

**REPORT OF THE PUBLIC PROTECTOR IN TERMS OF
SECTION 182(1)(b) OF THE CONSTITUTION OF THE
REPUBLIC OF SOUTH AFRICA, 1996 AND SECTIONS 8(1)
AND 8(2)(b)(i) OF THE PUBLIC PROTECTOR ACT, 1994**



**PUBLIC PROTECTOR
SOUTH AFRICA**

Report No: 12 of 2008/9

**REPORT ON AN INVESTIGATION INTO AN ALLEGATION OF THE
MISAPPROPRIATION OF PUBLIC FUNDS BY THE KUNGWINI LOCAL
MUNICIPALITY IN THE GAUTENG PROVINCE**

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Executive summary

The Office of the Public Protector investigated a complaint lodged by a Member of Parliament relating to a donation of funds made by the Kungwini Local Municipality (the Municipality) in May 2006 for the launching by the African National Congress (ANC) of a Parliamentary Constituency Office(PCO). It was not in dispute that the donation was requested from the Municipality by a Member of Parliament, was approved by the Executive Mayor and Acting Municipal Manager of the Municipality and that it amounted to R 25 856, which was paid into the bank account of the ANC Parliamentary Constituency Office.

From the evidence, applicable legislation and legal prescripts considered during the investigation it appeared that:

- Parliamentary Constituency Offices are established by political parties with the assistance of funds allocated to them by Parliament.
- The location, structure, functions and operations of a PCO are determined only by the political party involved.
- Political parties are accountable to the Electoral Commission and to Parliament for the expenditure of the funds allocated to them to enable them to perform their political functions effectively.
- A PCO is a political party structure. Even though it might be performing a public function to a certain extent, it does not do so in terms of "*any legislation*"¹, but in terms of the decisions, policies and prescripts of the political party by whom it was established. Constituency offices are therefore not organs of state or part of any sphere of government. The fact that Parliament provides financial assistance for the establishment

¹ As contemplated by section 239 of the Constitution

of PCO's does not change its character and status from that of being a political structure.

- The mere fact that members of a community can approach a PCO for assistance relating to service delivery issues, does not change its status from being a structure established by a political party and not by Parliament.
- A PCO therefore, cannot be regarded as an extension of Parliament.
- There is no obligation on any sphere of government or any organ of state, except the National Assembly, to assist political parties in the establishment and maintaining of PCO's.
- The establishment and launching of a PCO is not a matter that falls within the objectives of local government. The fact that some the objectives of a PCO, in terms of the monitoring of public service delivery, might overlap with that of a municipality, does not change the position.
- Neither the Constitution nor the Municipal Finance Management Act permits a municipality to donate public funds to political parties for any purpose. Such a donation would therefore constitute irregular expenditure.
- It would also amount to fruitless and wasteful expenditure as it was made in vain and could have been avoided if the municipal manager properly applied his/her mind to the matter.
- The fact that the mayor has approved certain expenditure does not oblige the accounting officer to approve it as well. He/she has to apply his/her mind to the matter concerned and take an informed decision as to whether the expenditure complies with the law. Should a request by

a mayor for expenditure not comply, the accounting officer is obliged to advise him/her accordingly.

- It is expected of a mayor to act in the best interests of the municipality and to ensure that its integrity and reputation is maintained.
- A decision to donate public funds to a political party, apart from being unlawful, creates a perception of bias and political favouritism on the part of the municipality. It also disadvantages other political parties that have to cope with the allowances allocated to them by Parliament.
- A mayor and a municipal manager, who are responsible for irregular, unauthorised and fruitless and wasteful expenditure, have to be held liable for the expense. Disciplinary steps could also be taken against them.
- It is expected of Members of Parliament to act and to be seen to be acting responsibly in respect of the expenditure of public money. Members are also expected to comply with the laws regulating the management of public funds and to set an example for others to follow in this regard. Failure to do so would be improper and inconsistent with the responsibilities and integrity of the office of a Member of Parliament

The following key findings were made from the investigation:

- The request by Mr Sibanyoni MP to the Executive Mayor of the Municipality for the donation of public funds for the launching of a PCO was improper; and

- The donation by the Municipality on 22 May 2006 of R 25 856 to the ANC Parliamentary Constituency Office was improper and unlawful. It resulted in irregular and fruitless and wasteful expenditure, and could be regarded as financial misconduct by the then accounting officer, Mr Matjila, in terms of the Municipal Finance Management Act.

