

# UMJINDI LOCAL MUNICIPALITY

## DRAFT POLICY : IRREGULAR, UNAUTHORISED & FRUITLESS & WASTEFULL EXPENDITURE

<b>Core Business Area</b>	Financial Services Directorate
<b>Operational Area</b>	Expenditure

Version:	Draft 0.01
Date:	15 February 2011
File Name:	Irregular Unauthorized & Fruitless & Wasteful Expenditure
Business Owner:	Chief Financial Officer

**Owner: Umjindi Income Management Office**  
**Client: Umjindi Local Municipality**

Document Classification:

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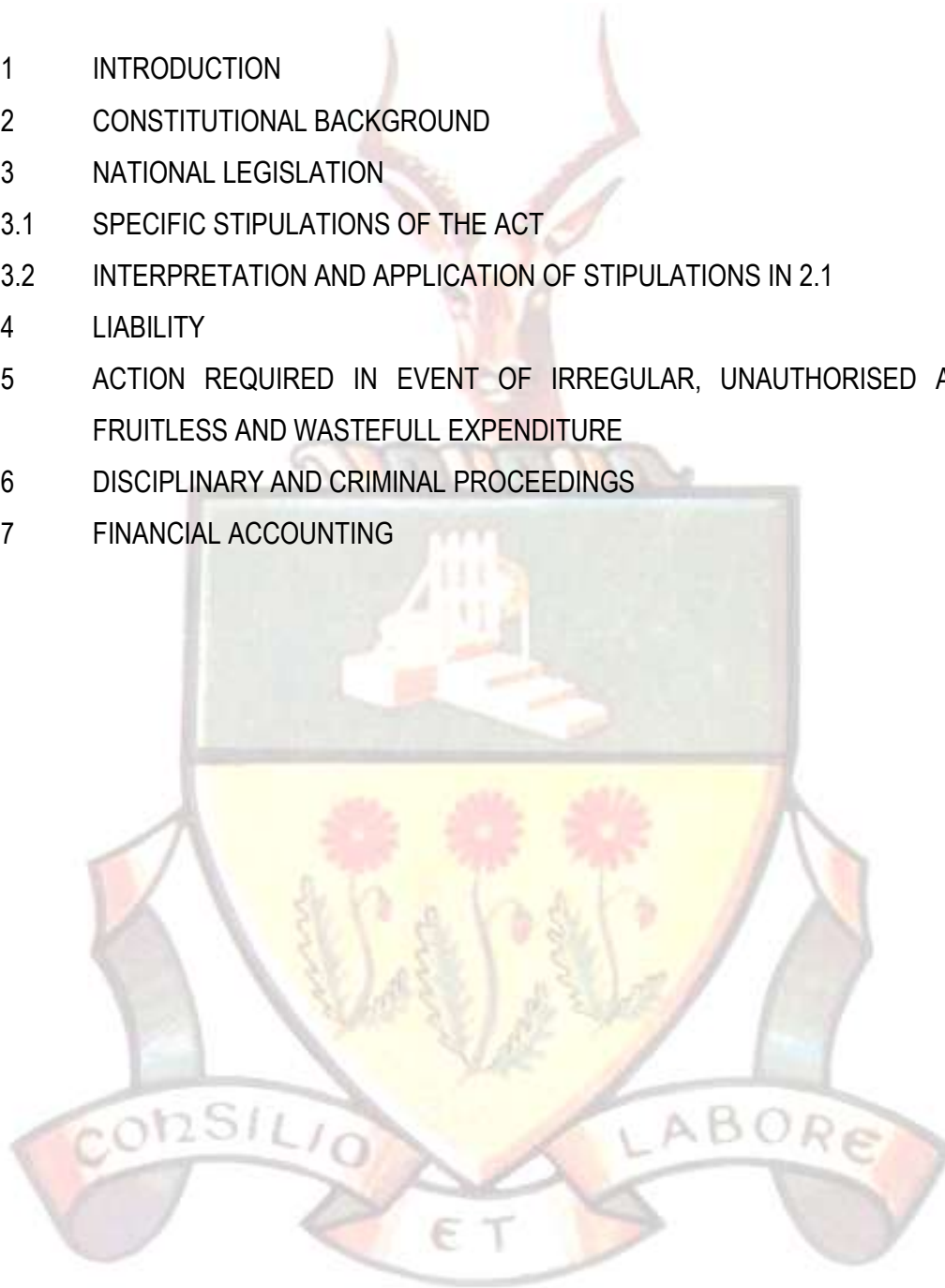
<b>REVISION HISTORY</b>			
<b>Date</b>	<b>Version</b>	<b>Description</b>	<b>Author/s</b>
15/02/2011	0.01	Draft	Chief Financial Officer

