and report to council with recommendations as to who should be suspended, who could be brought back to work, and who should be disciplined. According to the appellant this work was required urgently *"because it [would] render the council incapable of doing its work if some people [were] suspended and the senior management [were] for a long time not at work so that we [could not] deliver on our mandate to our communities."* In other words, the problem was twofold: the absence of many municipal officials from work rendered the Municipality unable to function, and the suspension of too many councillors would render the council hung or inquorate and therefore dysfunctional.

34. The appellant further testified that an additional reason was given by the

speaker, mayor and members of the mayoral committee for the need to appoint a consultant, namely that the administration of the municipality was in a chaotic state, that there was much work to be done, and that the services of a specialised consultant were required to assist in putting the municipality's affairs in order and implementing service delivery. This was required to be done before the next local government general elections in May 2011.

35. According to the Appellant he was told by the speaker and mayor to appoint IBR, headed by Kenned, as the consultant. His counsel also put it to state witnesses Jordaan and Mostert that the appellant was instructed by the mayor and the speaker to appoint IBR. However the appellant contradicted himself on this point during his evidence-in-chief when he stated that SALGA (the South African Local Government Association) had given him the names of a few consultants and that he chose IBR in consultation with his senior management, including Jordaan, the CFO. Under cross-examination it emerged that the appellant was introduced to Kenned by the speaker and the executive mayor at a meeting held a few days after he returned to work, and that they discussed what was required of IBR in that meeting, including the problems with the Barnard report and the Giliomee investigation. He also admitted under cross-examination that when he turned to work IBR was already involved in advising the political office-bearers (i.e. the speaker, the mayor and members of the executive or mayoral committee) *"on a risk basis"*.

36. The appellant's explanation for why he appointed IBR by way of a deviation instead of following normal procurement procedure was that the specialised services of a consultant were required urgently to bring political and administrative stability to the Municipality. The consultant had to have the expertise to deal with labour relations and disciplinary issues, planning and development, financial and legal matters. He considered that the need to *"get the Municipality right"* within a short period of time, i.e., before the next election 8 months away, made it impractical to implement normal procurement processes which, according to the appellant, took 4 to 5 months.

37. The appellant conceded in response to a question from the magistrate that it would have been possible to follow normal procurement processes in appointing the

consultant, but stated that the implementation would then have been for the new council, since the elections took place in May 2011.

38. According to the appellant, if a consultant had not stepped in at that stage to resolve the problem caused by the inability of council to function and address the dysfunction of municipal administration caused by the suspension of members of top management, the Municipality would likely have been placed under administration. As the appellant explained it, *"if your council can't function they can't take decisions, they can't deal with the budget, they can't deal with the integrated development plan, they can't deal with the implementation plan of council, they can't render services properly because there is no decision making in terms of projects and the money to be spent on those projects."*

39. The following facts pertaining to the deviation were admitted:

39.1 On 23 August 2010 the speaker addressed a memorandum to the mayor headed *"Investigations into Councillors"* in which he disclosed that a number of urgent matters had been reported to him related to alleged breaches of the Code of Conduct for Councillors and requested urgent assistance from a consultant to investigate these matters.

39.2 On 24 August 2010 the acting mayor instructed the appellant to provide the necessary assistance to the speaker. On the same day Kenned completed an application for IBR's registration on the Municipality's database as an accredited service provider, which was sent to Mr Ladouce, Senior Accountant: Supply Chain Management ("Ladouce"), on 25 August 2010.

39.3 On 25 August 2010 the speaker provided the appellant with a written "Brief to Consultant" which included an instruction to investigate reported breaches of the Code of Conduct for Councillors and report within 10 days. Three matters were listed as *"some of the allegations that require urgent investigation"*, namely: the irregular collection and distribution of food parcels by councillors under the guise of an emergency on or about 11 August 2010; the irregular use of council property by a councillor during 2010 when he instructed caterers to deliver food paid for by the Municipality to a private function; and the fact that 10 councillors left a council meeting in protest without permission from the speaker on 3 and 4 August 2010.

39.4 On 26 August 2010 the appellant wrote the following to Ladouce regarding the appointment of a consultant:

"I have perused correspondence¹⁶ from the office of the Speaker.

It appears from the correspondence that the matter is very urgent of a serious and very sensitive nature and I doubt whether we have internal capacity to deal with the request. I also get the impression from the Speaker that he would like to finalise the matter as soon as possible.

Could you please appoint IBR Consultants from our database on an urgent basis in terms of the SCM policy and Regulations 36(1)(a)(iv).¹⁷"

40. The undisputed evidence of Ladouce shows that on 26 August 2010 Ladouce compiled, and the appellant signed and approved, a written memorandum setting out the motivation for the appointment of IBR by way of a deviation in terms of s 36 of the SCM Policy ("the deviation memorandum").

41. One sees from the deviation memorandum that under the heading *11reasonsfor deviation*" various options are listed with boxes for ticking the applicable reason(s). Crosses appear in the boxes next to the categories *"exceptional case and it is impractical or impossible to follow the official procurement processes"* and *"specialized service"*. IBR is named as the supplier, and the goods and services are described simply as *"professional services"*. The words *"see attached quote"* appear in the space provided for the contract amount. However the quotation referred to is merely a letter dated 25 August 2010 from Kenned to the appellant setting out IBR's charges of R 1 000.00 per hour plus accommodation expenses plus travel at R 2.50 per kilometre. The following statement appears under the heading *"concise description and reason(s) for the deviation(s)"*

"Due to the specialized nature and the urgency of the matter as well as the time factor in which the process have to be concluded, it would not be practical to follow the procurement process."

¹⁶ The correspondence referred to was the internal memorandum addressed by the speaker to the mayor dated 23 August 2010 entitled "Investigation into Councillors referred to in paragraph 39.1.