The Public Protector recommended that:

- ❖ The Speaker of the National Assembly take the appropriate steps to:
 - Deal with the improper conduct of Mr Sibanyoni, referred to in this report; and
 - Ensure that it is brought to the attention of all Members of Parliament that no reliance can be placed on public funds, other than that allocated by Parliament, for the establishment, launching and maintaining of Parliamentary Constituency Offices.
- ❖ The Municipal Council of the Kungwini Local Municipality establish a special committee to investigate and report to the Council on:
 - The accountability of Mr Maila (the Executive Mayor) and Mr Matjila (the Acting Municipal Manager at the time when the donation was approved) for the irregular and fruitless and wasteful expenditure of the amount of R 25 856, referred to in this report;
 - The taking of disciplinary steps in relation to the said expenditure against Mr Matjila;

Whether the approval of the donation by Mr Maila constituted a breach of the Code of Conduct for Councillors, and if so, what steps should be taken against him; and

The recovery by the Municipality of the amount of R 25 856 in terms the Municipal Finance Management Act.

❖ The Municipal Manager:

Inform the Member responsible for Local Government of the Gauteng Provincial Government and the Auditor General of the irregular and fruitless and wasteful expenditure referred to in this report, the investigation that will be conducted and the steps that will be taken to recover the amount concerned; and

Take steps to ensure that the documentation recording the authorization of the donation is properly filed in the financial records of the Municipality.

REPORT ON AN INVESTIGATION INTO AN ALLEGATION OF THE MISAPPROPRIATION OF PUBLIC FUNDS BY THE KUNGWINI LOCAL MUNICIPALITY IN THE GAUTENG PROVINCE

1. INTRODUCTION

1.1 This Report is submitted to:

1.1.1 The National Assembly;

1.1.2 The Members of the Executive Council of the Gauteng Provincial Government responsible for Finance and Local Government; and

1.1.3 The Municipal Council of the Kungwini Local Municipality,

in terms of the provisions of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and sections 8(1) and 8(2)(b)(i) of the Public Protector Act, 1994 (the Public Protector Act).

1.2 It relates to an investigation into an allegation of the misappropriation of public funds by the Kungwini Local Municipality, in the Gauteng Province.

2. BACKGROUND

2.1 Early in 2006, representatives of the African National Congress (ANC) initiated the establishment of a Parliamentary Constituency Office (PCO) in the area of jurisdiction of the Kungwini Local Municipality (the Municipality).

- 2.2 The Member of Parliament for the area concerned, Mr J Sibanyoni, requested financial assistance for the launch of the PCO from the Municipality. An amount of R 25 856 was accordingly donated by the Municipality and paid into the account of the ANC Parliamentary Constituency Office.
- 2.3 The PCO was officially launched on 20 May 2006 at the Rethabiseng Community Hall.

3. THE COMPLAINT

Mr W P Doman, a Member of Parliament, lodged a complaint with the Office of the Public Protector in connection with the donation referred to in paragraph 2.2 above, on 8 December 2006. He stated *inter alia* that:

"An invoice from the Kungwini Local Municipality indicated that the money in question was intended for transport, catering and a sound system. Plus minus 700 people were expected to attend this function.

The DA (Democratic Alliance) maintains it is wrong when taxpayer's money in the local government sphere is used to subsidize a function for an office that operates in the national sphere of the state. Members of Parliament do receive (through their political party) money from Parliament for constituency offices and the possibility of fraud exists if funds are used from two sources for the same expense."

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

4.1 The Public Protector is part of a cluster of institutions established by Chapter 9 of the Constitution to strengthen the constitutional democracy of the Republic of South Africa.

4.2 Section 182 of the Constitution provides that the Public Protector has the power to:

4.2.1 Investigate any conduct in state affairs or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

4.2.2 Report on the conduct investigated; and

4.2.3 Take the appropriate remedial action.

4.3 In terms of section 6(4) of the Public Protector Act, the Public Protector is competent to investigate, on his or her own initiative or on receipt of a complaint, any alleged maladministration in connection with the affairs of government at any level and any alleged improper conduct by a person performing a public function.

4.4 The complaint of the misappropriation of public funds by the Municipality, therefore fall within the powers and jurisdiction of the Public Protector to investigate.

4.5 The Public Protector also has the power to investigate the conduct of the Member of Parliament involved in the matter.

