

**A statutory regulatory analysis of the accountability of the
municipal manager and corporate governance measures in Mahikeng
local municipality**

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Dissertation submitted in fulfilment of the requirements for the degree of Master of
Laws in the Faculty of Law

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SOLEMN DECLARATION

I,, hereby declare that the dissertation titled: "A statutory regulatory analysis of the accountability of the municipal manager and corporate governance measures in Mahikeng local municipality", submitted in fulfilment of the requirements for the Master of Laws (LLM) degree, is the product of my research and opinion with the exception of references of the sources acknowledged herein and that I have not at any prior time submitted it to any university or by any person for any qualification.

Signature of Candidate:

University Number:

Signed aton this day of 2020

Declared before me on this day of2020

Signature of Supervisor:

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DEDICATION

To my parents

And

The rest of the family

ABSTRACT

The problem of mismanagement of funds in the municipalities is an issue of concern in South Africa. The Mahikeng local municipality exemplifies the reckless management of municipal funds by the municipal manager who oversees the management of the municipal funds and budget. The current dilemma of the Mahikeng local municipality is due to reckless management of the municipal funds, which creates service delivery deficiencies leading to the municipality being put under administration. This study adopts a doctrinal research method. The study finds that, on the one hand, the provisions of the relevant laws are not adequate, and on the other hand, they are not adequately enforced to hold the municipal manager for Mahikeng local municipality accountable for municipal funds. The study further proposes that corporate governance principles should apply to the municipal authorities to ensure accountability in municipalities. The study concludes that the imposition of corporate governance principles and proper enforcement of the extant laws would ensure appropriate, effective and efficient accountability as well as improved service delivery in Mahikeng local municipality. Consequently, the researcher hopes that the recommendations of the study will apply to Mahikeng local municipality and other municipalities facing similar challenges in South Africa.

Keywords: Accountability, corporate governance, municipal council, municipal manager, Mahikeng local municipality, piercing the corporate veil.

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CHAPTER ONE

RESEARCH OUTLINE AND CONTEXT

1.1 Introduction

The Mahikeng local municipality provides local government services to the Mahikeng community.¹ It is the role and function of the Mahikeng local municipality to provide the community with basic services² and to be accountable to its people.³ The Mahikeng local municipality is responsible for the management of municipal funds and the provision of basic services to the community of Mahikeng.⁴ Basic services include, among others, the provision of housing, health care, roads, water, sanitation, and refuse and waste removal. As such, the Mahikeng local municipality must account to the Mahikeng community for the provision or the delivery of such basic services.⁵ Accountability means that the responsible person must be in a position to account for the outcomes, positive or negative, for the portion of work directly under their control.⁶ Accountability occurs when the municipal manager for

¹ *Ngaka Modiri Molema District Municipality v Chairperson, North West Provincial Executive Committee and Others* [2014] ZACC 31 (*Ngaka Modiri Molema* case) para 1, which emphasised that Municipalities are the face of government to the communities they are supposed to serve. If municipalities fail in their executive obligations to provide services to the people, the provincial executive may step in to dissolve the municipal council and appoint an administrator.

² Van As H "By-Laws and Law Enforcement as Management: Educational and Moral Rejuvenation Mechanisms" 2006 *Official Journal of the Institute of Municipal Finance Officers* 6, 6. Van As indicated that municipalities must ensure that people in their area of jurisdiction have basic services. These basic services have a direct and immediate effect on the quality of life of the people of Mahikeng local municipality.

³ *Constitution of the Republic of South Africa, 1996 (Constitution of South Africa)*, see section 152(1)(b); *Municipal Systems Act* 32 of 2000 (*Systems Act*), see section 4(2); Ndevu Z and Muller K "A Conceptual Framework for Improving Service Delivery at Local Government in South Africa 2017 *African Journal of Public Affairs* 13, 14; De Villiers NF, Van As HJ and Botha JC "The Enforceability of The By-Laws of District Municipalities on Local Municipalities: The Case of Solid Waste Disposal" 2020 *Stellenbosch Law Review* 315, 336. De Villiers, Van As and Botha argue that accountability includes accountability for service delivery.

⁴ Sections 4 and 73 of the *Systems Act*; see also *Ngaka Modiri Molema* case para 13; Ndevu and Muller 2017 *African Journal of Public Affairs* 14.

⁵ See sections 4(2)(b), (d) and (f) of the *Systems Act*, The members of the community have the rights to be informed about the decisions of the municipal council affecting their rights and regular disclosure of state of affairs of the municipality in terms of section 5(1)(c) and (d) of the *Systems Act*.

⁶ Smit PJ and Cronjé GJ *Management Principles: A Contemporary Edition for Africa* 3rd ed (Juta Cape Town 2002) 1, 192; Sikhakhane BH and Reddy PS "Public Accountability at the Local Government Sphere in South Africa" 2011 *African Journal of Public Affairs* 85, 86.

Mahikeng local municipality is held responsible for his or her actions, omissions, decisions, policies and/or expenditures of the municipality.⁷

Additionally, accountability occurs when the municipal manager transparently explains or gives feedback on the decisions of the Mahikeng local municipality to the municipal council or the Mahikeng community.⁸ One of the ways in which the municipal manager is held accountable is usually through the preparation of annual reports and convening of annual meetings with Mahikeng community.⁹

Be that as it may, the mismanagement of funds in the Mahikeng local municipality is an issue of concern.¹⁰ The municipality has demonstrated reckless management of municipal funds by the municipal manager, who is in charge of the management of the municipal funds and budget.¹¹ The municipal manager's conduct has led the Mahikeng local municipality to struggle to provide basic service delivery to the people of Mahikeng area and to account for the municipal resources and funds.¹² The reason for this is that for the municipality to be able to provide such basic services, it needs proper financial management of funds to ensure good governance and accountability. Although the lack of accountability of municipal funds and service delivery is a national crisis, this study selected the Mahikeng local municipality as a case study. The case study selection was made to effectively focus on specific aspects that are peculiar to Mahikeng local municipality and to avoid embarking on a study that is too broad. Although the Mahikeng local municipality is the capital city of

⁷ Bovens M "Public Accountability" in European Group Public Administration Annual Conference (3-6 September 2003 Oeiras Portugal) 1, 2; Smit and Cronjé *Management Principles: A Contemporary Edition for Africa* 192; Sikhakhane and Reddy 2011 *African Journal of Public Affairs* 86.

⁸ Section 55(1)(d) of the *Systems Act*; Bovens "Public Accountability" 2.

⁹ *Municipal Finance Management Act* 56 of 2003 (*Municipal Finance Management Act*), see section 121, which obliges the Mahikeng local municipality to prepare an annual report for each financial year.

¹⁰ Makwetu K "Consolidated General Report on National and Provincial Audit Outcomes 2017/2018" 2018 *Auditor General South Africa* 1, 5.

¹¹ Section 55(2) of the *Systems Act*; see also section 62 of the *Municipal Finance Management Act* which establishes that the accounting officer, i.e. the municipal manager, is responsible for financial administration generally, and in many specifics. Mathiba G "Time to Clean out the Augean Stables of Local Government" *Daily Maverick* (28 May 2019) 1.

¹² Mokwena TI Mahikeng Local Municipality Annual Report 2015/16 (19 January 2017 Mahikeng) 1, 8. The then municipal manager Mr Mokwena TI in the annual report 2016/16 acknowledged that the municipality is confronted with serious challenges of service delivery resulting in community not receiving services as expected.

North West Province, the researcher hopes that the recommendations of the study will be applicable to other municipalities facing similar challenges in South Africa.

1.2 Background of the Study

In 1990, municipalities were mere creatures of the statute created by provincial governments and did not have powers and responsibilities as they owed their existence from the provincial ordinance.¹³ Prior to 1994, the municipal council did not have the powers to govern the local government affairs of the community on their own initiative.¹⁴ This meant that the municipal council could not hold the municipal manager accountable. There was no measure of accountability against the municipal council and the municipal manager for maladministration and unequal distribution of resources in municipalities.¹⁵ As a result, the municipality provided massively unequal services to the different communities.

The promulgation of the King I Code¹⁶ on corporate governance was meant to improve corporate governance in South African companies. The King I Code¹⁷ introduced a sound corporate culture based on ethical leadership, corporate citizenship and transparency in companies. However, the King I Code did not expressly apply to municipalities but was only persuasive.¹⁸ As a result, the municipal council and the municipal manager were not required to apply the principles of good corporate governance in the same manner as directors of companies, who are obliged to do so. This means that in 1994, a municipal manager

¹³ Section 30 of the *Local Authorities Act* 23 of 1992 (*Authorities Act*); Stytler N and De Visser J *Local Government Law of South Africa* 8th ed (LexisNexis Durban 2007) 1, 8; Joubert WA and Faris JA *The Law of South Africa: Constitutional Law, Structures of Government* 2nd ed (LexisNexis Durban 2007) 1, 189.

¹⁴ Section 151 of the *Constitution of South Africa*; Joubert and Faris *The Law of South Africa: Constitutional Law, Structures of Government* 189.

¹⁵ Section 30 of the *Authorities Act*; Steytler and De Visser *Local Government Law of South Africa* 8; Joubert and Faris *The Law of South Africa: Constitutional Law, Structures of Government* 189.

¹⁶ King I Report "King Report on Corporate Governance for South Africa" 1994 *Institute of Directors Southern Africa* (hereinafter referred to as the "King I Report"); Cliffe Dekker Attorneys *King Report on Corporate Governance for South Africa* (2002) available at http://mervynking.co.za/downloads/CD_King2.pdf accessed 05 July 2019 1, 2.

¹⁷ Padayachee V "King IV is Here: Corporate Governance in South Africa Revisited" 2017 *South African Journal of Social and Economic Policy* 17, 17.

¹⁸ Cliffe Dekker Attorneys *King Report on Corporate Governance for South Africa* 2; Shaamara A *Corporate Social Responsibility: Practices, Trends and Developments* (LLM- dissertation University of Cape Town 2013) 61.

was not obliged to apply or adhere to corporate governance measures in as far as the King I Code¹⁹ was concerned as it only applies to companies.

The advent of the *Constitution of South Africa*²⁰ in 1996 brought significant changes to the functioning and powers of a municipality. These changes include conferring upon municipalities the right to govern the local government affairs of their communities on their own initiative. In 1998, the *Structures Act*²¹ established a new generation of municipal managers that had to be accountable to the municipal council as well as the community. The *Structures Act*²² expressly states that the municipal council must appoint a municipal manager who is the head of administration and the accounting officer of the municipality. In 2000, the *Systems Act*²³ was enacted to create a local government that is efficient, effective, accountable and transparent in its administration. The *Systems Act*²⁴ stipulates clearly that the municipality must organise its administration in a manner that enables it to hold the municipal manager accountable for the overall administration of the municipality. This is to ensure that there is accountability in the municipality, and this helps the municipality to move progressively towards the social and economic upliftment of local communities.

In 2003, the *Municipal Finance Management Act*²⁵ was promulgated to ensure sound and sustainable financial management in municipalities. The *Municipal Finance Management Act*²⁶ provides that the municipal manager must be accountable and properly manage the financial administration of the municipality. In addition, the municipal manager must prevent the unauthorised, irregular or fruitless and wasteful

¹⁹ Principle 1 of King I Code; Padayachee 2017 South African Journal of Social and Economic Policy 17.

²⁰ Section 151 of the *Constitution of South Africa*; Fuo O "Intrusion into the Autonomy of South African Local Government: Advancing the Minority Judgment in the Merafong City Case" 2017 *De Jure* 324, 325-326.

²¹ Section 12 of the *Structures Act*, provides that the Member of the Executive Council (MEC) for local government in a province must establish a municipality in each municipal area; see also sections 155 and 163 of the *Constitution of South Africa*; Thornhill C "The Executive Mayor/Municipal Manager Interface" 2008 *Journal of Public Administration* 725, 731.

²² Section 54A of the *Systems Act*; Thornhill 2008 *Journal of Public Administration* 731.

²³ Section 3 of the *Systems Act*; see also section 41(1)(c) of the *Constitution of South Africa*.

²⁴ Section 51(i) of the *Systems Act*; Visser 2001 Local Government Working Paper 2.

²⁵ Section 2 of the *Municipal Finance Management Act*.

²⁶ Section 62(1)(d) of the *Municipal Finance Management Act*; Botlhoko *Promoting Effective Financial Accountability in Local Government in the North West Province* 59.

expenditure of the municipal funds.²⁷ The *Municipal Finance Management Act*²⁸ requires the municipal manager for Mahikeng local municipality to exercise functions and powers assigned to an accounting officer and be held accountable for all the financial administration of the municipality. The reason for this is that the municipal manager is the accounting officer and head of administration of the municipality.

The King II Code acknowledges that there was a move away from the view that the aim of incorporating a business entity is solely to maximise profit for shareholders to that of the bottom line approach, which embraces the economic, environmental and social aspects of a company's activities.²⁹ The King II Code requires companies to comply with the King Codes or explain their non-compliance.³⁰ This means that the King II Code does not apply to municipalities but remains persuasive.

The King III Code³¹ on corporate governance applies to all entities irrespective of their method of incorporation, and it requires a board of directors to provide ethical leadership, which is the foundation of good corporate governance.³² Although it is not compulsory for municipalities to apply King III Code, it is advisable for a municipality to take into consideration the principles of good corporate governance as expounded in the King III Code to enhance good governance.³³ The consideration can be done by implementing the integrated sustainability and social transformation in the municipality, which lead to a lasting concentration on the effects of business

²⁷ Sections 173(1)(a)(iii) and 95(d) of the *Municipal Finance Management Act*.

²⁸ Sections 60(a) and 62(1) of the *Municipal Finance Management Act*; Botlhoko *Promoting Effective Financial Accountability in Local Government in the North West Province* 115.

²⁹ Esser IM "Corporate Social Responsibility: A Company Law Perspective" 2011 *South African Mercantile Law Journal* 317, 327.

³⁰ Naidoo R. *Corporate Governance and Essential Guide for South African Companies* 2nd Ed (LexisNexis Durban 2010) 34.

³¹ King III Report "King Report on Governance for South Africa 2009" 2009 *Institute of Directors Southern Africa* (hereinafter referred to as the "King III Report"), see section 13, all entities should apply the principles in the code and consider the best practice recommendations in the report. All entities should by way of explanation make a positive statement on how the principles have been applied or have not been applied. This level of disclosure will allow the stakeholders to comment on and challenge the board on the quality of its governance

³² Mokgopo TI "The Role of King III Report on Corporate Governance in Improving Poor Service Delivery in the South African Government" 2016 *Journal of Public Administration and Development Alternatives* 77, 80; Shaamara *Corporate Social Responsibility* 62.

³³ Section 13 of the King III Report; see also Principle 1.1 of the King III Code, which provides that the board should act as the focal point for corporate governance. The board can achieve this by exercising leadership, enterprise, integrity and by engaging the stakeholders in such a manner that they have trust and confidence in the company.

on the society and environment. In addition, the concept of sustainability is linked with the evaluation of ethics and the improvement of ethical standards in business and the community.

The King IV Code³⁴ was released in 2016. The King IV Code makes it easier for its application on municipalities as it provides for sector supplements. A sector supplement serves as a guideline which provides direction on how the King IV Code should be interpreted and applied by a variety of sectors and organisational types. Moreover, it is primarily aimed at the governing body, it being the focal point of corporate governance within the organisation. The King IV Code³⁵ requires a municipal council and the municipal manager to lead with integrity, responsibility, accountability, fairness and transparency. This will ensure that a high standard of professional ethics is promoted and maintained in the Mahikeng local municipality. The municipal manager for the municipality can observe the principles of good corporate governance as provided for in King IV Code³⁶ to ensure that he or she runs an efficient, effective and accountable administration in Mahikeng local municipality. The King IV Code is compatible with the *Constitution of South Africa*,³⁷ which provides for basic values and principles governing public administration. It is also supported by the *Systems Act*,³⁸ which also provides for basic values and principles governing local public administration. In so doing, the Mahikeng local municipality must strive for the achievement of the objects of local government as set out in the *Constitution of South Africa*.³⁹

The *Companies Act 71 of 2008*⁴⁰ requires the directors of a company to be held legally liable by the creditors of a company if it can be proven that they failed to exercise their fiduciary duties. The directors' fiduciary duties are to act in good faith,

³⁴ King IV Report "King IV Report on Corporate Governance for South Africa 2016" 2016 *Institute of Directors Southern Africa* (hereinafter referred to as the "King IV Report"), see page 79.

³⁵ Principle 1 of King IV Code which provides that the governing body should lead ethically and effectively.

³⁶ Principle 10 of the King IV Code which provides that the governing body should ensure that the appointment of, and delegation to, management contribute to role clarity and the effective exercise of authority and responsibilities.

³⁷ Section 95 of the *Constitution of South Africa*.

³⁸ Section 50 of the *Systems Act*.

³⁹ Section 152(1) of the *Constitution of South Africa*.

⁴⁰ *Companies Act 71 of 2008 (Companies Act 2008)*, see section 77 read with sections 71-76; Padayachee 2017 *New Agenda* 18.

in the best interest of the company and with a degree of skill, care and diligence.⁴¹ The directors in a company have a fiduciary duty to act in good faith and to be accountable to their corporation and shareholders.⁴² This position of the director or Chief Executive Officer in a company is similar to that of a municipal manager in a municipality.⁴³ They are both accounting officers, who are responsible for the running of the company or the municipality, respectively.⁴⁴ A director in a company and a municipal manager are both expected to prepare financial statements at the end of each financial year and account for all finances thereof. When you hold the position of a director in a company or municipal manager in a municipality, you are expected to act with honesty, integrity, and avoid conflict of interest. Therefore, the researcher suggests that the municipal manager must be held personally accountable if it can be proven that he or she failed to exercise his or her duties that are provided in the *Systems Act*, the *Structures Act* and the *Municipal Finance Management Act*.⁴⁵ The municipal manager of a municipality is responsible for the financial administration of a municipality and must ensure that reasonable steps are taken to ensure that the resources of a municipality are used effectively, economically and efficiently.⁴⁶ The municipal manager must ensure that full and proper records of the financial affairs of the municipality are kept in accordance with the prescribed norms and standards. The municipal manager must ensure that the municipality maintains transparent and efficient systems. The municipal manager must also ensure that disciplinary or criminal proceedings are instituted against any official of a municipality who has allegedly committed an act of financial misconduct⁴⁷ in order to ensure accountability and good governance in the municipality.

⁴¹ Section 73(a)-(c) of the *Companies Act* 2008.

⁴² Section 76(3)(a) of the *Companies Act* 2008; Schoeman N "Piercing of the Corporate Veil Under the New Companies Act" 2012 *De Rebus* 1, 1.

⁴³ Section 60(a) and 62(1) of the *Municipal Finance Management Act*; see also page 80 of the King IV Report.

⁴⁴ Section 60(a) and 62(1) of the *Municipal Finance Management Act*.

⁴⁵ Section 173 and 174 of the *Municipal Finance Management Act*.

⁴⁶ Section 63(1)(a) of the *Municipal Finance Management Act*; see also section 55(2)(c) of the *Systems Act*; Thornhill 2008 *Journal of Public Administration* 731.

⁴⁷ Section 62(1)(e) of the *Municipal Finance Management Act*.

The *Companies Act 2008*⁴⁸ encompasses the principle of piercing of the corporate veil, which seeks to protect the interests of the company's creditors from fraud or unconscionable conduct of directors. The principle of piercing the corporate veil is applied when the directors or shareholders of a company are held personally liable for having committed fraud, corruption or benefited unduly in the name of the company, which resulted in financial loss. The principle of piercing the corporate veil as expounded in the *Companies Act 2008*,⁴⁹ if applied in municipalities, can also be used as a measure of accountability of a municipal manager in a municipality to protect the interests of the creditors and the community as well as to combat fraud or corruption in municipalities.⁵⁰ This can be done by disregarding the separate legal existence of a municipality and apportioning liability on the municipal manager for material losses incurred due to his or negligence. The researcher suggests that the principle of piercing the corporate veil must be applied to the Mahikeng local municipality as a measure of holding the municipal manager and municipal council accountable for failure to provide services to the community and failure to pay the creditors of the municipality.

1.3 Problem Statement

Mahikeng local municipality falls under the Ngaka-Modiri Molema District Municipality in the North West Province. It is vested with the responsibility of providing service delivery to the people of Mahikeng.⁵¹ The municipality relies on its municipal council, which is entrusted with the executive and legislative powers to achieve the service delivery mandate.⁵² The Mahikeng local municipality also relies on its municipal

⁴⁸ Section 20(9) of the *Companies Act 2008*; Schoeman *De Rebus* 2012 1; Davis D *et al Companies and Other Business Structures in South Africa* 3rded (Oxford University Press Cape Town 2015) 1, 31.

⁴⁹ Section 20(9) of the *Companies Act 2008*; Davis D *et al Companies and Other Business Structures in South Africa* 31; Ndevu and Muller 2017 *African Journal of Public Affairs* 17.

⁵⁰ Although the principle of piercing the corporate veil is only applicable to corporates, it can be useful to a municipality to avoid the abuse of resources by the municipal council or manager. The researcher acknowledges that a municipality is not a company, but nothing precludes it from copying certain principles from the private sector to enhance its administration of resources.

⁵¹ De Visser J "The Political-administrative Interface in South African Municipalities Assessing the Quality of Local Democracies" 2010 *Commonwealth Journal of Local Governance* 86, 88.

⁵² Section 43(c), 151(2) and 156 of the *Constitution of the Republic of South Africa, 1996 (Constitution of South Africa)*; Freedman W "The Legislative Authority of the Local Sphere of Government to Conserve and Protect the Environment: A Critical Analysis of Le Sueur v

manager, who acts as an accounting officer of the municipality and ensures that there is effective service delivery in Mahikeng.⁵³ The municipal manager is responsible for, among others, the management of municipal funds and the municipal budget.⁵⁴ However, the Mahikeng local municipality is grappling with poor financial management, and lack of accountability.⁵⁵ These predicaments are mainly attributable to bad corporate practices by the overall workforce of the municipality.⁵⁶ Because of poor financial management in the Mahikeng local municipality, service delivery backlog ensue, leading to public unrests.⁵⁷ Moreover, the Auditor General has recently released a report identifying the worst-performing municipalities in the North West Province, and the Mahikeng local municipality is one of them.⁵⁸ Arguably, all these problems may be as a result of inadequate systems of financial accountability, misuse of funds, fraud and criminal behaviour and poor management by the municipal manager, the municipal council and the overall workforce of the municipality.⁵⁹

Despite having the *Municipal Finance Management Act*⁶⁰ and the *Systems Act*⁶¹ in place to ensure efficient, effective and accountable administration of the

Ethekwini Municipality [2013] ZAKZPHC 6 (30 January 2013)" 2014 *Potchefstroom Electronic Law Journal* 567, 568.

⁵³ Section 55(2) of the *Systems Act*; see also section 60 of the *Municipal Finance Management Act*; Joubert and Faris *The Law of South Africa: Local Government* 149.

⁵⁴ Sections 55(2)(a) and (b) of the *Systems Act*; Sikhakhane and Reddy 2011 *African Journal of Public Affairs* 86.

⁵⁵ Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 1, 14.

⁵⁶ Montsho M 2018 Eight North West Municipalities Put Under Administration <https://www.iol.co.za/news/politics/8-north-west-municipalities-put-under-administration-16710117> accessed 01 May 2019 page number unknown; Ndevu and Muller 2017 *African Journal of Public Affairs* 16. The Department of Cooperative Governance and Traditional Affairs (CoGTA) identified, among others, the inadequate accountability measures and support systems for local democracy as some of the factors that contribute to state of distress in municipalities.

⁵⁷ Ndevu and Muller 2017 *African Journal of Public Affairs* 16; Muller BN, Davids YD and Kanyane B "Service Delivery Challenges in South Africa" *South African Social Attitudes Survey* 4.

⁵⁸ Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 14; Makwetu 2018 *Auditor General South Africa* 5; Makwetu TK "Auditor General Reports an Overall Deterioration in the Audit Results of National and Provincial Governments Departments and their Entities" Auditor General Media Release (21 November 2018) 1, 10.

⁵⁹ Botlhoko TS *Promoting Effective Financial Accountability in Local Government in the North West Province: Developing Operational Guidelines for Municipal Public Accounts Committees* (LLD-dissertation Central University of Technology Free State 2017)1, 10.

⁶⁰ Section 2 of *Municipal Finance Management Act*; South African Local Government Association 2011 *Guideline Document on the Roles and responsibilities of Councillors, Political Structures and*

municipality, the Mahikeng local municipality has been experiencing maladministration and the irregular and fruitless expenditure of municipal funds.⁶² The problem of maladministration, irregular, unauthorised, fruitless and wasteful expenditure and mismanagement of funds mainly lies with the municipal manager as the accounting officer of the municipality who continuously fail to account and comply with legal and policy prescripts of municipal finances.⁶³ There is a lack of accountability and good corporate practices by the municipal manager as head of administration in Mahikeng local municipality, and this has resulted in the lack of service delivery in the Mahikeng local community.⁶⁴ Another challenge is that the municipality is facing service delivery backlogs, protests and bad audit outcomes.⁶⁵ The problem identified by the researcher is the lack of accountability of a municipal manager for Mahikeng local municipality, which, as a result, has a negative impact on service delivery of the community of Mahikeng.

1.4 Aims and Objectives

1.4.1 Aims

This research seeks to:

- a) investigate if corporate governance principles are adequately promoted by the municipal manager for Mahikeng local municipality to ensure proper financial administration of the municipality.
- b) examine whether the municipal manager for Mahikeng local municipality is conducting the affairs of the municipality in accordance with the current statutory framework such as the *Municipal Finance Management Act*,

Officials <https://www.salga.org.za/Documents/Municipalities/Guidelines-for-Municipalities/Guideline-doumebts—on-the-Roles-and-Responsibilities-of-Councillors-andOfficials> accessed 12 July 2019 1, 4.

⁶¹ Section 51(1)(a)(i) of the *Systems Act*; Visser 2001 *Local Government Working Paper 2*.

⁶² Mokwena *Mahikeng Local Municipality Annual Report 2015/16* 343; Montsho M 2018 <https://www.iol.co.za/news/politics/8-north-west-municipalities-put-under-administration-16710117> page number unknown.

⁶³ Mokwena *Mahikeng Local Municipality Annual Report 2015/16* 8, the then Municipal manager Mr Mokwena TI in this report indicated that the municipality has changed acting municipal managers three times in the same year, 2015-2016; Montsho M 2018 <https://www.iol.co.za/news/politics/8-north-west-municipalities-put-under-administration-16710117> page number unknown.

⁶⁴ Ndevu and Muller 2017 *African Journal of Public Affairs* 16.

⁶⁵ Ndevu and Muller 2017 *African Journal of Public Affairs* 16.

Structures Act and the *Systems Act* to ensure the proper administration of the Mahikeng local municipality.

- c) investigate the different causes of maladministration, irregular and fruitless expenditure of the municipal funds of the Mahikeng local municipality and recommend possible measures that could be utilised by relevant authorities to curb such maladministration.

1.4.2 Objectives

This research seeks to:

- a) investigate whether the current regulatory framework on corporate law and corporate governance is enforced in Mahikeng local municipality to ensure the accountability of the municipal manager.
- b) evaluate whether the regulatory framework such as the *Systems Act*, *Structures Act*, and *Municipal Finance Management Act* governing the powers and functions of the municipal manager for Mahikeng local municipality, is adequately applied to ensure that the municipal funds are accounted for.
- c) examine whether the principle of piercing of the corporate veil is applicable in municipalities to hold the municipal manager accountable for the lack of accountability, maladministration, and misuse of the municipal funds of the Mahikeng local municipality.

1.5 Research Questions

This research seeks to address the following questions:

- a) is the current statutory regulatory framework on corporate law and corporate governance applicable and consistently enforced to the Mahikeng local municipality to ensure accountability of municipal manager?
- b) are there any measures in place to ensure accountability and good corporate governance practices by the municipal manager for Mahikeng local municipality?
- c) is piercing the corporate veil, a feasible solution, if the existing statutory

mechanisms such as the *Municipal Systems Act*,⁶⁶ *Municipal Structures Act*,⁶⁷ and *Municipal Finance Management Act*⁶⁸ fail to hold municipal manager to account?