¹⁷ It appears that the reference to Regulation 36(1)(a)(iv), which refers to the acquisition of animals for zoos and game parks, was erroneous. The appellant clearly meant Regulation 36(1)(a)(v), which refers to exceptional cases where it is impractical or impossible to follow the official procurement

42. It is common cause that on the strength of the deviation the appellant, acting in his capacity as municipal manager, on 24 September 2010 concluded a service level agreement with IBR regarding the services to be rendered by IBR to the Municipality ("the SLA"). The following features of the SLA are noteworthy:

- 42.1 the stipulated commencement date is 13 August 2010, notwithstanding the fact that the appellant only approved the deviation on 26 August 2010;
- 42.2 the duration of the agreement is from the commencement date until 30 June 2011 (making it a long term contract, as defined in the SCM regulations);
- 42.3 the deliverables are defined as *"all services to be rendered and delivered in terms of this Agreement"*, but the SLA itself does not specify what services are to be rendered;
- 42.4 the proposal is defined as including *"the quotation submitted by the Consultant in response to the request from the Municipality for the rendering of specialised services on an urgent basis including all annexures thereto"*; whereas the quotation only refers to IBR's rates and contains no indication of the nature of the services involved or the estimated time involved;
- 42.5 under the heading *"scope of work"* it is stipulated that:
 - "4.1 It is agreed that the Consultant shall execute and provide the deliverables in terms of and as set out in the Proposal letter of appointment and upon the terms and conditions of this Agreement within the contract period as well as anything in addition or incidental thereto.*
 - 4.2 All deliverable shall be submitted to the Municipal Manager.*
 - 4.3 Without limiting the generality of the foregoing, the Consultant shall, among other things:*
 - 4.3.1 Provide general and specific advice to the Speaker, the Municipal Manager and any official/politician sanctioned by the Municipal Manager and provide guidance in all matters pertaining to the functioning generally and specifically of the Municipality."*

43. The document referred to in clause 4.1 of the SLA as the *"Proposal letter of appointment"* could not be found on the Municipality's electronic filing system and was not produced at the trial. The appellant claimed that he drafted the document

and that it referred to all the services which were needed at the time, including labour relations and human resources, contraventions by the Municipality of town and planning legislation, legal matters, financial delegations, fraud investigations, as well as the review of the Barnard report and the Giliomee investigation.

44. It was common cause that during the period August 2010 to 30 June 2011 IBR performed a number of different services to the municipality, which related to a variety of subjects and which required a range of skills, experience and qualifications.

45. Mr Hendrik Mostert ("Mostert") a forensic auditor and *ad hoc* member of the Special Investigation Unit ("SIU") appointed in 2011 to conduct an investigation into the affairs of the Municipality,¹⁸ testified for the State that during the period 30 September 2010 to 28 July 2011, IBR submitted 23 invoices totalling R 2 069 050.00 to the municipality, comprising professional fees of R 1 819 000.00 for 1819 hours at R 1 000 per hour, travel costs of R 167 850.00 and accommodation costs of R 74 550.00. His evidence in this regard was not disputed. It was also common cause that all these services were performed on the strength of a single deviation.

46. Keith Jordaan ("Jordaan"), who occupied the position of Chief Financial Officer ("CFO") at the Municipality during 2010 and 2011 while the appellant was the accounting officer, gave evidence for the State regarding the standard operating procedures for the appointment of consultants. He testified that the usual practice was for the Municipality to prepare a project brief with a timetable and specific deliverables required to be produced or provided by the consultant. A request for proposals would be advertised in accordance with the SCM Policy, and consultants would present a tender, proposal or quotation setting out the methodology to be followed to meet the deliverables, as well as an estimated time frame and the estimated hours and costs involved to complete the task. The Bid Evaluation Committee would then evaluate the bids received, whereupon the bid adjudication

¹⁸ The SIU was appointed under Presidential Proclamation No6 of 2011 in terms of s 2(2) of the Special Investigating Units and Special Tribunals Act 74 of 1996, published in Government Gazette No 34001 on 4 February 2011. The genesis of the special investigation is that a Mr WP Rabbets, then acting municipal manager of Oudtshoorn, on 9 February 2010 requested the SIU to conduct a preliminary investigation into serious allegations of fraud involving the municipality.

would be done in terms of the SCM Policy.

47. Ladouce testified for the State regarding the standard operating procedure involving deviations. He stated that the end user department within the Municipality is required to provide motivation for the deviation which is assessed by the SCM department which, if it agrees with the deviation, refers it to the CFO for approval, who then refers it to the Municipal Manager for final approval. As regards the deviation in issue, he testified that he was given a letter by the appellant instructing him to appoint IBR by way of a deviation in terms of Regulation 36. He was told by the appellant that there were urgent, confidential matters which required attention, but he was not told what the nature of the services was.

48. Having regard to the evidence as a whole with particular reference to the provisions of s 36 of the Municipality's SCM Policy, it is clear that the appellant's explanation for the deviation does not pass muster. Neither does the stated motivation for the deviation contained in the deviation memorandum, namely that the specialized nature and urgency of the matter and the time frame within which the work had to be concluded made it impractical to follow the usual procurement process.

49. As to the alleged specialized nature of the services, it is plain that IBR was not chosen because of their supposed expertise in municipal affairs. It cannot seriously be suggested that IBR is the only consultancy offering expertise in matters pertaining to local government. This is clear from the appellant's testimony that SALGA had given him the names of a few individuals who could assist the Municipality. Yet it is also clear from the appellant's evidence that he did not approach or even consider anyone other than IBR for the appointment. The reason for this is obvious: IBR, who had already been advising the political officer-bearers (and was therefore privy- and presumably sympathetic - to the agenda of the political office-bearers), had been introduced to the appellant by the speaker and the mayor at a briefing held to discuss municipal issues, including the problems surrounding the Barnard report and Giliomee investigation. IBR was hand-picked by the appellant because the political office- bearers wanted IBR and had instructed him to appoint it. In truth, it was the political office-bearers who chose IBR.