5. THE INVESTIGATION

The investigation was conducted in terms of sections 6 and 7 of the Public Protector Act. It comprised:

- 5.1 An assessment of the complaint;
- 5.2 Correspondence with:
 - 5.2.1 The Executive Mayor of the Municipality, Mr M O Maila, and the attorney representing him;
 - 5.2.2 Mr Chris Matjila, a senior official of the Municipality who acted as Municipal Manager at the time when the payment complained of was approved;
 - 5.2.3 The Acting Municipal Manager of the Municipality, Mr J S Gomba;
 - 5.2.4 Mr Sibanyoni, MP;
 - 5.2.5 The Secretary to Parliament;
 - 5.2.6 The Chief Financial Officer of Parliament; and
 - 5.2.7 The Auditor General.
- 5.3 Consultation with Mr Sibanyoni;
- 5.4 A study of all the relevant documentation obtained during the investigation; and

5.5 Consideration and application of the relevant provisions of:

5.5.1 The Constitution;

5.5.2 The Public Protector Act;

5.5.3 The Local Government: Municipal Finance Management Act, 2003 (the Municipal Finance Management Act);

5.5.4 The Local Government: Municipal Systems Act, 2000 (the Municipal Systems Act);

5.5.5 The Public Funding of Represented Political Parties Act, 1997; and

5.5.6 Parliament's *Policy on Political Parties Allowances*.

6. THE EVIDENCE

6.1 Common cause

From the investigation of the complaint it appeared that the following is not in dispute:

6.1.1 On 16 May 2006, Mr Sibanyoni addressed a letter, on a letterhead of the *ANC Parliamentary Office*, to the Executive Mayor of the Municipality under the heading:

“Follow up letter for a donation dated 7th May 2006 for the Launch (sic) of Kungwini Regional PCO on the 20th May 2006 at Rethabiseng Community Hall”.

6.1.2 In his letter Mr Sibanyoni stated that:

“This letter serves to request for financial assistance (a donation) for the launch of Kungwini Regional Parliamentary Office (PCO) as stated above.

The Constituency Office is meant to serve the whole community of Kungwini. Thus all the 14 Wards of Kungwini have been invited and it is intended to provide transport and catering.

In the circumstances, we hereby request a contribution (donation) of R 15 000 towards the costs for the launch.”

6.1.3 On receipt of the letter, the Executive Mayor, Mr M Maila, requested a breakdown of the envisaged expenditure referred to by Mr Sibanyoni, which was provided to him in writing on 17 May 2006. The breakdown was as follows:

Transport	R 12 906
Catering	R 12 500
Sound system	R 450
Total	R 25 856

6.1.4 The Executive Mayor approved the request for a donation in the amount of R 25 856.

6.1.5 Mr C Matjila was the Acting Municipal Manager of the Municipality from 17 to 19 May 2006.

6.1.6 The Acting Municipal Manager was requested to proceed with the payment and he forwarded it to the Finance Department of the Municipality where it was processed on 18 or 19 May 2006.

6.1.7 The said payment was made on 22 May 2006 from the Executive Mayor Special Project Vote and the Public Participation Vote of the budget of the Municipality into the bank account of the ANC Parliamentary Constituency Office.

6.1.8 Only an amount of R16 550 was spent on the launch of the PCO.

6.2 The evidence of Mr Sibanyoni

6.2.1 According to Mr Sibanyoni, a Parliamentary Constituency Office is established to monitor and observe the performance of government departments and to receive and address complaints from the community that it serves, irrespective of their political allegiance.

6.2.2 The funds to establish and maintain a PCO do not come directly from the Secretariat of Parliament, but are derived from allowances proportionally allocated by Parliament to the political parties represented.

6.2.3 Each party has a Parliamentary Constituency Unit to which PCO's report on its activities and administration. PCO's account to and are audited by Parliament.

6.2.4 Mr Sibanyoni holds the view that it was proper for the Municipality to have assisted in the launch of the PCO as the community it serves will benefit from it.

6.2.5 It was for the Municipality to decide whether or not the law allowed it to make the donation that was requested.

6.2.6 He further stated that:

“It would have been difficult to make an exception of requesting financial assistance from Parliament for the launch of the ANC PCO as it has not been done so by others. The event was seen more as a local activity than one that will require assistance from National Parliament.”

6.2.7 Mr Sibanyoni also explained that the balance of the amount of R25 856 was spent on disseminating information about the PCO to the public.

6.3 The explanation provided by the Acting Municipal Manager

6.3.1 Mr J Gomba, who was the Acting Municipal Manager of the Municipality at the time of the investigation, stated that in his view, a Constituency Office is an extension of Parliament.

6.3.2 Relying on the provisions of section 41 of the Constitution relating to co-operative governance, Mr Gomba indicated that it was required of the Municipality to assist the National Government in establishing the PCO.

6.3.3 He went on to state that:

“When the local PCO was launched last year, the Office of the Executive Mayor was requested to assist with among other logistical arrangements, the hiring of busses to ferry people from all remote/rural areas. Due to time constraints, the expenditure was duly

authorised by the Executive Mayor and subsequently a cheque amounting to R 25 000 was paid out to the PCO.

In terms of section 29(1) of the Local Government: Municipal Finance Management Act, 56 of 2003, 'the mayor of a municipality may in emergency or exceptional circumstances authorise unforeseeable and unavoidable expenditure for which no provision was made in an approved budget.