1.6 Rationale and Justification of the Study

The research analyses the statutory framework on legislations such as the *Structures Act*, *Systems Act* and *Municipal Finance Management Act* which governs the accountability of the municipal manager for Mahikeng local municipality to determine whether it is sufficient to hold the municipal manager accountable for his or her illicit actions. Holding the municipal manager accountable is a way of combatting maladministration, improper use of municipal funds and service delivery backlogs in the municipality. The research explores the causes of maladministration and improper use of municipal funds in the Mahikeng local municipality. It recommends that corporate governance measures must be adopted by the municipal council and carefully utilised by the municipal council, municipal manager and the overall workforce of the municipality. The researcher recommends that the principle of piercing the corporate veil should be applied to Mahikeng local municipality to ensure good governance and combat corruption.

1.7 Literature Review

Van Der Nest, Thornhill and De Jagger explain accountability as referring to an obligation to expose, explain, and justify the actions of municipal manager.⁶⁹ The researcher argues that accountability could promote the transparent financial administration of the Mahikeng local municipality. This is one of the democratic values and principles on public administration which provides that there must be accountability and transparency. This can be done through public participation by

⁶⁶ Section 55 of the *Systems Act*; Joubert WA and Faris JA *The Law of South Africa: Local Government* 2nd ed (LexisNexis Durban 2008) 1, 150.

⁶⁷ 117 of 1998 (*Structures Act*), see section 82(a); Visser JP "Roles and Responsibilities of the Municipal Manager" 2001 *Local Government Working Paper* 1, 4.

⁶⁸ Section 60 of the *Municipal Finance Management Act*; Joubert and Faris *The Law of South Africa: Local Government* 150.

⁶⁹ Van Der Nest DP, Thornhill C and De Jager J "Audit Committees and Accountability in the South African Public Sector" 2008 *Journal of Public Administration* 545, 546; Sikhakhane and Reddy *African Journal of Public Affairs* 86.

holding meetings within the ward committees and preparation of annual and financial reports by the municipal manager, which should be made accessible to the community. Kuye and Mafunisa argue that accountability demands that the actions of municipal manager be publicised to encourage public debate and criticism on the municipal performance.⁷⁰ The researcher agrees, and this must be done on municipal council meetings of the municipality and be publicised in the municipal website and other social media platforms within the community of Mahikeng local municipality. Publishing the municipal manager's actions encourages public participation, accountability, transparency and to adhere client orientation policy which is the *batho pele* principles. The researcher argues that a municipal manager must explain and justify his or her actions to the municipal council as an employee of the municipal council. Munzhedzi⁷¹ argues that accountability is an obligation to answer for the fulfilment of the assigned and accepted duties from a higher authority. The researcher argues that the municipal manager must indeed account to the higher authority, which is the municipal council but also to the Mahikeng local community, as required by the *Systems Act*⁷² in order to ensure that there is accountability of the municipal manager and corporate governance practices.

Munzhedzi⁷³ further argues that accountability is a constitutional requirement in all spheres of government in South Africa. This follows from the fact that the *Constitution of South Africa*⁷⁴ requires all spheres of government to promote an effective, transparent, and accountable government for the whole of South Africa. The researcher agrees that the municipality must be accountable to the community as required by the *Constitution of South Africa*. The *Constitution of South Africa*⁷⁵ also requires the local government to involve the communities in the matters of local

⁷⁰ Kuye KO and Mafunisa MJ "Responsibility, Accountability and Ethics: The Case for Public Service Leadership" 2003 *Journal of Public Administration* 421, 425.

⁷¹ Munzhedzi PH "Fostering Public Accountability in South Africa: A Reflection on Challenges and Successes" 2016 *Journal of Transdisciplinary Research in Southern Africa* 1, 2.

⁷² Sections 5 and 6(2) of the *Systems Act*; Visser 2001 *Local Government Working Paper* 4.

⁷³ Munzhedzi 2016 *Journal for Transdisciplinary Research in Southern Africa* 1.

⁷⁴ Section 41(1)(c) of the *Constitution of South Africa*; See also section 4(2)(b) of the *Systems Act*; Ndevu and Muller 2017 *African Journal of Public Affairs* 14.

⁷⁵ Section 152(1)(e) of the *Constitution of South Africa*; See also section 4(2)(c) of the *Systems Act*; Ndevu and Muller 2017 *African Journal of Public Affairs* 14.

government. The researcher submits that the community of Mahikeng must be involved in matters concerning the Mahikeng local municipality.

Hendrikse and Hendrikse⁷⁶ define corporate governance as a partnership of shareholders, directors and management to provide wealth creation and economic well-being to the broader community of stakeholders and societies. The researcher concurs with these authors and submits that corporate governance means the partnership between the municipal council, municipal manager, the community and stakeholders for the benefit of the broader community of Mahikeng local municipality. Hendrikse⁷⁷ argues further that in developing a corporate governance model, one must identify the causes of poor corporate governance practices and then prescribe the recommended solutions. The researcher argues that it is the responsibility of the municipal council to determine the cause of poor corporate governance as the employer of the municipal manager. The reason for this is that the municipal manager accounts to the municipal council and this will further assist the municipal council to prescribe the recommended solutions. The researcher argues further that the community of Mahikeng local municipality must have remedies against the municipality in the event where the principles of good corporate governance are not promoted. Such remedies include, among others, public participation where the community submit a memorandum of demand to the municipal council. Furthermore, the community has to apply to the courts to pierce the corporate veil in instances where there is fraud, corruption and misuse of municipal funds. This will enforce accountability and ensure that the municipal manager upholds his or her constitutional obligations.

According to Schoeman,⁷⁸ when the veil of incorporation is pierced, the court acts to strip away the protective covering of the limited liability presented by the company structure. This happens where there is fraud, dishonesty or improper conduct by the

⁷⁶ Hendrikse JW and Hendrikse LH *Corporate Governance Handbook: Principles and Practice* 2nded (Juta Cape Town 2012) 1, 104.

⁷⁷ Hendrikse and Hendrikse *Corporate Governance Handbook: Principles and Practice* 104.

⁷⁸ *Atlas Maritime Co SA v Avalon Maritime Ltd the Coral No.1* 1991 All SA 769 (CA) (*Atlas* case) para 779; Schoeman *De Rebus* 2012 1.

directors in a company.⁷⁹ In Mahikeng local municipality there were no reasonable steps taken to prevent unauthorised, irregular, fruitless and wasteful expenditure incurred by the municipality. There were not investigations undertaken to determine if any person is liable for that unauthorised, irregular and wasteful and fruitless expenditure. The researcher argues that it is very important for the principle of piercing the corporate veil to be applied by the courts to the Mahikeng local municipality against the municipal manager who does not act with care, diligence and skills and accounts to its stakeholders.⁸⁰ This is one of the measures of holding the municipal manager accountable for failure to exercise his or her fiduciary duties. This is evidenced by the Auditor General's reports for the past three consecutive years where the municipality has obtained disclaimer audit opinion from the Auditor General. A disclaimer opinion means that the municipal manager failed to submit sufficient appropriate audit evidence relating to the expenditures incurred in the municipality.

1.8 Assumptions and Hypothesis

1.8.1 Assumptions

This research is premised on the following assumptions:

- a) the municipal manager does not properly account for the municipal budget that is meant for local community development and he or she not held personally accountable by the municipal council.

- b) the *Systems Act*, *Structures Act* and the *Municipal Finance Management Act* are not adequately implemented in the Mahikeng local municipality, and it continues to get adverse audit outcomes.

⁷⁹ *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 4 SA 790 (A) 31 and 32 (*Cape Pacific* case 1995); Marobela MM *Piercing the Corporate Veil in a Holding / Subsidiary Relationship* (LLM- dissertation University of Pretoria 2017) 19.

⁸⁰ Section 174 of the *Municipal Finance Management Act* provides that a person is liable on conviction of an offence in terms of section 173 to imprisonment for a period not exceeding five years or to an appropriate fine determined in terms of applicable legislation. Such liability will easily be imposed against the perpetrator when the veil has been pierced.

1.8.2 Hypothesis

The civil society in Mahikeng believes that the municipal manager abuses municipal budgets and resources.⁸¹ This follows the fact that Mahikeng local municipality continues to receive negative audit outcomes and experience lack of proper and efficient service delivery.⁸² The application of the principles of corporate governance remains a problem in the Mahikeng local municipality, and municipal funds are not accounted for.⁸³ It is evident that the municipality does not apply good corporate governance measures or account for municipal funds.⁸⁴

1.9 Scope and Limitations of the Study

The research focuses on the accountability of the municipal manager and compliance with corporate governance measures in Mahikeng local municipality. The Mahikeng local municipality is one of the municipalities that was placed under administration due to its failure to fulfil its executive obligations, such as providing basic service to the Mahikeng community.⁸⁵ The research further discusses the principle of piercing the corporate veil and suggests that it should apply in Mahikeng local municipality, as a measure of accountability against the unconscionable conduct of the municipal manager and municipal council. The researcher does not discuss all municipal laws in detail, as this is not necessarily the main focus of the research. The research specifically discusses or addresses the accountability of the municipal manager and piercing the corporate veil in Mahikeng local municipality. The researcher acknowledges that the problem of lack of accountability is a national crisis within the municipalities in South Africa. However, the research mainly focuses on Mahikeng local municipality to avoid undertaking a study that is too broad.

⁸¹ Sikhakane 2011 *African Journal of Public Affairs* 1; Ndevu and Muller *African Journal of Public Affairs* 16.

⁸² Makwetu Auditor General South Africa 63; Montsho M 2018 <https://www.iol.co.za/news/politics/8-north-west-municipalities-put-under-administration-16710117> page number unknown.

⁸³ Botlhoko *Promoting Effective Financial Accountability in Local Government in the North West Province* 43.

⁸⁴ Mkhabele *A Legal Analysis of the Application of Corporate Governance Principles* 5.

⁸⁵ Gerber J "North West Put Under Administration: What happens now?" *News 24* (14 May 2018) page number unknown.

1.10 Research Method

The following research methods were utilised in this research:

a) Primary and secondary sources

The researcher used the library to access relevant books, case law, journals, statutes and other relevant materials. Reference was also made to relevant websites for information. The use of secondary sources is important because it provides the researcher with more access to the opinions of various renowned commentators and authors. The dates indicated in the bibliography reflect the dates on which the researcher accessed the websites. **For purposes of this research, the North-West University Potchefstroom Electronic Law Journal Referencing style was utilised.**

b) Relevant case law

The researcher examined and analysed case law relevant to the accountability of municipal manager and good corporate governance measures and principles.

c) Relevant legislation

The researcher focuses on the *Companies Act 2008*, *Systems Act*, *Structures Act*, and the *Municipal Finance Management Act*, as it is the relevant statute for holding municipal manager accountable and for good cooperate governance.

1.11 Statement Regarding Ethics

A qualitative research method is employed, and all used primary and secondary sources are referenced. No individual or group interviews and questionnaires were utilised as instruments for research to hold discussions concerning any issue or topic that might be sensitive, upsetting or embarrassing to the reader. No criminal or other disclosures requiring legal action and having potentially adverse effects or risks for research participants was made during the research. Therefore, there is no need for arrangements to be made in respect of insurance and/or indemnity to meet the potential legal liability of the North West University for harm to participants arising from the conduct of the research.

1.12 Relevance to the Research Unit Theme

This research focuses on the accountability and corporate governance measures in Mahikeng local municipality. Therefore, it falls under the Finance, Trade and Investment Research Unit of the Faculty of Law. Furthermore, the research focuses on company law and falls under the Master's in Mercantile Law module in the Faculty of Law. The study also analyses the principle of piercing of the corporate veil in terms of the *Companies Act* 2008. The researcher hopes that the final research findings contained in the final LLM dissertation and/or some parts of this research will be published as book chapters or referred journal articles.

1.13 Structure of the Dissertation

This study consists of five chapters, including this chapter.

Chapter One provides the background of the research. It outlines the aims, objectives, research questions, literature review, scope, and limitations of the research, statement of the problem, the rationale of the study and the research methodology.

Chapter Two discusses the legislative framework for accountability of the municipal manager in Mahikeng local municipality. The chapter also discusses how the provisions of the *Companies Act* 2008, are used to enforce accountability in the municipality.

Chapter Three analyses the concept of corporate governance in accordance with the King I Code, King II Code, King III Code and IV Codes on corporate governance as well as the *Companies Act* 2008. It further analyses whether municipal manager adheres to the corporate governance measures in administering and managing the affairs of the municipality.

Chapter Four discusses the principle of piercing of the corporate veil in terms of the *Companies Act* 2008 as a measure of holding the municipal manager personally liable for his or her misuse of the municipal budget.

Chapter Five discusses the challenges affecting the accountability of a municipal manager and the need to pierce the corporate in Mahikeng local municipality.

Chapter Six provides recommendations and conclusion.

CHAPTER TWO

LEGISLATIVE FRAMEWORK FOR MUNICIPAL MANAGER'S ACCOUNTABILITY IN MAHIKENG LOCAL MUNICIPALITY

2.1 Introduction

Accountability entails that the municipal manager and the municipal council has a responsibility to be answerable to the community of Mahikeng area for the performance of his or her duties.⁸⁶ This follows the fact that the municipal council is entrusted with, among others, the management of the municipal funds and budget for the benefit and on behalf of the people of Mahikeng area.⁸⁷ It is the municipal council's constitutional obligation that the municipality must strive within its financial and administrative capacity to achieve its objectives to provide for a democratic and accountable government for local communities, to promote social and economic development and to ensure the sustainable provision of services to communities.⁸⁸ The main objective of the *Municipal Finance Management Act*⁸⁹ is to ensure sound and sustainable management of the financial affairs of municipalities, including the Mahikeng local municipality. The *Municipal Finance Management Act*⁹⁰ read together with the *Municipal Systems Act*⁹¹ and the *Municipal Structures Act*,⁹² clarify the responsibilities and duties of the municipal council, municipal manager, and other municipal officials. The *Systems Act* provides that the municipal council has a duty to

⁸⁶ Dowdle MW *Public Accountability Designs, Dilemmas and Experiences* 1sted (Cambridge University Press United Kingdom 2006) 1, 3; Van Der Nest DP, Thornhill C and De Jager J "Audit Committees and Accountability in the South African Public Sector" 2008 *Journal of Public Administration* 545, 546.

⁸⁷ Bekker HJMP "Public Sector Governance – Accountability in the State" Paper for CIS Corporate Governance Conference (10-11 September 2009) 1, 15; Mokwena TI *Mahikeng Local Municipality Annual Report 2015/16* (19 January 2017 Mahikeng) 1, 6.

⁸⁸ Section 152 of the *Constitution of South Africa*.

⁸⁹ Section 2 of the *Municipal Finance Management Act* 56 of 2003 (*Municipal Finance Management Act*); South African Local Government Association Guideline Document on the Roles and Responsibilities of Councillors and Officials (March 2011) 1, 4.

⁹⁰ Section 2 of the *Municipal Finance Management Act*; also see South African Local Government Association Guideline Document on the Roles and Responsibilities of Councillors and Officials 4-5.

⁹¹ 32 of 2000 (*Systems Act*), see sections 4, 5 and 6; also see Bekink B *The Restructuring (Systemization) of Local Government under the Constitution of the Republic of South Africa, 1996* (LLD- dissertation University of Pretoria 2006) 124.

⁹² 117 of 1998 as amended (*Structures Act*), see section 18; Tau SF "Integrated Development Plan (IDP) as an Implementation Vehicle for Service Delivery for Local Government in South Africa" 2013 *South African Association of Public Administration and Management* 186, 192.

ensure that municipal services are provided to the community in an accountable and transparent manner.⁹³ The municipal manager must ensure that every expenditure within the municipality is accounted for. Failure to account, the municipal manager must be held personally and severally liable. It is important to note that a municipality would not be able to perform its functions in a controlled manner if it did not have a proper legislative framework and basic administration and management personnel to run its administration. However, there are gaps and flaws within the basic administration and management of personnel to run its administration. Legislation such as the *Municipal Finance Management Act* is not properly implemented and enforced, which results in lack of accountability. There is no proper implementation as the municipal manager failed to prevent the irregular, unauthorised, wasteful and fruitless expenditure in the municipality. No investigations were conducted to hold anyone liable for that irregular, unauthorised, wasteful and fruitless expenditure.⁹⁴

The municipal manager is assigned by the municipal council the duties and responsibilities of handling municipal finances and for providing basic services to the Mahikeng local community.⁹⁵ Furthermore, the municipal manager for Mahikeng local municipality must be held accountable for municipal finances and lack of delivery of basic services by the municipal council and the community of Mahikeng.⁹⁶ The reason for this is that the municipal manager is the accounting officer and the head of administration. This chapter discusses the legislative framework, such as the *Municipal Finance Management Act*, *Systems Act* and the *Structures Act* regulating the accountability of the municipal manager for Mahikeng local municipality. This is to ensure that the municipality achieves the objectives of local government and

⁹³ Section 4(2)(b) and (d) of the *Systems Act*.

⁹⁴ Section 62 of the *Municipal Finance Management Act* establishes that the accounting officer is responsible for financial administration generally, and in many specifics. Section 63 makes the municipal manager responsible for assets and liabilities, section 64 for revenues, section 65 for expenditures; thus, the municipal manager is responsible for preventing irregular, unauthorised and wasteful and fruitless expenditures in the municipality; see also Mathiba G "Time to Clean out the Augean Stables of Local Government" Daily Maverick (28 May 2019) 1.

⁹⁵ Section 55(1)(a)(i) of the *Systems Act*; Section 60 *Municipal Finance Management Act*; Joubert WA and Faris JA *The Law of South Africa* 2nd ed (LexisNexis Durban 2008) 1, 150.

⁹⁶ Section 55(1) of the *Systems Act*; Section 60 of the *Municipal Finance Management Act*; Mokgopo TI "The Burning South Africa in the 20 Years of Democracy: Service Delivery Protest and the Demarcation Problems with Specific Reference to the Case of Malamulele and Vuwani" 2016 *South African Association of Public Administration and Management* 65, 67.

there is effective accountability and facilitating compliance with the principles of co-operative government. This chapter seeks to determine whether such a regulatory framework on corporate law and corporate governance is consistently enforced to ensure the accountability of a municipal manager for Mahikeng local municipality. This chapter further outlines the duties and responsibilities of both the director in a company and the municipal manager as the accounting officer as well as head of administration of the municipality.

2.2 Historical Background for the Accountability of Municipal Manager for Mahikeng Local Municipality

Prior to the 1993 Interim Constitution,⁹⁷ the local government was merely a public body exercising delegated powers. This follows from the fact that municipalities owed their existence from the provincial ordinance or Acts of Parliament.⁹⁸ The municipalities were mere creatures of statute and enjoyed only delegated or subordinate legislative powers.⁹⁹ The existence and powers of local government were entirely dependent upon superior legislation.¹⁰⁰ It followed that municipal regulations or by-laws that went beyond the powers conferred, expressly or impliedly, by the superior enabling legislation, were ultra vires and invalid.¹⁰¹ Local government was described as being mere local authorities entrusted to provincial councils to administer.¹⁰² This means that the existence and powers of local government were entirely dependent on superior legislation and could therefore be terminated at any time and be entrusted to administrators appointed by the central or provincial governments.¹⁰³

⁹⁷ Section 151 of the *Constitution of the Republic of South Africa, 1996 (Constitution of South Africa)*; Fuo O "Intrusion into the Autonomy of South African Local Government: Advancing the Minority Judgment in the Merafong City Case" 2017 *De Jure* 324, 325-326.

⁹⁸ Joubert WA and Faris JA *The Law of South Africa: Constitutional Law, Structures of Government* 2nd ed (LexisNexis Durban 2007) 1, 189.

⁹⁹ *City of Cape Town and Other v Robertson and Other* 2005 2 SA 323 (CC) para 53 (*City of Cape Town Case*); Currie I *et al The New Constitutional & Administrative Law* 1st ed (Juta Cape Town 2001) 1, 218.

¹⁰⁰ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) para 38 (*Fedsure Life Assurance case*); *City of Cape Town case* para 54.

¹⁰¹ *City of Cape Town case* para 53; Currie I *et al The New Constitutional & Administrative Law* 220.

¹⁰² *City of Cape Town case* para 53; Currie I *et al The New Constitutional & Administrative Law* 220.

¹⁰³ *Fedsure Life Assurance case* para 38; *City of Cape Town case* para 54.

The town clerks, back then, held a similar position to that of a municipal manager in the current dispensation.¹⁰⁴ This follows the fact that the town clerks were the chief executive, administrative and accounting officer of the local authority employing him.¹⁰⁵ One of the duties of the town clerk was to report corruption and malpractice by councillors and officials to the Auditor General and the mayor.¹⁰⁶ This was done to enable the town clerk to account for all the assets of the municipality.

The Interim Constitution¹⁰⁷ confers powers, functions and duties to the local government which are subject to definition and regulation by either the national or provincial governments that were competent authorities for enacting such legislation.¹⁰⁸ In the *City of Cape Town* case,¹⁰⁹ the court held that, although municipalities were subject to definition and regulation, this did not mean that they have only delegated powers. Local government does exercise original powers from the Interim Constitution or competent authority.¹¹⁰ The *Constitution of the Republic of South Africa, 1996*,¹¹¹ provides that a municipality has the right to govern, on its own initiative, the local government affairs of its community.

In 1998, the *Structures Act*¹¹² established a new generation of municipalities and categorised them into metropolitan, district and local municipalities. The *Structures Act* further regulated the powers of the municipal council to enable the municipality to govern the local government affairs of its community. This is done in terms of section 30 of the *Structures Act* where the municipal council must form a quorum, meaning the majority of councillors must be present at a meeting of councillors, and

¹⁰⁴ Bekink B *Principles of South African Local Government Law* 1st ed (LexisNexis Durban 2006) 1, 329.

¹⁰⁵ *Profession of Town Clerks Act* 75 of 1988 (*Town Clerks Act*), see section 28; also see Bekink *Principles of South African Local Government Law* 329.

¹⁰⁶ Craythorne DL *The Role of the Town Clerk in Municipal Government in South Africa* (LLM-dissertation University of Cape Town 1977) 75.

¹⁰⁷ *Constitution of the Republic of South Africa* 200 of 1993 (*Interim Constitution*); *City of Cape Town* case para 55.

¹⁰⁸ *City of Cape Town* case para 55; *Fedsure Life Assurance* case para 35 and 39.

¹⁰⁹ *City of Cape Town* case para 56.

¹¹⁰ *City of Cape Town* paras 56 and 57; *Fedsure Life Assurance* case para 39.

¹¹¹ Section 151(3) of the *Constitution of the Republic of South Africa, 1996* (*Constitution of South Africa*); Currie I *et al The New Constitutional & Administrative Law* 219.

¹¹² Sections 12 and 82(1)(a) of the *Structures Act*; sections 155 and 163 of the *Constitution of South Africa*; Thornhill C "The Executive Mayor/Municipal Manager Interface" 2008 *Journal of Public Administration* 725, 731.

the municipal decisions must be voted on. The decisions on the municipality are taken based on majority rule. The municipal council of the Mahikeng local municipality should ensure that it runs an accountable municipality, provides basic services to the community, and promotes economic development.¹¹³ To ensure that the municipal council adheres to the objects of the local government set out in the *Constitution of South Africa*.¹¹⁴ The municipal council is required by the *Constitution of South Africa*¹¹⁵ to structure and manage its administration, budgeting, and planning sustainably to give priority to the basic needs of the community. This will ensure that the Mahikeng local municipality achieves its constitutional obligations.¹¹⁶ Moreover, for the municipality to achieve its constitutional objectives, the municipal council is required to appoint a municipal manager for the implementation of planned strategies of the municipality and ensuring the smooth running of the municipality's functions in terms of the *Systems Act*.¹¹⁷

The municipal manager is the administrative head of the municipality, and is also referred to as the accounting officer of the municipality.¹¹⁸ In the current dispensation, the municipal manager is vested with a huge responsibility of heading the administrative affairs of the municipality and accounting for the municipal funds and assets.

2.3 Municipal Management Legislative Framework

There is a legislative framework for municipal management, and it includes, among others, the *Structures Act*, *Municipal Finance Management Act*, *Systems Act*,

¹¹³ Section 152 of the *Constitution of South Africa*; Mashamaite MM "Improving Accountability in South African Local Government: Elements for Effective Local Government Accountability" 2013 *South African Association of Public Administration and Management* 89, 89.

¹¹⁴ Section 152 of the *Constitution of South Africa*.

¹¹⁵ Section 153(a) of the *Constitution of South Africa*; Madumo OS "The Promotion of Developmental Local Government to Facilitate a Developmental State" 2012 *Journal of the Association of Southern African Schools and Departments of Public Administration and Management* 40, 43.

¹¹⁶ Section 152 of the *Constitution of South Africa*.

¹¹⁷ Sections 54A(1)(a) and 55 of the *Systems Act*; Thornhill C "Improving Local Government Transformation in South Africa" 2012 *Administratio Publica* 128, 138; Bekink *Principles of South African Local Government Law* 329.

¹¹⁸ Section 54A(1)(a) of the *Systems Act*; also see section 60 of the *Municipal Finance Management Act*; Joubert and Faris *The Law of South Africa* 149.

Disciplinary Regulations for Senior Managers and Public Finance Management Act, as discussed below.

2.3.1 Constitution of South Africa

The *Constitution of South Africa*¹¹⁹ as the supreme law of the Republic established the local sphere of government which consists of municipalities. The *Constitution of South Africa* established the municipalities by providing for the categories of municipalities. The national legislation must be enacted and define different types of municipalities that must be established within each category.¹²⁰ The objects of local government as provided for in the *Constitution of South Africa*¹²¹ are *inter alia*, to provide a democratic and accountable government for local communities. Furthermore, the local government must provide services to communities in a sustainable manner and must promote social and economic development in local government.¹²² This is to ensure that there is access to essential services that are affordable to all the community of Mahikeng and to address socio-economic challenges. The *Structures Act*, *Municipal Finance Management Act* and the *Systems Act*¹²³ were enacted to give effect to the above-mentioned objects of local government as set out in section 152 of the *Constitution of South Africa*.¹²⁴

¹¹⁹ Sections 2 and 151(1) of the *Constitution of South Africa*; Makoti MZ and Odeku OK "Intervention into Municipal Affairs in South Africa and its Impact on Municipal Basic Services" 2018 *African Journal of Public Affairs* 68; Ndevu Z and Muller K "A Conceptual Framework for Improving Service Delivery at Local Government in South Africa" 2017 *African Journal of Public Affairs* 13, 14.

¹²⁰ Section 155(2) of the Constitution of South Africa.

¹²¹ Section 152(1)(a) of the *Constitution of South Africa*; section 73 of the *Systems Act*; Ndevu and Muller 2017 *African Journal of Public Affairs* 14.

¹²² Section 152(1)(b) and (c) of the Constitution of South Africa; Makoti and Odeku *African Journal of Public Affairs* 69; Ndevu and Muller 2017 *African Journal of Public Affairs* 14.

¹²³ Section 73 of the *Systems Act*; Zulu KC and Mubangizi BC "Rural Local Economic Development: Insights from a South African Rural Community" 2014 *Journal of Public Administration* 424, 426.

¹²⁴ Mathiba *The Role of the Auditor-General in the Promotion of Efficient Financial Management in Municipalities* 20.