50. As to the alleged urgency of the matter, in the first instance it seems that the appellant was exaggerating when he testified that it would have taken 4 to 5 months to procure the services of a consultant according to the usual procurement process. Regulation 22 requires that advertisements for competitive bidding be advertised for at least 14 days before closing date, however the accounting officer is permitted to stipulate a shorter closing date if the shorter period can be justified on the basis of urgency or emergency or any exceptional circumstances where it is impractical or impossible to follow the official procurement process. There is no reason why the appellant could not have proceeded by way of an expedited tender.

51. Even if one gives the appellant the benefit of the doubt and accepts that the speaker's brief dated 25 August 2010 to investigate reported breaches of the Code of Conduct for Councillors and report within 10 days, was too urgent to be put out to tender, that does not explain why the appellant did not make any effort to call for urgent tenders with an expedited closing date in respect of all the other services which IBR was required to perform over a 10 month period at a cost of over R 2 million. The inescapable conclusion is that no tenders were called for because IBR had been specifically chosen by the political- officer bearers and they did not want anyone else. This conclusion is fortified by the fact that the appellant backdated the commencement date of the SLA to 13 August 2010, at which time IBR was already working for the political office bearers "*on risk*" long before the deviation was approved and at a stage when IBR had not even been registered on the Municipality's database of approved service providers.

52. Secondly as regards the alleged urgency of the services and the time frame within which they were required to be rendered, it is clear that the reason for the urgent time frame was that the political office-bearers and the appellant wanted the tasks completed before the next election. As the appellant testified, the idea was to *get the Municipality right*" before the next election 8 months away, and to avoid the Municipality being placed under administration. However self-imposed urgency based on political expedience does not amount to the sort of urgency or exceptional case contemplated in Regulation 36 which justifies bypassing procurement requirements. Regulation 36 contemplates real emergencies and exceptional

situations where it is genuinely impractical or impossible to follow official procurement processes.

53. The deviation was a stratagem contrived to justify the appointment of IBR, the politically pre-selected consultant, for an open-ended range of purposes over an extended period without a competitive tender process. It did not meet the requirements of Regulation 36 and was therefore invalid. As a result, all the expenditure incurred on IBR was incurred in contravention of the SCM Policy. That had the consequence that the payments to IBR constituted irregular expenditure as defined in the MFMA, since all expenditure incurred in contravention of a municipality's SCM policy, and which has not been condoned in terms of such policy, amounts to irregular expenditure. The SCM Policy unsurprisingly does not contain a provision for condoning irregular expenditure, and there is no suggestion that there was any attempt to condone the irregular expenditure: the appellant's stance is that there was no irregular expenditure since the deviation was valid. Condonation in any event could not lawfully arise for consideration by the municipal council if the appellant's conduct had been deliberate or grossly negligent.

54. Having concluded that the deviation was invalid and that the appointment of IBR contravened the requirements of the SCM Policy, the question which remains is whether the appellant acted deliberately or in a grossly negligent way, as contemplated in 173(1)(a)(i) of the MFMA.

55. It was clear from the appellant's testimony that he was aware that even although the political office-bearers had instructed him to appoint IBR, *he* bore the responsibility for the appointment and was required to act in accordance with the law in that regard. Yet he bowed to pressure from the political office-bearers. He made no attempt to promote competition and cost-effectiveness in procuring the consulting services which IBR was hired to render. He did not call for quotations from other suitably qualified service providers. He did not put out an expedited tender. The SLA was designedly opaque regarding IBR's mandate, giving the appellant *carte blanche* to assign any task to IBR.

56. The circumstances surrounding the appointment of IBR, the manner in which

IBR was appointed and the contents of the SLA represent such a marked departure from the requirements of the SCM Policy, and the purported justification for the deviation is so patently spurious, that the inference is irresistible that the deviation memorandum was mere "window dressing" designed to conceal the irregular appointment of IBR. No experienced municipal manager, as the appellant claims to have been, could have honestly believed that the deviation was a valid and lawful exercise of the power under Regulation 36. The appellant could not seriously have thought that it was correct and proper to conclude the SLA for open-ended, undefined services over a period in excess of 10 months on the strength of a single deviation which was originally motivated by the speaker's request to conduct an urgent investigation and report within 10 days. In all the circumstances the conclusion is inescapable that the appellant acted in the knowledge that the deviation was unlawful, and therefore deliberately contravened the requirements of the SCM Policy.

Unauthorised expenditure

57. The appellant was charged under the second and fifth counts, *inter alia*, with a failure to prevent irregular, unauthorised and fruitless and wasteful expenditure. The MFMA separately defines "irregular expenditure", "unauthorised expenditure"¹ and "fruitless and wasteful expenditure". Irregular expenditure may conceivably also amount to unauthorised and/or fruitless and wasteful expenditure. They are different concepts which give rise to discrete offences. They should therefore have formed the subject of separate counts instead of being lumped together under the second and fifth counts in the charge sheet.

58. As mentioned the fact that the deviation was invalid means that all monies paid to IBR amounted to irregular expenditure. It is necessary to consider whether the amounts paid to IBR also amounted to unauthorised and/or fruitless and wasteful expenditure, because discrete offences are involved - notwithstanding the fact that they did not form the subject of separate charges.

59. It must be stated, for the sake of clarity, that even if the expenditure on IBR was authorised, that would not alter its character as irregular expenditure. The

difference between irregular and unauthorised expenditure, simply put, is that irregular expenditure is unlawful, whereas unauthorised expenditure is expenditure which has not been budgeted for. The fact that irregular expenditure has been authorised in a budget does not "cure" its irregularity; it has to be condoned as provided for in the MFMA.