In this matter the Executive Mayor acted within his vested powers in authorising the expenditure, in that it (the expenditure) was also reported to the municipal council at its subsequent meeting in terms of subsection 2(c) of the aforementioned section of the act (sic)."

6.3.4 According to Mr Gomba, Mr Matjila, who was the Acting Municipal Manager at the time, was aware of the payment, and had not objected to it as he was of the opinion that the Mayor was acting in good faith.

6.3.5 Mr Gomba could not produce the documentation of the Municipality in respect of the authorization of the payment made by the Finance Department.

6.4 The evidence submitted by Mr C Matjila

6.4.1 Mr Matjila explained that he was the Acting Municipal Manager of the Municipality from 17 to 19 May 2006.

6.4.2 In relation to the payment in question, he stated that

"During the course of the exercise of my duties as the Acting Municipal Manager, specifically on the 19th of May 2006, being the last

designated day within the aforesaid position, I received a request in respect of the alleged payment made by the municipality to the Kungwini Parliamentary Constituency Office.

At the time of receipt of the aforesaid request, it was already approved by the Executive Mayor, Clr. M O Maila.

Given that the aforesaid payment was already authorized by the Executive Mayor, my comprehension of the provisions of Section 29 of the Local Government: Municipal Finance Management Act, Act No 56 of 2003 (of which I was already familiar), and the urgency attaching to the purpose of the said payment, I deemed it exigent to forward same to the Finance Department, which I undertook forthwith."

6.4.3 Mr Matjila was adamant in his view that as the payment had already been authorized by the Executive Mayor, it was proper, lawful and "needless of any further accomplishment."

6.5 The evidence of the Executive Mayor

6.5.1 Mr Maila disagreed with the contention of Messrs Gomba and Matjila² that he acted in terms of section 29(1) of the Municipal Finance Management Act when he approved the donation.

6.5.2 According to him, he decided that funds from the Executive Mayor Special Project Vote and the Public Participation Vote of the budget could and had to be utilised for the said payment. It is "customary" for him to approve payments for projects, as he deems fit.

² See paragraphs 6.3.3 and 6.4.2 above

6.5.3 The payment was necessary and justified as the establishment of a PCO in the Kungwini area is in the interest of everyone in the community. He went on to state that:

"The fact that the project was driven by the ANC Parliamentary Office did not occur to me to be an obstacle at the relevant time."

6.5.4 Mr Maila expressed the view that the donation of the money in question could go a long way in assisting the Municipality in achieving its constitutional goals and objectives.

6.5.5 He also stated that:

"During the course of approving the donation, I interacted with the then Acting Municipal Manager in order to solicit his advice. Needless to say, the then Acting Municipal Manager also approved the donation in question."

6.6 The explanation of the Chief Financial Officer of Parliament in connection with the funding of Parliamentary Constituency Offices

6.6.1 The Chief Financial Officer clarified Parliament's role in establishing Parliamentary Constituency Offices by referring to the provisions of section 57(2)(c) of the Constitution³.

6.6.2 In terms of this provision, the National Assembly has to provide political parties with financial assistance, in accordance with the

³ See paragraph 9.1 below

number of their members in Parliament, in order to enable each of them to perform their functions effectively.

6.6.3 There are specific rules regulating the use of these funds and at the end of each financial year the parties must account to the Secretary to Parliament (the Accounting Officer of Parliament) by way of audited financial statements indicating whether the funds were used accordingly.

6.6.4 Parliament does not prescribe to political parties where and when they should or could establish Constituency Offices and they are not accountable to Parliament for the performance of the functions of these offices.

7. THE EXPENDITURE OF PUBLIC FUNDS BY A MUNICIPALITY

7.1 The provisions the Constitution

7.1.1 Section 216(1) provides that national legislation must prescribe measures to ensure transparency and expenditure control in each sphere of government.

7.1.2 In terms of section 152, the objects of local government are to:

7.1.2.1 provide democratic and accountable government for local communities;

7.1.2.2 ensure the provision of services to communities in a sustainable manner;

7.1.2.3 promote social and economic development;

7.1.2.4 promote a safe and healthy environment; and

7.1.2.5 encourage the involvement of communities and community organisations in the matters of local government.

7.2 The Local Government: Municipal Finance Management Act, 2003

7.2.1 The object of the Act

In terms of section 2, it is the object of the Act to secure sound and sustainable management of the fiscal and financial affairs of municipalities by establishing norms and standards for, *inter alia*:

7.2.1.1 ensuring transparency, accountability and appropriate lines of responsibility; and

7.2.1.2 the management of revenues, expenditures, assets and liabilities.

