

## FRAUD AND CORRUPTION

### 1. Introduction

Fraud represents a significant potential risk to the Municipality's assets, service delivery efficiency and reputation. The municipality will not tolerate corrupt or fraudulent activities, whether internal or external to the municipality, and will vigorously pursue and prosecute any parties, by all legal means available, which engage in such practices or attempt to do so.

### 2. Definition of fraud and corruption

In South Africa, the Common Law offence of **fraud** is defined as "the unlawful and intentional making of a misrepresentation which causes actual and or potential prejudice to another". The term "fraud" is also used in a wider sense by the general public.

In this regard, the term is used in this document in its widest possible meaning and is intended to include all aspects of economic crime and acts of dishonesty. In other words, fraud can be described as any conduct or behaviour of which a dishonest representation and/or appropriation forms an element.

The definition of the general offence of corruption is contained in section 3 of The Prevention and Combating of Corrupt Activities Act 12 of 2004. This section provides that any person who gives or accepts or agrees or offers to accept / receive any gratification from another person in order to influence such other person in a manner that amounts to:

- The illegal or unauthorised performance of such other person's powers, duties or functions;
- An abuse of authority, a breach of trust, or the violation of a legal duty or a set of rules;
- The achievement of an unjustified result; or
- Any other unauthorised or improper inducement to do or not to do anything is guilty of the offence of Corruption.

Corruption in its wider meaning, and as referred to in this article, includes any conduct or behaviour where a person accepts, agrees or offers any gratification for him/her or for another person where the purpose is to act dishonestly or illegally. Such behaviour also includes the misuse of material or information, abuse of a position of authority or a breach of trust or violation of duty.

### 3. Forms of corruption

Corruption takes various forms in the public service and elsewhere in society. The following are examples of different types of corruption.

#### **Bribery**

Bribery involves the promise, offering or giving of a benefit that improperly affects the actions or decisions of municipal officials.

#### **Embezzlement**

This involves theft of resources by persons entrusted with the authority and control of such resources.

#### **Fraud**

Any conduct or behaviour of which a dishonest representation and/or appropriation forms an element.



**Extortion**

Coercion of a person or entity to provide a benefit to a municipal official, another person or an entity, in exchange for acting (or failing to act) in a particular manner.

**Abuse of power**

The use by a municipal official of his or her vested authority to improperly benefit another public servant, person or entity (or using vested authority to improperly discriminate against another municipal official, person or entity).

**Conflict of interest**

The failure by a municipal official to act or to consciously fail to act on a matter where the municipal official has an interest or another person or entity that has some form of relationship with the municipal official has an interest.

**Abuse of privileged information**

This involves the use, by a municipal official of privileged information and knowledge that a municipal official possesses as a result of his/ her office to provide unfair advantage to another person or entity to obtain a benefit.

**Favoritism**

The provision of services or resources according to personal affiliation (for example cultural or religious) of a municipal official.

**Nepotism**

A municipal official ensuring that family members are appointed to public service positions or that family members receive contracts from the municipality, is regarded as nepotism. These manifestations are by no means exhaustive as corruption appears in many forms and it is virtually impossible to list all of these.

**4. Actions constituting fraud and corruption**

Fraud and corruption manifests in a number of ways and varying degrees of intensity. These include, but are not limited to:

- Unauthorised private use of the municipality's assets, including vehicles;
- Falsifying travel and subsistence claims;
- Conspiring unfairly with others to obtain a tender;
- Disclosing proprietary information relating to a tender to outside parties;
- Accepting inappropriate gifts from suppliers;
- Employing family members or close friends;
- Operating a private business in working hours;
- Stealing equipment or supplies from work;
- Accepting bribes or favours to process requests;
- Accepting bribes or favours for turning a blind eye to a service provider who does not provide an appropriate service;
- Submitting or processing false invoices from contractors or other service providers; and
- Misappropriating fees received from customers, and avoiding detection by not issuing receipts to those customers.



## 5. Case Law

The Labour Appeal Court judgment in *Rand Water v Stoop & another (2013) 34 ILJ 576 (LAC)* has shaken up the law on counterclaims for damages against dismissed employees. In this case two employees were dismissed after a disciplinary hearing found that they had defrauded the employer of about R8 million in the performance of their duties. They referred an unfair dismissal dispute to the CCMA and, when conciliation failed, the employer applied under section 191(6) of the LRA for the unfair dismissal disputes to be referred to the Labour Court rather than to be dealt with in the normal way through arbitration. When this was granted, the employer subsequently instituted damages claims against the employees under sections 77(3) and 77A(e) of the BCEA. The unfair dismissal and damages claims and counterclaims were consolidated into one matter, but the Labour Court held that it did not have jurisdiction to deal with the employer's damages claims. The LC's jurisdictional ruling was then taken on appeal to the LAC.

### Sections 77 and 77A of the BCEA

At the heart of this dispute was an interpretation of section 77(3) of the BCEA, which states - "*The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment....*" Section 77A(e) then gives the Labour Court, in respect of such matters, the power to make a determination "*....that may include an order for specific performance, an award of damages or an award of compensation.*"

**The LAC appeal.** The employer claimed that the employees committed fraud and as such they had breached their duty of good faith, justifying dismissal. The LAC held it was an implied term of an employment contract that an employee had a duty to act in good faith towards the employer, and serve the employer honestly and diligently. The contractual link to the claim was also secured by the fact that at common law employees undertake to exercise due and reasonable diligence in the discharge of their duties. The LAC was accordingly satisfied that the counterclaims were based on the contracts of employment between the parties, and that the LC did have jurisdiction under section 77(3) of the BCEA. One of the corollaries to a breach of contract is a claim for damages or specific performance.

The LAC rejected the employees' contention that, even if the claims were based on an employment contract, the employer should have pursued its claim in the civil courts and not the Labour Court. The LAC held that the Labour Court was both a court of law and a court of equity, and it applied the appropriate principles depending on the matter before it. In this matter, the Labour Court would sit as a court of law in determining the damages claims and as a court of equity in deciding the unfair dismissal claims. Was the fact that the employment relationship had been terminated by the time of the case a factor? Not so, said the LAC - the fact that at the commencement of the action no employment relationship existed did not remove its jurisdiction, because the claim accrued *before* such termination. The cancellation of a contract does not prevent a party from claiming damages for a breach of that contract.

The LAC said there was no basis for finding that the BCEA only contemplated claims by employees against their employers, and *not vice versa*. The BCEA was designed to promote the right to fair labour practices, which is available to everyone, employees and employers alike. If an employee can claim damages for breach, so too can an employer.



In the court's view the employees had failed to appreciate that their unfair dismissal claims were regulated by the LRA, whereas the employer's counterclaims were permissible under the BCEA. Whilst the LAC found that the counterclaims arose from the same set of facts that resulted in the employees' dismissal, a counter claim is generally not required to be linked or related to the initial claim, as long as the Court has jurisdiction to entertain it. The LAC accordingly found that the Labour Court had jurisdiction, and it should have dismissed the preliminary jurisdictional point raised by the employees.

**The consequences of this judgment.**

This is a very important case, particularly in dismissal cases involving fraud, theft or other serious damage to the employer. Whilst an employer could in any event institute action for the recovery of such damages under section 77(3) of the BCEA, employees dismissed under such circumstances should in future think twice before instituting an unfair dismissal claim. This was previously a largely 'no risk' venture, but employees may in future have to consider the prospects of damages counterclaim. If the employer is called upon to defend its dismissal of an employee in such circumstances, when it has suffered significant damage as a result of the employee's actions, it may well decide to simultaneously counterclaim for those damages.