60. In terms of the MFMA any expenditure incurred otherwise than in terms of an approved budget and within the limits of the amounts appropriated for the different votes in an approved budget amounts to unauthorised expenditure, subject to specific exceptions set out in sections 11(1)(b) to 0) of the MFMA.¹⁹

61. Section 11(1)(c) permits a municipal manager to defray unforeseeable and unavoidable expenditure authorised in terms of s 29(1) of the MFMA. Section 29(1) of the MFMA provides that the mayor may in emergency or other exceptional circumstances authorise unforeseeable and unavoidable expenditure for which no provision was made in an approved budget. Any such expenditure must, *inter alia*, be reported by the mayor to the municipal council at its next meeting and be appropriated in terms of an adjustment budget passed within 60 days after the expenditure was incurred, failing which the expenditure is unauthorised.²⁰

62. The definition of unauthorised expenditure includes overspending of the total amount appropriated in the municipality's approved budget and overspending of the total amount appropriated for a vote in the approved budget. In terms of section 28(1) of the MFMA, a municipality may revise an approved budget through an adjustment budget. Section 28(2)(c) permits an adjustment budget, within a prescribed framework, to authorise unforeseeable and unavoidable expenditure recommended by the mayor, while s 28(2)(d) permits an adjustment budget to authorise the utilisation of projected savings in one vote towards spending under another vote.

63. Mostert testified that 15 IBR invoices received after 21 November 2010

¹⁹ See s 15 of the MFMA read with the definition of unauthorised expenditure and s 11(3) of the MFMA.

²⁰ See s 29 of the MFMA.

totalling some R 1.4 million were paid out of an overspent vote, which meant that the payments to IBR amounted to unauthorised expenditure. He stated that he could find no evidence of what he referred to as *"council condonation of the overspend or rectification of the votes in terms of the MFMA"*. Mostert was presumably referring in this regard to an adjustment budget. He did not say whether steps were taken to ascertain whether or not the payments made to IBR had been rectified in terms of an adjustment budget, and if so, what those steps were.

64. It was put to Mostert in cross-examination that the adjustment of expenditure was dealt with at a council meeting during January or February 2011. Mostert was not in a position to dispute this. The high watermark of his evidence was that, during his investigation, he had not received any documents dealing with an adjustment budget and had not been informed that there was one. He admitted that he had not consulted with and put the question to any of the political office-bearers or council members prior to compiling his report. The evidence indicates that Mostert worked solely off documents provided to him. No evidence was led as to exactly what documents were removed by the SIU from the Municipality and were made available to Mostert. One therefore cannot infer that there was no adjustment budget merely because Mostert did not get to see it.

65. The appellant was emphatic that an adjustment budget was passed in January or February 2011. He testified that the overspending of the vote in relation to expenditure on IBR was dealt with by agreement between himself and the mayor in terms of ss 28 and 29 of the MFMA and rectified in the adjustment budget. During cross-examination he testified that he discussed the funding of IBR with the political office-bearers and that it was agreed that:

"...we need to fund the services of IBR out of the professional services fund. And if there is a shortfall the mayor agreed that in terms of his powers in terms of section 29 of the MFMA he will then go to council in the next year to fill up their budget."

66. He further stated that:

"There was also an agreement between managers, because it is also directors and myself that can do virements in terms of the virements policy"

that we will then, if there is a shortfall we will then fill up the budgets from there and make proper, proper budget provision in the adjustment. And if there is any problem towards year end, June the virement system will be activated again so that we can then close off the books so that there is no deficit."

67 The appellant's testimony that an adjustment budget was passed in January or February 2011 was corroborated by Ladouce, who confirmed that an adjustment budget was passed, and was consistent with the evidence of May Du Plessis, senior accountant for creditors and salaries ("Du Plessis"), who testified that an adjustment budget is usually tabled before February each year and that approval thereof by council is a mere formality.

68. The State, which bore the onus of proving the appellant's guilt in relation to unauthorised expenditure, failed to adduce evidence which served to prove beyond doubt that the payments made to IBR from vote number 100103402186 between 13 January 2011 and 28 July 2011 had not in fact been provided for in an adjustment budget. To succeed on this score the State would have had to lead the evidence of a municipal official employed in the budget department who had first-hand knowledge of whether or not an adjustment budget was passed in February 2011 and whether it dealt with the monies paid to IBR. It failed to do so.

69. There is therefore no evidence to gainsay the appellant's version that an adjustment budget was passed in early 2011 which made provision for and rectified what would otherwise have amounted to unauthorised expenditure on the IBR invoices. His evidence on this point is not improbable, and must be accepted.

70. In the circumstances the State's claim that R 1.4 million of the payments made to IBR amounted to unauthorised expenditure is unsubstantiated by the evidence, and those parts of the second and fifth count which are based on unauthorised expenditure cannot be sustained. Indeed it is mystifying that the State persisted with its contentions regarding unauthorised expenditure, given the fact that the charge sheet itself makes reference to the rectification of overspending through

adjustment budgets.²¹

Fruitless and wasteful expenditure

71. Fruitless and wasteful expenditure is defined in the MFMA as expenditure that was made in vain, and would have been avoided had reasonable care been exercised.

72. Mostert gave evidence regarding a number of the IBR invoices with a view to establishing that the payments made to IBR amounted to fruitless and wasteful expenditure.

73. He testified that the travel cost charged on invoice number 10/2010/0122 dated 29 October 2010 (at p 587 of the record) was R 13 500.00 for 1 800 km, whereas correct amount in terms of IBR's quote of R 2.50 per kilometre was R 4 500.00. The error was not corrected and IBR was overpaid by R 9 000.00, which amounted to fruitless and wasteful expenditure, payment of which was authorised by the appellant.