<b>DOCUMENT APPROVAL</b>			
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## **1. INTRODUCTION:**

Irregular, Unauthorized and Fruitless and Wasteful expenses can be described as “negative forces working against effective administration” which create numerous problems for many municipalities simply because of interpretational problems and some vague stipulations in relevant legislation. The purpose of this document is therefore to attempt to explain the entire matter in a more comprehensible way and furthermore go give guidance as to what steps must be taken to prevent it and how to act in the event of such expenses being incurred.

## **2. CONSTITUTIONAL BACKGROUND:**

Although a Municipality has the right in terms of the Constitution to govern, on its own initiative, the Local Government affairs of its community it does not imply that such governing power is unlimited. On the contrary, the Constitution clearly stipulates in Section 151 that such governing shall take place subject to National and Provincial legislation, as provided for elsewhere in the Constitution.

The Constitution inter alia requires in Section 215 that a Municipal Budget and Budgetary process promote transparency, accountability and effective financial management of the local economy. Section 216 in particular stipulates that National legislation must prescribe measures to ensure both transparency and expenditure control.

## **3. NATIONAL LEGISLATION:**

Various National statutes were passed pursuant to the stipulations of the Constitution relating to Local Government in general, but the Local Government : Municipal Finance Management Act, 2003 (Act No 56 of 2003) primarily regulates the matter under discussion. The Local Government : Municipal Finance Management Act, 2003 (Act No 56 of 2003) will henceforth be referred to as the Act.

Section 2 of the Act (objectives) basically confirms the ideals as set out in the Constitution and it is advisable that all officials and political office bearers acquaint themselves with the contents thereof.

### **3.1 Specific stipulations of the Act:**

The Act distinguishes between “irregular”, “unauthorized” and “fruitless and wasteful” expenditure by means of a definition of each concept as follows:

#### **3.1.1 Irregular expenditure:**

Means expenditure:

- (a) Incurred in contravention of, or that is not in accordance with a requirement of the Act, and which has not been condoned in terms of Section 170.

- (b) Incurred in contravention of, or that is not in accordance with a requirement of the Local Government : Municipal Systems Act, 2000 (Act No 32 of 2000) and which has not been condoned in terms of that Act.
- (c) Incurred in contravention of, or that is not in accordance with, a requirement of the Remuneration of Public Office-Bearers Act, 1998 (Act No 20 of 1998)
- (d) Incurred in contravention of, or that is not in accordance with, a requirement of the Supply Chain Management Policy of the Municipality or any of the Municipality's By-laws giving effect to such Policy and which has not been condoned in terms of such Policy or By-law.

but excludes expenditure which falls within the definition of "Unauthorized expenditure". Irregular expenditure can thus be classified as expenditure incurred in contravention of or not in accordance with statutory requirements.

### 3.1.2 **Unauthorized Expenditure:**

#### Means

- (a) Expenditure incurred by the Municipality otherwise than in accordance with Section 15 or 11(3). This includes:

- \* Expenditure not provided for in an approved budget
- \* Expenditure exceeding limits of amounts appropriated for different votes
- \* Unforeseen / unavoidable expenditure in terms of Section 29 of the Act which has not been provided for in an Adjustment Budget and which budget has not been passed within 60 days after the expenditure was incurred.