2.3.2 Structures Act

To give effect to the provisions of the *Constitution of South Africa*,¹²⁵ the *Structures Act*¹²⁶ provides for the establishment of municipalities and criteria for establishing such municipalities. The *Structures Act*¹²⁷ provides for types of municipalities that may be established within each category. The *Structures Act*¹²⁸ also provides for the division of functions between categories of municipalities. The *Structures Act* further regulates internal systems structures and office bearers of the municipality. The *Structures Act*¹²⁹ requires the municipality to have a municipal council that must review the needs of the community and prioritise to meet the needs of the community. Therefore, the Mahikeng local municipality is required to have a municipal council that reviews and meets the basic needs or services of the community. Such needs include providing basic services to the community of Mahikeng. The municipal council must find ways to involve the community in performing its functions.¹³⁰ One of the ways to involve the community is through the calling of annual meetings with the community. The annual meetings afford the Mahikeng community with the opportunity to be consulted by the municipal council on important issues affecting them and to improve the delivery of services. This encourages the involvement of the community, promotes openness and transparency, accountability and consultation within the municipality.¹³¹

2.3.3 Systems Act

The *Systems Act*¹³² was enacted to give effect to the new system of local government under the new constitutional dispensation, which requires an efficient,

¹²⁵ See section 155(2) of the *Constitution of South Africa* which provides that national legislation must define the different types of municipality that may be established within each category. The *Structures Act*, was thus enacted to achieve this purpose.

¹²⁶ Section 12(1) of the *Structures Act*.

¹²⁷ Section 10 and 12(3)(a) of the *Structures Act*.

¹²⁸ Section 7 of the *Structures Act*.

¹²⁹ Sections 18(1)(a) and 19(2)(a) and (b) of the *Structures Act*; section 152 of the *Constitution of South Africa*.

¹³⁰ Gaedie IJ *Assessment of Basic Service Delivery in Mahikeng Local Municipality* (unpublished Masters Mini thesis, NWU, 2015) 19.

¹³¹ Section 152(1)(e) of the *Constitution of South Africa*.

¹³² Section 3(3) of the *Systems Act*; Reynecke AJ *Testing the Boundaries of Municipal Supervision: An Analysis of Section 106 of the Municipal Systems Act and Provincial Legislation* (LLM-dissertation University of Western Cape 2012) 19.

effective and transparent local public administration. The *Systems Act*¹³³ sets out the powers, duties and various functions of the municipal council and municipal manager. One of the key powers or responsibilities of the municipal council of the Mahikeng local municipality is to be able to run its municipality on its own initiative and to exercise legislative and executive authority without any interference from the national or provincial government or political parties.¹³⁴ The *Systems Act* provides that the municipal council has the right and duty to finance the affairs of the Mahikeng local municipality through the charging of fees for municipal services and imposing surcharges on fees and rates on the property of the local community.¹³⁵ The municipality is failing to collect the municipal rates and fees from water sales, refuse removal and sewerage charges services.¹³⁶ The Mahikeng local municipality must be able to generate an income or revenue through the charging of fees on municipal services that they provide to the community of Mahikeng. However, it is failing to collect fees or charges for municipal services, and this will affect the income of the municipality, which will have a negative impact on service delivery. This is because the Mahikeng local municipality generates revenue by charging of fees for its municipal services to finance the affairs of the municipality.¹³⁷

The *Systems Act* provides that the municipal council has a duty to provide an accountable government without favour or prejudice.¹³⁸ This entails that when providing services to the community, the municipal council must do so in an equal and fair manner without prejudicing anyone regardless of their political affiliation, status, race and religion. The municipal council must provide for an accountable and transparent government by encouraging the involvement of the local community in the affairs of the municipality.¹³⁹ De Villiers, Van As and Botha argue that community

¹³³ Section 4 and 54A of the *Systems Act*.

¹³⁴ Section 4(1)(a) and (b) of the *Systems Act*; Section 151(2) and (3) of the *Constitution of South Africa*.

¹³⁵ Section 4(1)(c)(i)(ii) of the *Systems Act*.

¹³⁶ Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 2.

¹³⁷ Section 4(1)(c) of the *Systems Act*.

¹³⁸ Section 4(2)(b) of the *Systems Act*; See also section 152(1)(a) of the *Constitution of South Africa*.

¹³⁹ Section 4(2)(c) of the *Systems Act*; Ndevu and Muller 2017 *African Journal of Public Affairs* 20; Gaedie *Assessment of Basic Service Delivery in Mahikeng Local Municipality* 20.

participation in local government matters is a constitutional imperative.¹⁴⁰ Encouraging community participation in Mahikeng local municipality is important as it enables the local community to know how to access municipal services, what service standards to expect, and what is being done to improve such services. This can be done during ward committees and imbizos. The *Systems Act*¹⁴¹ requires the municipal council to consult the local community of Mahikeng local municipality about the level, quality, range and impact of municipal services provided by the municipal. Moreover, the municipal council has a duty to ensure that it provides municipal services to the local community of Mahikeng in a financially and environmentally suitable manner.¹⁴² This means that the Mahikeng local municipality must focus on environmental concerns such as preservice water, land use, waste management and sustainable use of water resources for the present and future generations. The municipal council must give the local Mahikeng community equitable access to the municipal services to which they are entitled.¹⁴³ The reason for this is that the community of the Mahikeng local municipality have a right to have access to such municipal services.¹⁴⁴

The *Systems Act*¹⁴⁵ also confers roles and responsibilities political structures, political office bearers and of the municipal manager for a municipality. For instance, the Mahikeng local municipality must, within the framework of and in accordance with the relevant provisions of the *Structures Act*, define the specific role and area of responsibility of each political structure, political office bearer and the municipal manager.¹⁴⁶ Such specific roles must be defined in precise terms by way of separate

¹⁴⁰ Section 152(1)(e) of the *Constitution of South Africa*; De Villiers NF, Van As HJ and Botha JC "The Enforceability of The By-Laws of District Municipalities on Local Municipalities: The Case of Solid Waste Disposal" 2020 *Stellenbosch Law Review* 315, 337.

¹⁴¹ Section 4(2)(e) of the *Systems Act*; Ndevu and Muller 2017 *African Journal of Public Affairs* 20; Gaedie *Assessment of Basic Service Delivery in Mahikeng Local Municipality* 20.

¹⁴² Section 4(2)(d) of the *Systems Act*.

¹⁴³ Section 4(2)(f) of the *Systems Act*.

¹⁴⁴ Section 5(1)(g) of the *Systems Act*; see also section 152(1)(b) of the *Constitution of South Africa*.

¹⁴⁵ Section 53 of the *Systems Act*; Ndevu and Muller 2017 *African Journal of Public Affairs* 21; Surty F *The Political/Administrative Interface: The Relationship Between the Executive Mayor and Municipal Manager* (LLM- dissertation University of the Western Cape 2010) 24.

¹⁴⁶ Section 53(1) of the *Systems Act*; Ndevu and Muller 2017 *African Journal of Public Affairs* 21; Surty *The Relationship Between the Executive Mayor and Municipal Manager* 24.

terms of reference and must be in writing.¹⁴⁷ When defining the respective roles and responsibilities of each political structure, political office bearer or the municipal manager, the municipality must determine among others, the appropriate lines of accountability and reporting for those political structures, political office bearers and the municipal manager.¹⁴⁸ The Mahikeng local municipality must also determine the relationship among those political structures, political office bearer and the municipal manager.¹⁴⁹ The *Systems Act*¹⁵⁰ goes further and requires the municipality to determine mechanisms, processes and procedures for minimising cross-referrals and unnecessary overlapping of responsibilities between the political structures, office bearers and municipal manager. These responsibilities as well as mechanisms to facilitate dispute resolution are determined by the municipality.

The *Systems Act*¹⁵¹ also confers rights and duties on the members of the local community of the Mahikeng local municipality. The local community has the right to contribute to the decision making of the municipality and to submit written or oral recommendations, representations or complaints to the municipal council.¹⁵² The Mahikeng community has the right to receive a prompt response to their written request or complains, and most importantly, they have the right to be informed about the decisions of the municipal council.¹⁵³ The Mahikeng community has the right to regular disclosure of the state of affairs of the municipality including its finances.¹⁵⁴ Moreover, the local community of Mahikeng local municipality have a right to demand that the proceedings of the municipal council and those of its

¹⁴⁷ Section 53(2)(a) of the *Systems Act*; Surty *The Relationship Between the Executive Mayor and Municipal Manager* 24. The terms of reference is a document that outlines the roles and responsibilities of political office-bearers, political structures and the municipal manager.

¹⁴⁸ Section 53(5)(b) of the *Systems Act*; Surty *The Relationship Between the Executive Mayor and Municipal Manager* 24.

¹⁴⁹ Section 53(5)(a) of the *Systems Act*; Surty *The Relationship Between the Executive Mayor and Municipal Manager* 24.

¹⁵⁰ Section 53(5)(c) and (d) of the *Systems Act*; Surty *The Relationship Between the Executive Mayor and Municipal Manager* 25.

¹⁵¹ Section 5 of the *Systems Act*; Section 195 of the *Constitution of South Africa* in terms of the basic values and principles governing public administration, people's needs must be responded to, and the public must be encouraged to participate in policy-making.

¹⁵² Section 5(1)(a)(i) and (ii) of the *Systems Act*; Gaedie *Assessment of Basic Service Delivery in Mahikeng Local Municipality* 20; Thornhill 2008 *Journal of Public Administration* 731.

¹⁵³ Section 5(1)(b) and (c) of the *Systems Act*.

¹⁵⁴ Section 5(1)(d) of the *Systems Act*.

committees be made open to the public.¹⁵⁵ The local community also have the right to demand that such proceedings be made impartially and without prejudice and untainted by personal self-interest.¹⁵⁶

The *Systems Act*¹⁵⁷ also imposes certain duties upon the members of Mahikeng local community. These include the duty to observe mechanisms, processes and procedures of the municipality when exercising their rights. The local community has the duty to pay for the service fees, surcharges on fees and rates on properties promptly.¹⁵⁸ The Mahikeng community must comply with the by-laws of the Mahikeng local municipality that apply to them.¹⁵⁹

The accountable administration of the municipality is run by the municipal manager who must be equipped to carry out the task of implementing the municipality's Integrated Development Plan (IDP).¹⁶⁰ The municipal manager for Mahikeng local municipality must form and develop an economical administration of the municipality subject to the policy directions of the municipal council.¹⁶¹ The administrative powers of the municipal council are executed through the municipal council.

2.3.4 Municipal Finance Management Act

The *Municipal Finance Management Act* aims to improve the municipal budget, accounting, and financial management practices by ensuring that local government finances are managed in a sustainable manner to enable municipalities to deliver the best possible services to the community of Mahikeng local municipality. The *Municipal Finance Management Act* also provides for a sound financial governance framework by clarifying and separating the roles and responsibilities of the municipal council, municipal manager and officials. Among other objectives, it sets out to establish norms and standards for Supply Chain Management processes.

¹⁵⁵ Section 5(1)(e)(i) of the *Systems Act*.

¹⁵⁶ Section 5(1)(e)(ii) and (iii) of the *Systems Act*; Gaedie *Assessment of Basic Service Delivery in Mahikeng Local Municipality* 20.

¹⁵⁷ Section 5(2)(a) of the *Systems Act*; Gaedie *Assessment of Basic Service Delivery in Mahikeng Local Municipality* 20.

¹⁵⁸ Section 5(2)(b) of the *Systems Act*.

¹⁵⁹ Section 5(2)(e) of the *Systems Act*.

¹⁶⁰ Section 55(1)(a)(i) of the *Systems Act*; Thornhill 2008 *Journal of Public Administration* 731.

¹⁶¹ Section 55(1) of the *Systems Act*.

The *Municipal Finance Management Act*¹⁶² specifies that only the accounting officer may withdraw or authorise withdrawal funds from the municipal bank account. The accounting officer for Mahikeng local municipality must prepare a consolidated report to the municipal council of all the withdrawals made out of the municipal account.¹⁶³ A copy of the consolidated report must be submitted to the Auditor General and relevant provincial treasury.¹⁶⁴ This means that the accounting officer has control over municipal finances. The accounting officer must ensure that he or she employs diligent and skilled personnel to deal with municipal finances and avoid irregular or fruitless expenditure.

2.3.5 Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings

The Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings¹⁶⁵ requires any person to report an allegation of financial misconduct against the accounting officer or the Chief Financial Officer (CFO) of the municipality to the municipal council, provincial or national treasury. Any person must report an allegation of financial misconduct against an official of the municipality other than the accounting officer, to that accounting officer.¹⁶⁶ Such official against whom an allegation of financial misconduct is made must be given an opportunity to make written representations to the municipality as to why he or she should not be suspended, within 7 days of being notified of the allegation.¹⁶⁷ The municipal council is required to establish a disciplinary board to investigate allegations of financial misconduct in the municipality and to monitor the institution of such disciplinary proceedings against an alleged transgressor.¹⁶⁸ The disciplinary board must provide recommendations to the municipal council on further steps to be taken regarding the disciplinary proceeding.¹⁶⁹

¹⁶² Section 11(3) of the *Municipal Finance Management Act*.

¹⁶³ Section 11(4)(1) of the *Municipal Finance Management Act*.

¹⁶⁴ Section 11(4)(2) of the *Municipal Finance Management Act*.

¹⁶⁵ Reg 2 and 3(1)(a) in GN430 in GG 37699 of 30 May 2014 applies to alleged financial misconduct.

¹⁶⁶ Reg 3(1)(b) in GN430 in GG 37699 of 30 May 2014.

¹⁶⁷ Reg 3(5) in GN430 in GG 37699 of 30 May 2014.

¹⁶⁸ Reg 4(1) in GN430 in GG 37699 of 30 May 2014.

¹⁶⁹ Reg 4(2) in GN 430 in GG 37699 of 30 May 2014.

Where a financial misconduct has been committed, the accounting officer or, if the accounting officer is involved, the municipal council must report the alleged misconduct to the South African Police Service (SAPS).¹⁷⁰ The accounting officer or the municipal council must report such financial misconduct to the SAPS without delay, and not wait for the completion of the investigation since a delay will cause further financial loss.¹⁷¹ It is noteworthy that these Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings contain detailed provisions on reporting, investigation, disciplinary action and prosecution resulting from alleged financial misconduct. Furthermore, if these regulations are enforced in Mahikeng local municipality, this would curb the misuse of municipal funds.

2.4 The Role and Responsibilities of the Municipal Manager Under the Systems Act and Municipal Finance Management Act

The municipal council is entrusted with the most critical role and powers of shaping the direction of its municipality and ensuring that it achieves its constitutional mandates of providing basic services to its community.¹⁷² One of the ways in which the municipal council does this is by making by-laws and putting those laws into practice.¹⁷³ The municipal council must enact by-laws that will allow them to achieve the constitutional objectives.¹⁷⁴ The constitutional objectives include, among others, to provide an accountable government and ensure that municipal services are provided to the Mahikeng local community in a sustainable manner.¹⁷⁵ The

¹⁷⁰ Reg 10(1) in GN 430 in GG 37699 of 30 May 2014; read with section 173 of the *Municipal Finance Management Act*.

¹⁷¹ Reg 10(2) in GN430 in GG 37699 of 30 May 2014.

¹⁷² Section 152 of the *Constitution of South Africa*; Visser JP "Roles and Responsibilities of the Municipal Manager" 2001 *Local Government* 1, 1.

¹⁷³ Section 160(2)(a) of the *Constitution of South Africa*; section 4(1)(b) of the *Systems Act*; Fuo 2017 *De Jure* 330.

¹⁷⁴ Sections 152(1)(a) and (b) of the *Constitution of South Africa*; See also section 19(1) of the *Structures Act* which provides that A municipal council must strive within its capacity to achieve the objectives set out in section 152 of the *Constitution of South Africa*.

¹⁷⁵ Sections 152(1)(a) and (b) of the *Constitution of South Africa*; Sikhakhane BH and Reddy PS "Public Accountability at the Local Government Sphere in South Africa" 2011 *African Journal of Public Affairs* 85, 86.

*Constitution of South Africa*¹⁷⁶ encourages the municipality to strive within its financial and administrative capacity to achieve these constitutional objectives.

The most critical role of the municipal council is not only to pass by-laws but to approve municipal budgets.¹⁷⁷ Certain functions, such as being accountable for budgets are vested with the municipal manager. The municipal council must appoint a municipal manager as head of administration of the Mahikeng local municipality.¹⁷⁸ The municipal council is the employer of the municipal manager, and it determines what it expects from a municipal manager.¹⁷⁹ The person to be appointed as the municipal manager by the municipal council must at least have the skills, expertise, competencies, and qualifications to run the administration of the municipality.¹⁸⁰

The *Systems Act*¹⁸¹ provides that subject to the policy directives of the municipal council, the municipal manager is responsible and accountable for the creation and development of an economical, efficient, effective and accountable administration of the Mahikeng local municipality.

The municipal manager for Mahikeng local municipality is responsible for the preparation and fair presentation of financial statements in accordance with the South African Standards of Generally Recognised Accounting Practice, and the requirements of the *Municipal Finance Management Act*,¹⁸² and the *Division of Revenue Act* of South Africa. The *latter* provisions enable the municipal manager to prepare the financial statements that are free from material misstatements, whether due to fraud or error.¹⁸³

¹⁷⁶ Section 152(2) of the Constitution of South Africa; Madumo 2012 *Journal of the Association of Southern African Schools and Departments of Public Administration and Management* 43.

¹⁷⁷ Section 160(2)(a) of the *Constitution of South Africa*; Thornhill 2008 *Journal of Public Administration* 728.

¹⁷⁸ Section 54A(1)(a) of the *Systems Act*; Thornhill 2008 *Journal of Public Administration* 731.

¹⁷⁹ Section 57(4)(a) of the *Systems Act* requires the municipal manager to enter into a performance Agreement which will set out performance objectives and targets that must be met, and the time frames within which those performance objectives and targets must be met.

¹⁸⁰ Section 54A(2) of the *Systems Act*; *Xuma v Engcobo Local Municipality and Others* 2017 35 ZAECMHC para 11 (*Xuma* case).

¹⁸¹ Section 55(1)(a) of the *Systems Act*; Bekink *Principles of South African Local Government Law* 329.

¹⁸² Section 63 of the *Municipal Finance Management Act*.

¹⁸³ Section 63 of the *Municipal Finance Management Act*.

The municipal manager should be able to run a municipality that can implement the IDP and be responsive to the needs of the community.¹⁸⁴ The IDP contains the plans and strategies in which the municipality seeks to achieve its objectives. The IDP is developed by municipalities or the municipal council to accommodate key development priorities identified by the people in communities.¹⁸⁵ The Mahikeng local municipality should have an IDP that incorporates the vision of the municipal council.¹⁸⁶

The municipal manager has a responsibility to facilitate participation by the local communities in the affairs of the municipality.¹⁸⁷ This includes hearing or taking into account the development needs and priorities of the community. The municipal manager must further develop and maintain a system whereby community satisfaction with municipal services is assessed.¹⁸⁸ The process of assessing the municipal services is through proper reports to the municipal council and the proper calling of annual meetings to give account to the community. The facilitation of community meetings allows the municipal manager to hear the concerns of the community. If not, the municipal manager, together with the municipal council, must come up with effective ways to meet such. The facilitation of the annual meeting also allows the municipal council to assess the performance of the municipal manager. This is important because the municipal manager enters into a performance agreement with the municipal council.

The municipal manager has a duty to ensure and oversee the municipality's financial matters.¹⁸⁹ The municipal manager for Mahikeng local municipality is responsible and accountable for all the income and expenditure of the municipality.¹⁹⁰ The municipal

¹⁸⁴ Section 55(1)(a)(iii) of the *Systems Act*; Thornhill 2008 *Journal of Public Administration* 731; Nkuna NW "Performance Management in South African Local Government: Is it a Matter of a System, Model or Measurement" 2013 *South African Association of Public Administration and Management* 65, 77.

¹⁸⁵ Tau 2013 *South African Association of Public Administration and Management* 186.

¹⁸⁶ Section 26(a) of the *Systems Act*; Bekink *Principles of South African Local Government Law* 333.

¹⁸⁷ Section 152(1)(e) of the *Constitution of South Africa* requires the municipality to encourage the involvement of communities; see also section 51(1)(n) of the *Systems Act*; Sikhakhane and Reddy 2011 *African Journal of Public Affairs* 92.

¹⁸⁸ Sections 29(1)(b)(i) and ii of the *Systems Act* which also requires the community to be consulted and be involved in the process of drafting the integrated development plan.

¹⁸⁹ Bekink *Principles of South African Local Government Law* 331.

¹⁹⁰ Section 55(1) of the *Systems Act*; Visser 2001 *Local Government Paper* 4.

manager is also responsible and accountable for all the assets, and the discharge of all liabilities of the municipality.¹⁹¹

One of the objects of the *Municipal Finance Management Act*¹⁹² is to secure sound and sustainable management of the fiscal and financial affairs of the municipalities. The reason for this is that the proper management of the financial affairs of the Mahikeng local municipality enhances service delivery in Mahikeng area. The *Municipal Finance Management Act*¹⁹³ seeks to ensure transparency, accountability and the handling of the financial affairs of the municipality. The *Municipal Finance Management Act*¹⁹⁴ achieves this by recognising the municipal manager as the accounting officer of the municipality and requiring him or her to exercise the functions of the accounting officer.

The municipal manager is responsible for the management of the assets and the liabilities of the municipality.¹⁹⁵ For this purpose, he or she must take reasonable steps to ensure that municipal resources are used effectively, efficiently and economically.¹⁹⁶ The municipal manager for Mahikeng local municipality must ensure that the municipality has and maintains the accounting and a management system that accounts for the assets and liabilities of the municipality.¹⁹⁷ The reason for this is that proper accounting system will result in the effective management of the municipal resources, thus enhancing service delivery in the municipality. The municipal manager must account for all the bank accounts of the Mahikeng local

¹⁹¹ Section 55(2)(c) of the *Systems Act*; section 2 of the *Municipal Finance Management Act*; Thornhill 2008 *Journal of Public Administration* 731.

¹⁹² Section 2 of the *Municipal Finance Management Act*; Bekink *Principles of South African Local Government Law* 329; Steytler N and De Visser J *Local Government Law of South Africa* 8th ed (LexisNexis Durban 2014) 14-5.

¹⁹³ Section 2(a) of the *Municipal Finance Management Act*; Bekink *Principles of South African Local Government Law* 329.

¹⁹⁴ Section 60(a) of the *Municipal Finance Management Act*; Joubert WA and Faris JA *The Law of South Africa* 2nd ed (LexisNexis Durban 2008) 1, 149. Bekink *Principles of South African Local Government Law* 331.

¹⁹⁵ Section 63(1)(a) of the *Municipal Finance Management Act*; see also section 55(2)(c) of the *Systems Act*; Thornhill 2008 *Journal of Public Administration* 731.

¹⁹⁶ Section 62(1)(a) of the *Municipal Finance Management Act*; Mkhabele CJMM *A Legal Analysis of the Application of Corporate Governance Principles in Musina Local Municipality* (LLM-dissertation University of Limpopo 2014) 8.

¹⁹⁷ Section 63(2)(a) of the *Municipal Finance Management Act*; Thornhill 2008 *Journal of Public Administration* 731.

municipality, including any bank account opened for any relief, charitable, trust, or other fund set up by the municipality.¹⁹⁸

The municipal manager for Mahikeng local municipality has the responsibility in terms of the *Municipal Finance Management Act*¹⁹⁹ to act with fidelity, honesty, integrity and in the best interests of the municipality in managing its financial affairs. This helps to avoid financial problems, attract investments and improve the performance of the local municipality. The *Municipal Finance Management Act*²⁰⁰ obliges the accounting officer to disclose to the municipal council and the mayor, all material facts which are available to him or her or reasonably discoverable, and that can influence the decision of the municipal council or the mayor. The disclosure of such information may prevent any prejudice to the financial interests of the municipality. This could help the municipal council when drafting their policies and developing their future IDPs.

The municipal manager should avoid acting in any way that is inconsistent with the duties assigned to accounting officers of municipalities. This could ensure the effective administration of the municipal funds. The municipal manager should adhere to the principles of good corporate citizenship to ensure good governance in Mahikeng local municipality. The King IV Code²⁰¹ requires the municipal manager to provide effective leadership that is founded on an ethical foundation. Ethics or integrity is the basis of and the reason for corporate governance.²⁰²

¹⁹⁸ Section 62(2) of the *Municipal Finance Management Act*; Visser 2001 *Local Government Paper 2*.

¹⁹⁹ Section 61(1)(a) of the *Municipal Finance Management Act*; This duty is similar to the common law duty which requires the directors in a company to act in utmost good faith and in the interest of the company.

²⁰⁰ Section 61(1)(b)-(c) of the *Municipal Finance Management Act*; Mkhabele *A Legal Analysis of the Application of Corporate Governance Principles in Musina Local Municipality* 8.

²⁰¹ King IV Code "King Code of Governance for South Africa 2016" 2016 Institute of Directors Southern Africa (King IV Code) 1, 39, see principle 1; Mkhabele CJMM *A Legal Analysis of the Application of Corporate Governance Principles in Musina Local Municipality* (LLM-dissertation University of Limpopo 2014) 1, 11.

²⁰² Mkhabele *A Legal Analysis of the Application of Corporate Governance Principles in Musina Local Municipality* 11.

2.5 Employment Contract of Municipal Manager Under the Systems Act

The municipal council of the Mahikeng local municipality is vested with the authority of appointing a municipal manager for the municipality under the *Systems Act*.²⁰³ The municipal manager is appointed to run the administration of the Mahikeng local municipality subject to policy directions of the municipal council.²⁰⁴ The municipal manager may only be appointed through a written employment contract with the municipal council.²⁰⁵ Such an employment contract must contain *inter alia* the duties, responsibilities, remuneration, benefits, and other terms of employment as agreed to by the parties.²⁰⁶ The municipal manager for Mahikeng local municipality must carry out his duties in line with such employment contract and in line with the *inter alia* the *Systems Act* and *Municipal Finance Management Act* and policy directions of the municipal council.²⁰⁷ The employment contract is subject to a separate performance agreement concluded annually between the municipal council and the municipal manager for the municipality.²⁰⁸ This enables the municipal council to evaluate the performance of the municipal manager or the manager directly accountable to the municipal manager. The employment contract of the municipal manager is entered into by the municipal manager and the municipal council on behalf of the Mahikeng local municipality.²⁰⁹

The performance agreement must be concluded within a reasonable time after a person has been appointed as the municipal manager.²¹⁰ The performance agreement must include performance objectives and targets that must be met, standards and procedures for evaluating performance intervals for evaluation as well

²⁰³ Sections 54A(1)(a) and 56(1)(a)(i) of the *Systems Act*; Reg 2(1) in GN R805 in GG 29089 of 1 August 2006; Thornhill 2008 *Journal of Public Administration* 731.

²⁰⁴ Section 55(1)(b) of the *Systems Act*; Thornhill 2008 *Journal of Public Administration* 731.

²⁰⁵ Section 57(1)(a) of the *Systems Act*; Reg 2(1) in GN R805 in GG 29089 of 1 August 2006; Bekink *Principles of South African Local Government Law* 331.

²⁰⁶ Section 57(3)(a) of the *Systems Act*; Reg 2(2) in GN R805 in GG 29089 of 1 August 2006.

²⁰⁷ Sections 55(1)(b) and 57(3)(a) of the *Systems Act*.

²⁰⁸ Sections 57(1)(a) and (b) of the *Systems Act*; Reg 23 in GN R805 in GG 29089 of 1 August 2006; Bekink *Principles of South African Local Government Law* 331.

²⁰⁹ Section 57(1)(b) of the *Systems Act*.