7.2.2 The Accounting Officer

7.2.2.1 Section 1, read with section 60, provides that the Municipal Manager or the Acting Municipal Manager is the accounting officer of a Municipality.

7.2.2.2 The accounting officer must:

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

(b) seek, within the sphere of his/her influence, to prevent any prejudice to the financial interests of the municipality.⁴

7.2.2.3 The accounting officer may not:

(a) act in a way that is inconsistent with the duties assigned to accounting officers of municipalities in terms of the Act; or

(b) use the position or privileges of, or confidential information obtained as accounting officer, for personal gain or to improperly benefit another person.⁵

7.2.2.4 In terms of section 62, the accounting officer is responsible for managing the financial administration of the municipality, and must for this purpose take all reasonable steps to ensure, *inter alia*, that:

(a) the resources of the municipality are used effectively, efficiently and economically;

(b) full and proper records of the financial affairs of the municipality are kept in accordance with any prescribed norms and standards; and

(c) unauthorised, irregular or fruitless and wasteful expenditure and other losses are prevented.

⁴ See section 61 of the Act

⁵ See section 61(2) of the Act

7.2.3 Withdrawals from municipal bank accounts

7.2.3.1 Section 11 provides that only the accounting officer or the chief financial officer or any other senior financial official of the municipality acting on the written authority of the accounting officer, may withdraw money or authorise the withdrawal of money from any of the municipality's bank accounts.

7.2.3.2 Money may only be withdrawn⁶

(a) to defray expenditure appropriated in terms of an approved budget;

(b) to defray unforeseeable and unavoidable expenditure, authorised in terms of section 29(1)⁷;

(c) to pay over to a person or organ of state money received by the municipality on behalf of that person or institution;

(d) to refund money incorrectly paid;

(e) to refund guarantees, sureties and security deposits;

(f) for cash management and investment purposes;

(g) to defray increased expenditure; or

(h) for such other purposes as may be prescribed.

⁶ See section 11(1)

⁷ See paragraph 7.2.6 below

7.2.4 The meaning of a vote

“Vote” is defined by section 1 as:

- “(a) one of the main segments into which a budget of a municipality is divided for the appropriation of money for the different departments of functional areas of the municipality; and*
- (b) which specifies the total amount that is appropriated for the purposes of the department or functional area concerned.”*

7.2.5 The responsibilities of the mayor

7.2.5.1 Section 52 provides that the mayor of a municipality must provide general political guidance over the fiscal and financial affairs of the municipality.

7.2.5.2 In providing such guidance the mayor may monitor and oversee the exercise of responsibilities assigned in terms of the Act to the accounting officer and the chief financial officer, but may not interfere in the exercise of those responsibilities.

7.2.6 Unforeseen and unavoidable expenditure

Section 29 provides in this regard that:

- “(1) The mayor of a municipality may in emergency or other exceptional circumstances authorise unforeseeable and unavoidable expenditure for which no provision was made in an approved budget.*

(2) *Any such expenditure-*

(a) must be in accordance with any framework that may be described;

(b) may not exceed a prescribed percentage of the approved annual budget;

(c) must be reported by the mayor to the municipal council at its next meeting; and

(d) must be appropriated in an adjustments budget.

(3) *If such adjustments budget is not passed within 60 days after the expenditure was incurred, the expenditure is unauthorised and section 32 applies”(emphasis added)*

7.2.7 Co-operative government

7.2.7.1 Chapter 5 of the Act deals with co-operative government between the national, provincial and local governments.

7.2.7.2 The national and provincial governments are obliged to assist municipalities in the building of capacity for effective and efficient financial management. They also have to promptly meet their financial commitments towards municipalities.

7.2.7.3 Municipalities, on the other hand, are obliged to promote co-operative government in their fiscal and financial relations with the national and provincial governments. They also have to promptly meet all financial commitments towards other municipalities or national and provincial organs of state.

7.2.8 Fruitless and wasteful expenditure

According to section 1, "*fruitless and wasteful expenditure*" means expenditure that was made in vain and that could have been avoided.

7.2.9 Irregular expenditure

7.2.9.1 Section 1 defines "*irregular expenditure*" in relation to a municipality, *inter alia*, as expenditure that is incurred in contravention of or that is not in accordance with a requirement of the Municipal Finance Management Act, 2003, the Municipal Systems Act or the Public Office-Bearers Act, 1998.

7.2.9.2 The definition of irregular expenditure excludes expenditure by a municipality which falls within the definition of *unauthorised expenditure*.

