

ISS Conference - Corruption in service delivery: policy priorities for South Africa – 2009 and beyond.’

**26 November 2008 at 14:00 - Panel discussion: Are the national and local government anti-corruption strategies adequate in preventing and detecting corruption?**

Moderator: Andile Sokomani – Researcher, ISS Corruption and Governance Programme

**What can civil society do to monitor the implementation of anti-corruption strategies?**

Paper prepared and delivered by: Jay Kruuse  
Head: Monitoring & Research Programme  
Public Service Accountability Monitor (PSAM)  
Centre for Social Accountability  
Rhodes University

Draft version – not for distribution or citation

Thank you to the Institute for Security Studies for the invitation to present a brief paper at this conference. Fellow panellists and invited guests, I have been asked to consider and suggest what civil society can do to monitor the implementation of anti-corruption strategies?

We live an era where we appear readily able to identify blockages, failings, and areas of underperformance within the following selected areas:

- anti-corruption strategies;
- the crime-fighting sector;
- the public service;

We remain however stunted and disjointed in our ability to implement lasting corrective action which will bring about improved performance and stem the tide of corrupt practices. With the political landscape of South Africa under transition in the lead-up to next years elections there have been increased calls made on politicians to act in the interests of good governance and to look beyond personal or party political interests and expediency.

As commentators have observed, the political climate in our country is at a crossroads, either we mature as a democracy or we deteriorate and erode the successes achieved in the last 14 years. Ill conceived and unbridled attacks upon the judiciary by those who seek political solutions to matters requiring judicial consideration represent but one manifestation of actions which endanger the health of our democracy.

These challenges remain, despite the lucid provisions of our Constitution and other supporting legislation.

Why is this case and where can civil society intervene in order to address systemic failings within anti-corruption strategies, the crime-fighting sector and most importantly, the public service?

Given time constraints and our research focus at the PSAM, I have chosen to focus primarily on the public service and wish to illustrate by way of an example, where civil society could focus attention in order to enhance the impact of current anti-corruption strategies targeted specifically at this sector.

#### Example

A forensic investigation undertaken by the Auditor-General (AG) establishes that public officials within a provincial Housing Department have received housing subsidy grants despite not qualifying for such grants due to them being salaried employees of the state who receive an income above the qualifying threshold for such grants.

The AG recommends to the accounting officer of the Housing Department that he investigate the matter and commence with disciplinary action where required alongside the institution of criminal charges in accordance with the Prevention and Combating of Corrupt Activities Act.

The accounting officer fails to act on the AG's recommendations, opting merely to cancel the grants being received by the public officials and requests that they be re-paid by the

implicated officials. No disciplinary action is instituted and the cases are not forwarded to the law enforcement authorities for criminal prosecution.

What should happen in such a case if the legislative framework were to be applied? Let us apply the provisions of the Public Finance Management Act (PFMA) and applicable Treasury Regulations.

Section 38(1)(h) of the PFMA directs that an accounting officer must take effective and appropriate disciplinary steps against any official who:

- (i) contravenes or fails to comply with a provision of this Act;
- (ii) commits an act which undermines the financial management and internal control system of the department, trading entity or constitutional institution; or
- (iii) makes or permits an unauthorised expenditure, irregular expenditure or fruitless and wasteful expenditure;

In our example the public officials who received housing subsidy grants breached the section above, and the accounting officer also failed to act in accordance with the terms of the section.

The PFMA (at section 81) determines that an accounting officer commits an act of financial misconduct if he/she wilfully or negligently fails to comply with a requirement of section 38. For present purposes, I have assumed that the accounting officer's failure in this regard was wilful. What is then required, with due regard for the legislative framework?

The Treasury Regulations (promulgated to give effect to the PFMA provisions) direct as follows:

If an accounting officer is alleged to have committed financial misconduct, the relevant treasury, as soon as it becomes aware of the alleged misconduct, must ensure that the relevant executive authority initiates an investigation into the matter and if the allegations are confirmed, holds a disciplinary hearing in accordance with the prescripts applicable and agreements applicable in the public service.<sup>1</sup>

The PFMA definition of an 'executive authority' includes a Cabinet Member of a national department and a MEC of a provincial department, that is to say the political head of such departments.<sup>2</sup>

To recap, we have an accounting officer who has wilfully chosen not to take disciplinary and criminal action against implicated officials within his department. We have seen that the Treasury Regulations now place an onus on the political head to commence with disciplinary action against the accounting officer.

What if the MEC fails to take action as required by the legislation? Does the PFMA, as it did with the accounting officer, regard the MEC's failure to take disciplinary action as an act of financial misconduct? The answer is of course, no. The Legislature deemed it

---

<sup>1</sup> Treasury Regulation 4.1.3.