74. He further testified that the correct total of the three amounts charged for professional fees, travel cost and accommodation on invoice 05/2011/0194 dated 30 May 2011 (at p 644 of the record) was R 67 350.00 and not R 75 000.00 as charged on the invoice in question. According to Mostert this meant that IBR was overpaid in an amount of R 7 650.00. However, if one examines the travel cost on this particular invoice, one sees that the travel of 5 400 km at R 2.50 per kilometre was in fact undercharged. The figure stipulated on the invoice for travel cost was R 5 850.00, whereas it should have been R 13 500.00. The sum total of the three figures was correctly calculated as R 75 000.00, based on the correct figure for travel charges, and R 75 000.00 was the amount paid to IBR. There was therefore no overpayment in respect of that particular invoice.

75. Mostert also testified regarding what he described as a "*reasonability*

²¹ Paragraphs 73 to 75 of the indictment.

calculation" which he performed on certain of the travelling costs charged by IBR. He pointed out that the travelling costs claimed on invoice number 11/2010/0153 dated 30 November 2010 (at p 594 of the record) amounted to R 18 000 for 7200 km at R 2.50 per km, plus accommodation costs of R 6 500.00. On 21 November 2010 travel costs of R 6 750.00 for 2700 km had been charged on invoice number 11/201/00149. According to Mostert the charge for 7 200 km a mere seven work days after the previous invoice was excessive because it amounted to 9 round trips in 7 days back and forth from Brackenfell, where IBR is based.

76. He testified in a similar vein in regard to invoice number 04/2011/0171 dated 30 April 2011 (at p 638 of the record) where R 20 250 was charged for 8 100 km, which he said amounted to 10 round trips from Brackenfell to Oudtshoorn in a month and indicated that a vehicle drove to Oudtshoorn and back every second day, whereas accommodation costs of R 10 400.00 were charged for in addition. The intimation was that the travel costs were inflated.

77 The difficulty with Mostert's evidence in this regard is that he is not in a position to say how many of IBR's staff or team were working at the Municipality from time to time, and he fails to take into the possibility that the travel costs were not only for one, but for several people. Indeed the invoice dated 30 April 2011 states in terms that the charge for 8 100 km was for various consultants.

78. It is common cause that it was not only Kenned who attended at the Municipality on behalf of IBR, but that there were other persons as well. The IBR invoices do not provide a breakdown of the travel costs. Without evidence from the State as to how many people travelled to Oudtshoorn, their dates of travel and the duration of their stay in Oudtshoorn, it is not possible to determine whether the travel costs were fair and reasonable or excessive and wasteful, perhaps even fraudulent.

79. The State contended in the Court a *quo*, and the magistrate accepted, that the reports of Barnard and Giliomee were regarded as unacceptable because of the outcomes and not because of any problem with their work, and that the motivation for having the work redone by IBR was political and not performance-related.

80. On this basis the magistrate concluded that the cost involved was "a *potential loss or waste of tax payers' money*". This was a misdirection. In the first instance, IBR was tasked with reviewing the Barnard and Giliomee reports and providing alternative recommendations as to how to deal with delinquent councillors and municipal officials. Given that there was a perception of political bias in relation to the work done by Barnard and Giliomee, it was not unreasonable to appoint someone else to review their work and provide a second opinion which would carry greater weight and legitimacy in the council. In the second instance, the review of the Barnard and Giliomee reports was only one of many tasks performed by IBR. No evidence was led by the State to show that the services rendered by IBR were unnecessary and/or that value was not received by the Municipality. Indeed Jordaan conceded that he could not say that the work done by IBR was unnecessary and that his issue was with the irregular manner in which IBR had been appointed, not the services they provided.

81. The high watermark of the State's case in regard to fruitless and wasteful expenditure is the evidence that there was an overpayment of R 9 000.00 in regard to IBR's invoice number 10/2010/0122 dated 29 October 2010. It is clear that the calculation error on the invoice, and hence the overpayment could and would have been avoided if the invoice had been checked properly and reasonable care exercised. The overpayment of R 9 000.00 to IBR therefore constitutes fruitless and wasteful expenditure as defined in the MFMA.

The first count

82. The State alleged that the appellant used his position as accounting officer for personal gain or to improperly benefit Kenned or IBR, in contravention of s 61(2)(b) as read with s 173 (1)(a)(i) of the MFMA. However no evidence whatsoever was adduced to show that the appellant received a backhand payment from IBR, or that he profited personally in any way from the appointment of IBR.

83. The evidence of the appellant was clear, and must be accepted in the absence of any contrary evidence on the point, that he derived no gain from the appointment of IBR, that he had no personal interest in appointing Kenned. Indeed

he did not even know Kenned before he was introduced to him by the mayor and the speaker a few days after his return to work.

84. The magistrate found that the appellant permitted Kenned and/or IBR to benefit improperly because IBR subcontracted work to a chartered accountant, Ms Althea Lapoorta ("Lapoorta"), in connection with an investigation into the control environment regarding the daily cash collection process at the Municipality. Lapoorta charged IBR R 35 000.00 for 35 hours at R 1 000.00 per hour, whereas IBR charged the Municipality R 95 000.00 for the task. The magistrate accepted that this meant that IBR had profited improperly to the tune of R 60 000.00. This was a misdirection. If one has regard to Lapoorta's affidavit, in which she states that Kenned attended five out of seven of the interviews conducted by her, and if one compares Lapoorta's draft reports with the final report submitted by IBR to the Municipality,²² it is clear that Kenned and Lapoorta worked on the assignment together. One cannot infer that Lapoorta did all the work on her own and that Kenned did nothing and merely added a surcharge on top of her bill.

85. In the absence of any evidence regarding exactly what was done by Lapoorta and Kenned respectively, the time spent by each, what would have been a reasonable number of hours to complete the task and the average market rate per hour for similar work, the inference that the amount of R 95 000.00 charged by IBR was excessive and that IBR profited improperly cannot be sustained. But even if the charge was excessive and IBR's profit improper, there was nothing in the evidence to prove that that this had been due to the use by the appellant of his position to achieve the improper enrichment of IBR.

86. In the circumstances there is no evidence to substantiate the charge of contravening s 61(2)(b) and the appellant should not have been convicted on the first count.