7.2.10 Liability for irregular or fruitless and wasteful expenditure

7.2.10.1 In terms of section 32 of the Act:

(a) Any political office-bearer or official of a municipality who deliberately or negligently committed, made or authorised an irregular expenditure, is liable for that expenditure; and

(b) Any political office bearer or official of a municipality who deliberately or negligently made or authorised a fruitless and wasteful expenditure is liable for that expenditure.

7.2.10.2 In terms of section 1, the meaning of “*political office bearer*” includes the executive mayor of a municipality.

7.2.10.3 A municipality must recover irregular or fruitless and wasteful expenditure from the person liable for it.⁸

7.2.10.4 Subsection(3) provides that:

“If the accounting officer becomes aware that the council, the mayor or the executive committee of a municipality, as the case may be, has taken a decision which, if implemented, is likely to result in unauthorised, irregular or fruitless and wasteful expenditure, the accounting officer is not liable for any ensuing unauthorised, irregular or fruitless and wasteful expenditure provided that the accounting officer has informed the council, the mayor or the executive committee, in writing, that the expenditure is likely to be unauthorised, irregular or fruitless and wasteful expenditure.”

7.2.10.5 The accounting officer must, in terms of section 32(4) inform the mayor, the MEC for Local Government in the province and the Auditor- General in writing of:

(a) any unauthorised, irregular or fruitless and wasteful expenditure incurred by the municipality;

(b) whether any person is responsible or under investigation for such unauthorised, irregular and wasteful expenditure; and

⁸ See section 32(2) and the conditions referred to

(c) the steps that have been taken:

(i) to recover or rectify such expenditure; and

(ii) to prevent a recurrence of such expenditure.

7.2.11 Financial misconduct

7.2.11.1 Section 171(1)(c) provides that an accounting officer of a municipality commits an act of financial misconduct if he/she deliberately or negligently makes or permits or instructs another official of the municipality to make an unauthorised, irregular or fruitless and wasteful expenditure.

7.2.11.2 A municipality must investigate allegations of misconduct against the accounting officer unless those allegations are frivolous, vexatious, speculative or obviously unfounded.⁹

7.2.11.3 If the allegations warrant such a step, the municipality must institute disciplinary proceedings against the accounting officer in accordance with systems and procedures referred to in section 67 of the Municipal Systems Act.

8. THE CODE OF CONDUCT FOR COUNCILLORS

8.1 Schedule 1 to the Municipal Systems Act contains the Code of Conduct for Councillors.

8.2 Item 2 of the Code provides that a councillor must:

⁹ Section 171(4)(a)

8.2.1 Perform the functions of office in good faith, honestly and in a transparent manner; and

8.2.2 At all times act in the best interest of the municipality and in such a way that the credibility and integrity of the municipality are not compromised.

8.2.3 It terms of item 6(1), a councillor may not use the position or privileges of a councillor to improperly benefit another person.

8.2.4 A municipal council may, in terms of item 14 of the Code:

8.2.4.1 Investigate and make a finding on any alleged breach of a provision of the Code; or

8.2.4.2 Establish a special committee:

(a) to investigate and make a finding on alleged breach of the Code; and

(b) to make appropriate recommendations to the council.

9. THE LEGAL FRAMEWORK REGULATING THE PUBLIC FUNDING OF POLITICAL PARTIES

9.1 The Constitution

9.1.1 Section 236 provides that:

"To enhance multi-party democracy, national legislation must provide for the funding of political parties participating in national and provincial legislatures on an equitable and proportional basis."

9.1.2 Section 57(2)(c) of the Constitution provides that the rules and orders of the National Assembly must provide for financial and administrative assistance to each party represented in the Assembly in proportion to its representation, to enable the party and its leader to perform their functions in the Assembly effectively.

9.2 The Public Funding of Represented Political Parties Act, 1997

9.2.1 This Act was established in compliance with section 236 of the Constitution. It provides¹⁰ for the establishment of a Represented Political Parties' Fund (the Fund) for the purpose of funding political parties that participate in Parliament and provincial legislatures.

9.2.2 The Fund is credited with, *inter alia* moneys appropriated by Parliament¹¹.

9.2.3 The Chief Electoral Officer of the Electoral Commission is the accounting officer and chief executive officer of the Fund.

9.2.4 In terms of section 5, every political party is entitled to be allocated moneys from the Fund for any financial year that it is represented in the National Assembly or in any provincial legislature or in both. Allocations are made in terms of a formula based on proportional representation.

¹⁰ Section 2

¹¹ Section 2

9.2.5 The moneys allocated to a political party from the Fund may be used for any purposes compatible with its functioning as a political party in a modern democracy¹². These purposes include:

9.2.5.1 The development of the political will of the people;

9.2.5.2 Bringing the political party's influence to bear on the shaping of public opinion;

9.2.5.3 Inspiring and furthering political education;

9.2.5.4 Promoting active participation by individual citizens in political life;

9.2.5.5 Exercising an influence on political trends; and

9.2.5.6 Ensuring continuous, vital links between the people and organs of state.

9.2.6 Political parties are accountable to the Electoral Commission for the moneys allocated to them from the Fund and the Commission has to report on its management and administration of the Fund to Parliament.