<sup>2</sup> Definition of an 'executive authority' as contained in section 1 of the PFMA.

unnecessary to bring political heads within the remit of the sections in question.

What other laws then regulates the procedure should such an unacceptable state of affairs unfold?

Sections 127 to 136 of the Constitution describe the powers and functions of Premiers and MECs including the requirement that they swear or affirm an oath of faithfulness to the Republic and obedience to the Constitution. Sections 83 to 96 contain similar provisions regulating the appointment, powers, and functions of the President, Cabinet Members and Deputy Ministers.

The Executive Members Ethics Act 82 of 1998 (the Ethics Act) and the complimentary Executive Ethics Code (the Code) introduced in 2000 place an onus on the MEC in our example above, to take the required action in that the Code requires the following:

- 2.1 Members of the Executive must, to the satisfaction of the President or the Premier, as the case may be -
  - (a) perform their duties and exercise their powers diligently and honestly,
  - (b) fulfil all the obligations imposed upon them by the Constitution and law; and
  - (c) act in good faith and in the best interest of good governance; and
  - (d) act in all respects in a manner that is consistent with the integrity of their office or the government.
- 2.2 In deciding whether members of the Executive complied with the provisions of clause 2.1, the President or Premier, as the case may be, must take into account the promotion of an open, democratic and accountable government.
- 2.3 Members of the Executive may not-
  - (a) wilfully mislead the legislature to which they are accountable;
  - (b) wilfully mislead the President or Premier, as the case may be;
  - (c) act in a way that is inconsistent with their position;
  - (d) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person;
  - (e) use information received in confidence in the course of their duties otherwise than in connection with the discharge of their duties;
  - (f) expose themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests;
  - (g) receive remuneration for any work or service other than for the performance of their functions as members of the Executive; or

- (h) make improper use of any allowance or payment properly made to them, or disregard the administrative rules which apply to such allowances or payments.

These provisions of the Code beg the inevitable question: What consequences follow should a MEC or Cabinet Member's action or inaction breach the Code?

The Ethics Act contains a complaints procedure whereby any alleged breaches of the Code are investigated by the Public Protector's office which is required to report on the outcome of its investigation to the President (if the complaint is against a Cabinet member, Premier or Deputy Minister) or the Premier (if the complaint is against a MEC).<sup>3</sup>

The Ethics Act further requires the President to submit a copy of the report on a Cabinet member or Deputy prepared by the Public Protector, and any comments thereon, together with a report on any action taken or to be taken in regard thereto, to the National Assembly within 14 days of receiving such report from the Public Protector.

The President must within 14 days after receiving a report on a Premier from the Public Protector, submit a copy of the report and any comments thereon to the National Council of Provinces.

A Premier must within 14 days after receiving a report on an MEC from the Public Protector, submit a copy of the report and any comments thereon, together with a report on any action taken or to be taken in regard thereto, to the provincial legislature.

Applied to the facts of our example above, it would be necessary for the Premier or a member of the provincial legislature to lay a complaint against the Housing MEC with the Public Protector by.<sup>4</sup> A member of the public would be able to lodge a complaint in this regard with the Public Protector in accordance with the provisions of the Public Protector Act of 1994.

Despite the existence of such a complaints mechanism, a perusal of investigative reports produced by the Public Protector reveal that the mechanism is severely underutilised. I was only able to source three complaints lodged with the Public Protector relating to alleged breaches of the Code and these all involved allegations of conflicts of interest. To date, no complaints appear to have been lodged against any Cabinet Ministers, their Deputies, Premiers or MEC's for failing to take disciplinary action against their accounting officers.

This state of affairs does not mean that financial misconduct is an uncommon phenomenon, rather the Public Service Commission have noted that financial misconduct cases reported by departments have increased: In 2004/05 513 cases were reported, which increased to 771 in 2005/06 and 1042 in 2006/07.<sup>5</sup> What appears uncommon however is action taken against accounting officers involved in financial misconduct.

In the Eastern Cape provincial administration, disciplinary action taken against officials,

---

<sup>3</sup> Section 3 and 5 of the Executive Members Ethics Act 82 of 1998.

<sup>4</sup> Section 4 of the Executive Members Ethics Act.

<sup>5</sup> State of the Public Service Report, 2008, p.32, Public Service Commission.

particularly accounting officers for acts of financial misconduct have been few and far between despite an abundance of material suggesting that action should be taken. The Eastern Cape Department of Education has for instance received 12 consecutive audit disclaimers<sup>6</sup> since 1995 followed by two adverse audit opinions in 2006/07 and 2007/08.<sup>7</sup> Similarly the Eastern Cape Health Department has received 9 audit disclaimers and two adverse audit opinions in the past 12 years.<sup>8</sup> A perusal of the AG's reports supporting the aforesaid audit opinions reveals findings and evidence-based conclusions requiring corrective steps to be taken, including the initiation of disciplinary action against accounting officers implicated in recurrent acts of non-compliance with the provisions of the PFMA. Despite these findings, MEC's and the erstwhile Premier of Eastern Cape Province have displayed an unwillingness and/or inability to commence with disciplinary action, particularly against senior officials.