The second count

²² At pp 749 to 797 of the record.

87. The second count is based on an alleged deliberate or grossly negligent breach of the requirements of s 62(1) of the MFMA. Section 62(1)(a) to (f) sets out a number of goals and measures which a municipal manager must take reasonable steps to implement in managing the financial administration of a municipality. A municipal manager must take all reasonable steps to ensure, *inter alia*, that the resources of the municipality are used effectively, that proper financial records are kept, that the municipality maintains systems of financial risk management and control, that unauthorised, irregular and fruitless and wasteful expenditure is prevented, and that the municipality has and implements a proper supply chain management policy. The general import of s 62(1) is that a municipal manager must take all reasonable steps to put in place and implement systems and policies to ensure the proper financial administration of a municipality.

88. It is convenient to commence with sections 62(1)(b) and (c) which deal with the keeping of financial records and the maintenance of systems of financial risk management, control and internal audit *"in accordance with prescribed norms and standards"*. The State failed to adduce any evidence regarding the prescribed norms and standards and the manner in which the Municipality's records and systems allegedly fell short. It follows that the State failed to make out a case against the appellant in respect of a contravention of sections 62(1)(b) and (c) of the MFMA.

89. Section 62(1)(a) requires a municipal manager to take all reasonable steps to ensure that the resources of the municipality are used effectively, efficiently and economically. The word "a/" is significant as it extends the ambit of the obligation and means that the section is wide enough to cover single defaults as well as systemic failures. Section 62(1)(a) is closely related to s 62(1)(d) which requires that all reasonable steps be taken to ensure that unauthorised, irregular or fruitless and wasteful expenditure and other losses be prevented. Circumstances amounting to a contravention of s 62(1)(d) with reference to fruitless and wasteful expenditure or losses will usually also amount to a contravention of s 62(1)(a) as they involve the inefficient use of resources. Both of these subsections overlap with s 173 (1)(iii) on which count 5 is based, which provides that an accounting officer is guilty of an offence if he deliberately or grossly negligently fails to take all reasonable steps to prevent unauthorised, irregular or fruitless and wasteful expenditure.

90. Section 62(1)(f)(iv) requires that an accounting officer take all reasonable steps to ensure that a municipality has and implements, i.e. carries out or executes, a supply chain management policy in accordance with chapter 11 of the MFMA.

91. The conclusion that the appellant deliberately violated the SCP Policy with regard to the deviation and the SLA has the automatic consequence that the amounts paid to IBR in terms thereof amount to irregular expenditure.

92. The fact that the appellant knowingly relied on an artificial and invalid deviation to appoint IBR in all the circumstances referred to above necessarily means that he failed to take all reasonable steps to ensure that the Municipality implemented the SCM Policy, as required in s 62(1)(f). The SCM Policy was not implemented: it was deliberately bypassed with knowledge of unlawfulness. For this reason alone the appellant is guilty and was correctly convicted on the second count.

93. Then there is the overpayment of R 9 000.00 to IBR referred to above, which amounts to fruitless and wasteful expenditure in terms of the MFMA. The question is whether the appellant acted deliberately or with gross negligence by failing to take all reasonable steps to ensure that this fruitless and wasteful expenditure was prevented, as required by s 173(1)(a)(i) as read with s 62(1)(d) of the MFMA.

94. In *Transnet Ltd t/a Portnet v MV 'Stella Tingas' and Another*²³ Scott JA described gross negligence in the following terms:

"[T]o qualify as gross negligence the conduct in question, although falling short of dolus eventualis, must involve a departure from the standard of the reasonable person to such an extent that it may properly be characterized as extreme; it must demonstrate, where there is found to be conscious risk-taking, a complete obtuseness of mind, or where there is no conscious risk-taking, a total failure to take care. If something less were required, the distinction between ordinary and gross negligence would lose its vitality."

²³ 2003 (2) SA 473 at 480 o 481.

95. It is common cause that the appellant approved the various payments to IBR, including payment of the invoice containing the overcharge of R 9 000.00, by signing the payment requisition form and writing "approved" and signing his name on the invoices. The invoices do not provide a breakdown of the travel and accommodation costs and very little, if any, detail of the work done.

96. According to the appellant the IBR invoices were accompanied by fee notes which detailed the work done by IBR and the travel and accommodation costs. If there were in fact no detailed fee notes substantiating the charges it would undoubtedly have amounted to gross negligence, if not *dolus eventualis*, to approve payment of the invoices without insisting that IBR provide a detailed breakdown of the services rendered, the hours spent on the various tasks, the number of trips and dates of travel, and particulars of the accommodation expenses. Without these details, no one could properly be satisfied that the charges in the invoices were genuine, fair, reasonable and in accordance with the SLA.

97 The appellant testified in chief that all IBR invoices and fee notes were first checked by the head of the department which was the end user or beneficiary of the particular service rendered by IBR, who signed off on the fee notes if he or she was happy that the services had been rendered and the charges were correct. The appellant would discuss the invoice with the head of department, and if the head of department was happy with it and had signed off on the fee notes, he would approve the invoice for payment by signing on the invoice and signing the payment requisition form. He repeated his version during cross-examination when he stated that:

"I confirm that each department received a report on whatever matter was dealt with by IBR in their office. With that report they received a fee note. My instruction to everybody, including the consultant, was I will only sign off on the requisition and the approval of the invoice once the fee notes are signed off which explains what was done, which explains the hours' work, the tariffs charged, the accommodation charged and signed off by that specific end user. For my office I did the same. I signed off on those issues [sic - fee notes], and it should have been in my office even when I left or taken away by the SIU."