9.3 The Parliamentary Policy on Political Party Allowances

9.3.1 The Speaker of the National Assembly and the Chairperson of the National Council of Provinces adopted the *Policy on Political Party Allowances* on 20 July 2005.

¹² Section 5(b)

9.3.2 Paragraph 1 of the Policy refers to the background of a constituency allowance for members of Parliament as follows:

"A 'constituency allowance' was paid to political parties since about 1978 as a result of a Cabinet decision. The system of allowances was introduced to enable political parties represented in Parliament to set up an infrastructure for the benefit of constituents." (emphasis added)

9.3.3 The Policy requires of political parties to annually submit to the Secretary to Parliament financial statements in respect of party allowances reflecting also the amount spent on *"constituency allowance expenditure items and services."*

10. THE CONSTITUTIONAL IMPERATIVE OF CO-OPERATIVE GOVERNMENT

10.1 Section 41(1)(h)(ii) of the Constitution provides that all spheres of government and all organs of state within each sphere must co-operate with one another in mutual trust and good faith by assisting and supporting one another.

10.2 'Organ of state' is defined by section 239 of the Constitution to mean:

"(a) any department of state or administration in the national, provincial or local sphere of government; or

(b) any other functionary or institution-

(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

(ii) exercising public power or performing a public function in terms of any legislation,

but does not include a court or a judicial officer.” (emphasis added)

11. THE OPINION OF THE OFFICE OF THE AUDITOR-GENERAL ON THE DONATION

11.1 The evidence obtained during the investigation and referred to in this report in relation to the donation made by the Municipality to the ANC Parliamentary Constituency Office was referred to the Auditor-General in order to determine whether it was interrogated during the annual audit of the financial records of the Municipality.

11.2 The Legal Advisor: Governance of the Office of the Auditor General advised that the donation (being of a relatively small amount) was not picked up in the audit sample. He however stated that:

“In our opinion, the donation constitutes irregular expenditure as such expenditure is not authorised in terms of the Local Government: Municipal Finance Management Act, 2003. We, with respect, agree with your view that Parliamentary Constituency Offices should be established in terms of funds set aside and allocated to political parties for that purpose in terms of section 57(2)(c) of the Constitution (read with section 236 of the Constitution and the Public Funding of Represented Political Parties Act, 2007) (sic).

In our opinion, the donation cannot be justified and it would indeed be inappropriate for a municipality to make such a donation to a political party.”

12. ANALYSIS OF THE APPLICABLE LEGAL PRESCRIPTS AND THE EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

- 12.1 Parliamentary Constituency Offices are established by political parties with the assistance of funds allocated to them by Parliament.
- 12.2 The location, structure, functions and operations of a PCO are determined only by the political party involved.
- 12.3 Political parties are accountable to the Electoral Commission and to Parliament for the expenditure of the funds allocated to them to enable them to perform their political functions effectively.
- 12.4 A PCO is a political party structure. Even though it might be performing a public function to a certain extent, it does not do so in terms of “*any legislation*”¹³, but in terms of the decisions, policies and prescripts of the political party by whom it was established.
- 12.5 Constituency offices are therefore not organs of state or part of any sphere of government. The fact that Parliament provides financial assistance for the establishment of PCO’s does not change its character and status from that of being a political structure.
- 12.6 Moreover, the mere fact that members of a community can approach a PCO for assistance relating to service delivery issues, does not change its status from being a structure established by a political party and not by Parliament.

¹³ As contemplated by section 239 of the Constitution

- 12.7 A PCO therefore, cannot be regarded as an extension of Parliament.
- 12.8 The provisions of section 41 of the Constitution and Chapter 5 of the Municipal Finance Management Act relating to co-operative governance, consequently do not apply to PCO's.
- 12.9 There is therefore no obligation on any sphere of government or any organ of state, except the National Assembly, to assist political parties in the establishment and maintaining of PCO's.
- 12.10 The establishment and launching of a PCO is not a matter that falls within the objectives of local government. The fact that some the objectives of a PCO, in terms of the monitoring of public service delivery, might overlap with that of a municipality, does not change the position.
- 12.11 Neither the Constitution nor the Municipal Finance Management Act permits a municipality to donate public funds to political parties for any purpose. Such expenditure therefore cannot be covered under any vote in the budget of a municipality.
- 12.12 Unforeseen and unavoidable expenditure, as contemplated by section 29 of the Municipal Finance Management Act, relates to expenditure in connection with the constitutional objectives of the municipality. It cannot justify financial assistance provided to a particular political party in the form of a donation for the establishment of a political structure.
- 12.13 Such a donation would therefore constitute irregular expenditure.