²¹⁰ Section 57(2)(a) of the *Systems Act* requires the performance agreement to be concluded within 60 days after a person has been appointed as the municipal manager or as a manager directly accountable to the municipal manager.

as consequences for substandard performance.²¹¹ The provisions of the *Municipal Finance Management Act*²¹² conferring responsibilities on the municipal manager as the accounting officer of a municipality must be regarded as part of the performance agreement of the municipal manager for Mahikeng local municipality. The *Municipal Finance Management Act*²¹³ establishes standards for ensuring transparency and accountability of financial affairs of the Mahikeng local municipality, among others. The municipal council should work together with the municipal manager to ensure the successful running of the Mahikeng local municipality. The municipal manager must maintain and promote the highest form of ethics when performing his functions.²¹⁴

2.6 Accountability of a Municipal Manager for Mahikeng Local Municipality

The municipal manager is the head of administration as well as the accounting officer of the Mahikeng local municipality.²¹⁵ As such, the municipal manager is accountable and responsible for all the income and expenditure of the municipality.²¹⁶ The municipal manager for Mahikeng local municipality is accountable and responsible for all the assets and the discharge of all liabilities of the municipality.²¹⁷ The municipal manager must ensure proper and diligent compliance with the *Municipal Finance Management Act* in managing the financial affairs of the municipality.²¹⁸ He or she is responsible for the creation and development of an effective, efficient and accountable administration of the municipality.²¹⁹ The Mahikeng local municipality should structure its administration in

²¹¹ Sections 57(4)(a) and (c) of the *Systems Act*; Bekink *Principles of South African Local Government Law* 332.

²¹² Section 61 of the *Municipal Finance Management Act*; see also section 57(4A) of the *Systems Act*.

²¹³ Section 2(a) of the *Municipal Finance Management Act*; Botlhoko *TS Promoting Effective Financial Accountability in Local Government in the North West Province: Developing Operational Guidelines for Municipal Public Accounts Committees* (LLD- dissertation Central University of Technology, Free State 2017) 86.

²¹⁴ Section 195(1) of the *Constitution of South Africa*.

²¹⁵ Section 54A(1)(a) of the *Systems Act*; Thornhill 2008 *Journal of Public Administration* 730.

²¹⁶ Section 55(2)(a) of the *Systems Act*.

²¹⁷ Section 55(2)(b) of the *Systems Act*.

²¹⁸ Section 55(2)(c) of the *Systems Act*.

²¹⁹ Section 55(1)(a) of the *Systems Act*; Joubert and Faris *The Law of South Africa* 150.

a way that holds the municipal manager accountable for the overall performance of the administration.²²⁰ The reason for this is that the municipal manager is the accounting officer of the municipality and must account for all the financial affairs of the municipality.²²¹ Such accountability could ensure that the Mahikeng local municipality delivers services to the Mahikeng community in an efficiently and sustainably.

The municipal council should review the performance of a municipal manager. This is to make sure that the municipal manager is implementing the IDP of the municipality, thus meeting the obligations of the municipality. When the *Systems Act*²²² says that the municipality holds the municipal manager accountable, it is, in fact, the municipal council first, who must hold the municipal manager accountable.²²³ The *Systems Act*²²⁴ makes it the responsibility of the municipal manager to implement the policy directions of the municipal council of the Mahikeng local municipality. A municipal manager is held accountable by the municipal council. This is in terms of the legislation such as *Systems Act*, *Municipal Finance Management Act*, as well as the employment contract and the performance agreement entered into, between the municipal council and the municipal manager.²²⁵ The reason for this is that the municipal manager is appointed by the municipal council to carry the objectives of the Mahikeng local municipality.

The Mahikeng local municipality has a duty to improve the quality of lives of the people of Mahikeng through their participation in the IDP programme. The municipality is obliged to give annual reports to the community of Mahikeng as a measure of accountability. The municipal manager must prepare an annual report for each financial year which entails a record of the activities of the Mahikeng local municipality including how the municipal budget was spent.²²⁶ The annual report

²²⁰ Section 51(i) of the *Systems Act*; Visser 2001 *Local Government Paper 2*.

²²¹ Section 61 of the *Municipal Finance Management Act*.

²²² Section 51(i) of the *Systems Act*; Visser 2001 *Local Government Paper 2*.

²²³ Visser Paper 4.

²²⁴ Section 55(1) of the *Systems Act*. The municipal council has the executive powers to make policies of the municipality.

²²⁵ Section 57(1)(a) of the *Systems Act*.

²²⁶ Section 121 of the *Municipal Finance Management Act*; also see section 46(1) of the *Systems Act*.

must promote accountability to the local community for the decisions made throughout the year by the municipality.²²⁷ The *Systems Act*²²⁸ requires the municipal manager to prepare the municipality's annual report reflecting the performance of the Mahikeng local municipality. The municipal manager for Mahikeng local municipality must notify the community as well as the Auditor General and the Member of Executive Council (MEC) about the meeting on the annual report.²²⁹ The Auditor General and the MEC play an oversight role. The Auditor General and the MEC have a right to speak at such general meetings. The preparation of the annual report is a measure of accountability and one of the ways in which the municipality ensures community involvement.

The Mahikeng local municipality must put in place, mechanisms and processes that will enable the community to participate.²³⁰ The reason for this is that the municipality is obliged by the *Constitution of South Africa* to involve community participation in local government.²³¹ The members of the local community of Mahikeng have the rights and duties which include, among others, to be informed of the decisions of the municipality affecting their rights, property and reasonable expectations.²³² The members of the local community possess the rights to be involved and to contribute to the decision making of the Mahikeng local municipality.²³³ The member of the local community may do so by submitting their oral or written recommendations, representations and complaints to the municipal council of the Mahikeng local municipality.²³⁴ The municipal council of the Mahikeng local municipality must adhere to the recommendations and complaints submitted by

²²⁷ Section 121(2)(c) of the *Municipal Finance Management Act*; The report must include amongst others annual financial statements, Auditor General's audit report

²²⁸ Section 46 of the *Systems Act*; The annual performance report must form part of the municipality's annual report in terms of Chapter 12 of the *Municipal Finance Management Act*.

²²⁹ Visser 2001 Local Government Paper 7.

²³⁰ Section 152(1)(e) of the *Constitution of South Africa*; Section 17 (2) of the *Systems Act*; Visser2001 *Local Government Paper 7*.

²³¹ Section 152(1)(e) of the *Constitution of South Africa*; Visser2001 *Local Government Paper 7*.

²³² Section 5(1)(c) of the *Systems Act*; Bekink *Principles of South African Local Government Law* 85. This right is imperative as the rights of the municipality have an impact on the rights of members of the community one way or the other.

²³³ Section 5(1)(a)(i) of the *Systems Act*; Bekink *Principles of South African Local Government Law* 85.

²³⁴ Section 5(1)(a)(ii) of the *Systems Act*; Bekink *Principles of South African Local Government Law* 85.

the community. The reason for this is that the Mahikeng community has rights with regard to local authority and can make certain demands to the municipal authority of the Mahikeng local municipality.²³⁵

Accountability must not only be done, but it must also be seen to be done. Accountability can be seen to be done when there is proper and efficient service delivery in Mahikeng local municipality. Accountability can also be seen to be done when the municipal manager prevents irregular, unauthorised, fruitless and wasteful expenditures in the municipality. The living conditions of a community must improve, and there must be, among others, proper roads, sanitation, and proper facilities as well as sufficient water supply to the community of Mahikeng. This will indicate that the municipality is achieving its primary mandate of delivering basic service delivery to the community. In South Africa, there have been many protests happening, especially in the North West province, particularly in Mahikeng local municipality for service delivery.²³⁶ This could be caused by lack of basic service delivery to the community of Mahikeng and lack of accountability of Mahikeng local municipality to the community. The municipality has a duty to deliver basic services to the Mahikeng community and provide for an accountable government. The municipal manager for Mahikeng local municipality has a duty to give proper account to the municipality, and the responsibility to lead ethically to improve service delivery in Mahikeng. This ensures that the municipality delivers the required basic services and is accountable to the community.

2.7 Accountability of Company Directors Under the Companies Act 71 of 2008

The role of a municipal manager for Mahikeng local municipality is similar to the role of a director in a company.²³⁷ Similarly, the municipal council plays a similar role to that of the board of directors such as appointing the municipal manager and the

²³⁵ Bekink *Principles of South African Local Government Law* 85.

²³⁶ Mamabolo MA "Municipal Service Partnerships: Are they Useful in Addressing Service Delivery Backlogs?" 2013 *South African Association of Public Administration and Management* 202, 204.

²³⁷ 71 of 2008 (*Companies Act* 2008), see section 66; The business affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company; Erasmus J and Riche N "Duties of Directors" 2013 *Deloitte* 1, 9.

director, respectively.²³⁸ The director in a company reports to the board of directors, and the municipal manager also reports to the municipal council. However, the municipal council and manager in Mahikeng local municipality seem to be struggling to meet their primary mandate of providing basic service delivery and accounting for the municipal funds.²³⁹ This is evident from the Auditor General's report 2018-2019 where he indicated that the Mahikeng local municipality was unable to prevent the irregular, unauthorised, fruitless and wasteful expenditures.²⁴⁰ In addition, the municipal manager of the Mahikeng local municipality failed to provide the Auditor General with appropriate audit evidence on which to base his opinion on the financial statements of the municipality. The Auditor General also indicated in his 2018-2019 audit report of the Mahikeng local municipality that the municipal manager failed to prepare a fair presentation of the financial affairs of the municipality.²⁴¹ Failure by the municipal manager to prepare a fair presentation of the financial affairs of the municipality and failure to provide the Auditor General with appropriate evidence for financial affairs of the municipality is an indication that the municipal manager is failing to account for municipal accounts.

Furthermore, the Mahikeng local municipality was placed under administration in 2018 for failure by the municipal council to perform its executive obligations.²⁴² Failure by the municipal council to fulfil its executive obligations, include among others, the failure by the Mahikeng local municipality to deliver basic services to the community of Mahikeng.²⁴³ This also entails that the Mahikeng local municipality is

²³⁸ Section 54A(1)(a) of the *Systems Act*; also see section 66 of the *Companies Act*; Stevens R "The Legal Nature of the Duty of Care and Skill: Contract or Delict?" 2017 *Potchefstroom Electronic Law Journal* 1, 3.

²³⁹ Makwetu K "Auditor-general flags lack of accountability as the major cause of poor local government audit results" 2019 *Auditor General South Africa* 1, 1; The Auditor General stated that the state of audit outcomes is deteriorating, as a result, the accountability for financial and performance management continue to worsen in most municipalities, including Mahikeng local municipality.

²⁴⁰ Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 3.

²⁴¹ Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 3.

²⁴² Section 139(1)(b) of the *Constitution of South Africa*; Makwetu K "Consolidated General Report on National and Provincial Audit Outcomes 2017/2018" 2018 *Auditor General South Africa* 1, 63; Montsho M 2018 <https://www.iol.co.za/news/politics/8-north-west-municipalities-put-under-administration-16710117> page number unknown.

²⁴³ Section 152(1)(b) of the *Constitution of South Africa*.

failing to provide an accountable, transparent and democratic local government.²⁴⁴ The Mahikeng local municipality being placed administration entails that an administrator is appointed to manage and oversee the day-to-day running of the municipality.²⁴⁵ The researcher argues that the Mahikeng local municipality must take lessons from the corporate sector, particularly on the role of directors and apply the corporate governance principles. The corporate sector has proven to be more successful in achieving the primary objectives as outlined in the *Companies Act* 2008.²⁴⁶ There are principles governing the roles of directors in a company that can be employed by the municipal council and the municipal manager for Mahikeng local municipality to run an effective and accountable administration.²⁴⁷

One of the duties of a director is to act in the utmost good faith and in the best interests of the company.²⁴⁸ This was the position in common law, which entails that directors must exercise care, skill, and diligence to promote the success of a company.²⁴⁹ The duties of a director are similar to that of the accounting officer as provided for in the *Municipal Finance Management Act*.²⁵⁰ The *Companies Act* 2008²⁵¹ has codified this common law position by compelling the directors to act with honesty, in good faith, and in a manner, they believe to be in the interest of the company. The director of a company is compelled to perform his or her functions by

²⁴⁴ Section 152(1)(a) of the *Constitution of South Africa*.

²⁴⁵ Section 139 of the *Constitution of South Africa*, allows provincial intervention in local government when that municipality fails to fulfil their executive obligations in terms of the constitution or legislation. One of these interventions may include putting a municipality under administration. Add credible sources

²⁴⁶ Section 7 of the *Companies Act* 2008; Although the corporate sector is not perfect, many companies are able to encouraging transparency and embrace high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation. The researcher is of the view that company law principles can assist in encouraging accountability in Mahikeng local municipality.

²⁴⁷ Botha MM "The Role and Duties of Directors in the Promotion of Corporate Governance: A South African Perspective" 2009 *Research Gate* 702, 706. These duties are important because they play a role in ensuring the promotion of corporate governance principles in Company law.

²⁴⁸ Hendrikse JW and Hendrikse LH *Corporate Governance Handbook, Principles and Practice* 2nded (Juta Cape Town 2012) 1, 220. This is the common law position which was codified into the *Companies Act*.

²⁴⁹ Bidie SS "Director's Duty to Act for a Proper Purpose in the Context of Distribution under the Companies Act 71 of 2008" 2019 *Potchefstroom Electronic Law Journal* 1,6.

²⁵⁰ Section 61(1)(a) of the *Municipal Finance Management Act*.

²⁵¹ Section 76(3)(a) and (b) of the *Companies Act* 2008; Bidie 2019 *Potchefstroom Electronic Law Journal* 6; Botha 2009 *OBITER* 706.

exercising a degree of care, skill, and diligence.²⁵² The duty of care, skill and diligence entails that director of a company must manage the business of the company as a reasonably prudent person would manage his affairs.²⁵³ The researcher argues that this principle must be applied by the municipal manager for Mahikeng local municipality to promote the success of the municipality. The municipal manager is also required by the *Municipal Finance Management Act*²⁵⁴ to act with fidelity, honesty, integrity and in the best interests of the municipality in managing its financial affairs. However, the municipal manager for Mahikeng local municipality is failing to apply such fiduciary duties in running the affairs of the municipality. As a result, the municipal manager has failed to prevent the irregular, unauthorised, fruitless and wasteful expenditures in Mahikeng local municipality.²⁵⁵ The municipal manager also failed to recover such irregular, unauthorised, fruitless and wasteful expenditure in the municipality. Professor Van As argues that one of the things that cause a moral collapse in South Africa is the failure to enforce the law by the police as well as the local authorities.²⁵⁶ The researcher submits that failure to enforce the law in Mahikeng local municipality led to the municipal manager to disregard the law or the principles of good governance. Therefore, it is important that the penalties imposed on the accounting officer in terms of the *Municipal Finance Management Act*²⁵⁷ for failure to act with honesty and in the best interest of the municipality be enforced.

The *Companies Act* 2008 imposes liability on the company directors for non-compliance with the common law principle of exercising utmost good faith.²⁵⁸ A

²⁵² Section 76(3)(c) of the *Companies Act* 2008; Bidie 2019 *Potchefstroom Electronic Law Journal* 6; Botha 2009 *OBITER* 706.

²⁵³ Section 76(3)(c) of the *Companies Act* 2008; Botha 2009 *OBITER* 706.

²⁵⁴ Section 61(1)(a) of the *Municipal Finance Management Act*.

²⁵⁵ Section 62(1)(d) of the *Municipal Finance Management Act*; Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 3.

²⁵⁶ Van As H "By-Laws and Law Enforcement as Management: Educational and Moral Rejuvenation Mechanisms" 2006 *Official Journal of the Institute of Municipal Finance Officers* 6, 6.

²⁵⁷ Section 174 of the *Municipal Finance Management Act* provides that a person is liable on conviction of an offence in terms of section 173 to imprisonment for a period not exceeding five years or to an appropriate fine determined in terms of applicable legislation.

²⁵⁸ Section 77(2)(a) of the *Companies Act*; Cassim R "Delinquent Directors under the Companies Act 71 of 2008: *Gihwala v Grancy Property Limited* 2016 ZASCA 35" 2016 *Potchefstroom Electronic Law Journal* 15.

director of a company may be held personally liable for failing to exercise his or her duty of acting in utmost good faith and the best interest of the company.²⁵⁹ If the municipal manager is held personally liable for failing to act in good faith and in the best interest of the municipality, this may reduce irregular expenditures in the Mahikeng local municipality. The director may be held personally liable to pay monetary damages.²⁶⁰ The researcher argues that the municipal manager or the municipal council must be held personally liable for failing to act in honest and in good faith. This will oblige the municipal manager to act in good faith and in the interest of the municipality. The municipal manager must ensure that he or she exercises his or her duties with reasonable care, skill, and diligence. He or she must be held personally liable to pay monetary damages for failure to exercise good faith. This could cause the municipal manager to exercise reasonable care, skill, and diligence when dealing with the affairs or finances of the Mahikeng local municipality.

A director in a company would have acted in good faith and in the best interest of the company if he or she has taken diligent steps to become informed about any matter concerning the company.²⁶¹ The director of a company must have a rational basis for believing that a particular decision was taken in the best interest of the company.²⁶² The municipal manager for Mahikeng local municipality should ensure that he or she takes every rationale decision concerning the municipality in the best interest of the municipality.

A director in a company must not use his or her position as a director or any information obtained while acting in his or her capacity as a director to gain interest to gain an advantage for the director, or for another person other than the company.²⁶³ Moreover, the director of a company must not use his or her position to

²⁵⁹ Section 77(2) of the *Companies Act* 2008; Stevens 2017 *Potchefstroom Electronic Law Journal* 1; Botha 2009 *Research Gate* 713.

²⁶⁰ Section 77(2)(b) of the *Companies Act* 2008; Stevens 2017 *Potchefstroom Electronic Law Journal* 1; Botha 2009 *OBITER* 713.

²⁶¹ Section 76(4)(a) of the *Companies Act* 2008; Bidie 2019 *Potchefstroom Electronic Law Journal* 7; Davis *et al Companies and Other Business Structures in South Africa* 124.

²⁶² Section 76(4)(a)(iii) of the *Companies Act* 2008; Bidie 2019 *Potchefstroom Electronic Law Journal* 7; Davis *et al Companies and Other Business Structures in South Africa* 124.

²⁶³ Section 76(2)(a)(i) of the *Companies Act* 2008; Botha 2009 *OBITER* 713.

cause harm to the company or a subsidiary of the company.²⁶⁴ Similarly, the *Municipal Finance Management Act*²⁶⁵ provides that the municipal manager may not use the position or privileges of or confidential information obtained as accounting officer for personal gain or to benefit another person improperly.

The *Companies Act* 2008²⁶⁶ requires a company director to disclose any personal financial interest in advance by delivering to the board a notice in writing setting out the nature and extent of that interest. The municipal manager is also required to disclose to the municipal council or the mayor all the material facts which might influence the decision or the actions of the municipal council.²⁶⁷ In *Robinson v Randfontein Estate Gold Mining Co. Ltd.*,²⁶⁸ the plaintiff's company had a lease of mineral right in a farm. The defendant was the chairperson of the board of directors of the company. The defendant was mandated to purchase the farm for the plaintiff's company, but could not agree to the terms with the owner. The owner promised the defendant that if he wanted to sell, he would give the defendant the first option. At a later stage, the defendant bought half of the farm through an agent. The defendant thereafter sold it to the Water Waterval Trust Company, which was a wholly owned subsidiary to the plaintiff's company. The defendant never disclosed his interest in the transaction, and he did not also disclose his profit. The plaintiff then sued the defendant for the recovery of profits after discovering that the defendant failed to act in fiduciary duty.²⁶⁹

The Appellate Division in *Robinson* case²⁷⁰ refused to recognise the separate legal personality of a subsidiary where the defendant attempted to use the subsidiary to evade the fiduciary duties, he owed to the holding company as a director of that

²⁶⁴ Section 76(2)(a)(ii) of the *Companies Act* 2008; Botha 2009 *OBITER* 713.

²⁶⁵ Section 60(2)(b) of the *Municipal Finance Management Act*.

²⁶⁶ Section 75(4) of the *Companies Act* 2008; Davis *et al Companies and Other Business Structures in South Africa* 29; Delpont P *et al Henochsberg on the Companies Act 71 of 2008* 1st ed (LexisNexis Durban 2011) 1, 116.

²⁶⁷ Section 61(1)(b) of the *Municipal Finance Management Act*.

²⁶⁸ 1921 AD 168 (*Robinson* case) para 197; Marobela MM *Piercing the Corporate Veil in a Holding/Subsidiary Relationship* (LLM- dissertation University of Pretoria 2017) 32; Davis *et al Companies and Other Business Structures in South Africa* 121.

²⁶⁹ *Robinson* case para 177; Davis *et al Companies and Other Business Structures in South Africa* 29.

²⁷⁰ *Robinson* case para 197; Marobela *Piercing the Corporate Veil in a Holding / Subsidiary Relationship* 32; Davis *et al Companies and Other Business Structures in South Africa* 29.

company. The court in the *Robinson* case²⁷¹ rejected to recognise separate legal personality to prevent the defendant from evading his fiduciary duties from the holding company. The court held that the director of a company must observe the utmost good faith in his dealings with the company.²⁷²

One of the duties or standards of a director that can be introduced to a municipal manager for Mahikeng local municipality is a breach of fiduciary duty.²⁷³ The *Companies Act* 2008²⁷⁴ provides that a director in a company may be held liable for any loss, damages or costs sustained by the company as a consequence of any breach by the director of a duty. The general rule is that a director of a company owes a fiduciary duty to his or her own company.²⁷⁵ A director of a subsidiary, who is also a director of a holding company, has the same fiduciary duty when acting as a director of such subsidiary and to act in the best interest of a group as a whole.²⁷⁶

If a director in a company is in breach of his fiduciary duties, he or she will be held liable to the company in delict or damages.²⁷⁷ In addition, if a contract exists between the director and the company, the director is also in breach of such a contract.²⁷⁸ The *Municipal Finance Management Act* does not explicitly provide that a municipal manager will be held liable for breach of fiduciary duty. The researcher suggests that this must be expressly stated in the *Municipal Finance Management Act* that an accounting officer must be held liable for breach of a fiduciary duty which causes loss or damages to the municipality.²⁷⁹

²⁷¹ *Robinson* case para 197; Marobela *Piercing the Corporate Veil in a Holding / Subsidiary Relationship* 32; Davis *et al Companies and Other Business Structures in South Africa* 29.

²⁷² Davis *et al Companies and Other Business Structures in South Africa* 29.

²⁷³ Section 77(2)(a) of the *Companies Act* 2008; Werkmans Attorneys *Claims Against Directors of the Companies Act, 2008* (2018) available at <https://www.werksmans.com/wp-content/uploads/2018/10/Directors-liability.pdf> accessed 23 July 2020; Botha 2009 *OBITER* 713.

²⁷⁴ Section 77(2)(a) of the *Companies Act* 2008; Werkmans Attorneys *Claims Against Directors of the Companies Act, 2008* 5; Botha 2009 *Research Gate* 713; Davis *et al Companies and Other Business Structures in South Africa* 29.

²⁷⁵ Marobela *Piercing the Corporate Veil in a Holding/Subsidiary Relationship* 32.

²⁷⁶ Marobela *Piercing the Corporate Veil in a Holding / Subsidiary Relationship* 32.

²⁷⁷ Botha 2009 *OBITER* 709.

²⁷⁸ Botha 2009 *OBITER* 709.

²⁷⁹ Section 174 of the *Municipal Finance Management Act*.

Furthermore, a director of a company is liable for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director having acted in the name of the company.²⁸⁰ A director of a company is also liable for same if he/she has signed anything on behalf of the company, or purported to bind the company or authorise the taking of any action by or on behalf of the company, despite knowing that he or she lacked the authority to do so.²⁸¹ Although the *Municipal Finance Management Act*²⁸² provides that the municipal manager commits financial misconduct if he or she fails to uphold any provision of this Act, there is no municipal manager of Mahikeng local municipality that has ever been held liable for breach of his or her fiduciary duties.

The *Municipal Finance Management Act*²⁸³ further provides that a municipality must investigate allegations of financial misconduct against the municipal manager, a senior manager or other officials of the municipality unless those allegations are frivolous, vexatious, speculative or unfounded. The researcher submits that the municipal council must enforce compliance with the *Municipal Finance Management Act* and hold the municipal manager accountable for financial misconduct. The Mahikeng local municipality has not obtained a clean audit, but to date, no one has ever been held liable in the municipality. Investigations have been undertaken, but little evidence exists to show that people have been held liable in Mahikeng local municipality.²⁸⁴

In the case of *Re Darby Ex Parte Broughton*,²⁸⁵ the court confirmed that the corporate veil would be pierced if a company is used to perpetrate any kind of fraud or abuse. In the *Re Darby* case, Darby and another person formed a company in a Channel Islands. They were the only directors and sole shareholders with other five

²⁸⁰ Section 77(3)(a) of the *Companies Act* 2008.

²⁸¹ Section 77(3)(a) of the *Companies Act* 2008.

²⁸² Section 172(1)(b) of the *Municipal Finance Management Act*.

²⁸³ Section 172(3)(a) of the *Municipal Finance Management Act*.

²⁸⁴ Mathiba GL *The Role of the Auditor-General in the Promotion of Efficient Financial Management in Municipalities: A Case Study of the North West Province* (LLM- dissertation University of Western Cape 2019) 65.

²⁸⁵ 1911 1 KB 95 (*Re Darby* case); Mthembu LV *To Lift or Not Lift the veil – the Unfinished Story: A Critical Analysis of Common Law Principles in Lifting the Corporate Veil* (LLM- dissertation University of Natal 2002) 29.

others as their nominees.²⁸⁶ The company then formed and registered a subsidiary company in Whales, and they sold it a Quarrying licence and certain plant at a vast overvalue.²⁸⁷ The company went into liquidation.²⁸⁸ The liquidators claimed secret profit made by Darby on the promotion of the Welsh Company.²⁸⁹ The court held that Darby was the real promoter of the Welsh Company and it further stated that the Channel Island Company was the only vehicle for the perpetration of fraud. Hence the court pierced the corporate veil.²⁹⁰ The decision by the court illustrates that any personal profit made using the mechanism of the corporate form where there is a conflict of duties and interest, can be deemed improper and the court may disregard the corporate or company.

The *Companies Act 2008*²⁹¹ limits the liability of directors by providing for the principle of piercing the corporate veil. The principle of piercing the corporate veil promotes the interests of the company and company creditors against the unconscionable conduct of company directors. The principle of piercing the corporate veil empowers the courts to look behind the dealings of the company and have regard to the controllers of the company.²⁹² The researcher argues that this principle must be applicable in municipalities, and further discussion is provided in chapter four of this research.

2.8 Conclusion

The Mahikeng local municipality relies on its municipal council to achieve its primary constitutional mandate, which is the provision of basic services to the Mahikeng community. Such basic services include, among others, the provision of water and sanitation, road construction and maintenance, refuse removal and health care services to the community of Mahikeng local municipality. To that end, it also relies

²⁸⁶ Mthembu *To Lift or Not Lift the veil – the Unfinished Story* 29.

²⁸⁷ Mthembu *To Lift or Not Lift the veil – the Unfinished Story* 29.

²⁸⁸ Re Darby case para 103; Mthembu *To Lift or Not Lift the veil – the Unfinished Story* 29.

²⁸⁹ Re Darby case para 103; Mthembu *To Lift or Not Lift the veil – the Unfinished Story* 29.

²⁹⁰ Re Darby case para 103; Mthembu *To Lift or Not Lift the veil – the Unfinished Story* 29.

²⁹¹ Section 20(9) of the *Companies Act 2008*; Schoeman N "Piercing the Corporate Veil Under New Companies Act" (1 June 2012) *De Rebus* 1, 1.

²⁹² *Atlas Maritime Co SA v Avalon Maritime Ltd the Coral No.1* 1991 All SA 769 (CA) (*Atlas* case) para 779.

heavily on the municipal manager.²⁹³ For the municipality to achieve the service delivery mandate and to run an efficient and effective financial administration, the municipal council must hold the municipal manager accountable for the exercise of his duties. The municipal council must ensure that the municipal manager presents a fair presentation of the financial statements of the Mahikeng local municipality.²⁹⁴ This will assist the municipality to obtain clean audits from the Auditor General. The municipal council must be able to hold the municipal manager accountable, and the Mahikeng local municipality must be accountable to the community. However, the municipality is failing to provide basic service delivery to the municipality and to account for the funds of the municipality. The researcher suggests that the Mahikeng local municipality must ensure compliance with the *Systems Act* and the *Municipal Finance Management Act* to ensure efficient and effective accountability. This will enable the municipality to secure sound and sustainable management of the financial affairs of the municipality and to assist the municipality to move progressively towards the social and economic upliftment of the local community of Mahikeng. The municipal manager, as the accounting officer, must ensure that he or she acts with fidelity, honesty, integrity and in the best interests of the municipality in managing its financial affairs. The Mahikeng local municipality can employ the principles governing the role of directors to assist in running an effective and efficient administration of the municipality.