98. The fee notes to which the appellant referred were not produced by the State at the trial and they were not given to Mostert together with the IBR invoices. However one cannot safely draw the inference beyond a reasonable doubt that the fee notes did not exist. That is so, firstly, because Mostert himself did not work through all the documents in the SIU's possession and merely analysed those documents presented to him by the SIU investigators, and secondly, because the State witness Warren Muller C'Muller'), the official from the Municipality who was subpoenaed to hand over all documentation pertaining to IBR to the SIU investigation, confirmed that fee notes existed and were present in the six lever arch files of documents which he handed over to SIU on 20 May 2011. He corroborated the appellant's evidence regarding the existence of fee notes when he confirmed under cross-examination that:

"In die leer sou daar 'n fooi lys gewees het wat die end user afgeteken het dat die werk gedoen was soos die persoon se brief op daardie stadium."

99. One must therefore accept that there were in fact such fee notes and that the appellant did not render himself guilty of gross negligence by approving payment without a proper breakdown of the work done and travel expenses charged.

100. The fact that the fee notes existed, however, is not the end of the matter. There is still the question of whether the appellant was grossly negligent in relation to the overpayment of R 9 000.00. The gist of the appellant's defence in regard to this overpayment was that it was the task of the head of department of the end-user to check the invoice and ensure that it was in order, and that his task, as Municipal Manager, was merely to ensure that the head of department had verified that the work had been done and that it was in order to pay the invoice.

101. It was clear from the appellant's evidence that he did not personally scrutinise the charges or check the figures on the IBR invoices. On his own version he left this to the relevant head of department. The question, then, is whether the fact that the appellant did not personally check the figures on the IBR Invoices amounts to a deliberate or grossly negligent failure to take all reasonable steps to ensure that fruitless and wasteful expenditure such as the R 9 000.00 overpayment, was prevented, as contemplated in s 173(1)(a) read with s 62(1)(d) of the MFMA.

102. The evidence on this count does not support a charge of deliberate conduct on the part of the appellant. Nor, to my mind, does it show that he was grossly negligent. In the absence of conscious risk-taking, conduct must evince a total lack of care to qualify as gross negligence. It cannot be said that the appellant showed a total lack of care in regard to the IBR invoices. He put in place a system or practice where the head of the department in which the work was done had to verify that the work had been properly done and that the charges were in accordance with what had been agreed. It was not unreasonable for the appellant to delegate this task to the heads of department and rely on their work when approving payment.

103. Furthermore, there was only one overpayment of R 9 000.00 to IBR out of some twenty three payments totalling in excess of R 2 million over a ten month period. This does not show that the payment approval process place by the appellant was hopelessly inefficient and therefore unreasonable; on the contrary, it tends to indicate that the process was reasonably efficient. Human error is unavoidable: it is only when it occurs wholesale that it can perhaps be indicative of systemic failure which may, in turn, point to gross negligence on the part of those charged with putting in place reasonable measures to guard against human error.

104. The appellant is accordingly not guilty of a deliberate or grossly negligently failure to take all reasonable steps to prevent the overpayment of R 9 000.00 to IBR, and he should not have been convicted on this particular ground. As indicated, however, he was nevertheless correctly convicted on the second count in relation to his deliberate failure to take reasonable steps to prevent the irregular expenditure arising from the irregular appointment of IBR.

The third count

105. In terms of s 65(2){a) of the MFMA the accounting officer of a municipality must, for purposes of managing the expenditure of a municipality, take all reasonable steps to ensure that *"the municipality has and maintains an effective system of expenditure control, including procedures for the approval, authorisation, withdrawal and payment of funds"*.

106. It is clear from the testimony of the State witnesses Du Plessis, Lekay and Muller²⁴ that the Municipality did have procedures for the approval, authorisation, withdrawal and payment of funds. No evidence was lead by the State to show that these procedures were generally ineffective.

107. The only evidence which casts doubt on the efficacy of the Municipality's expenditure control was that there was an overpayment of R 9 000.00 on one of IBR's invoices where an inflated travel claim was not detected.

108. The evidence shows that the IBR invoices were treated differently and did not follow the usual payment process described by Muller because of the fact that the appellant was the nominal end user while the services were rendered to different departments. The IBR invoices lacked the customary stamps placed on invoices by the finance department with a place for the signature of the head of the user department and of the municipal manager. This suggests that the IBR invoices did not go through the finance department. Instead the IBR invoices were signed only by the appellant, while the relevant head of department, and the speaker in the case of services rendered to the office of the speaker, signed only on fee notes which accompanied the invoices and were evidently detached from the invoices.

109. As stated above in regard to the second count, the overpayment of R 9 000.00 on one IBR invoice came about because the appellant neglected to scrutinise the invoice himself and left it to the relevant head of department to check that the charges on the invoice were correct.

110. All the evidence indicates that there was in fact a standard procedure for the approval of payments which was not applied in regard to the IBR invoices, where a different process was followed.

111. There is no evidence that the usual expenditure control system applied by the Municipality was ineffective, or even that the payment approval process followed in

²⁴ Du Plessis was the senior accountant dealing with creditors and salaries, Lekay was a creditors

respect of the IBR invoices was ineffective, save for one overpayment of R 9 000.00.

112. The evidence of a single overpayment in these circumstances, while it does indicate a failure to take reasonable steps to prevent fruitless and wasteful expenditure for purposes of the second count, does not suffice to establish a failure to take steps to ensure that the Municipality had and maintained an effective system of expenditure control for the purposes of the third count. It seems that s 65(2)(a) contemplates systemic failure of expenditure control, which requires proof of more than one erroneous payment in a relatively small amount. It follows that the appellant was wrongly convicted on the third count.

The fourth count

113. In terms of s 65(2)(i) a municipal manager is required to take all reasonable steps to ensure that the municipality's supply chain management policy is implemented in a way that is fair, equitable, transparent, competitive and cost-effective. Section 65(2)(i) must be distinguished from s 62(1)(f), which requires that a municipality has and implements a supply chain management policy. The latter provision deals with the existence and implementation of a supply chain management policy whereas the former deals with the manner in which it is implemented.