- 12.14 It would also amount to fruitless and wasteful expenditure as it was made in vain and could have been avoided if the municipal manager properly applied his/her mind to the matter.
- 12.15 The ultimate responsibility for the expenditure of a municipality rests with the municipal manager or the acting municipal manager, as the accounting officer.
- 12.16 Any expenditure agreed to by the mayor or the municipal council has to be approved by the accounting officer before it can be paid from the funds of the municipality.
- 12.17 The accounting officer has to verify and ensure that all expenditure to be incurred by the municipality comply with the provisions of the Municipal Finance Management Act and is properly recorded in the financial records of the Municipality.
- 12.18 The fact that the mayor has approved certain expenditure does not oblige the accounting officer to approve it as well. He/she has to apply his/her mind to the matter concerned and take an informed decision as to whether the expenditure complies with the law. Should a request by a mayor for expenditure not comply, the accounting officer is obliged to advise him/her accordingly. Failure to do so could be regarded as negligence, which might result in the accounting officer being held accountable, should the expense be irregular, unauthorised or fruitless and wasteful.
- 12.19 It is expected of a mayor to act in the best interests of the municipality and to ensure that its integrity and reputation is maintained.

- 12.20 A decision to donate public funds to a political party, apart from being unlawful, creates a perception of bias and political favouritism on the part of the municipality. It also disadvantages other political parties that have to cope with the allowances allocated to them by Parliament.
- 12.21 A mayor and a municipal manager, who are responsible for irregular, unauthorised and fruitless and wasteful expenditure, have to be held liable for the expense. Disciplinary steps could also be taken against them.
- 12.22 It is expected of Members of Parliament to act and to be seen to be acting responsibly in respect of the expenditure of public money. Members are also expected to comply with the laws regulating the management of public funds and to set an example for others to follow in this regard. Failure to do so would be improper and inconsistent with the responsibilities and integrity of the office of a Member of Parliament.

13. FINDINGS

The following findings were made from the investigation:

- 13.1 The request by Mr Sibanyoni to the Executive Mayor of the Municipality for the donation of public funds for the launching of a PCO was improper; and
- 13.2 The donation by the Municipality on 22 May 2006 of R 25 856 to the ANC Parliamentary Constituency Office was improper and unlawful. It resulted in irregular and fruitless and wasteful expenditure, and could be regarded as financial misconduct by the then accounting officer, Mr

Matjila, as contemplated by section 171(1)(c) of the Municipal Finance Management Act.

14. RECOMMENDATIONS

In terms of the provisions of section 182(1)(c) of the Constitution and section 6(4)(c)(ii) of the Public Protector Act, it is recommended that:

14.1 The Speaker of the National Assembly take the appropriate steps to:

14.1.1 Deal with the improper conduct of Mr Sibanyoni, referred to in this report; and

14.1.2 Ensure that it is brought to the attention of all Members of Parliament that no reliance can be placed on public funds, other than that allocated by Parliament, for the establishment, launching and maintaining of Parliamentary Constituency Offices.

14.2 The Municipal Council of the Kungwini Local Municipality establish a special committee, in terms of section 171(4) of the Municipal Finance Management Act and item 14 of the Code of Conduct for Councillors, to investigate and report to the Council on:

14.2.1 The accountability of Mr Maila (the Executive Mayor) and Mr Matjila (the Acting Municipal Manager at the time when the donation was approved) for the irregular and fruitless and wasteful expenditure of the amount of R 25 856, referred to in this report;

14.2.2 The taking of disciplinary steps in relation to the said expenditure against Mr Matjila;

14.2.3 Whether the approval of the donation by Mr Maila constituted a breach of the Code of Conduct for Councillors, and if so, what steps should be taken against him; and

14.2.4 The recovery by the Municipality of the amount of R 25 856 in terms of section 32(2) the Municipal Finance Management Act.

14.3 The Municipal Manager:

14.3.1 Inform the MEC for Local Government of the Gauteng Provincial Government and the Auditor General of the irregular and fruitless and wasteful expenditure referred to in this report, the investigation that will be conducted and the steps that will be taken to recover the amount, in compliance with section 32(2) of the Municipal Finance Management Act; and

14.3.2 Take steps to ensure that the documentation recording the authorization of the donation is properly filed in the financial records of the Municipality.

ADV M L MUSHWANA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

Date: 4 August 2008

Assisted by: Adv C H Fourie
Head Special Investigations

Mr P Tjale
Senior Investigator