The standards regulating the conduct of directors in a company may be applied in Mahikeng local municipality by the municipal manager if it will be in the interest of the municipality. The researcher suggests that the common law principle of acting in utmost good faith must apply to the municipal manager. Furthermore, the municipal manager must be held personally liable by the municipal council of the Mahikeng local municipality or the Auditor General for failure to act in good faith and for failing to exercise care, skill, and diligence in running the administration of the municipality. This will ensure that the municipal manager for Mahikeng local municipality adheres

²⁹³ Section 43 and 156 of the *Constitution of South Africa*; Section 55(1) of the *Systems Act*; Freedman W "The Legislative Authority of the Local Sphere of Government to Conserve and Protect the Environment: A critical Analysis of the *Le Sueur v Ethekweni Municipality* [2013] ZAKZPHC 6 (30 January 2013)" 2014 *Potchefstroom Electronic Law Journal* 567, 568.

²⁹⁴ Section 122 of the *Municipal Finance Management Act*.

to the basic values and principles governing public administration, such as accountability and transparency as enshrined in the *Constitution of South Africa*.

CHAPTER THREE

CORPORATE GOVERNANCE MEASURES UNDER THE KING CODES AND THE COMPANIES ACT 71 OF 2008

3.1 Introduction

Corporate governance is the exercise of ethical and effective leadership in the running or management of a corporation or an organisation to achieve corporate governance outcomes such as ethical culture, good governance, effective control and legitimacy.²⁹⁵ The term "corporate" in corporate governance refers to "organisations that are incorporated to form legal entities that are separate from their founders" and apply to all forms of incorporation, whether it is a company, trust, retirement fund or legislative entity.²⁹⁶ The Mahikeng local municipality is an organ of state exercising its powers and functions in terms of the *Constitution of the Republic of South Africa, 1996*.²⁹⁷ Therefore, Mahikeng local municipality is a legal entity. As such, the municipal council and municipal manager of the municipality ought to exercise their functions and powers in accordance with the principles of good corporate governance enshrined in the King IV Code.²⁹⁸ This could provide an effective, transparent, and accountable administration in the municipality and assist the municipality to promote and maintain a high standard of professional ethics as required by the *Constitution of South Africa*.²⁹⁹

Corporate governance has largely contributed to facilitating effective and efficient management of companies, especially in corporate companies and state-owned enterprises (SOEs).³⁰⁰ The principle of corporate governance started in the United

²⁹⁵ Fredmun M *Effective Top Management: Beyond the Failure of Corporate Governance and Shareholder Value* 1sted (Wiley-VCH Weinheim 2006) 1, 21; Tricker B *Corporate Governance Principles, Policies, and Practices* 1st ed (Oxford New York 2009) 1, 38.

²⁹⁶ King IV Report "King IV Report on Corporate Governance for South Africa 2016" 2016 *Institute of Directors Southern Africa* (hereinafter referred to as the "King IV Report")1, 11, see part 2.

²⁹⁷ Section 239 of the *Constitution of the Republic of South Africa, 1996 (Constitution of South Africa)*.

²⁹⁸ See part 3 of Principle 1 of King IV Report; Section 41(1)(c) of the *Constitution of South Africa*.

²⁹⁹ Section 195(1)(a) of the *Constitution of South Africa* requires that a high standard of professional ethics must be promoted and maintained.

³⁰⁰ Mbecke P "Corporate Municipal Governance for Effective and Efficient Public Service Delivery in South Africa" 2014 *Journal of Governance and Regulation* 98, 99.

Kingdom with the report of the committee on the financial aspects of corporate governance known as the Cadbury Report of 1992.³⁰¹ This report identified integrity, openness, and accountability as three key principles of corporate governance.³⁰² The Cadbury Report informed the genesis of the King I Code³⁰³ of 1994. The King I Code relies on leadership, sustainability, and corporate citizenship. The King Committee issued the King II Code³⁰⁴ in 2002, followed by the King III Code³⁰⁵ in 2009 and ultimately the King IV Code³⁰⁶ on corporate governance, which was released in 2016. It is important to note that Mahikeng local municipality has not yet implemented the principles of corporate governance. This is evident as the municipality is receiving bad audit outcomes and experiencing service delivery deficiencies. Although the municipality has a good legislative framework and policies such as the *Municipal Finance Management Act*, the municipality continues to receive bad audit outcomes, and municipal funds not being accounted for.³⁰⁷

This chapter discusses the principles of corporate governance as outlined in all the King Codes³⁰⁸ as well as the *Companies Act 2008*.³⁰⁹ The chapter further discusses whether corporate governance principles are applied by the municipal manager and the municipal council of the Mahikeng local municipality to ensure good governance

³⁰¹ Cadbury A "The Financial Aspect of Corporate Governance" 1992 *Committee on the Financial Aspects of Corporate Governance and Gee and Co. Ltd* (the Cardbury report) see section 3.2 which provides that the principles on which the code is based are those of openness, integrity and accountability.

³⁰² Sections 3.2, 3.3 and 3.4 of the Cardbury report; Mbecke 2014 *Journal of Governance and Regulation* 99.

³⁰³ King I Report "King Report on Corporate Governance for South Africa" 1994 *Institute of Directors Southern Africa* (hereinafter referred to as the "King I Report"), corporate governance in South Africa was institutionalised by the publication of the King Report on Corporate Governance ("King Report 1994") in November 1994.

³⁰⁴ King II Report "King Report on Corporate Governance for South Africa 2002" 2002 *Institute of Directors Southern Africa* (hereinafter referred to as the "King II Report") 1, 4.

³⁰⁵ King III Report "King Report on Governance for South Africa 2009" 2009 *Institute of Directors Southern Africa* (hereinafter referred to as the "King III Report") 1, 20, see principle 1.1.

³⁰⁶ Principle 1 of King IV Report; Price Waterhouse Coopers *A summary of the King IV Report on Corporate Governance™ for South Africa, 2016* (2016) available at <http://pwc.co.za>>pdf accessed 24 July 2019 1, 2.

³⁰⁷ 56 of 2003 (*Municipal Finance Management Act*), see section 2; Mbecke 2014 *Journal of Governance and Regulation* 101.

³⁰⁸ Principle 1 of the King III Report; De Beer F and Du Toit DH "Human Resources Managers as Custodians of the King III Code" 2014 *South African Journal of Economic Management Sciences* 206, 206; Price Waterhouse Coopers *A summary of the King IV Report on Corporate Governance™ for South Africa, 2016* 2.

³⁰⁹ 71 of 2008 (*Companies Act 2008*), see section 7.

of the municipality, and if not, how such principles can be enforced to ensure good governance in the municipality.

3.2 Corporate Governance Measures and Standards Under the Companies Act 2008

The *Companies Act 2008*³¹⁰ encourages transparency and high standards of corporate governance in the corporate sector. The researcher argues that there are lessons that can be adopted by municipalities from the *Companies Act 2008* to promote transparency and high standards of corporate governance. Corporate governance was introduced in South Africa through the establishment of King Codes³¹¹ on Corporate Governance. The *Companies Act 2008*³¹² is characterised by flexibility, simplicity, transparency, corporate effectiveness, and certainty for the maintenance and development of the South African economy. Company law must ensure that there is proper recognition of director accountability, and the minimum accounting standards should be required for annual reports. The King III Code³¹³ was established to comply with the *Companies Act 2008*. These principles and standards developed in the *Companies Act 2008* must be applied and promoted in the Mahikeng local municipality for the proper financial administration of the municipality.

It is worth noting that the *Companies Act 2008*³¹⁴ obliges the directors in a company to exercise high standards of corporate governance. The municipal manager for Mahikeng local municipality must ensure that he exercises high standards of

³¹⁰ Section 7(b)(iii) of the *Companies Act 2008*; Walker D and Mokoena S *The Corporate Governance Review: South Africa* (Law Business Research United Kingdom 2011) 275, 275.

³¹¹ Walker and Mokoena *The Corporate Governance Review* 275; Mokgopo TI A Legal Analysis of the Application of Corporate Governance Principles in the Local government Sphere as a Measure to Improve Service Delivery (LLM- dissertation University of Limpopo 2017)1, 16.

³¹² Section 7(b)(ii) of the *Companies Act 2008*; Gwanyanya M "The South African *Companies Act* and the Realisation of Corporate Human Rights Responsibilities" 2015 *Potchefstroom Electronic Law Journal* 3102, 3108.

³¹³ Principle 1.2 of the King III Report; De Beer and Du Toit 2014 *South African Journal of Economic Management Sciences* 206.

³¹⁴ Section 77(2) of the *Companies Act 2008*. A director of a company may be held liable for a breach of a fiduciary duty, for any loss, damages or costs sustained by the company as a consequence of any breach by the director of a duty to act in utmost good faith.

corporate governance because the application of such standards will help him/her in running the proper financial administration of the Mahikeng local municipality.

The *Companies Act* 2008³¹⁵ provides that, when the director performs his functions or powers, in respect of any matter, he must do so, by taking diligent steps to become informed about the matter. Furthermore, the director can make a decision, or support the decision of a committee or the board concerning that matter; having a rational basis for believing that the decision was in the best interests of the company.³¹⁶ This is what is required of a municipal manager in carrying out his duties as the accounting officer. The municipal manager must ensure that he has taken reasonably diligent steps to be informed of any matter within the municipality as the head and the accounting officer.

The municipal manager for Mahikeng local municipality may be held liable in accordance with the *Municipal Finance Management Act*³¹⁷ for the breach of fiduciary duty such as to act with fidelity, honesty, integrity and in the best interests of the municipality in managing its financial affairs, for any damage, loss or costs sustained by the municipality as a consequence of any breach of duty by the municipal manager.³¹⁸

The municipal manager for Mahikeng local municipality must also be held liable following the principles of common law relating to delict for any loss, damage sustained by the municipality, as a consequence of any breach of the municipal manager's duties.³¹⁹

The municipal manager may be held liable for any loss, damage or costs sustained by the Mahikeng local municipality as a direct or indirect consequence of the municipal manager having acted in the name of the municipality, purported to bind the municipality, signed anything on behalf of the municipality even though he or

³¹⁵ Section 76(4)(a)(i) of the *Companies Act* 2008.

³¹⁶ Section 76(4)(a)(iii) of the *Companies Act* 2008.

³¹⁷ Section 173 of the *Municipal Finance Management Act* which provides that the accounting officer is guilty of an offence if he or she contravenes or fails to comply with a provision of section 61 of the *Municipal Finance Management Act*.

³¹⁸ Section 77(2)(a) of the *Companies Act* 2008; see also section 61, 173 and 174 of the *Municipal Finance Management Act*.

³¹⁹ Section 77(2)(b) of the *Companies Act* 2008.

she lacked the authority to do so.³²⁰ The municipal manager for Mahikeng local municipality must also be held liable where he or she signed, consented to or authorised any financial statements that were false or misleading in a material respect.³²¹ This helps to ensure that the municipal manager exercise reasonable care and diligence when administering the affairs of the Mahikeng local municipality.

3.3 King I Code on Corporate Governance

The King I Code³²² was published in 1994, and its aim was to finalise what had become generally accepted as corporate governance norms and procedures. The King I Code³²³ did not apply to all companies or organisations. The King I Code only applied to organisations such as companies with securities listed on the Johannesburg Stock Exchange (JSE), banks, government departments, state-owned companies, and insurance companies. The King I Code³²⁴ was also aimed at promoting the standards of corporate governance in the corporate sector.

3.4 King II Code on Corporate Governance

The King II Code³²⁵ was published in 2002, and it identified seven fundamental characteristics of good corporate governance, namely, discipline, transparency, independence, accountability, responsibility, fairness, and social responsibility. The King II Code³²⁶ introduced corporate citizenship and acknowledged that there is a need for a triple bottom line approach, which embraces the economic, environmental

³²⁰ Section 77(3)(a) of the *Companies Act* 2008; see also section 61(1)(a) and 173 of the *Municipal Finance Management Act*. The municipal manager is guilty for failing to act with act with fidelity, honesty, integrity and in the best interests of the municipality in managing its financial affairs.

³²¹ Section 77(3)(d) of the *Companies Act* 2008.

³²² King I Report para 24.4; Walker and Mokoena *The Corporate Governance Review* 278; Mokgopo *A Legal Analysis of the Application of Corporate Governance Principles* 16; Hendricks PSA and Wyngaard RG "South Africa's King III: A Commercial Governance Code Determining Standards of Conduct for Civil Society Organizations" 2010 *International Journal of Not-for-Profit Law* 104, 105.

³²³ King I Report para 24.7; Walker and Mokoena *The Corporate Governance Review* 275.

³²⁴ King I Report para 24.3; Walker and Mokoena *The Corporate Governance Review* 275; Mokgopo *A Legal Analysis of the Application of Corporate Governance Principles* 19.

³²⁵ Principle 1.5 of the King II Report; Walker and Mokoena *The Corporate Governance Review* 275.

³²⁶ Section 4 Chapter 1 of the King II Report; Hendricks and Wyngaard *International Journal of Not-for-Profit Law* 105; Mokgopo *A Legal Analysis of the Application of Corporate Governance Principles* 17.

and social aspects of a company's activities. King II Code³²⁷ also applied to government departments, state-owned companies, all companies with securities listed on the JSE, banks, and insurance companies, which meant that it also did not expressly apply to municipalities, as its terminology was restricted or directed at the corporate sector.

3.5 King III Code on Corporate Governance

The promulgation of the *Companies Act* 2008 necessitated a review of the second report by the King Committee and to update the King II Code³²⁸ in the light of the *Companies Act* of 2008. The King III Code³²⁹ was established to be in line with the *Companies Act* 2008 and to be complied with by all entities regardless of their form of incorporation or establishment. If any organisation or the Mahikeng local municipality adheres to the principles of good corporate governance enshrined in the King III Code,³³⁰ this results in practising good governance and achieving high performance culture and governance objectives. The King III Code³³¹ does not dictate the application of its principles. It is the responsibility of any entity to decide on the application of such principles considering its size, complexity, and mandate. It is important to note that the King III Report³³² focuses on the issues of corporate leadership, sustainability and corporate citizenship.

3.5.1 Principles of Corporate Governance and Related Aspects

The King III Code³³³ provides for the principles of corporate governance. Such principles include ethical leadership and corporate citizenship; boards and directors; audit committees; the governance of risk; compliance with the laws, codes, rules,

³²⁷ Principle 1.2 of the King II Report; Walker and Mokoena *The Corporate Governance Review* 275.

³²⁸ De Beer and Du Toit 2014 *South African Journal of Economic Management Sciences* 206; Mokgopo *A Legal Analysis of the Application of Corporate Governance Principles* 19.

³²⁹ Mokgopo *A Legal Analysis of the Application of Corporate Governance Principles* 19; Price Water House Coopers Incorporated 2009 *King's Counsel: King III at a Glance Steering Point* <https://www.pwc.co.za/en/assets/pdf/pwc-draft-kingiii-09.pdf> accessed 24 July 2019 1, 2.

³³⁰ Principle 1 and 8.5 of the King III Report.

³³¹ See section 1 on the introduction of the King III Report.

³³² Principle 1.1 and 1.2 of the King III Report; Walker and Mokoena *The Corporate Governance Review* 276;

³³³ King Committee King III Report on Governance for South Africa 4.

and standards; internal audit; governing stakeholder relationship; and integrated reporting and disclosure.

3.5.1.1 Ethical Leadership and Corporate Citizenship

The King III Code³³⁴ is based on ethical leadership, sustainability, and corporate citizenship. The responsible corporate citizenship implies that there must be an ethical relationship between the company and the society in which it operates.³³⁵ The King III Code³³⁶ on the issue of leadership requires the municipal council, and the municipal manager to provide effective leadership based on an ethical foundation. The municipal council and the municipal manager should ensure that the municipality is and seen to be a responsible corporate citizen.³³⁷ The foundation of good corporate governance is ethics and integrity. The *Constitution of South Africa* concurs with King III Code³³⁸ as it provides that public administration should promote and maintain high ethical standards, which includes the Mahikeng local municipality as one of the spheres of the local government of which the constitution applies. This can be useful to Mahikeng local municipality in that the municipal council will lead effectively and ethically, adhering to the duties of a municipal manager by maintaining sufficient working knowledge acting with due care and diligence, and by remaining informed about matters for decision making.

3.5.1.2 Compliance with the Laws, Codes, Rules and Standards

The municipal council is responsible for the municipality's compliance with applicable laws, codes and standards with which the municipality has elected to comply.³³⁹ A municipality is established through legislation, and the municipal council has to ensure its compliance with relevant statutes, regulations, and policies in order to

³³⁴ Hendrikse JW and Hendrikse LH *Corporate Governance Handbook Principles and Practise* 2nd ed (Juta Cape Town 2012) 1, 184.

³³⁵ Mkhabele CJMM *A Legal Analysis of the Application of Corporate Governance Principles in Musina Local Municipality* (LLM- dissertation University of Limpopo 2014) 1, 11.

³³⁶ Principle 1.1 of the King III Report; Mkhabele *A Legal Analysis of the Application of Corporate Governance Principles* 11.

³³⁷ Principle 1.2 of the King III Report; Hendrikse and Hendrikse *Corporate Governance Handbook* 184.

³³⁸ Principle 1 of the King III Report; see also section 41(1) of the *Constitution of South Africa*.

³³⁹ Havenga M *et al Corporate Governance Annual Review 2012* 1sted (LexisNexis Cape Town 2012) 1, 54.

ensure good governance. Sustainable development and the success of a municipality depend solely on the adherence of a municipal council to legislation and relevant policies. The municipal council has the powers to appoint a manager directly accountable to the municipal manager to be able to carry out the municipal objectives and to comply with the relevant statute, regulations and policies. This is useful because the municipal council may govern in compliance with applicable laws, non-binding rules, codes and standards in a way that supports the municipality. Non-compliance with the applicable laws, non-binding rules, codes and standards is one of the causes of maladministration in Mahikeng local municipality.

3.5.1.3 Boards and Directors/Municipal Council

The board of directors in a company is similar to the municipal council of a municipality. Moreover, the position or the functions of a director in a company are similar to those of the municipal manager who is employed by the municipal council.³⁴⁰ The powers or the structure of the board of directors in a company are similar to that of the municipal council in a municipality.

The King III Code³⁴¹ emphasises on the leadership, integrity, and responsibility of the municipal council and the company's board of directors. The municipal council is responsible for all decisions of the Mahikeng local municipality, and they often carry out the objectives of the municipality through the municipal manager. Hence, the municipal council is required to employ a municipal manager who is accountable to the municipal council. The board or the municipal council must ensure that they uphold the principles of good corporate governance in executing their decisions or any decision affecting the Mahikeng local municipality.

³⁴⁰ Section 82 of the *Municipal Structures Act (Structures Act)*.

³⁴¹ Principle 1.1 of King III Report; Mkhabele *A Legal Analysis of the Application of Corporate Governance Principles* 12.

3.5.1.4 Governing Stakeholder Relationship

The municipality may adhere to the triple bottom line approach and sustainability as required by King III Code.³⁴² Directors and/or the municipal manager should consider the economic, social, and environmental factors in their management of the company or the municipality.³⁴³ It is the responsibility of the municipal manager and the municipal council of the Mahikeng local municipality to ensure that they take into account the social, environmental and financial factors into consideration in carrying out their functions on behalf of and for the benefit of the municipality.

3.5.1.5 Audit Committees

An independent audit committee plays a central role in corporate governance. It is important to ensure the integrity of integrated reporting and financial controls as well as to identify and manage financial risks.³⁴⁴ The King III Code³⁴⁵ requires the board of directors or municipal council to have an effective and independent audit committee, which plays a central role in corporate governance.³⁴⁶ The *Public Finance Management Act*³⁴⁷ and *Municipal Finance Management Act*³⁴⁸ require public sector institutions to establish independent audit committees and independent internal committees.

The municipal council of the Mahikeng local municipality must appoint an independent audit committee that consists of at least three people with appropriate experience and skills.³⁴⁹ The audit committee must review the financial statements of the municipality and provide the municipal council with an authoritative and

³⁴² Principle 1.1 of the King III Report; Hendricks and Wyngaard *International Journal of Not-for-Profit Law* 105.

³⁴³ Mokgopo *A Legal Analysis of the Application of Corporate Governance Principles* 62.

³⁴⁴ Van Der Nest DP, Thornhill C and De Jager J "Audit Committees and Accountability in the South African Public Sector" 2008 *Journal of Public Administration* 545, 548; Mkhabele *A Legal Analysis of the Application of Corporate Governance Principles* 15.

³⁴⁵ Principle 2.6 of the King III Report; See also section 166 of the *Municipal Finance Management Act*.

³⁴⁶ Mkhabele *A Legal Analysis of the Application of Corporate Governance Principles in Musina local municipality* 15.

³⁴⁷ 1 of 1999 (*PFMA*), see section 2.

³⁴⁸ 56 of 2003 (*Municipal Finance Management Act*), see section 166.

³⁴⁹ Section 166 and 165 of the *Municipal Finance Management Act*; Mkhabele *A Legal Analysis of the Application of Corporate Governance Principles in Musina Local Municipality* 15.

credible view of the financial status of the municipality, its effectiveness and efficiency, and its overall compliance with the *Finance Management Act*.³⁵⁰ In performing its functions, the audit committee must have access to all the financial information of the municipality and relevant information.³⁵¹ The audit committee must carry out investigations on the financial affairs of the municipality at the request of the municipal council to ensure that the information is reliable and does not conflict with the financial information.³⁵² The audit committees promote accountability in municipalities. However, Mahikeng local municipality still faces mismanagement of municipal funds and does not clearly demonstrate how municipal funds are being utilised.

3.5.1.6 Internal Audit

The King III Code³⁵³ provides that the board that is referred to as a municipal council in terms of municipalities should ensure that there is an effective risk-based internal audit. This principle is applicable in Mahikeng local municipality since the *Municipal Finance Management Act*³⁵⁴ requires municipalities to have an internal audit unit that must prepare a risk-based audit plan and an internal audit program for each financial year. The internal unit has a duty as per the *Municipal Finance Management Act*³⁵⁵ to advise the accounting officer and to report to the audit committee on the implementation of the internal plan and in matters relating to an internal audit, accounting procedures and practices. The King III Code acknowledges that an effective risk-based internal audit plays a critical role in good corporate governance.

³⁵⁰ Section 166(2)(b) of the *Municipal Finance Management Act*.

³⁵¹ Section 166(3)(a) of the *Municipal Finance Management Act*.

³⁵² Havenga M *et al Corporate Governance Annual Review 2012* 46.

³⁵³ Principle 7.1 of the King III Report; Hendricks and Wyngaard *International Journal of Not-for-Profit Law* 107.

³⁵⁴ Section 165 of the *Municipal Finance Management Act*.

³⁵⁵ Section 165(1) of the *Municipal Finance Management Act*.

3.5.1.7 Integrated Reporting and Disclosure

An integrated report means "a holistic and integrated representation of the company's performance in terms of both its finances and its sustainability".³⁵⁶ In municipalities, the annual report is the equivalent of the company's integrated report. The annual report of a municipality, which is prepared by the municipal manager, covers both the financial and non-financial performance of a municipality in an integrated manner.³⁵⁷ The annual financial report of the municipality should include the annual financial statements as well as commentary on the municipality's financial results. The annual financial report must integrate with sustainability reporting and disclosure.³⁵⁸ The commentary should include information that enable the community and any interested party to make an informed assessment and decision regarding the municipality and exercise their voting rights.³⁵⁹

The municipal council should ensure that the annual report includes the positive and negative impacts on the municipality's performance, together with its plans to improve the positives and eliminate negatives in the next financial year.³⁶⁰ The municipality's annual report should have sufficient information to record how the municipality has positively and negatively affected the socio-economic life of the community in which it operates during the year under review.

3.6 King IV Code on Corporate Governance

Since the publication of the first King Code in 1994, South Africa has maintained a proud tradition of corporate governance. The King IV Code³⁶¹ sets out the latest principles and practices, which serve as a benchmark for corporate governance in

³⁵⁶ Maradi SMM "An Analysis of Corporate Governance Issues in the Indian Context: Challenges and Prospects" *GE - International Journal of Management Research* 2014 9, 12; Mkhabele *A Legal Analysis of the Application of Corporate Governance Principles in Musina Local Municipality* 22.

³⁵⁷ Section 122 of the *Municipal Finance Management Act*; see also section 91(1)(b) of the *PFMA*.

³⁵⁸ Mkhabele *A Legal Analysis of the Application of Corporate Governance Principles* 22.

³⁵⁹ Mkhabele *A Legal Analysis of the Application of Corporate Governance Principles* 22.

³⁶⁰ Mkhabele *A Legal Analysis of the Application of Corporate Governance Principles* 22.

³⁶¹ Part 3 of the King IV Report.

South Africa. The King IV Code³⁶² promotes corporate governance as integral to running an organisation and delivering governance outcomes such as the ethical culture, good performance, effective control, and legitimacy. The King IV Code³⁶³ encourages transparent and meaningful reporting to stakeholders. It also reinforces corporate governance as a holistic and interrelated set of arrangements to be understood and implemented in an integrated manner. The King IV Report³⁶⁴ further seeks to broaden its application by making it accessible and fit for implementation with appropriate adaptation across a variety of sectors and organisational types, including municipalities. The King IV Code³⁶⁵ presents corporate governance that is more concerned with the ethical consciousness and conduct of municipal manager.

The King IV Code and Report³⁶⁶ applies to all sectors, and it covers municipalities as a sector supplement, which provides for a better and clear interpretation and application of the principles of good governance. The sector supplements contained in the King IV Report provide guidance and direction on how King IV Code³⁶⁷ should be interpreted and applied by various sectors or organisation such as the municipalities. The King IV Code refer to organisations rather than businesses, governing bodies rather than boards, and those who are charged with governance duties rather than directors. The following are the King IV Code principles and measures which may be useful to the municipal council and manager for Mahikeng local municipality.

3.6.1 Ethical Leadership Principle

The ethical leadership principle entails that a governing body must lead ethically and effectively adhere to their duties by acting with due care and diligence.³⁶⁸ The municipal council must set the strategic direction and oversee the implementation of

³⁶² Part 2 of the King IV Report; Lourens S and Talrea R "Company Law: The importance of King IV'S Principles on Corporate Governance" *Strauss Daly News* (22 May 2018) page number unknown.

³⁶³ Section 2 of the King IV Report; Lourens and Talrea *Strauss Daly News* page number unknown.

³⁶⁴ See Part 1 of the King IV Report.

³⁶⁵ See part 5, principle 1 of the King IV Report; Price Waterhouse Coopers *A summary of the King IV Report on Corporate Governance™ for South Africa, 2016 4*.

³⁶⁶ See part 6.1 and 6.2 of the King IV Report.

³⁶⁷ See part 6.1 of the King IV Report.

³⁶⁸ Principle 1 of King IV Code; See also page 81 of the King IV Report.

approved strategies by the municipal manager, ensuring accountability on the municipal manager's performance. The *Systems Act*³⁶⁹ contains a code of conduct which includes, among others, that any member of the municipal council and municipal manager must sign an annual declaration, declaring any interest or confirming that there is no conflict of interest.³⁷⁰ The author is of the view that this principle is useful to Mahikeng local municipality in that it supplements and provides substance to the latter sections of the *Systems Act* and also ensures accountability in the municipal managers' performance.