114. This is not a case where the supply chain management policy was in fact implemented but in a deficient manner which did not meet the requirements of fairness, transparency, competitiveness etc. The evidence shows that the SCM Policy was not implemented at all because it was deliberately bypassed and ignored. The deviation was a sham contrived to conceal the irregular appointment of IBR.

115. Section 65(2)(i) therefore does not find application on the facts in this case, and the appellant should not have been convicted on the fourth count.

The fifth count

clerk and Muller worked in the legal department.

116. The conclusion that the appellant deliberately breached the SCM Policy in regard to the deviation means that all payments made to IBR amounted to irregular expenditure under the MFMA. Inasmuch as the appellant acted deliberately, it follows that he failed to take all reasonable steps to prevent irregular expenditure since he failed to implement the SCM Policy.

117. In the circumstances he is guilty of contravening s 173(1)(a)(iii) of the MFMA in respect of the irregular payments to IBR, and was correctly convicted on the fifth count.

Sentence

118. Section 174 of the MFMA stipulates that a person found guilty of an offence in terms of s 173 may be sentenced to imprisonment for a period not exceeding five years or to an appropriate fine. As mentioned, the magistrate, having convicted the appellant as charged on all five counts, took all counts together for purposes of sentence and sentenced him to five years' imprisonment.

119. Given that the appeal against conviction has succeeded in respect of the first, third and fourth counts, it is necessary to reconsider the appellant's sentence.

120. The appellant is guilty of a deliberate failure to implement the SCM Policy and to prevent resultant irregular expenditure arising out of the invalid deviation.

121. The second and fifth counts overlap inasmuch as they both relate to irregular expenditure flowing from an unlawful deviation from the SCM Policy. It is therefore appropriate to take the second and fifth counts together for purposes of sentence in order to avoid an improper duplication of punishment.

122. The appellant was born on [...] 1956. He was 54 years old at the time of the commission of the offences and 60 years old when he was sentenced by the court *a quo* on 31 March 2017. He is now 62 years old. He is married to a woman employed as a Detective Commander in the South African Police Service, has two children

who in 2017 were pursuing tertiary education, and resides in Burgersdorp in the Eastern Cape.

123. He has Bachelors and Honours degrees in Theology and a Masters degree in Public Administration. He commenced his municipal career in the Drakensberg municipality in 1996 and was employed by various municipalities between 1996 and 2016 when he was dismissed from the Dr Beyers Naude Municipality in Graaff Reinet as a result of his conviction in this case. He lost his employment which earned him a salary of R 66 000.00 per month, and was reduced to a monthly stipend of R 7 000.00 per month from part-time employment as a minister in the Uniting Reformed Church in Burgersdorp. He has no previous convictions.

124. The State adduced uncontested evidence in aggravation of sentence regarding the widespread problem of procurement irregularities and irregular expenditure in public institutions. Evidence was lead that the extent of irregular expenditure in municipalities is on the increase. In 2010 the Auditor General reported R 4.14 billion of irregular expenditure in municipalities. In 2015 the figure for irregular municipal expenditure had risen to R 14.75 billion.

125. Irregular procurement practises lie at the heart of the epic levels of corruption which is corroding the moral fabric of our society, not to mention the financial health of our public institutions. The importance of procurement in our constitutional democracy is evident from the fact that it is dealt with ins 217 of the Constitution, which requires that organs of state contract for goods and services in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. Strict adherence to procurement laws is vital to ensure proper service delivery and a healthy public purse.

126. The appellant committed a serious offence by deliberately breaching the SCM Policy in order to accommodate the wishes of the political office-bearers who wanted him to appoint IBR to assist them in achieving their objectives for the Municipality. Even more serious is the fact that the appellant is unrepentant about his conduct. He insists that he made the right decision in order to bring about stability and functionality at the Municipality and to take the Municipality forward. He says that he

would do it again if faced with the same choice. This attitude cannot be countenanced. While the appellant's goals might conceivably have been laudable, the end does not justify the means. Officials cannot be permitted to subvert the law in order to achieve personal ambitions or political objectives, however well-intentioned. A strong message needs to be sent that they will be severely punished if they do so. For this reason a custodial sentence must be imposed in this case, and a suspended sentence coupled with a fine, as contended for by appellant's counsel, would be too lenient.

127. On the other hand it is important to take into account the fact that the appellant was not actuated by greed. He derived no financial gain from the appointment of IBR. Had he done so, the maximum sentence of five years' imprisonment laid down by the MFMA would have been fitting. But he seems to have been genuinely motivated to try and improve affairs at the Municipality. To this extent at least his motives were pure.

128. It is also important to take into account that the appellant has already endured significant punishment as a result of his conviction. He lost his job and his salary of R 66 000.00 per month. He will not be able to work as a municipal official for at least ten years. He has had to live with the stress of an uncertain future and an impending prison sentence since he was convicted in 2016.

129. All things considered, and having particular regard to the facts that the appellant did not act out of greed but seemingly out of the moral conviction, albeit misguided, that he was doing the right thing for the good of the Municipality, a sentence of two years imprisonment would be appropriate.

Conclusion

130. In the result the following order is made:

1. The appeal against the conviction on counts 1, 3 and 4 is upheld and the appellant's conviction on those counts is set aside.
2. The appeal against the conviction on counts 2 and 5 is dismissed, and the convictions are confirmed.

3. The sentence of five years' imprisonment imposed on the appellant is set aside and replaced with a sentence of two years' imprisonment in respect of counts 2 and 5 taken together as one for the purpose of sentencing.

D. M. DAVIS
Acting Judge of the High Court

BINNS-WARD J:

I agree.

A.G. BINNS-WARD
Judge of the High Court

For the appellant:

Adv M Orban

Office of the Director of Public Prosecutions

For the respondent:

Adv J Van der Schyff

Instructed by Ezechiel Beddy & Associates, George