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# DISPUTE RESOLUTION ALERT

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### **Criminal offences in the MFMA – not a paper tiger: The imposition of a custodial sentence for failing to prevent irregular expenditure**

A recent judgment handed down by the Western Cape High Court held a former municipal manager criminally liable for offences relating to irregular expenditure. The case raises concerns about the severity of the penalty that municipal managers – acting with good intentions and in what they believe to be the best interests of the municipality – may face for failing to prevent irregular expenditure.

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CLIFFE DEKKER HOFMEYR

## Criminal offences in the MFMA – not a paper tiger: The imposition of a custodial sentence for failing to prevent irregular expenditure

In *Martin Noel Pietersen v the State* [Case Number: A309/2017] – an appeal judgment handed down on 6 February 2019 – the Western Cape Division of the High Court imposed a sentence of two years' imprisonment on a former municipal manager of the Oudtshoorn Municipality.

A recent judgment handed down by the Western Cape High Court held a former municipal manager criminally liable for offences relating to irregular expenditure. The case raises concerns about the severity of the penalty that municipal managers – acting with good intentions and in what they believe to be the best interests of the municipality – may face for failing to prevent irregular expenditure.

In *Martin Noel Pietersen v the State* [Case Number: A309/2017] – an appeal judgment handed down on 6 February 2019 – the Western Cape Division of the High Court imposed a sentence of two years' imprisonment on a former municipal manager of the Oudtshoorn Municipality. The former municipal manager was found to have deliberately failed to implement the Oudtshoorn Municipality's supply chain management (SCM) policy by not taking reasonable steps to prevent irregular expenditure arising from the irregular appointment of a service provider and the authorisation of irregular payments to the same service provider (amounting to R2,082,093).

The facts of the case may be summarised as follows:

- At the time of the offence, several of the Municipality's officials were suspended or facing suspension and several councillors were facing disciplinary proceedings for alleged misconduct uncovered by investigations. In light of the aforesaid circumstances, Mr Pietersen, the Municipality's municipal manager at the time, was instructed by the speaker, the mayor and several senior council members to stop the investigation ongoing at the time and appoint a consultant who could "independently investigate without a political motive".
- Mr Pietersen, acting on the instruction of the speaker and the mayor (the political office-bearers), proceeded to appoint a service provider as the consultant. Mr Pietersen appointed the service provider by way of a deviation in terms of regulation 36 of the Municipal SCM Regulations, 2005 (Regulations) and s36 of the Municipality's SCM policy. The stated reason for the appointment by way of deviation, as opposed to following the prescribed procurement procedure, was that the specialised services of the service provider were urgently required to resolve the dysfunction of council and to bring political and administrative stability to the Municipality before the next election.
- On the strength of the deviation, Mr Pietersen, in his capacity as municipal manager, concluded a service-level agreement with the service provider.

## Criminal offences in the MFMA – not a paper tiger: The imposition of a custodial sentence for failing to prevent irregular expenditure...*continued*

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Mr Pietersen was sentenced to five years' imprisonment, all counts being taken together for purposes of the sentence. Mr Pietersen appealed against his conviction and sentence with the leave of the court *a quo*.

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In the court *a quo*, the Oudtshoorn Regional Court, Mr Pietersen was convicted on five counts of contravening several provisions of the MFMA in respect of actions he carried out during his tenure as the municipal manager and accounting officer of the Oudtshoorn Municipality. Mr Pietersen was sentenced to five years' imprisonment, all counts being taken together for purposes of the sentence. Mr Pietersen appealed against his conviction and sentence with the leave of the court *a quo*.

On appeal, the High Court found that the service provider was not appointed because of its expertise, but rather because the political office-bearers had instructed Mr Pietersen to make the appointment. Further, the appointment lacked urgency as Mr Pietersen could have proceeded with the appointment of the service provider by way of an expedited tender, and, in any event, the reason for the urgency was that the political office-bearers and Mr Pietersen wanted the tasks completed before the next election. The High Court held that a *"self-imposed urgency based on political expedience does not amount to the sort of urgency or exceptional case contemplated in regulation 36"*. As the deviation did not meet the requirements of regulation 36, the deviation was invalid and the expenditure incurred in respect of the service provider was incurred in contravention of the Municipality's SCM policy. The payments made to the service provider were thus held to constitute irregular expenditure for purposes of the MFMA.

The High Court found Mr Pietersen guilty of two of the five counts brought against him. Specifically, Mr Pietersen was found guilty of deliberately breaching the requirements of s62(1)(f), read with s173(1)(a)(i), of the MFMA, which inter alia require a Municipality to implement a SCM policy, and of deliberately failing to take all reasonable steps to prevent irregular expenditure, in terms of s173(1)(a)(iii) of the MFMA. The High Court explained that Mr Pietersen committed a serious offence by deliberately breaching the SCM policy and the MFMA, and thereby failed to take reasonable steps to prevent irregular expenditure, in order to accommodate the political office-bearers who wanted him to appoint the service provider to assist them in achieving their political objectives for the Oudtshoorn Municipality. In this regard, the High Court noted Mr Pietersen's assertion that he appointed the service provider under instructions from the speaker and the mayor, however, the High Court held that Mr Pietersen was aware that even though political office-bearers had instructed him to appoint the service provider, Mr Pietersen bore the responsibility for the appointment and was therefore required, at all times, to act in accordance with the law.

Furthermore, the High Court noted Mr Pietersen's assertion that he acted in order to bring about stability and functionality at the Municipality. Accordingly, the Court acknowledged that Mr Pietersen's actions were not actuated by greed; he derived no financial gain from appointing and paying the service provider; and he was genuinely trying to

## Criminal offences in the MFMA – not a paper tiger: The imposition of a custodial sentence for failing to prevent irregular expenditure...continued

*Pietersen* thus forcibly highlights the fact that the MFMA is no paper tiger – municipal officials not only face potential civil liability for incurring irregular expenditure, but also criminal liability for deliberately, or even grossly negligently failing to take reasonable steps to prevent irregular expenditure.

improve the operation of the Oudtshoorn Municipality. However, the High Court reasoned that, despite Mr Pietersen's goals being conceivably laudable, the end did not justify the means. The High Court held in this regard that:

*"[o]fficials 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".*

Despite acknowledging Mr Pietersen's good intentions, and only finding him guilty on two of the five charges brought against him, the Court found that a suspended sentence, coupled with a fine, would be too lenient and, pursuant thereto, held that the imposition of a custodial sentence of two-years imprisonment would be appropriate.

*Pietersen* thus forcibly highlights the fact that the MFMA is no paper tiger – municipal officials not only face potential civil liability for incurring irregular expenditure, but also criminal liability for deliberately, or even grossly negligently failing to take reasonable steps to prevent irregular expenditure. The consequences of this judgment will no doubt have a chilling effect on municipal officials due to the severity of the penalty imposed. Nevertheless, the judgment sets precedent and municipal officials, in particular municipal managers and chief financial officers, should be mindful of the possibility of being held criminally liable and facing imprisonment for offences under the MFMA, irrespective of whether an official contravened the SCM process in good faith and in the best interests of the Municipality, to ensure service delivery or by acting on the instructions of political office-bearers.

*Lionel Egypt, Sabrina de Freitas, Keanan Wheeler and Joshua Reuter*

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