3.6.2 Organisational Ethics Principle

The organisational ethics principle provides that the municipal council should govern the ethics of the municipality in a way that supports the establishment of an ethical culture.³⁷¹ The municipal council ensure that ethics are managed effectively and provide effective leadership on an ethical foundation. The *Systems Act*³⁷² contains a code of conduct for municipal staff members. The recommended practices under organisational ethics principle provide useful guidance on how to ensure and oversee adherence to this code and the ethics of the municipality, generally. This is useful for Mahikeng local municipality in that the code of ethics and conduct can be published on the municipality's website and incorporated in the employees' contract. There must be monitoring and reporting on the measures taken by the municipal manager to achieve adherence thereof (through the social and ethics and audit committees).³⁷³ The municipal manager must ensure the implementation and execution of the code of ethics and conduct, and related policies to ensure accountability.³⁷⁴

3.6.3 Strategy and Performance Principle

The municipal council should appreciate that the municipality's core purpose, risks, performance and sustainability are inseparable elements of the value creation

³⁶⁹ Section 50 of the *Systems Act*.

³⁷⁰ Section 5 of schedule 2 of the *Systems Act*.

³⁷¹ Principle 2 of the King IV Code.

³⁷² Schedule 2 of the *Systems Act* contains the code of conduct for municipal staff members.

³⁷³ Distell Group Holdings Limited Application of the KING IV Code Principles 1, 3.

³⁷⁴ Section 8 of the *Systems Act*.

process.³⁷⁵ This means that the municipal council should approve policy and plans to implement the strategy, including key performance for assessing the achievement of strategic objectives. Upon the approval, the municipal council should empower the municipal manager to implement the strategy and provide it with accurate, timely and relevant feedback on progress. The municipal manager or the municipal council may establish sub-committees to assist in discharging its duties and responsibilities as provided for in the *Systems Act*³⁷⁶ to ensure performance management and accountability. This strategy and performance principle is useful in approving policies and plans to implement the strategy of the Mahikeng local municipality and assess the impact of the short, medium and long-term strategy.

3.6.4 Reporting Principle

The reporting principle in the King IV Code³⁷⁷ provides that the governing body should ensure that the reports are issued by the municipality to enable stakeholders to make informed assessments of its short, medium and long-term prospects and performance. In terms of the reporting principle, the municipal council delegates the governance and approval of the Integrated Annual Report to the audit committee.³⁷⁸ The reporting principle in the King IV Code is useful to Mahikeng local municipality in that the establishment of an audit committee plays a crucial role in approving the Integrated Annual Report. An audit committee can also ensure that the recommendations by the Auditor General are implemented, and the municipal manager can be held jointly and severally liable for failure to enforce those recommendations. Moreover, this committee oversees the assurance provided by the internal audit department on sustainability reporting and disclosure.

³⁷⁵ Principle 4 of King IV Code; Distell Group Holdings Limited Application of the KING IV Code Principles 4.

³⁷⁶ See also section 17(4) of the *Systems Act* which provides that the municipality may have more advisory committees consisting of persons who are not councillors to advise the council on any matter within the council's competence.

³⁷⁷ Principle 5 of King IV code; Distell Group Holdings Limited Application of the KING IV Code Principles 5.

³⁷⁸ Principle 5 of the King IV code; Distell Group Holdings Limited Application of the KING IV Code Principles 5.

3.6.5 Committees of the Board Principle

According to King IV Code,³⁷⁹ this principle provides that a municipal council should ensure that its arrangement for delegation of structures assists with the balance of power, and the effective discharge of its duties and promote independent judgement. The municipal council delegates particular roles and responsibilities to the municipal committees. They operate under the municipal council's approved terms of reference setting out the nature and extent of the responsibilities delegated and decision-making authority.³⁸⁰ The terms of references of each committee are reviewed annually. The council must ensure that each committee has necessary experience, skills and knowledge to discharge their duties effectively. The committees comprise of risk and compliance committee, audit committee, remuneration committee, nomination committee, social and ethics committee, and investment subcommittee.³⁸¹

3.6.5.1 Municipal Public Accounts Committee

The Municipal Public Accounts Committee (MPAC) is established in terms of *Municipal Structures Act* to perform an oversight function on behalf of Mahikeng local municipality. The main objective of the MPAC is to promote accountability, transparency, promote good local governance, efficient financial management and optimal service delivery.³⁸² The MPAC may be useful to the Mahikeng local municipality to evaluate the annual report and make recommendations to the council, scrutinise financial records and audit reports of the municipality and evaluate the annual reports.

³⁷⁹ Principle 8 of King IV Code.

³⁸⁰ Section 160(2) of the *Constitution of the Republic of South Africa, 1996 (Constitution of South Africa)*; See also section 59 of the *Systems Act*.

³⁸¹ Distell Group Holdings Limited Application of the King IV Code Principles 8.

³⁸² Mathiba GL *The Role of the Auditor-General in the Promotion of Efficient Financial Management in Municipalities: A Case Study of the North West Province* (LLM- dissertation University of Western Cape 2019) 32.

3.6.5.2 Finance Committee

The *Systems Act*³⁸³ provides that the municipal council may appoint the finance committee. The primary responsibility for the finance committee is to ensure that the processes and policies on municipal budget and planning are well aligned.³⁸⁴ This committee can be useful to Mahikeng local municipality by monitoring and overseeing the financial performance responsibilities assigned to the municipal manager. The committee is also helpful in identifying financial problems facing the municipality and recommending the corrective measures to be taken by the municipal council.³⁸⁵

3.6.5.3 Audit Committee

The *Municipal Finance Management Act*³⁸⁶ provides that each municipality must have an audit committee as an independent advisory and an oversight body to the municipal council. Its objective is to advise the municipal council and the municipal manager on matters relating to internal financial controls, accounting policies, effective governance, audits and evaluation.³⁸⁷ This committee may be useful to the municipal manager for Mahikeng local municipality by monitoring the adequacy of corrective measures taken by the municipal council. Moreover, this committee may advise the municipal council on how best to respond to the internal audit process raised by the Auditor General in the audit report, thus ensuring accountability.³⁸⁸

3.6.5.4 Risk Governance Principle

One of the responsibilities of the municipal council is the governance of risk, which may be defined as the act of taking a risk for a reward.³⁸⁹ The King IV Code³⁹⁰

³⁸³ Section 19 of the *Systems Act*.

³⁸⁴ Mathiba *The Role of the Auditor-General in the Promotion of Efficient Financial Management in Municipalities* 36.

³⁸⁵ Sections 54(1)(e) & 54(2) *Municipal Finance Management Act*; Mathiba *The Role of the Auditor-General in the Promotion of Efficient Financial Management in Municipalities* 33.

³⁸⁶ Section 166(1) of the *Municipal Finance Management Act*; Mathiba *The Role of the Auditor-General in the Promotion of Efficient Financial Management in Municipalities* 34.

³⁸⁷ Mathiba *The Role of the Auditor-General in the Promotion of Efficient Financial Management in Municipalities* 34.

³⁸⁸ Section 166(2)(c) *Municipal Finance Management Act*; Mathiba *The Role of the Auditor-General in the Promotion of Efficient Financial Management in Municipalities* 34.

³⁸⁹ Mkhabele *A Legal Analysis of the Application of Corporate Governance Principles* 18.

requires the governing body to determine the level of risk that the company is willing to bear in carrying out the objectives of the company and be responsible for the governance of risk. Therefore, the municipal council must be responsible for the governance of risk of the municipality and determine the level of risk that the Mahikeng local municipality is prepared to bear in carrying out its objectives, and for the benefit of the municipality. The municipal council may appoint a risk committee that will help the municipality in carrying out its risk responsibilities. Such a committee must comprise of people with adequate risk management skills and experience. This will help the municipality to assess and evaluate and ensure that appropriate mitigating actions are implemented to address the identified risk for approving the policies and frameworks on technology and information governance management. The risk committee ensures the protection and privacy of personal information and enables the effective internal control environment and oversees an effective and independent internal audit department.

3.7 Characteristics of Good Corporate Governance

3.7.1 Transparency

Transparency entails that the municipal council and municipal manager must exercise their functions, duties, and responsibilities transparently.³⁹¹ This implies making information freely available and directly accessible to the community and those who will be affected by their decisions. The municipality must ensure that sufficient information is released so that the affected persons can know what is happening inside the municipality and make informed decisions when electing their leaders.³⁹² Therefore, it is the responsibility of the municipal council together with the municipal manager to set the mechanism in place such as code of conduct, performance evaluations of the council, its member and performance evaluations of

³⁹⁰ Principle 2 and 4 of the King IV Code; Principle 4.1 and 2.7 of the King III Report.

³⁹¹ Principle 1 of the King IV Code; Mokgopo *A Legal Analysis of the Application of Corporate Governance Principles in Musina Local Municipality* 43.

³⁹² Mokgopo *A Legal Analysis of the Application of Corporate Governance Principles in musina Local municipality* 43.

the municipal manager, that ensure that municipal council or the municipal manager are held accountable for ethical and effective leadership.³⁹³

3.7.2 Accountability

Accountability entails that those who control, manage and make decisions or take action on specific issues, must be accountable for their decisions and actions.³⁹⁴ This means accountability requires the director of a company or the municipal manager as the accounting officer to be accountable for their actions or decisions. There must be an active and efficient mechanism in place that ensures that directors or municipal manager are held accountable. This provides an opportunity to the stakeholders, the creditors or the Mahikeng community to query and assess the decisions of municipal manager.³⁹⁵

3.7.3 Responsibility

The municipal council must take responsibility for the management and control of the municipality.³⁹⁶ It is the responsibility of the municipal council to approve policies and planning, oversee and monitor the implementation and execution by management, and ensure accountability for municipal performance.³⁹⁷ Therefore, the municipal council, as well as the municipal manager, must exercise their responsibilities for the benefit of the Mahikeng local municipality.³⁹⁸

3.7.4 Fairness

Fairness entails that the municipal manager, municipal council and the overall workforce of the municipality must adopt a stakeholder-inclusive approach in

³⁹³ Section 76 and 77 of the *Systems Act*; Mokgopo *A Legal Analysis of the Application of Corporate Governance Principles in Musina Local Municipality* 43.

³⁹⁴ Sikhakhane BH and Reddy PS "Public Accountability at the Local Government Sphere in South Africa" 2011 *African Journal of Public Affairs* 85, 86

³⁹⁵ Meryvn E King SC "King Report on Corporate Governance for South Africa" 2002 *Institute of Directors for Southern Africa* 1, 12.

³⁹⁶ Section 76(a)(ii) of the *Municipal Systems Act* 32 of 2000 (*Systems Act*); Mokgopo *A Legal Analysis of the Application of Corporate Governance Principles* 43.

³⁹⁷ Section 55(1) and 75 of the *Systems Act*; Mokgopo *A Legal Analysis of the Application of Corporate Governance Principles* 43.

³⁹⁸ Van Der Nest, Thornhill and De Jager *Journal of Public Administration* 731.

carrying out their governance roles and responsibilities in a sustainable manner.³⁹⁹ This means that the interests of the minority and members of the Mahikeng local community must receive equal consideration to that of the dominant. The municipal council and the municipal manager for Mahikeng local municipality must consider the rights of all various stakeholders and all those who have an interest in the municipality in such a way that it does not adversely affect the natural environment, society, and future generations.

3.8 Application of the Principles of Corporate Governance

The King IV Code⁴⁰⁰ applies to all entities incorporated in the Republic of South Africa, irrespective of their manner of incorporation. The King IV Code⁴⁰¹ makes corporate governance more accessible and relevant to a wider range of organisations, including municipalities. The municipal manager for Mahikeng local municipality can also consider the King IV Code⁴⁰² when running the administration of the municipality. The King IV Code⁴⁰³ contains voluntary principles and leading practices, or a combination of the two. Some practices of good corporate governance have been legislated in parallel with the voluntary King Codes of governance, but if there is a conflict between legislation and King IV Code,⁴⁰⁴ now or in the future, the law prevails. Good governance does not exist separately from the law, and a corporate governance code that applies voluntarily may trigger legal consequences. A court of law considers all relevant circumstances in determining the suitable standard of conduct for those charged with governance duties and responsibilities, including what the generally accepted practices for a particular setting and situation are.

³⁹⁹ Mokgopo *A Legal Analysis of the Application of Corporate Governance Principles* 44; Vorster S & Marais C "Corporate Governance, Integrated Reporting, and Stakeholder Management: A case Study of Eskom" 2014 *African Journal of Business Ethics* 1, 32.

⁴⁰⁰ Part 2, chapter 1 of the King IV Report; Mokgopo *A Legal Analysis of the Application of Corporate Governance Principles* 52.

⁴⁰¹ King Committee King IV Report on Corporate Governance for South Africa 26.

⁴⁰² Part 4 of the King IV Report; Price Waterhouse Coopers A summary of the King IV Report on Corporate Governance™ for South Africa, 2016 2; Walker and Mokoena *The Corporate Governance Review* 278.

⁴⁰³ See part 3 of the King IV Report.

⁴⁰⁴ Principle 1 of the King IV Code.

3.9 The South African Broadcasting Corporation Ltd v Dali Mpfu and the Principles of Corporate Governance

In case of *South African Broadcasting Corporation Ltd and Another v Mpfu*,⁴⁰⁵ Mpfu applied to the court for an order declaring any decision, including the decision taken by the South African Broadcasting Corporation (SABC) Board to suspend him by the board meeting and the resolution of such board meeting, invalid and of no force or effect. The facts of the matter were as follows, Mpfu and the other two executive directors were notified of a directors meeting on one minute's notice.⁴⁰⁶ Mpfu spoke to the chairman of the SABC board at about 5 pm on May 6, who advised him that there is going to be a meeting on the 7th of May.⁴⁰⁷ However, during the evening while Mpfu was in an unrelated meeting with the executive members, he was informed that there would be a non-executive board meeting starting at 8 pm that day and that the executive members were required to remain on standby.⁴⁰⁸ Mpfu and the two executive directors were called into the meeting for a short period, wherein Mpfu addressed the meeting. Thereafter, Mpfu was asked to leave. At 1.40 am Mpfu received a call from the chairman of the SABC Board informing him that he was suspended.⁴⁰⁹

The High Court in the *SABC* case declared the meeting of the SABC Board held on 6 May unlawful, and the decision to suspend Mpfu and the resolutions of the board meeting to be invalid.⁴¹⁰ The SABC board appealed against the judgement; however, the full bench of the South Gauteng High Court found the suspension of Mpfu not in accordance with the articles of association or good corporate governance.⁴¹¹ The court was of the view that the SABC board was not properly constituted as three of the directors of the SABC board were excluded from the meeting at the time when the decision to suspend Mpfu was taken. The court also found that there was an

⁴⁰⁵ *South African Broadcasting Corporation Ltd and Another v Mpfu* 2009 4 All SA 169 (GSJ) para 2 (*SABC* case); Hendrikse and Hendrikse *Corporate Governance Handbook* 116.

⁴⁰⁶ *SABC* case para 41; Hendrikse and Hendrikse *Corporate Governance Handbook* 116.

⁴⁰⁷ *SABC* case para 17.

⁴⁰⁸ *SABC* case para 18.

⁴⁰⁹ Hendrikse and Hendrikse *Corporate Governance Handbook* 116.

⁴¹⁰ *SABC* case para 2; Mkhabele *A Legal Analysis of the Application of Corporate Governance Principles in Musina Local Municipality* 23.

⁴¹¹ Mkhabele *A Legal Analysis of the Application of Corporate Governance Principles in Musina Local Municipality* 23.

insufficient notice given to the three directors to attend the board meeting. The court considered whether the board applied proper corporate governance principles in making their decision.⁴¹²

The central issue of corporate governance is the accountability of senior management and the board of a company because of the extensive powers vested in them.⁴¹³ The *Constitution of South Africa* compels government in all its forms, including the local sphere of government to adhere to the principles of good governance. The senior management of the Mahikeng local municipality, which includes the municipal council and the municipal manager, must adhere to the principles of good corporate governance in running the administration of the municipality. The *Constitution of South Africa* recognises the importance of good corporate governance as it deals with basic values and principles governing public administration.⁴¹⁴ The *Constitution of South Africa*⁴¹⁵ provides that a high standard of professional ethics must be promoted and maintained by the senior management of the Mahikeng local municipality.

In the above mentioned case, the court in the SABC case ruled that integrity is a key principle underpinning good corporate governance, and based on a clear code of ethical behaviour and personal integrity exercised by the board.⁴¹⁶ Judge Jajbhay's held that it was time to incorporate the views of *umuntu ngumtungabantu* (a person is a person because of other people) in the King Code of good governance.⁴¹⁷ The principle of *ubuntu* is deeply rooted in our society, and the values incorporated in *ubuntu* should assist in informing corporate decisions made by directors in a state-owned enterprise.⁴¹⁸ A municipal manager in exercising his or her duties must take

⁴¹² SABC case para 28.

⁴¹³ SABC case para 30.

⁴¹⁴ Section 195 of the *Constitution of South Africa*; Mkhabele *A Legal Analysis of the Application of Corporate Governance Principles* 25.

⁴¹⁵ Section 195(1) of the *Constitution of South Africa*.

⁴¹⁶ SABC case para 64; Sebola KR *Principles of Corporate Governance with Specific Reference to the Case of South African Broadcasting Corporation (Ltd) v Mpofu [2009] 4 All Sa 169. (GSJ)* (LLM-dissertation University of Limpopo)1, 1.

⁴¹⁷ Part 2 of the King IV Report; SABC case para 66; Mkhabele *A Legal Analysis of the Application of Corporate Governance Principles* 23.

⁴¹⁸ SABC case para 66; Mokgopo *A Legal Analysis of the Application of Corporate Governance Principles* 65; Mkhabele *A Legal Analysis of the Application of Corporate Governance Principles* 23.

into consideration the principle of *ubuntu* as it is one of the governing principles of *Bathopele*, meaning people first. The municipal manager is responsible for effective proper service delivery and accountable to the people or community. The municipal manager must acknowledge that he or she is there to lead and provide services to the community. There are many benefits to incorporating *Ubuntu* in the governance of an organisation or a municipality. Such incorporation may have a positive impact on how a municipality is directed and controlled and may result in a municipality achieving growth and prosperity.⁴¹⁹

3.10 Benefits of Corporate Governance

Corporate governance contributes to business success by making leadership aware of the importance of making sound decisions that involve positive returns and making the business responsible and accountable with integrity.⁴²⁰

Corporate governance helps one recognise that leadership is a privilege and responsibility affecting the lives of many and therefore requires a sense of responsibility. Any decision taken by the municipal manager affects the whole community either positively or negatively. The municipal manager must exercise standards of corporate governance which incorporates the spirit of *ubuntu* and the *Bathopele* principles. This may increase service delivery, and the municipal manager will not only be seen to be accountable but will genuinely be accountable by applying the principles of good corporate governance. Corporate governance deters those who are responsible for municipal resources from committing the acts of fraud or misusing the municipal resources and report those who defraud or misuse the municipal funds or resources.⁴²¹

Although corporate governance may not necessarily be a guarantee of the municipality's success, the municipality may produce better outcomes over time. Corporate governance contributes to the business or the municipality's success by

⁴¹⁹ Hendrikse and Hendrikse *Corporate Governance Handbook* 116.

⁴²⁰ Hendrikse and Hendrikse *Corporate Governance Handbook* 105.

⁴²¹ Kakabadse A and Nada Korac-Kakabadse N "Corporate governance in South Africa: Evaluation of the King II Report (Draft)" 2002 *Journal of Change Management* 305, 310; Hendrikse and Hendrikse *Corporate Governance Handbook* 105.

making leadership aware of the importance of making sound decisions that involve returns and risk, and of making the municipality responsible and accountable with integrity which is something that is lacking in Mahikeng local municipality. The people have lost hope in the municipality, and one may argue that this is because of the lack of application of the principles of good corporate governance.

3.11 Conclusion

In conclusion, the researcher submits that corporate governance measures and principles in terms of King IV Code, mindfully applied, is a fundamental part of the solution to the challenges facing Mahikeng local municipality. The corporate governance measures, in terms of the *Companies Act* 2008, can also be adopted by the Mahikeng local municipality. The King IV Code⁴²² promotes the highest standards of good corporate governance in South Africa. Without the principles of good corporate governance in the municipality, the municipality will not be effective and efficient in its administration. The reason for this is that when the municipal council and municipal manager do not adhere to the principles of good corporate governance, corrupt activities and maladministration become the day-to-day business of the municipal workforce, and this affects the municipality.⁴²³

There is no doubt that good corporate governance is a crucial element in improving the economic efficiency and growth of the Mahikeng local municipality. Therefore, the principles of good corporate governance should be welcomed by South African local municipalities and thus be incorporated in the *Municipal Finance Management Act* to ensure that municipal councils and municipal manager are capable of implementing the objectives of the municipality. The principles of corporate governance provided in the King IV Code⁴²⁴ may be incorporated in the *Municipal Finance Management Act* so that the municipal council, municipal manager and the overall workforce of the Mahikeng local municipality must all ensure that such

⁴²² See part 5.1, Principle 1 of the King IV Report; see also Principle 1 of the King III Code.

⁴²³ Lekubu BK "Issues of Corruption in South Africa's Municipalities" 2013 South African Association of Public Administration and Management 121, 124; Mokgopo *A Legal Analysis of the Application of Corporate Governance Principles* 72.

⁴²⁴ Part 6.1 and 6.2 of the King IV Report.

principles are binding on Mahikeng local municipality to avoid poor governance in the municipality.

CHAPTER FOUR

THE PRINCIPLE OF PIERCING THE CORPORATE VEIL AS A MEASURE OF ACCOUNTABILITY UNDER THE COMPANIES ACT 71 OF 2008

4.1 Introduction

Piercing the corporate veil can be defined as disregarding the division between a company and the person who controls it and then attributing liability to the person who misused the principle of a separate legal personality.⁴²⁵ The court often pierces the corporate veil in an attempt to prevent abuse of separate personality by directors, members, employees and shareholders of a company.⁴²⁶ The court can either ignore the company or treat its members as if they were the owners of its assets, and they are conducting its business in their personal capacity.⁴²⁷ It is accepted that if the corporate personality has been used as a device to cover the improper conduct or fraud, or where it has been used as an agent, or it is just equitable to do so, the court will pierce the corporate veil.⁴²⁸ The court pierces the corporate veil by attributing personal liability to those misusing the concept of the separate legal existence of a company.⁴²⁹

The Mahikeng local municipality is an organ of state within the local government, exercising legislative and executive authority in Mahikeng.⁴³⁰ The Mahikeng local municipality has a separate legal personality which excludes the liability on the part of its municipal council, municipal manager, and community for the commissions and

⁴²⁵ *Cape Pacific v Lubner Controlling Investments (Pty) Ltd and Others* 1993 (4) SA 790 (A) (*Cape Pacific* case) para 28; Halliday CE and Ogbonna E "Lifting the Corporate Veil and the War Against Corruption in Nigeria: An Appraisal" 2018 *Port Harcourt Journal of Business Law* 25, 25.

⁴²⁶ See *CMS Dolphin Ltd v Simonet* 2001 2 BCLC 704 (*Simonet* case) para 98-105 where the abuse of the separate personality of an entity used by a director to breach the fiduciary duty to act in the best interest of the company by usurping corporate opportunities was considered and loss of profit was claimed as a result such abuse.

⁴²⁷ Larkin MP "Regarding Judicial Disregarding of the Company's Separate Identity, Piercing the Corporate Veil" 1989 *SA Mercantile Law Journal* 227, 387.

⁴²⁸ Sher H "Piercing the Corporate Veil" 1994 *Business Law Journal* 51, 51.

⁴²⁹ Gibson J *South African Mercantile & Company Law* 2nd ed (Juta Johannesburg 1997) 269.

⁴³⁰ Section 2(a) of the *Municipal Systems Act* 32 of 2000 (*Systems Act*); section 239 of the *Constitution of the Republic of South Africa, 1996* (*Constitution of South Africa*); Bekink B *The Restructuring (Systemization) of Local Government under the Constitution of the Republic of South Africa, 1996* (LLD- dissertation University of Pretoria 2006) 127.

omissions of the municipality.⁴³¹ Similarly, the incorporation of a company confers it the legal personality status,⁴³² with an implication that the company would also have a separate legal standing from its directors and shareholders. Thus, both the Mahikeng local municipality and companies are legal persons that can acquire rights and duties separate from their member officials.⁴³³ These rights include the capacity to sue and be sued in their name.⁴³⁴ However, these legal entities execute their rights and duties through their accounting officers, such as directors or board of directors in case of a company and municipal manager or the municipal council in case of the Mahikeng local municipality.⁴³⁵ The decisions of a director in a company are the decisions of the company, and the decisions of a municipal manager are the decisions of the municipality since they are the accounting officers. The acts performed by the municipal manager for Mahikeng local municipality or the director of a company, are regarded as the acts of the municipality or the company and not of the municipal manager or the director in their individual capacities.⁴³⁶ The reason for this is that both the company and a municipality enjoy separate legal existence from the director or municipal manager respectively. Both the company and a municipality have legal powers and capacity to act on their own names.

In instances where the director of a company perpetuates fraud, dishonesty, corruption, improper purpose or uses the company for his personal gain or interest, and not for the benefit of the company, the corporate veil may be pierced by the

⁴³¹ Section 2(d) of the *Systems Act*; *Mhana and Others v Ngqwebo* (CA 65/2011) [2011] ZAECGHC 90 para 13 (*Mhana* case).

⁴³² Section 19(a) of the *Companies Act* 71 of 2008 (*Companies Act* 2008); Davis D and Geach W *Companies and Other Business Structures in South Africa* 3rd ed (Oxford Cape Town 2015) 1, 29; Davis PL, Worthington S and Micheler E *Gower and Davis' Principles of Modern Company Law* 8th ed (Sweet & Maxwell London 2008) 1, 33.

⁴³³ Section 2(a) and (d) of the *Systems Act*; Davies and Geach *Companies and Other Business Structures in South Africa* 29.

⁴³⁴ Section 156 (5) of the *Constitution of South Africa*; sections 2 and 8 of the *Systems Act*; *Maxim Programme Development CC v The Municipality of Maluti-A-Phofung* (746/2004) [2006] ZAFSHC 54 (*Maluti* case) para 2.

⁴³⁵ Section 4 and 55 of the *Systems Act*; see also section 19(2) of the *Companies Act* 2008.

⁴³⁶ Section 51(i) of the *Systems Act*; section 82(a) of the *Structures Act*; Visser JP "Roles and Responsibilities of Municipal Manager" 2001 *Local Government Paper* 1, 2; Section 19(1)(a) and (b) of the *Companies Act* 2008; Pretorius JT *et al* (eds) *South African Company Law Through the Cases* 6th ed (Juta Cape Town 1999) 1, 24.

court.⁴³⁷ The court may pierce the corporate veil in exceptional circumstances and through an application by an interested party.⁴³⁸ The piercing of the corporate veil allows the court to disregard the company's legal personality, and pierce, lift or pull aside the corporate veil of a company and hold the directors and shareholders personally liable for the debts of the company.⁴³⁹ This principle is only applicable in company law, and it is provided for in the *Companies Act 2008*⁴⁴⁰ and common law. The principle of piercing the corporate veil is not utilised in Mahikeng local municipality to hold the municipal manager or members of the municipal council personally liable for their improper conduct in running the affairs of the municipality. The researcher argues that the principle of piercing the corporate veil should be used in Mahikeng local municipality to combat the improper conduct by the municipal manager and the municipal council. This can be done by making the remedy available to the creditors of the municipality, members of the community of Mahikeng or any person adversely affected by the improper abuse of the Mahikeng local municipality's separate legal existence by the municipal manager or the municipal council.

This chapter discusses the principle of piercing the corporate veil under the common law and in terms of the *Companies Act 2008*.⁴⁴¹ The chapter further discusses the legal nature of both a company as well as a municipality. Lastly, an analysis is made on the applicability and/or potential applicability of the principle of piercing the corporate veil to foster accountability in the Mahikeng local municipality.

⁴³⁷ Section 20(9) of the *Companies Act 2008*; *Cape Pacific* case para 33; Kathleen O "An Anatomy of the Grounds of Lifting the Corporate Veil: Steps to Codification" 2019 *International Journal of Family Business and Management* 1, 2.

