The real state of the nation

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Financial misconduct in the public service cost taxpayers R346 million in 2009/2010, 87% of which was never recovered. 2011/2012 brought even worse news, with that number shooting up t R930 million. Our government has said that the public service is in good health, but what's the real prognosis?

Accountability framework

One of the key requirements of officials in the public service (national and provincial departments) is that they perform their duties and responsibilities, making efficient, effective and economic use of public resources. The officials need to be constantly measured in an accountability framework to ensure that public resources are protected and maintained whilst being maximised for the broadest economic benefit. The accountability framework serves another important function: to monitor the behaviour of officials to ensure that they do not incur unauthorised, irregular, fruitless or wasteful expenditure.

Obligation

There is an obligation on the public service, and their officials, that reasonable care must be exercised to prevent and detect unauthorised, irregular, fruitless and wasteful expenditure. The obligation extends to the active recovery of financial losses or damages resulting from unlawful behaviour. The most prevalent unlawful behaviour is financial misconduct.

The legislative framework supporting public entities is prescriptive in terms of the action that must be taken against an official who wilfully or negligently makes or permits unauthorized, irregular or wasteful expenditure. The problem is that a significant number of public entities are failing to take action or to report unlawful behaviour to law enforcement authorities.

The public service is obligated to report financial misconduct in terms of the Public Finance Management Act and supporting Treasury Regulations. There is a more serious reporting obligation stipulated in the Prevention and Combating of Corrupt Activities Act which states that the public service need to report incidents of financial misconduct (theft, fraud, extortion, forgery or uttering of a forged document) involving amounts of R100,000 or more to the South African Police Service.

The Public Service Commission publishes annual findings of criminal proceedings instituted against officials found guilty of financial misconduct. The findings revealed startling statistics which show that the majority of the public service do not comply with their mandatory reporting obligations and needed to be constantly reminded to report financial misconduct. The findings of financial misconduct furthermore reveal that the public service has consistently shunned instituting criminal charges in appropriate circumstances.

In 2009/2010, no criminal action was taken in 57% of cases whereas criminal action was only taken in 22% of cases! The situation worsened during 2010/2011, where no criminal action was taken in 76% of cases whereas criminal action was only taken in 20% of cases! The findings for 2011/2012 have not been published but preliminary statistics reveal that 39% of cases provide no indication of criminal action or civil proceedings, there is no reporting on the recovery of money lost or recovered from unlawful behaviour, and less than 1% of departments provide an indication of the trend of financial misconduct cases.

Insufficient capacity

The situation is further exacerbated by insufficient investigative capacity within public entities which often leads to substantial delays or the ultimate withdrawal and cancellation of investigations or cases. A further challenge is that public entities take several months to finalize investigations during which time the implicated officials resign and serve out their notice period without facing disciplinary sanctioning.

The Public Service Commission publishes annual findings on the extent of precautionary suspensions reported by the public service. The findings for 2010/2011 show that 58% of officials serve suspensions greater than 91 days, whilst 16% serve suspensions between 61 and 90 days, and 26% serve suspensions less than 60 days. The majority of officials in public service have notice periods of one calendar month which means that a considerable amount of time and money is spent on precautionary suspensions which are often wasted and lost to the public service when the officials resign without facing disciplinary sanctioning or resign during disciplinary hearings before sanctioning is announced.

Once the officials have served out their notice periods, the public service usually abandons disciplinary, criminal and civil proceedings allowing implicated officials to move to other institutions to commit financial misconduct. The situation often results in corrupt officials moving to other institutions thereby avoiding sanctioning and finding a new hunting ground for unlawful behaviour.

The problem has become so severe that Government has established dedicated entities and mechanisms to combat widespread commercial crime in the public service. Unfortunately, the Directorate for Priority Crime Investigation (the Hawks), the Special Investigating Unit (SIU), the Asset Forfeiture Unit (AFU), the Multi-Agency Working Group and the Public Service Anti-Corruption Unit are fighting a losing battle to stop financial misconduct in the public service. The Code of Conduct, Financial Disclosures Framework and anti-corruption strategies, forums, databases have had minimal impact on financial misconduct. The establishment of anti-corruption hotlines to report financial misconduct in the public service have largely been unsuccessful. Forensic investigations have found that significant numbers of officials are unaware of these anticorruption mechanisms, and this low level of awareness exacerbates a very problematic situation.

The extent of the situation

The Public Service Commission publishes annual findings on the extent of financial misconduct reported by the public service. In their *Report on Financial Misconduct for the 2009/2010 Financial Year*, 1,135 incidents of financial misconduct were reported. The most common types of financial misconduct found in the public service were fraud (53%), financial mismanagement (17%), theft (12%) and misappropriation & abuse (10%). Kwazulu-Natal saw the highest incidence of financial misconduct (21%), followed by the Western Cape (13%) and then National Departments (9%).

A big concern is that the Director General of the Public Service Commission believes that the reported cases of financial misconduct are underreported. This means that the real extent of the problem is really unknown. There is general consensus that financial misconduct has significantly increases but the true extent of the situation is hard to quantify because there is such a low level of reporting by the public service.

The most troublesome finding is that there appeared to be no meaningful consequence to financial misconduct. Although 88% of officials were found guilty of misconduct in the cases, the most common sanction for financial misconduct was a final written warning (43%). Only 19% of officials found guilty of financial misconduct were discharged from the public service. The majority of perpetrators remain in their positions and often continue to commit financial misconduct. The losses from the finalized cases of financial misconduct totalled R346 million, and only 13% of this amount was recovered from officials (R44 million) whilst 87% remained lost to the public service (R302 million).