The following expenditure is excluded which means that it will be regarded as authorized expenditure : notwithstanding the fact that no provision has been made on the budget:

- \* Expenditure to defray costs in the event where the Municipality has not approved a Budget at the commencement of a new Financial Year provided that it is done strictly in accordance with Section 26 of the Act.
- \* Unforeseen / unavoidable expenditure strictly in accordance with Section 29 of the Act (emergency or exceptional circumstances).
- \* Expenditure incurred from a special bank account for relief, charitable or trust purposes provided of course that it is done strictly in accordance with Section 12 of the Act.
- \* The payment of money received on behalf of a person or organ of the state to such a person as provided for in Section 11(1)(e)
- \* Refunding of money incorrectly paid into the Municipal Bank account
- \* Refunding of guarantees, securities and securities deposits investments in terms of Section 13 of the Act.
- \* Defrayment of increased expenditure in respect of a multi year Capital Programme in terms of Section 31 of the Act.

- (b) Overspending of the total amount appropriated in the approved budget

- (c) Overspending of the total amount appropriated for a vote in the approved budget
- (d) Expenditure from a vote unrelated to the Department or functional area covered by the vote
- (e) Expenditure of money appropriated for a specific purpose otherwise than for that specific purpose.
- (f) Spending of an allocation received in terms of paragraph (b), (c) or (d) of the “definition” of an allocation contrary to the conditions of such allocations. This simply means that allocations received in terms of Section 214 (1)(c) of the Constitution or from the Provincial Government or any other organ of state or Municipality may only be used for the purpose allocated. The equitable share allocation in terms of Section 214(1)(a) of the Constitution is excluded.
- (g) Payment of a Grant by the Municipality otherwise than in accordance with the Act.

Unauthorized expenditure can thus be broadly classified as those expenditures not budgeted for or expenditures exceeding budgeted amounts or simply “misdirected spending”.

### 3.1.3 Fruitless and Wasteful Expenditure:

Means

- (a) Expenditure that was made in vain that would have been avoided had reasonable care been exercised.

## 3.2 Interpretation and Application of Stipulations in 2.1

The expenditure referred to in 3.1.1 and 3.1.2 pose no problem and need no explanation. The problem though lies with 3.1.3 which creates numerous interpretational difficulties for Municipalities. The Act *per se* does not give any explicit example of fruitless and wasteful expenditure but provides a vague guideline which must be applied in order to determine whether or not an anticipated expense will be “in vain” and thus be fruitless and wasteful. The requirement of “reasonable care” should be applied as an objective measurement to determine whether or not a particular expenditure was necessary or essential. Without getting too technical or academic it will suffice to emphasize that the “average man” test will have to be applied in order to determine if “reasonable care” was indeed exercised. The “average man” referred to here does not refer to the man in the street but to the average experienced and competent “accounting officer”. The question will thus be asked whether another “Accounting Officer” would have incurred the particular expenditure under exactly the same conditions or circumstances. If the answer to such questions is positive the expenditure would not be fruitless and wasteful. Our courts of law will not apply any other rule than the “objective average man test” should an alleged fruitless and wasteful expenditure end up in litigation. No particular expenditure is explicitly identified by the Act

as Fruitless and Wasteful either which means that the Municipality will always have to act cautiously when spending money. It appears that the term “fruitless and wasteful” expenditure was included in the Act by the legislator as an extra safety measure for just in case all the prohibitions explicitly mentioned (irregular or unauthorized expenses) are insufficient to protect the interest of the Local community. However, the matter of the fact remains that a particular expenditure may not be “irregular” or “unauthorized” but yet “fruitless and wasteful” which leads to the question what measures could possibly be implemented to avoid it. It seems that the most logical approach to address this is to ask a few elementary questions prior to the spending of Municipal funds such as:

**3.2.1 Does the intended spending relate to the formal powers of the Municipality?**

A Municipality may perform only those functions and powers conferred to it by the Constitution and relevant legislation. Any expenditure incurred relating to an act or conduct exercised outside those functions and powers will result in fruitless and wasteful expenditure notwithstanding sufficient provision has been made on the budget and correct procedures were followed in incurring the expenditure.