⁴³⁸ Section 20(9) of the *Companies Act 2008*; *Ex Parte Gore NNO* 2013 (3) SA 382 (WCC) (*Ex Parte Gore* case) para 35.

⁴³⁹ Section 19(3) of the *Companies Act 2008*; *Davies et al Companies and Other Business Structures in South Africa* 32.

⁴⁴⁰ Section 20(9) of the *Companies Act 2008*; Arden DBE "Piercing the Corporate Veil – Old Metaphor, Modern Practice?" 2017 *Journal of Corporate and Commercial Law & Practice* 1, 3.

⁴⁴¹ Section 20(9) of the *Companies Act 2008*; *Davies et al Companies and Other Business Structures in South Africa* 31.

4.2 Brief History of Piercing the Corporate Veil

The principle of piercing of the corporate veil originated from the common law legal system, particularly in England.⁴⁴² This stems from the fact that the company has a separate legal personality and limited liability from its founding members.⁴⁴³ The House of Lords in the case of *Salomon v Salomon*⁴⁴⁴ firmly established the principle that a company is a corporate entity which is distinct from those who own or control it.⁴⁴⁵ This entails that the company has a legal personality which separated it from its founding members.⁴⁴⁶ The members or shareholders of the company have limited liability which reduced the risk faced by the controllers of the company by limiting their loss only to the amount invested in the company.⁴⁴⁷ This decision by the House of Lords in the *Salomon* case, that the company is an entity separate from its members, led to the development of the exception to this rule, namely, the principle of piercing the corporate veil.⁴⁴⁸ The exception to the rule of separate legal entity of a company is when the courts disregard such separateness of a company from its directors or shareholders in exceptional circumstances.

The South African corporate law on the principle of piercing the corporate veil is based on the British foundations in the middle of the 19th century. Therefore, this means that the English case law in some cases serve as persuasive authority, which offers guidance in interpreting the concept of piercing the corporate veil in South Africa.⁴⁴⁹ Although many courts have developed their own articulation of the circumstances in which the court can pierce the corporate veil,⁴⁵⁰ this principle was largely discretionary and applied differently in different courts; hence it was not

⁴⁴² Zindoga *Piercing of the Corporate Veil in terms of Gore* 14.

⁴⁴³ Nyombi C "Lifting the Veil of Incorporation Under Common Law and Statute" 2013 *International Journal of Law and Management* 66, 66.

⁴⁴⁴ *Salomon v Salomon* [1897] AC 22 (HL) (*Salomon* case) para 30.

⁴⁴⁵ Marcantel JA "Because Judges are not Angels either: Limiting Judicial Discretion by introducing objectivity into Piercing Doctrine" 2010 *Kan Law Review* 1, 195; Zindoga *Piercing of the Corporate Veil in terms of Gore* 14.

⁴⁴⁶ Nyombi 2013 *International Journal of Law and Management* 66.

⁴⁴⁷ Limited Liability Act 1855; Nyombi 2013 *International Journal of Law and Management* 66.

⁴⁴⁸ Zindoga *Piercing of the Corporate Veil in terms of Gore* 14. The principle of piercing of piercing the corporate veil is an exception to the concept of separate legal entity.

⁴⁴⁹ Zindoga *Piercing of the Corporate Veil in terms of Gore* 14.

⁴⁵⁰ Sweeney MA "Piercing the Corporate Veil in Ohio: The Need for a New Standard following *Dombroski v Wellpoint Inc*" 2009 *Cleveland State Law Review* 951, 953; Zindoga *Piercing of the Corporate Veil in terms of Gore* 15.

uniformly applied both in South Africa and England. This has caused uncertainty and confusion regarding the application of the principle of piercing the corporate veil because the courts failed to formulate a single coherent principle upon which decision to disregard juristic personality is based.⁴⁵¹ However, the *Companies Act* 2008⁴⁵² has codified the principle of piercing of the corporate and the *Ex Parte Gore* case also gives guidance on how the *Companies Act* 2008 can be applied in South Africa jurisprudence.

4.3 Concept of Separate Legal Entity

"At the foundation of company law is the concept that a company has a separate legal personality".⁴⁵³ A company once incorporated in terms of the *Companies Act* 2008⁴⁵⁴ becomes a legal person from the date and time stated in the registration certificate. A legal person is an entity that can acquire rights and duties separate from its members.⁴⁵⁵ This means that the corporate obligations are vested in the company and not the directors nor the shareholders of such company.⁴⁵⁶ This is due to the fact that the company is a juristic person that has all the powers and capacity of an individual.⁴⁵⁷ However, there is a veil that is created between the directors, shareholders and the company which protects the shareholders from liabilities and debts of the company.⁴⁵⁸ This is due to the fact that a company is a legal person and

⁴⁵¹ Zindoga *Piercing of the Corporate Veil in terms of Gore* 14; Manda *A Comparative Analysis of Piercing the Corporate Veil in English Law and South African Law* 80.

⁴⁵² Section 20(9) of the *Companies Act* 2008.

⁴⁵³ Section 19(1) of the *Companies Act* 2008; Cassim R "Piercing the Veil under Section 20(9) of the Companies Act 71 of 2008: A New Direction" 2014 *South African Mercantile Law Journal* 307, 307; Zindoga WT *Piercing of The Corporate Veil in terms of Gore: Section 20(9) of the New Companies Act 71 of 2008* (LLM- dissertation University of Cape Town 2015) 10.

⁴⁵⁴ Section 19(1) of the *Companies Act* 2008; Cassim 2014 *South African Mercantile Law Journal* 325; Marobela *Piercing the Corporate Veil in a Holding Relationship* 5.

⁴⁵⁵ Section 19(1) of the *Companies Act* 2008; Davis and Geach *Companies and Other Business Structures in South Africa* 29; Heaton J *The South African Law of Persons* 5th ed (LexisNexis Cape Town 2017) 1, 4.

⁴⁵⁶ Section 19(2) of the *Companies Act* 2008; Cassim 2014 *South African Mercantile Law Journal* 325.

⁴⁵⁷ Section 19(1)(a) and (b) of the *Companies Act* 2008; Waqas M and Rehman Z "Separate Legal Entity of Corporation: The Corporate Veil" 2016 *International Journal of Social Sciences and Management* 1, 2.

⁴⁵⁸ Section 19(1)(b) of the *Companies Act* 2008; Thompson RB "Piercing the Corporate Veil: An Emperical Study" 1991 *Cornell Law Review* 1036, 1039.

has all the powers and capacity of an individual.⁴⁵⁹ The principle of a company's separate legal personality was established in the renowned *Salomon* case.⁴⁶⁰

In the *Salomon* case,⁴⁶¹ Aron Salomon was trading in leather boots and shoes. He ultimately sold his business to Salomon & Company Ltd, a company that he incorporated himself. He was the majority shareholder in the Salomon & Company Ltd and divided six shares equally amongst his wife and five children.⁴⁶² Salomon & Company Ltd eventually collapsed, and it was liquidated.⁴⁶³ Aron Salomon lodged a claim Against Salomon & Company Ltd during the liquidation process as one of the secured creditors.⁴⁶⁴ However, the liquidator held that 'Aron Salomon' and 'Salomon & Company Limited' was one entity or alternatively, the company was used to carry the business of Aron Salomon. The court held that Salomon & Company Limited was not a sham but a legal person that must be treated distinctly from its members or shareholders.⁴⁶⁵ The court further held that once the company as an artificial person has been created, it must be treated like any other independent person with its rights and liabilities appropriate to itself.⁴⁶⁶ The researcher submits that the concept of separate legal personality was properly outlined in the *Salomon* case.⁴⁶⁷ However, the court did not provide guidance on the instances when the veil may be pierced.⁴⁶⁸

The principle of treating the company as a separate legal person was also affirmed in *Dadoo Ltd v Krugersdorp Municipal Council*.⁴⁶⁹ In the *Dadoo* case,⁴⁷⁰ the Transvaal

⁴⁵⁹ Section 19(1)(b) of the *Companies Act* 2008; Cassim 2014 *South African Mercantile Law Journal* 325.

⁴⁶⁰ *Salomon* case para 42; Pretorius *et al South African Company Law Through the Cases* 31; Marobela *Piercing the Corporate Veil in a Holding Relationship* 16.

⁴⁶¹ *Salomon* case para 42; Siebritz *A Critical Analysis of Section 20(9) of the Companies Act 71 of 2008* 11; Pretorius *et al South African Company Law Through the Cases* 12.

⁴⁶² *Salomon* case para 23; Siebritz *A Critical Analysis of Section 20(9) of the Companies Act 71 of 2008* 12.

⁴⁶³ *Salomon* case para 24; Siebritz *A Critical Analysis of Section 20(9) of the Companies Act 71 of 2008* 12.

⁴⁶⁴ *Salomon* case para 24; Pretorius *et al South African Company Law Through the Cases* 12.

⁴⁶⁵ *Salomon* case para 56; Siebritz *A Critical Analysis of Section 20(9) of the Companies Act 71 of 2008* 12.

⁴⁶⁶ Section 19(1)(a) and (b) of the *Companies Act* 2008; *Salomon* case para 30.

⁴⁶⁷ Nyombi 2013 *International Journal of Law and Management* 67.

⁴⁶⁸ Nyombi 2013 *International Journal of Law and Management* 68; Becker R *Disregarding the Separate Juristic Personality of a Company: An English Case Law Comparison* (LLM- dissertation University of Pretoria 2014) 39.

⁴⁶⁹ *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 (*Dadoo* case) para 550-1; Davis *et al Companies and Other Business Structures in South Africa* 29.

statute⁴⁷¹ prohibited indians from owning immovable property in South Africa. However, two indians purchased an immovable property from Krugersdorp municipality through their company named Dadoo Limited. The municipal council of the Krugersdorp municipality sought an order setting aside the transfer of the immovable property to Dadoo Limited. This was based on the fact that the acquisition of such immovable property by Dadoo Limited was an infringement of Law 3 of 1885 which provided that only white persons could be the owners of immovable property.⁴⁷² Wessels, J in the trial court concluded that Dadoo, Ltd., was manifestly formed to acquire what Dadoo personally could not hold. The transfer of the immovable property to Dadoo Limited was an attempt to indirectly achieve what the law would not tolerate directly. Therefore, if the immovable property was transferred to Dadoo personally, then such transfer would have conflicted with law 3 of 1885.⁴⁷³ The Appeal Court held that a company has a separate legal entity, which is distinct from its members.⁴⁷⁴ It was held that the property that was transferred to Dadoo Limited, vests in the company and cannot be regarded as the property vesting in any or all of the shareholders of the company.⁴⁷⁵ Innes J held that a registered company is a legal *persona* distinct from the members who compose it.⁴⁷⁶ A company has a legal personality and the same capacity and powers as a natural person.⁴⁷⁷ The concept of separate legal personality as adopted in the *Dadoo* case prevents the company directors and shareholders from being held personally liable

⁴⁷⁰ Phiri S *Piercing the Corporate Veil: A Critical Analysis of Section 20(9) of the Companies Act 71 of 2008* (LLM- dissertation University of Venda 2017) 38.

⁴⁷¹ Section 2 of Law 3 of 1885 of the South African Republic read as follows: "The native races of Asia shall not be capable of being owners of fixed property in this Republic, except only in such streets, wards or locations as the Government for purposes of sanitation shall assign to them to live in.

⁴⁷² *Dadoo* case para 550-2; Siebritz *A Critical Analysis of Section 20(9) of the Companies Act 71 of 2008* 13.

⁴⁷³ *Dadoo* case para 550-1; Siebritz *A Critical Analysis of Section 20(9) of the Companies Act 71 of 2008* 13.

⁴⁷⁴ Siebritz *A Critical Analysis of Section 20(9) of the Companies Act 71 of 2008* 13; Mashiri PT *A Critical Analysis of the Piercing of the Corporate Veil in South African Corporate Law, with Special Reference to the Position in Groups of Companies* (LLM- dissertation University of Kwa-Zulu Natal 2016) 10.

⁴⁷⁵ Davis *et al Companies and Other Business Structures in South Africa* 29.

⁴⁷⁶ *Dadoo* case para 550-1; Pretorius *et al South African Company Law Through the Cases* 14.

⁴⁷⁷ Marobela MM *Piercing the Corporate Veil in a Holding/Subsidiary Relationship* (LLM- dissertation University of Pretoria 2017) 6; Heaton *The South African Law of Persons* 4.

for the debts of the company.⁴⁷⁸ The concept of separate legal personality is the genesis of the principle of piercing the corporate veil. This is due to the fact that the directors or shareholders of the company may, abuse the separate legal personality of the company.⁴⁷⁹ It is for this reason that the principle of piercing the corporate veil seeks to prevent the abuse of the company's separate legal existence by the directors or shareholders of the company.

In *Airport Cold Storage v Ebrahim*⁴⁸⁰ the court also confirmed that the most fundamental consequence of incorporation is that a company is a juristic entity separate from its members. The separate legal personality of a company is further affirmed in the *Companies Act 2008*⁴⁸¹ which provides that the company has all the legal powers and capacity of an individual from the date and time of incorporation of that company and is registered.

One of the consequences of the company's separate legal personality is that it will have limited liability.⁴⁸² The company will have rights and duties, which include, among others, the fact that the company can sue and be sued in its name.⁴⁸³ The debts and liabilities of a company (except in exceptional circumstances) are the debts and liabilities of the company.⁴⁸⁴ Similarly, the Mahikeng local municipality has rights, which include the right to sue or be sued in its name. The debts of the Mahikeng local municipality are debts and liabilities of the municipality. The researcher submits that corporate veil must be pierced in Mahikeng local municipality where the limited liability or separate legal personality of the municipality is abused by the municipal manager or the municipal council.

⁴⁷⁸ *Dadoo* case para 547.

⁴⁷⁹ Becker *Disregarding the Separate Juristic Personality of a Company* 62.

⁴⁸⁰ *Airport Cold Storage (Pty) Ltd v Ebrahim* 2008 (2) SA 303 (C) (*Airport Cold Storage* case) para 17.

⁴⁸¹ Section 19(1)(b) of the *Companies Act 2008*; Zindoga *Piercing of the Corporate Veil in terms of Gore* 11.

⁴⁸² Mashiri *A Critical Analysis of the Piercing of the Corporate Veil in South African Corporate Law* 4; Marobela *Piercing the Corporate Veil in a Holding Relationship* 15.

⁴⁸³ Section 19(1)(a) and (b) of the *Companies Act 2008*; Zindoga *Piercing of the Corporate Veil in terms of Gore* 11; Manda PW *A Comparative Analysis of Piercing the Corporate Veil in English Law and South African Law* (LLM- dissertation University of Pretoria 2019) 7.

⁴⁸⁴ Section 19 of the *Companies Act 2008*; Siebritz *A Critical Analysis of Section 20(9) of the Companies Act 71 of 2008* 13.

The courts have realised that the principle of separate legal personality and its benefits thereof may be subject to abuse by company directors and shareholders.⁴⁸⁵ Consequently, the courts do not recognise the existence of separate legal personality of the corporate entity when there is an abuse of the separate legal personality of a company by the directors or shareholders.⁴⁸⁶ The courts would disregard the veil of incorporation in order to examine who really controls the corporation when there is misuse or abuse of corporate structure, which results in harm being suffered by a third party.⁴⁸⁷ This process is usually described as piercing the corporate veil. The piercing of the corporate veil principle enables the corporate creditors and interested persons to hold the directors and shareholders personally liable for the debts of a company.⁴⁸⁸ This is done where there is an abuse of the separate legal personality of a company and such separate legal personality, and the limited liability principle would have protected the directors or shareholders of the company from the debts of the company.⁴⁸⁹

4.4 Piercing the Corporate Veil

The principle of piercing the corporate veil has its origin from a common law legal system.⁴⁹⁰ At common law, the courts have the power to lift the corporate veil and hold directors and shareholders personally liable for company debts.⁴⁹¹ This is in instances where a company is used as a device to cover up or disguise fraudulent or illegal conduct.⁴⁹² The need for piercing the corporate veil under the common law legal system occurs where the aggrieved party or creditors suffers harm as a result of the abuse of corporate structure by the shareholder or director. The aggrieved

⁴⁸⁵ Huyssteen VD *Piercing the Corporate Veil: A Critical Analysis of section 20(9) of the Companies Act 71 of 2008* (LLM- dissertation University of Johannesburg 2014) 17.

⁴⁸⁶ *Shipping Cooperation of India Ltd v Evdoman Corporation and Another* 1994 [1] SA 550 [A] at page 566 F-C; *Charles Baloyi v Jd Malherbe JR 2661/2007* (*Baloyi case*) para 17.

⁴⁸⁷ Section 20(9) of the *Companies Act 2008*; *Baloyi case* para 17; Cassim 2014 *South African Mercantile Law Journal* 319.

⁴⁸⁸ Hodge LC & Sachs AB "Empirical Study: Piercing the Veil: Bringing the Thompson Study into the 1990s" 2008 *Wake Forest Law Review* 341, 344.

⁴⁸⁹ *Ex Parte Gore case* para 1; Siebritz *A Critical Analysis of Section 20(9) of the Companies Act 71 of 2008* 64.

⁴⁹⁰ Zindoga *Piercing of The Corporate Veil in terms of Gore* 14.

⁴⁹¹ Nyombi 2013 *International Journal of Law and Management* 68.

⁴⁹² *Trustor AB v Smallbone No.2* (2001) 3 All ER 987 (*Smallbone case*) para 23.

party or creditor may apply to the court to pierce the corporate veil of a company to hold the directors or shareholders liable for the debts of the company.⁴⁹³

The principle of piercing the corporate veil as a common law remedy was aimed at addressing the injustices resulting from the abuse of separate legal personality of a company which is detrimental to the company creditors or the aggrieved party. The principle of piercing the corporate veil granted an aggrieved party or creditor the right to obtain an order from the court which treats the rights and liabilities of the company as the rights and liabilities of the directors or shareholders of the company.⁴⁹⁴ Furthermore, principle of piercing the corporate veil applies where a director and/or shareholders treat the company's assets as his or her own or when a statute empowers the court to ignore corporate legal personality.

The Mahikeng local municipality has a separate legal personality which limits the liability of the municipal manager or municipal council from being liable for the acts of the municipality.⁴⁹⁵ The concept of separate legal personality protects the municipal manager and the municipal council of the Mahikeng local municipality from being liable for the debts of the municipality. Therefore, the principle of piercing the corporate veil may be applied in the Mahikeng local municipality to combat or deter the abuse of the separate personality of the municipality by the municipal manager or the municipal council. When there is abuse or misuse of funds by the municipal manager or the municipal council of the Mahikeng local municipality, the separate legal personality of the municipality would be disregarded, and liability will be invoked on the municipal manager or the municipal council. The principle of piercing the corporate veil grants a member of the community, a creditor of the municipality or an aggrieved party to obtain a court order from the court will treats the rights and liabilities of the municipality as the rights and liabilities of the municipal manager or the municipal council.⁴⁹⁶ This assists to address the prejudice resulting from the

⁴⁹³ Section 20(9) of the *Companies Act* 2008.

⁴⁹⁴ *Atlas Maritime* case para 779.

⁴⁹⁵ Section 151(2) and (3) of the *Constitution of South Africa*; see also section 2(d) of the *Systems Act*; *Mhana and Others v Ngqwebo* (CA 65/2011) [2011] ZAECGHC 90 para 13 (Mhana case).

⁴⁹⁶ Section 5(1)(a) of the *Systems Act* provides that the members of local community have the right to demand that the proceedings of the municipal council and those of its committees must be untainted by personal self-interest. The principle of piercing the corporate veil may be helpful to

abuse of separate legal personality of the Mahikeng local municipality by the municipal council or municipal manager which is detrimental to the creditors of the municipality or members of the Mahikeng community. However, under the common law, the courts were reluctant to pierce the corporate veil and would only do so on exceptional circumstances and as a measure of last resort.⁴⁹⁷ The researcher agrees with the common law remedy of piercing the corporate veil and submits that piercing of the corporate veil in the Mahikeng local municipality can be used as a measure of last resort and only on exceptional circumstances. This is because there are already internal processes and procedures to be followed to hold the controllers of the municipality accountable. Those processes and procedures are in terms of among others, the *Systems Act*, *Municipal Finance Management Act*, *Public Audit Act*⁴⁹⁸ that must be exhausted first before approaching the court.

The common law principle of piercing the corporate veil has been fused and developed into the *Companies Act 2008*.⁴⁹⁹ The *Companies Act 2008*⁵⁰⁰ endorses the power to the courts to lift the corporate veil, and either ignores the separate legal existence of the company and treats its members as if they owned the assets and conducted the business in their personal capacities, or attribute certain rights or obligations of the shareholders to the company. The principle of piercing the corporate veil seeks to protect the interests of company creditors against fraud, corruption, or unconscionable conduct of company directors or shareholders.⁵⁰¹ However, it must first be understood that the principle of piercing the corporate veil stems from the fact that a company has a separate legal personality from its members.⁵⁰² In other words, a company is a juristic person, and it has rights, duties,

the community of Mahikeng to ensure that the municipal manager or the municipal council do not conduct the proceedings of the Mahikeng local municipal to serve their personal self-interest.

⁴⁹⁷ *Ex Parte Gore* case para 449.

⁴⁹⁸ Section 5A of the *Public Audit Act*.

⁴⁹⁹ Section 20(9) of the *Companies Act 2008*; *Ex Parte Gore* case para 2; Mongalo T *Corporate Law & Corporate Governance: A Global Picture of Business Undertakings in South Africa* 1sted (New Africa Books Cape Town 2003) 1, 84.

⁵⁰⁰ Section 20(9) of the *Companies Act 2008*; Cassim 2014 *South African Mercantile Law Journal* 307.

⁵⁰¹ Schoeman N "Piercing the Corporate Veil Under the New Companies Act" (1 June 2012) *De Rebus* 1, 1; Smith BS "Statutory Discretion or Common Law Power? Some Reflections on veil piercing and the Consideration of (the value of) Trust Assets in Dividing Matrimonial Property at Divorce – Part One" 2016 *Journal for Juridical Science* 68, 72.

⁵⁰² *Salomon* case para 30; *Dadoo* case para 550-1.

and it can sue or be sued in its name. A company has its assets and liabilities.⁵⁰³ The company is solely responsible for its actions as well as its debts and obligations. Creditors or any party aggrieved by the company can sue the company in its name and not the directors or the shareholders of such company.⁵⁰⁴ This is as a result of the separate legal personality of the company and the limited liability principle. The shareholders and directors of the company are acting on behalf of the company and not on their personal capacity. Therefore, all the debts incurred in the name of the company are the debts of the company and not the debts of the directors or shareholders of the company.

A company acts through its shareholders, board, and directors. The acts of the directors in a company are considered to be the acts of the company since the company is a juristic person.⁵⁰⁵ Although this may be the case, the company directors or shareholders must not abuse the company's legal personality.⁵⁰⁶ The directors of a company have a fiduciary duty to act in good faith, with honesty, integrity and in the best interest of the company when conducting the affairs of a company.⁵⁰⁷ The courts may disregard the legal personality of a company and apportion the liability of the company on its directors or shareholders.⁵⁰⁸ This is known as piercing the corporate veil. This occurs when the court would disregard the "veil" or the company's legal personality where there is an unconscionable abuse of the company's separate legal personality.⁵⁰⁹

The corporate veil is pierced when the focus shifts from the company to the person behind it or in control of its activities, or to the natural person as if there is no

⁵⁰³ *Airport Cold Storage (Pty) Ltd v Ebrahim* 2008 (2) SA 303 (C) (*Airport Storage* case) para 17; Davis *et al Companies and Other Business Structures in South Africa* 29; Delpont P *et al Henochsberg on the Companies Act 71 of 2008* 1st ed (LexisNexis Durban 2011) 1, 82.

⁵⁰⁴ Mashiri *A Critical Analysis of the Piercing of the Corporate Veil in South African Corporate Law* 4.

⁵⁰⁵ Mongalo *A Global Picture of Business Undertakings in South Africa* 90; Siebritz KL *Piercing the Corporate Veil: A Critical Analysis of Section 20(9) of the Companies Act 71 of 2008* (LLM-dissertation University of Western Cape 2016) 39.

⁵⁰⁶ Davis and Geach *Companies and Other Business Structures in South Africa* 29.

⁵⁰⁷ Section 76(3) of the *Companies Act* 2008.

⁵⁰⁸ *Cape Pacific* case para 33; Marobela *Piercing the Corporate Veil in a Holding/Subsidiary Relationship* 15.

⁵⁰⁹ *Cape Pacific* case para 33; Smith 2016 *Journal for Juridical Science* 71; Cilliers HS *et al Corporate law* 3rd ed (LexisNexis Durban 2000) 1, 13.

difference from the company and such person(s).⁵¹⁰ This principle has been the primary mitigating method, through which the courts have mitigated the strenuous demands of a logical fulfilment of the separate legal existence of a juristic entity. This means that the courts are permitted, in appropriate circumstances, to ignore the separate legal existence of an artificial legal person.⁵¹¹

In *Zeman v Quikelberge and Another*,⁵¹² the court held that to pierce or lift the corporate veil means "disregarding the dichotomy between the company and the natural person behind it and attributing liability to that person where he has misused or abused of corporate personality". This is done when there is an element of fraud or improper conduct by the directors or shareholders of a company.⁵¹³

In *Atlas Maritime Co SA v Avalon Maritime Ltd the Coral Rose No.1*,⁵¹⁴ Staughton LJ distinguished between piercing and lifting the corporate veil and explained the principle of piercing the corporate veil as a method courts would use to treat the liabilities, rights or activities of the company as those of the shareholders of the company. Staughton LJ⁵¹⁵ further elaborated that to lift the corporate veil should mean to look behind the company and have regard to the controllers or directors of the company for some legal purpose. The court would pierce or lift the veil that was created through the incorporation of a company to hold the shareholders or directors of a company liable for some legal purpose.⁵¹⁶ This occurs where there is an abuse of separate legal personality of a company or where one cannot separate the improper conduct of a company from those of the controllers or shareholders of a company. The court looks behind the veil that seeks to protect the directors or

⁵¹⁰ Zindoga *Piercing of the Corporate Veil in terms of Gore* 12.

⁵¹¹ Farzana S "The Concept of Piercing the Corporate Veil in Corporate Law: A Critical Analysis" 2009 *The Chittagong University Journal of Law* 129, 135.

⁵¹² (2011) 32 ILJ 453 (LC) (*Zeman* case); *Baloyi* case para 13.

⁵¹³ *Zeman* case para 29; *Baloyi* case para 13.

⁵¹⁴ 1991 4 All SA 769 (CA), (*Atlas* case) para 779; *Ex Parte Gore* case para 3; Phiri *Piercing the Corporate Veil: A Critical Analysis of Section 20(9) of the Companies Act* 15-17.

⁵¹⁵ *Atlas* case para 779; *Ex Parte Gore* case para 3.

⁵¹⁶ Tweedle G & Flynn L "Piercing the Corporate Veil: Cape Industries and Multinational Corporate Liability for a Toxic Hazard 1950-2004" 2007 *Oxford Journals* 270.

shareholders of a company from liability when they commit wrongful acts and cause the company to incur debts from such wrongful acts.⁵¹⁷

The then Appellate Division in the *Cape Pacific* case laid down few principles relating to the circumstances in which the court would pierce the veil.⁵¹⁸ The *Cape Pacific* case involved Lubner, who was a successful businessman and a shareholder in Findon Investment (Pty) Ltd (Findon (Pty) Ltd). The Findon (Pty) Ltd shares were transferred to Lubner Controlling Investments (Pty) Limited (LCI) which held them on its behalf. The LCI was owned by four trusts which were created by Lubner's father for the benefit of Lubner's children. One of the trusts was Gerald Lubner Family Trust (Pty) Limited (GFI) which owned all shares in LCI. In 1979, Lubner owned all the issued shares in GLI. Therefore, Lubner exercised complete control over LCI in respect of the Findon (Pty) Ltd shares.