The Public Service Commission recently published findings showing that financial misconduct in the public service has grown rapidly over the last 3 years. Financial misconduct grew from R100 million in 2008/2009 by 346% to R346 million in 2009/2010 and then soared another 269% to R932 million in 2010/2011! The Public Service Commission estimates that financial misconduct for 2011/2012 could exceed R1-billion! The findings confirm the widespread belief that there is a higher prevalence of financial misconduct and a decline in ethical behaviour and conduct.

The seriousness of the situation was best conveyed by the estimate provided by Revered Kenneth Meshoe, President of the African Christian Democratic Party (ACDP), during proceedings on 15 August 2012 in the National Assembly. He revealed that a staggering R385 billion had been lost at every level of Government since 1994. The amount highlights the extent of financial misconduct that is taken place beyond national and provincial departments in state owned enterprises and municipalities!

<u>So what is the problem?</u>

The majority of officials conducted during forensic investigations don’t seem to understand the impact or consequence of external business interests on the institution or the official. Officials often turn a blind eye to the external business interests of colleagues without considering the influence on the ability of the institution to contract for goods or services in accordance with a system which is fair, equitable, transparent, competitive and cost effective. The biggest problem with external business interests is that they either divert the official away from the roles and responsibilities of their job or create a real or perceived conflict of interest. The most common response recorded from an official found to have an undeclared business interest is, “so what is the problem?”.

<u>No real consequences</u>

The findings published by the Public Service Commission confirm the widespread belief that there are no real consequences to financial misconduct. The public service consistently ignores Section 81 and 85 of the Public Finance Management Act and Regulation 4.3 of the Treasury Regulations which mandates institutions to report financial misconduct.

There are several initiatives that are being considered to impose punitive consequences for financial misconduct. The initiatives are being driven by national and provincial departments and by the Western Cape Government. The key focus of the initiatives is to enforce the legislative framework, improving governance & oversight and making accounting officers and officials more accountable.

Five common practices will be classified as serious contraventions of financial misconduct:

1. Failure to pay creditors within 30 days;

2. Failure to report unauthorised, irregular, fruitless or wasteful expenditure;

3. Acts that undermine internal control systems;

4. Failure to disclose any direct/indirect personal or business interest; and

5. Abuse of state assets.

There is common belief that the strict enforcement of the initiatives will support the containment and minimisation of financial misconduct. The public service is moving towards practices in the private sector, where employees that are found guilty of financial misconduct in a bank or retail store are unlikely to be employed in the same industry. Several industries in the private sector share information on individuals that have been found guilty of financial misconduct so that they are not employed elsewhere in the industry. A similar practice is vital for the public service where there are fewer reporting and control mechanisms to protect national and provincial departments. It's critical that appropriate deterrents and consequences are implemented in the public service to overcome the scourge of financial misconduct.

The situation on the ground – the experience of a forensic investigator

Two forensic investigations have been selected to show the extent of financial misconduct in the public service. The two case studies selected mirror the typical environment of institutions and confirm that in most instances, institutions do not pursue disciplinary, criminal or civil action against all officials found guilty of financial misconduct. The lack of appropriate sanctioning has allowed a culture of non-compliance to develop.

Department A

A forensic investigation was conducted into the external business interests and resultant conflicts of interest of the directors, managers and officials of the institution. The investigation found that directors failed to disclose 84% of their business interests (13 directors had 118 business interests), managers failed to disclose 100% of their business interests (13 managers had 48 business interests) and officials failed to disclose 98% of their business interests (111 officials had 175 business interests). The most worrying aspect of the investigation is that we found almost 25% of workforce had external business interests which severly impacted on the institution being able to fulfil its legislative mandate.

No disciplinary, criminal or civil sanctions were pursued.

Department B

A forensic investigation was conducted into the fraud and theft of R2 million over a seven-year period in an institution that was weak on governance and oversight. The institution was characterised by the active bypassing of policies, procedures and internal controls that exposed the institution to unauthorised, irregular, fruitless or wasteful expenditure over an extended period of time. Limited governance and oversight allowed unlawful behaviour to develop and prosper.

The investigation uncovered seven officials that committed on-going incidents of financial misconduct. One official was dismissed following a disciplinary hearing and was subsequently found guilty of fraud and theft in court. The institution recovered 75% of the stolen money.

The remaining six officials shared passwords to the finance system to overcome security features to safeguard fraudulent payments, pre-signed cheques and stored these in a safe so that cheques were ready for urgent payments and failed to declare external business interests. No disciplinary, criminal or civil sanctions were pursued against the six officials.

Proactive solutions

The public service should implement a multi-pronged strategy that combats financial misconduct across the public sector. The strategy should incorporate the following components:

- The commitment of leadership to combat financial misconduct;
- Strict enforcement of the legislative framework;
- Define a common and consistent definition of financial misconduct across the public service;
- Strengthening risk management practices and procedures;
- Implementation of fraud prevention and fraud response plans;
- Appoint independent experts to conduct serious financial misconduct investigations so that the periods of the precautionary suspensions and investigations can be substantially shortened;
- Improving the investigative capacity of the public service;
- Issue guidelines to ensure the consistent management of disciplinary hearings and sanctions;
- Institution of criminal and civil proceedings against officials found guilty of financial misconduct;
- Blacklisting of officials found guilty of financial misconduct within the public service;
- Active recovery of unauthorised, irregular, fruitless or wasteful expenditure; and
- Implementation of monitoring and reporting mechanisms.

The road ahead

The public service is facing a daunting mission to overcome financial misconduct. The leadership of the public service needs to set the appropriate ethical tone from the top stating that unlawful behaviour of financial misconduct is unacceptable. The tone needs to be supported by a statement of commitment to combat financial misconduct across national and provincial departments. The multi-pronged strategy needs to be implemented and constantly measured to ensure its achieving the desired aims and objectives. This is a fight worth winning.