**3.2.2 Will the expenditure further the interest of the Municipality?**

The expenditure incurred to obtain a service, inventory, asset or to render a service et. must have been necessary and ideally unavoidable to enable the Municipality to exercise its functions and powers in accordance with the relevant legislation. (see comments below 3.2.3)

**3.2.3 Is it essential to incur the intended expenditure?**

It is of paramount importance to incur expenditure only when it is really necessary or essential for purposes as mentioned under question 3.2.1 and 3.2.2 above. One should be satisfied that non-incurrence of such expenditure will have a negative impact on the lawful activities of the Municipality.

**3.2.4 Is any other option perhaps available to prevent the intended expenditure or to reduce it?**

This question overlap to some extent with question 3.2.3 above but it is more specific in the sense that it put pressure on the Municipality to apply its mind and to consider all possible options. Should it appear after the expenditure has been incurred that a more effective and perhaps a less expensive option was at the disposal of the Municipality but that it was ignored or disregarded without good cause the expense will be regarded as fruitless and wasteful.

**3.2.5 Will the intended spending be done in accordance with good financial practice, ethical norms and transparency?**

Lack of sound Financial and ethical practice may in many cases result in expenditure being regarded as fruitless and wasteful.

**3.2.6 What are the chances that a human error will contribute to unnecessary expenditure?**

Municipalities on a daily basis waste money as a result of errors by Municipal officials which could result in such expenditure be declared “fruitless and wasteful”. Any expenditure incurred as a result of the negligence, or gross negligence in particular, of an official will almost always be regarded as fruitless and wasteful. Human errors manifest in various forms in Municipalities as a result of the divergent functions of Municipalities and no attempt will be made to mention specific examples. It is important though to take note that Municipalities must at all times ensure that their officials are sufficiently trained and equipped to do their jobs.

If a human error results in irregular or unauthorized expenditure such error will obviously not simultaneously be regarded as “fruitless and wasteful”

These questions obviously relate to fruitless and wasteful expenditure only. Questions relating to overspending of the budget or a specific vote or unrelated vote spending or non provision on the budget etc. are not applicable simply because such matters are covered under “unauthorized” or “irregular” expenditure.

To conclude with it is interesting to take note that “fruitless and wasteful” expenditure mentioned in the Auditor-General’s report may be rebutted if the Municipality can prove that, on account of reliable information, it did in fact act with reasonable care and that the expenditure in all other respects comply with the legislative requirements. The Auditor General is in exactly the same situation as the Municipality when he must rule if a particular expenditure is indeed “fruitless and wasteful” as he is obliged to apply the very same legislation discussed in this document.

**4. LIABILITY:**

In terms of Section 32 of the Act liability for irregular, unauthorized and fruitless and wasteful expenditure will be incurred as follows:

**By a Political Office-Bearer:**

- Who knowingly or after having been advised by the Accounting Officer that a particular expenditure is like to result in unauthorized expenditure, instructed an official to incur that expenditure.
- Who deliberately or negligently committed, made or authorized an irregular expenditure;
- Who deliberately or negligently made or authorized a fruitless and wasteful expenditure

**By an Accounting Officer:**

- Who deliberately or negligently incur unauthorized expenditure;
- Who deliberately or negligently committed, made or authorized an irregular expenditure
- Who deliberately or negligently made or authorized a fruitless and wasteful expenditure

**By an Official:**

- Who deliberately or negligently committed, made or authorized an irregular expenditure
- Who deliberately or negligently made or authorized a fruitless and wasteful expenditure

It is important to note that liability in terms of Section 32 of the Act does not limit liability which may be incurred in terms of the common law or any other legislation.

**5. ACTION REQUIRED IN EVENT OF IRREGULAR, UNAUTHORISED AND FRUITLESS AND WASTEFUL EXPENDITURE:**

In terms of Section 32 of the Act the Municipality is obliged to take the following specific steps in the event of irregular, unauthorized and fruitless and wasteful expenditure:

- \* To recover such expenditure from the liable person:

Unless in the case of unauthorized expenditure such expenditure is authorized in an Adjustment Budget or certified by the Municipal Council, after investigation by a Council Committee, as irrecoverable and written off by the Council.