This unacceptable state of affairs prompted the Eastern Cape Provincial Legislature's Standing Committee on Public Accounts (SCOPA) to recommend in its Consolidated Report for 2006/07 that the accounting officers for the departments of Health, Education, Social Development, Economic Affairs and Tourism and Provincial Treasury be charged with financial misconduct and that disciplinary proceedings be instituted in terms of section 84 of the PFMA.<sup>9</sup>

The PSAM has since enquired from the incumbent Premier as to what action has been taken in response to the SCOPA's recommendations. The Premier's progressive and welcomed response is as follows:

I am aware of the SCOPA recommendations that have subsequently become resolutions of the House. I also hope that you are aware that in my speech to the legislature on 9 September 2008 I stated that "We will investigate the circumstances, but certainly any Accounting Officer who does not show respect to the management of public funds, and even more seriously adopts an attitude that seeks to undermine the oversight bodies, such Accounting Officer will not enjoy and support and protection by the Executive Council".

Subsequent to the resolutions taken by the House, the Executive Council meeting held on 17 September 2008 reminded the relevant MEC's that in terms of the existing delegations framework ... they are responsible for the career incidents including disciplinary actions of their Head of Departments.

Accordingly the relevant MEC's will consider the House resolutions to investigate the alleged acts of misconduct, take disciplinary action where necessary... I prefer not to anticipate the decisions of the relevant MEC's in their consideration of the House

---

<sup>6</sup> The Auditor-General expresses a disclaimer of opinion when "the possible effect of a limitation is so material and pervasive that the auditor has not been able to obtain sufficient appropriate audit evidence to form an opinion and accordingly is unable to express an opinion on the financial statements" - Audit Communication and Reporting Presentation, Office of the Auditor-General of South Africa, slide 5.

<sup>7</sup> Eastern Cape Department of Education Annual Report for 2006/07 at page 2 and Eastern Cape Department of Education Annual Report for 2007/08 at page 101.

<sup>8</sup> Performance Monitoring Report for 2006/07 in respect of the Eastern Cape Health Department, p.1, Public Service Accountability Monitor – available at [www.psam.org.za](http://www.psam.org.za). See also Eastern Cape Department of Health Annual Report for 2007/08 at page 230.

<sup>9</sup> Consolidated Report of SCOPA dated 28 August 2008, as contained in the Eastern Cape Legislature ATC 12 of 2008 dated 8 September 2008, at pp. 266 – 317.

resolution, save to say that, as Premier I reserve the right to review such decisions should they not be in keeping with the Premier's speech to the legislature...<sup>10</sup>

The PSAM will continue to monitor this issue in the interests of improving good governance and service delivery within the Eastern Cape Province. Anti-corruption strategies will remain stunted and ineffectual in situations where key role-players display an unwillingness to diligently monitor and enforce such strategies. To quote the chairperson of the Public Service Commission:

Today I see emerging in our society two categories of people. One is the category of men and women of virtue who have discharged their duties responsibly and accountably as stewards of resources destined for alleviating poverty among our suffering masses. These we need to protect and preserve the best we can... the second category is that of wicked men and women: the corrupt fraudsters who have siphoned millions, if not billions of rands for their selfish ends from the state coffers for which they are responsible – thus depriving the millions of our destitute masses... these we do not need in our society.<sup>11</sup>

The message I wish to conclude this paper with is as follows. The effectiveness of anti-corruption strategies and the health of our constitutional democracy are dependent upon the active and sustained involvement of numerous actors. Our history has shown that we have both saints and sinners in all sectors of South Africa. We cannot rely on the goodwill of politicians, nor can we expect the judiciary to be our vanguard defence against the negative effects of poor financial management which enables corrupt practices to fester and take hold.

Over and above legal reforms, we need civil society to sometimes do the work of others, which may include:

- lodging complaints with the Public Protector where political heads fail to act in the interests of good governance;
- involving themselves in impact litigation, which may include seeking interdicts compelling political heads to commence with disciplinary action as required by the PFMA.
- gathering evidence to hold persons accountable.

I thank you.

---

<sup>10</sup> Letter from the Eastern Cape Premier dated 30 September 2008.

<sup>11</sup> Opening remarks by SS Sangweni at the opening of the Third National Anti-corruption Summit, 4 – 5 August 2008, quoted in an article by SS Sangweni entitled *Corrupt fraudsters in the State*, contained in the New Agenda, Issue 31, Third Quarter 2008.