Unless, in the case of irregular or fruitless and wasteful expenditure such expenditure is certified by the Municipal Council, after investigation by a Council Committee, as irrecoverable and written off by the Council.

- \* The Accounting Officer must notify the Council, Mayor or Executive Committee in writing if it is likely that a decision taken by them will result in unauthorized, irregular or fruitless and wasteful expenditure.

This will not only prevent the unauthorized, irregular or fruitless and wasteful expenditure to take place but will also exonerate the Accounting Officer from any liability whatsoever should such expenditure ensue.

The Accounting Officer must promptly inform the Mayor, MEC for Local Government and the Auditor General in writing of:

- \* Any unauthorized, irregular or fruitless and wasteful expenditure incurred by the Municipality.

- \* Whether any person is responsible or under investigation for such expenditure

Steps that have been taken:

- \* To recover or rectify such expenditure
- \* To prevent a recurrence of such expenditure
- \* The Accounting Officer must report all cases of alleged expenditure that constitute a criminal offence to the SAPS. Theft and fraud in general must also be reported.
- \* The Council must ensure that all cases of irregular expenditure, theft and fraud committed by the Accounting Officer are referred to the SAPS. The Council must also report to the SAPS if the Accounting Officer fails to perform his duties as referred to in 4 above.

## **6. DISCIPLINARY AND CRIMINAL PROCEEDINGS:**

Although the three different concepts namely unauthorized, irregular or fruitless and wasteful expenditure are separately and individually defined in the Act they are treated equally when it comes to disciplinary and criminal proceedings. None of these are thus more or less serious than the other and are dealt with in exactly the same manner whenever it occurs for purposes of institution of disciplinary or criminal proceedings.

In terms of Section 171 of the Act financial misconduct is committed by the Accounting Officer, Chief Financial Officer or any other official who deliberately or negligently makes, permits or instructs another official of the Municipality to make an unauthorized, irregular or fruitless and wasteful expenditure.

Such financial misconduct must be investigated unless it is frivolous, vexatious, speculative or obviously unfounded and disciplinary action must be instituted if the investigation warrants such conduct.

Section 173 of the Act stipulates that an Accounting Officer or any other official is guilty of a criminal offence if he/she deliberately or in a grossly negligent way makes or permits or instructs another official to make an unauthorized, irregular or fruitless and wasteful expenditure. In terms of Section 174 a person is liable on conviction to an appropriate fine or maximum imprisonment of five years.

## **7. FINANCIAL ACCOUNTING:**

Unauthorized, Irregular and Fruitless and Wasteful Expenditure is accounted for as expenditure in the statement of financial performance, and where recovered is subsequently accounted for as revenue in the statement of financial performance.

Any political office bearer or official who deliberately or negligently made or authorized an unauthorized, irregular and fruitless and wasteful expenditure is liable for that expenditure. The Municipality must recover the unauthorized, irregular and fruitless expenditure unless the expenditure:

- \* In the case of unauthorized expenditure is authorized in an Adjustment Budget or certified by the Council, after investigation by a Council Committee as irrecoverable and written off by the Council and
- \* In the case of irregular or fruitless and wasteful expenditure is after an investigation by a Council Committee, certified by Council, as irrecoverable and written off by the Council.

Some examples of Unauthorized, Irregular and Fruitless and Wasteful Expenditure:

1. VAT not claimed on Capital or Operational Expenditure
2. No supporting documentation for Capital or Operational Expenditure
3. VAT penalty interest
4. Interest paid on Creditors not paid within 30 days

5. Late payment of PAYE, UIF, SDL
6. Councillors remuneration not in accordance with guidelines as gazette from time to time
7. Unauthorized overtime paid
8. Non compliance to SCM Procurement Policy
9. Journals not authorized
10. Expenditure occurred that was not budgeted for.