Cape Pacific Ltd then sued Lubner, LCI and GLI for an order compelling GLI to transfer the Findon (Pty) Ltd shares to it or compelling GFI to transfer them to CLI and LCI to then transfer to Cape Pacific Ltd. Alternatively, an order compelling Lubner to cause GLI to deliver the shares to Cape Pacific Ltd. Cape Pacific Ltd submitted that the court should pierce the corporate veil as an effective control of the companies, that is LCI and GFI which had at all times vested in Lubner. The trial court refused to pierce the veil and held that although the transfer of the shares could be described as improper conduct, it has not resulted in an unconscionable injustice. This is because Cape Pacific Ltd had an opportunity to recover the Findon (Pty) Ltd shares through a claim in terms of the contract. Therefore, Cape Pacific Ltd failed to use the remedy for breach of contract and was therefore, the author of its misfortune. The decision of the trial court not to pierce the corporate veil was based on two principles. The first principle is that the court can only pierce the veil where there is an unconscionable injustice. The second principle is that the remedy of lifting the veil is available only when the aggrieved party has no other legal remedy. The researcher does not agree with the latter principles adopted by the trial court and submits that the principle of piercing the corporate veil can also be used

⁵¹⁷ Siebritz KL *Piercing the Corporate Veil: A Critical Analysis of Section 20(9) of the Companies Act 71 of 2008* (LLM- dissertation University of Western Cape 2016) 2.

⁵¹⁸ Case Pacific case para 12; Zindoga *Piercing of the Corporate Veil in terms of Gore* 16.

even if another remedy exists. Hence, the decision of the trial court was overturned by the Appellate Division.

Cape Pacific Ltd appealed to the Appellate Division against the decision of the court *aquo*. The Appellate Division in the Cape Pacific case reversed the decision of the court *aquo* and ordered that the corporate veil with regard to GLI and LCI should be pierced. The Appellate Division ordered that GLI to deliver the Findon (Pty) Ltd shares to Cape Pacific Ltd. The court held that it does not have a general discretion simply to disregard the corporate veil whenever it deems it as just and equitable to do so. Nevertheless, the court accepted that fraud, dishonesty or improper conduct could provide grounds on piercing the corporate veil. To this end, if there has been abuse or misuse of the corporate personality of a company by directors or shareholders, the court would disregard it and attribute liability where it rightly lies. However, the application of the principle of piercing the corporate veil depends on the facts of each case and should not be seen as mandatory.⁵¹⁹

It was stressed out in the *Cape Pacific* case⁵²⁰ that the courts should not lightly disregard the company's separate legal personality but should strive to uphold it. Failure by the courts to uphold or preserve the separate legal personality of a company would negate or undermine the concept of separate legal personality and the consequences attached to it.⁵²¹ The court further stated that other considerations would come to play where there is a fraud, improper conduct or dishonesty.⁵²² The court in the *Cape Pacific* case adopted a balancing approach and laid down the principles that the concept of separate legal personality must be weighed against those principles in favour of piercing the corporate veil.⁵²³ The balancing approach between the separate legal personality and piercing the corporate veil has proven to be reliable since the courts take careful consideration

⁵¹⁹ *Cape Pacific* case para 12; Zindoga *Piercing of the Corporate Veil in terms of Gore* 16.

⁵²⁰ *Cape Pacific* case para 31; *Airport Cold Storage* case para 22; *Ex Parte Gore* case para 27; Manda *A Comparative Analysis of Piercing the Corporate Veil in English Law and South African Law* 24.

⁵²¹ *Cape Pacific* case para 31; Section 19(1) of the *Companies Act* 2008; *Dadoo* case para 550; Cassim 2014 *South African Mercantile Law Journal* 323; Manda *A Comparative Analysis of Piercing the Corporate Veil in English Law and South African Law* 90.

⁵²² Zindoga *Piercing of the Corporate Veil in terms of Gore* 16.

⁵²³ Zindoga *Piercing of the Corporate Veil in terms of Gore* 17.

and exercise their discretion cautiously.⁵²⁴ The researcher argues that the separate legal personality of Mahikeng local municipality as an organ of state or local sphere of government must be balanced between the piercing of the corporate veil of the municipality. The court must be cautious and careful in taking its decision to pierce the corporate veil of the Mahikeng local municipality. Similarly like in a company, the court when piercing the corporate veil of the Mahikeng local municipality, it ought to weigh up the concept of the municipality as an organ of state against the adverse moral and economic effects of tolerating an unconscionable abuse of the juristic personality of a municipality.⁵²⁵

In *Botha v Van Niekerk*,⁵²⁶ Fleming J concluded that imposing personal liability on the shareholders or directors of a company would only become justifiable when it is clear that the third party suffered an unconscionable injustice as a result of improper conduct of the improper party.⁵²⁷ In *Hülse-Reutter v Gödde* the Supreme Court of Appeal adopted a stricter approach and insisted that piercing of the corporate veil should only be used as a last resort.⁵²⁸ The court further stated that the corporate veil must be pierced if there was evidence of misuse or abuse of the distinction between the company and those who control it, and this enabled those who control the company to gain an unfair advantage.⁵²⁹

The court in the case of *Amlin (SA) Pty Ltd v Van Kooij*,⁵³⁰ indicated that the justifiable motivations to be submitted for piercing the corporate veil are *inter alia*, fraud, abuse of the corporate form, and the creation of a mere façade to conceal the true state of affairs or as a means or device to conceal wrongdoing or to avoid

⁵²⁴ *Van Zyle N.O. and Another v Kaye N.O and Others* 2014 (4) SA 452 (WCC) (Van Zyle case) para 33; Manda *A Comparative Analysis of Piercing the Corporate Veil in English Law and South African Law* 90.

⁵²⁵ Cassim 2014 *South African Mercantile Law Journal* 324.

⁵²⁶ *Botha v Van Niekerk* 1983 (3) SA 513 (W) (*Botha* case) para 33; Zindoga *Piercing of the Corporate Veil in terms of Gore* 17.

⁵²⁷ Manda *A Comparative Analysis of Piercing the Corporate Veil in English Law and South African Law* 27; Mashiri *A Critical Analysis of the Piercing of the Corporate Veil in South African Corporate Law* 10.

⁵²⁸ *Hülse-Reutter v Gödde* 2001 (4) SA 1336 (SCA) (*Hülse-Reutter* case) para 23; Zindoga *Piercing of the Corporate Veil in terms of Gore* 17.

⁵²⁹ *Hülse-Reutter* case para 22; Zindoga *Piercing of the Corporate Veil in terms of Gore* 18.

⁵³⁰ *Amlin (SA) Pty Ltd v Van Kooij* 2008 (2) SA 558 (C) (*Amlin* case) para 34; Zindoga *Piercing of the Corporate Veil in terms of Gore* 18; Manda *A Comparative Analysis of Piercing the Corporate Veil in English Law and South African Law* 17.

obligations. This clearly states that the law is not settled with regards to the circumstances in which the corporate veil can be pierced, and this depends on the facts of each case, policy considerations and judicial judgement.⁵³¹

4.5 Piercing the Corporate Veil Under the Companies Act 2008

The principle of piercing the corporate veil previously existed under the common law and has now been expressly incorporated into the *Companies Act* 2008.⁵³² The *Companies Act* 2008 provides for a statutory remedy of piercing the corporate veil.⁵³³ The purpose of the principle of piercing the corporate veil under the *Companies Act* 2008 is to prevent the abuse of the separate legal status of the companies by the directors or shareholders of the company.⁵³⁴ The *Companies Act* 2008 seeks to combat fraud and corruption, which is in the public interest.⁵³⁵

The *Companies Act* 2008⁵³⁶ grants relief to any interested person affected by the unconscionable abuse of the juristic personality of a company by company directors or shareholders. An interested person may apply to the court in any proceedings in which a company is involved.⁵³⁷ The *Companies Act* 2008 provides⁵³⁷ that if the court finds that the incorporation of a company, any use of the company, or any act by or on behalf of the company constitutes an unconscionable abuse of the company's separate legal existence, the court may pierce the corporate veil.⁵³⁸ This means that the court can pierce the veil by declaring that the company is not deemed to be a juristic person in respect of any right, obligation or liability of the company.⁵³⁹ The rights, obligation or liability of a company will be apportioned to the directors of the

⁵³¹ Zindoga *Piercing of the Corporate Veil in terms of Gore* 49.

⁵³² Section 20(9) of the *Companies Act* 2008; Zindoga *Piercing of the Corporate Veil in terms of Gore* 7.

⁵³³ Section 20(9)(b) of the *Companies Act* 2008; *Ex Parte Gore* case para 34; Mashiri *A Critical Analysis of the Piercing of the Corporate Veil in South African Corporate Law* 35.

⁵³⁴ Mashiri *A Critical Analysis of the Piercing of the Corporate Veil in South African Corporate Law* 32; Schoeman 2012 *De Rebus* 1.

⁵³⁵ Section 20(9) of the *Companies Act* 2008; Schoeman 2012 *De Rebus* 1; Delpont Henochsberg on the *Companies Act* 71 of 2008 86.

⁵³⁶ Section 20(9) of the *Companies Act* 2008; Davies and Geach *Companies and Other Business Structures in South Africa* 31; Arden 2017 *Journal of Corporate and Commercial Law & Practice* 3.

⁵³⁷ Section 20(9) of the *Companies Act* 2008; Mashiri *A Critical Analysis of the Piercing of the Corporate Veil in South African Corporate Law* 33.

⁵³⁸ Section 20(9) of the *Companies Act* 2008.

⁵³⁹ Section 20(9)(a) of the *Companies Act* 2008.

company.⁵⁴⁰ The *Companies Act* 2008 further empowers the court to make an order which the court deems to be appropriate to give effect to a declaration contemplated in the latter paragraph.⁵⁴¹ The *Companies Act* 2008 makes it clear that an unconscionable abuse can occur in three instances namely, on the incorporation of a company, as a result of any use of the company as a legal entity, or as a result of any act by, or on behalf of, the company.⁵⁴²

The principle of piercing the corporate veil in terms of the *Companies Act* 2008 was first considered in the *Ex Parte Gore* case.⁵⁴³ The court in the *Ex Parte Gore* case⁵⁴⁴ adopted the purposive approach in interpreting the statutory provision of piercing the corporate veil.⁵⁴⁵ The purposive approach promotes the objective which the legislature seeks to achieve. The purposive approach must be coupled with contextualism is regarded as the new approach to the interpretation of the statute in general. This approach is concerned with clarifying the meaning of particular legislative provisions together with the legislative text as a whole as well as other contextual consideration.⁵⁴⁶ This basically means that when looking at the context of the statutory instrument, one must consider not only the language of the entire statute but also the purpose and background of the statute.⁵⁴⁷ This Supreme Court of Appeal confirmed this in the case of *Hoban v Absa Bank Ltd.*⁵⁴⁸

Furthermore, the Constitutional Court in *Harksen v Lane*⁵⁴⁹ emphasised the importance of construing constitutional provisions in context with the view that these include the history and background of the statute as well as other provisions within the statute. Moreover, the court emphasised that where the language is clear and

⁵⁴⁰ Section 20(9)(a) of the *Companies Act* 2008.

⁵⁴¹ Section 20(9)(b) of the *Companies Act* 2008.

⁵⁴² Section 20(9) of the *Companies Act* 2008; Cassim 2014 *South African Mercantile Law Journal* 310.

⁵⁴³ *Ex Parte Gore* case para 32; Cassim 2014 *South African Mercantile Law Journal* 307.

⁵⁴⁴ *Ex Parte Gore* case para 32.

⁵⁴⁵ Section 20(9) of the *Companies Act* 2008; Mashiri *A Critical Analysis of the Piercing of the Corporate Veil in South African Corporate Law* 33.

⁵⁴⁶ Zindoga *Piercing of the Corporate Veil in terms of Gore* 30.

⁵⁴⁷ *Jaga v Dönges* 1950 (4) SA 653 (A) (*Jaga* case) para 662; Zindoga *Piercing of the Corporate Veil in terms of Gore* 30.

⁵⁴⁸ *Hoban v Absa Bank Ltd t/a United Bank* 1992 2 SA 1036 (SCA) (*Hoban* case) para 1044B; Zindoga *Piercing of the Corporate Veil in terms of Gore* 30.

⁵⁴⁹ *Harksen v Lane* 1997 11 BCLR 658 (CC) (*Harksen* case) para 1534.

unambiguous, the court must read in context. The same approach was also confirmed in the case of *University of Cape Town v Cape Bar Council*⁵⁵⁰ where the court held that the courts have to examine all the contextual factors in ascertaining the intention of the legislature, irrespective of whether or not the words of the legislation are clear and unambiguous. The *Constitution of South Africa*⁵⁵¹ also calls out for the purposive interpretation as it mandates the courts to promote the spirit, purport and objects of the bill of rights when interpreting any legislation.

4.5.1 Interpretation of Section 20(9) of the Companies Act 2008 in Relation to Ex Parte Gore Case

*The Companies Act 2008 provides that Ex Parte Gore case*⁵⁵² represents an important development and the interpretation of the common law principle of piercing the corporate veil of a company under the *Companies Act 2008*.⁵⁵³ The *Companies Act 2008*⁵⁵⁴ empowers the court to pierce the corporate veil where it finds the use, or any act by or on behalf of the company constituted an unconscionable abuse of the juristic personality of the company as a separate entity. Many interpretative questions have been raised with regards to the application of piercing the corporate veil in terms of the *Companies Act 2008*⁵⁵⁵ and these questions have been answered in the *Ex Parte Gore* case in the context of company groups.⁵⁵⁶ The facts of the *Ex Parte Gore* case are discussed below.

⁵⁵⁰ *University of Cape Town v Cape Bar Council* 1986 (4) SA 903 (A) (*University of Cape Town* case) para 913.

⁵⁵¹ Section 39(2) of the *Constitution of South Africa*; Gwanyanya M "The South African Companies Act and the Realisation of Corporate Human Rights Responsibilities" 2015 *Potchefstroom Electronic Law Journal* 3102, 3104.

⁵⁵² *Ex Parte Gore* case para 3; Siebritz *A Critical Analysis of Section 20(9) of the Companies Act 71 of 2008* 18.

⁵⁵³ Section 20(9) of the *Companies Act 2008*; Cassim 2014 *South African Mercantile Law Journal* 307.

⁵⁵⁴ Section 20(9) of the *Companies Act 2008*; *Ex Parte Gore* case para 30; Manda *A Comparative Analysis of Piercing the Corporate Veil in English Law and South African Law* 86.

⁵⁵⁵ Section 20(9) of the *Companies Act 2008*.

⁵⁵⁶ Zindoga *Piercing of the Corporate Veil in terms of Gore* 37.

4.5.1.1 Facts of the Case

In the *Ex Parte Gore* case,⁵⁵⁷ the applicants were the liquidators of the King Group. The King Group was a group of companies consisting of 41 companies.⁵⁵⁸ The said King Group was also a subsidiary of the King Financial Holdings Limited (KFH), a holding company which was also in liquidation. The three king brothers held the majority shares of the KFH, and they were the directors of KFH and most of its subsidiaries.⁵⁵⁹ This also enabled them to exercise complete control of the King Group. The King Brothers used the companies in the King Group and KFH to conduct the business of providing financial services to the public by marketing investments in commercial and residential immovable properties.⁵⁶⁰

Financial Services Board (FSB) and Price Waterhouse Coopers (PWC) conducted investigations after it was discovered that there was maladministration of funds and illegal share conversion schemes, among others, which showed that there were irregularities in how the business was conducted.⁵⁶¹ This is one of the factors that precipitated the subsequent winding up of the companies. The FSB and PWC further discovered that all the companies were treated as one entity by the King Brothers, who transferred the monies of their investors between the different companies in the King Group.⁵⁶² The transfer of such solicited funds from the investors were transferred by the controllers of the holding company between the various companies at will. Such transfer of the solicited funds was done with no effectual regard to the individual identity of the companies concerned, and with grossly inadequate record-keeping. As a consequence of the dishonest and chaotic administration of the affairs of the King Group by the King Brothers, the liquidators

⁵⁵⁷ *Ex Parte Gore* Case para 5.

⁵⁵⁸ *Ex Parte Gore* case para 2.

⁵⁵⁹ *Ex Parte Gore* case para 6.

⁵⁶⁰ *Ex Parte Gore* case para 7; Siebritz *A Critical Analysis of Section 20(9) of the Companies Act 71 of 2008* 19.

⁵⁶¹ *Ex Parte Gore* case para 7; Siebritz *A Critical Analysis of Section 20(9) of the Companies Act 71 of 2008* 19.

⁵⁶² Siebritz *A Critical Analysis of Section 20(9) of the Companies Act 71 of 2008* 19.

of the constituent companies were unable to identify the relevant corporate entities against which the individual investor-creditor should claim.⁵⁶³

4.5.1.2 Legal Question in the *Ex Parte Gore* Case

The issue was whether the court in the *Ex Parte Gore* case⁵⁶⁴ should pierce the corporate veil and disregard the separate legal personality of several companies in a group of companies, and treat their residual assets as the assets of the holding company to settle the investor's claims.

4.5.1.3 Courts' Findings in the *Ex Parte Gore* Case

The court found that all the King Brothers disregarded the separate legal personality of the companies and operated all of these companies as one entity.⁵⁶⁵ The court further found that such disregard of the separate legal existence of the companies was far-reaching and it was the basis for the court to conclude that the group was a sham.⁵⁶⁶ The court, in its findings, applied the principle of piercing the corporate veil as expounded in the *Companies Act 2008*⁵⁶⁷ and regarded KFH as the only company and removed the juristic personalities of the King Group. This was because it was only the juristic personality of the KFH that remained intact.⁵⁶⁸

4.5.1.4 Rationale for Court's Findings in the *Ex Parte Gore* Case

The court in the *Ex Parte Gore* case considered following issues, particularly in interpreting section 20(9) of the *Companies Act 2008*: the interpretation of the term unconscionable abuse; whether section 20(9) of the *Companies Act 2008* to pierce the corporate veil overrides the common law approach of piercing the corporate veil as a measure of last resort; and the interpretation of the term 'interested person' under the *Companies Act 2008*.

⁵⁶³ *Ex Parte Gore* case para 12; Zindoga *Piercing of the Corporate Veil in terms of Gore* 38.

⁵⁶⁴ *Ex Parte Gore* case para 2; Cassim R "Hiding behind the veil" 2013 *De Rebus* page number unknown.

⁵⁶⁵ *Ex Parte Gore* case para 37.

⁵⁶⁶ *Ex Parte Gore* case para 15.

⁵⁶⁷ Section 20(9) of the *Companies Act 2008*; *Ex Parte Gore* case para 15.

⁵⁶⁸ *Ex Parte Gore* case para 37; Siebritz *A Critical Analysis of Section 20(9) of the Companies Act 71 of 2008* 19.

4.5.1.5 Courts Interpretation of the Word Unconscionable Abuse

The court in the *Ex Parte Gore* case⁵⁶⁹ adopted a very wide interpretation of the words "unconscionable abuse" for piercing of the corporate veil in terms of the *Companies Act 2008*,⁵⁷⁰ on the basis that the King Group was a sham. The term unconscionable abuse is not defined in the *Companies Act 2008*. This may raise many questions and uncertainties surrounding its application and interpretation. The reason for this is that the *Companies Act 2008* does not give any direction on the circumstances that would constitute an unconscionable abuse of the juristic personality of the company.⁵⁷¹ This has been left entirely to the courts to determine the meaning and scope of the term unconscionable abuse.⁵⁷² However, the term unconscionable was first introduced in South African law in the case of *Botha*⁵⁷³ where the court decided that personal liability only becomes justifiable when it is clear that the third party has suffered an unconscionable injustice as a result of the unjust actions of the liable party.

In the *Cape Pacific* case,⁵⁷⁴ the court rejected this test of acquainting unconscionable abuse to unconscionable injustice on the basis that it was rigid. The court in the *Cape Pacific* case stated that a more flexible approach needs to be adopted and would be determined by the facts of each case, whether the piercing of the corporate veil was appropriate in the circumstances or not.⁵⁷⁵ The researcher argues that the term unconscionable abuse should not be used interchangeably with the term unconscionable injustice. The term unconscionable abuse gives rise to a remedy of piercing the corporate veil, whereas unconscionable injustice relates to the consequences of the conduct suffered by the plaintiff.⁵⁷⁶

⁵⁶⁹ *Ex Parte Gore* case para 15.

⁵⁷⁰ Section 20(9) of the *Companies Act 2008*.

⁵⁷¹ Cassim 2014 *South African Mercantile Law Journal* 316; Zindoga *Piercing of the Corporate Veil in terms of Gore* 42.

⁵⁷² Section 20(9) of the *Companies Act 2008*; Cassim 2014 *South African Mercantile Law Journal* 316.

⁵⁷³ *Botha* case para 33; Cassim 2014 *South African Mercantile Law Journal* 316.

⁵⁷⁴ *Cape Pacific* case para 805.

⁵⁷⁵ *Cape Pacific* case para 805.

⁵⁷⁶ *Ex Parte Gore* case para 34; Cassim 2014 *South African Mercantile Law Journal* 317.

In *TJ Jonck BK h/a Bothaville Vleismark v Du Plessis NO*,⁵⁷⁷ the court provided that a member of a close corporation was found to have acted recklessly and fraudulently. The member's action constituted a gross abuse of the juristic personality. In this case, the court did not explain the term unconscionable abuse. The court only differentiated between abuse and injustice. The researcher disagrees with the case in that failure to define the term always leaves the parties with uncertainties and this defeats the democratic values of the *Constitution of South Africa*.⁵⁷⁸

In the case of *Ben Hashem v Ali Shayi*,⁵⁷⁹ the court defined the term unconscionable abuse as being the illegitimate use of a juristic person, and such use adversely affects the third party in a way that it cannot be reasonably tolerated. It is for this reason the researcher suggests that unconscionable abuse covers all the descriptive terms like sham, stratagem and/or device.

In the *Ex Parte Gore* case,⁵⁸⁰ the court in interpreting this section was guided by the *Close Corporations Act*.⁵⁸¹ The wording of the provisions of the *Close Corporations Act*⁵⁸² and the *Companies Act 2008*⁵⁸³ are closely similar but not exactly the same. It is upon the court's discretion to interpret whether there are differences between gross abuse and unconscionable abuse and to determine the extent of the abuse before it may be considered unconscionable.⁵⁸⁴ In determining the extent of the

⁵⁷⁷ *TJ Jonck BK h/a Bothaville Vleismark v Du Plessis NO en 'n Ander* 1998 (1) SA 971 (O) (*TJ Jonck* case); Marobela *Piercing the Corporate Veil in a Holding/subsidiary relationship* 36.

⁵⁷⁸ Section 195(1) of the *Constitution of the Republic of South Africa, 1996 (Constitution of South Africa)*.

⁵⁷⁹ *Ben Hashem v Ali Shayif and Another* [2008] EWHC 2380; Marobela *Piercing the Corporate Veil in a Holding/subsidiary Relationship* 36.

⁵⁸⁰ *Ex Parte Gore* case para 24.

⁵⁸¹ 69 of 1984 (*Close Corporation Act*), see section 65.

⁵⁸² Section 65 of the *Close Corporation Act* provides that "whenever a Court on application by an interested person, or in any proceedings in which a company is involved, finds that the incorporation of, or any act by or on behalf of, or any use of, that corporation, constitutes a gross abuse of the juristic personality of the corporation as a separate entity, the Court may declare that the corporation is to be deemed not to be a juristic person in respect of such rights, obligations or liabilities of the corporation, or of such member or members thereof, or such person or persons thereof, as are specified in the declaration, and the Court may give such further order or orders as it may deem fit in order to give effect to such declaration.

⁵⁸³ Section 20(9) of the *Companies Act 2008*; Manda *A Comparative Analysis of Piercing the Corporate Veil in English Law and South African Law* 88.

⁵⁸⁴ *Ex Parte Gore* case para 34; Manda *A Comparative Analysis of Piercing the Corporate Veil in English Law and South African Law* 88.

abuse, the court applied gross abuse in terms of the *Close Corporations Act*.⁵⁸⁵ The term unconscionable abuse, in its ordinary sense refers to unprincipled misuse of the juristic personality of the company as a separate entity.

The court adopted a very wide approach in interpreting the words unconscionable abuse when applying the *Companies Act 2008*.⁵⁸⁶ In interpreting the *Companies Act 2008*,⁵⁸⁷ the court applied a lesser standard of approach for piercing the corporate veil, than the one required in the *Close Corporations Act*,⁵⁸⁸ which is gross abuse. The court however in the *Ex Parte Gore* case applied a purposive approach.

4.5.1.6 Courts Interpretation of the Word "Interested Person"

The *Companies Act 2008*⁵⁸⁹ requires that an application to declare that the company be declared not to be a juristic person must be brought by an interested person. However, the term "interested person" is not defined in the *Companies Act 2008*.⁵⁹⁰ This raises questions as to how the courts would interpret the term interested person. The general rule is that a person who claims relief from the court in respect of any matter must establish that he or she has a direct interest in order to acquire the *locus standi* to seek the relief.⁵⁹¹ Any person seeking a remedy in terms of the *Companies Act 2008*, must first establish his or her legal standing on the basis of well-established principles, and if the rights in the bill of rights of such person are affected, the legal standing must be determined in terms of the *Constitution of South Africa*.⁵⁹²

The interested person must have a direct interest in the matter, and such interest must not be remote and must be a real interest and not an abstract, hypothetical or

⁵⁸⁵ Section 65 of the *Close Corporation Act*; Zindoga *Piercing of the Corporate Veil in terms of Gore* 44.

⁵⁸⁶ Section 20(9) of the *Companies Act 2008*.

⁵⁸⁷ Section 20(9) of the *Companies Act 2008*.

⁵⁸⁸ Section 65 of the *Close Corporations Act*.

⁵⁸⁹ Section 20(9)(a) of the *Companies Act 2008*.

⁵⁹⁰ Zindoga *Piercing of the Corporate Veil in terms of Gore* 40.

⁵⁹¹ *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 (A) (*Eins* case) para 388.

⁵⁹² Section 38 of the *Constitution of South Africa*; *Ex Parte Gore* case para 35; See also *Jacobs en 'n Ander v WaksenAndere* 1992 (1) SA 521 (A) (*Jacobs Ander* case) para 533 – 534.

academic interest.⁵⁹³ In determining whether the interested person has a direct interest or whether it is not too remote depends on the merits of each case.⁵⁹⁴ In determining the *locus standi* of a person, the courts must use its discretion on a case by case basis.⁵⁹⁵

In the *TJ Jonck* case,⁵⁹⁶ the court held that the term interest should not be interpreted restrictively; it also should not be interpreted too wide to include an indirect interest. The interest must be material, relevant or direct, and, in particular, it is limited to a financial or monetary interest.⁵⁹⁷ The court in interpreting the term interested person was guided by the *Close Corporations Act* in determining who the interested person would be for the purpose of bringing an application in terms of the *Companies Act* 2008. However, the court in the *Ex Parte Gore* case did not require that an interested person must have a financial or monetary interest.⁵⁹⁸ The *Ex Parte Gore* case adopted the principles stated in the *Jacobs* case. The Appellate Division in the *Jacobs* case held that it is not necessary that the interest should be measurable in monetary terms.⁵⁹⁹ To this end, the court in the *Ex Parte Gore* case found that the liquidators had a direct and sufficient interest in the relief sought to qualify as 'interested persons'.

4.5.1.7 Does Section 20(9) of the Companies Act 2008 Override Common Law Approach of Piercing the Corporate Veil?

There has been much debate on whether the introduction of the statutory provision of the *Companies Act* 2008⁶⁰⁰ on piercing the corporate veil has replaced the common law approach of piercing the corporate veil. The common law approach

⁵⁹³ Section 38 of the *Constitution of South Africa*; *Ex Parte Gore* case para 35; See also *Jacobs Ander* case para 533 – 534; Cassim 2014 *South African Mercantile Law Journal* 312.

⁵⁹⁴ Zindoga *Piercing of the Corporate Veil in terms of Gore* 40.

⁵⁹⁵ Zindoga *Piercing of the Corporate Veil in terms of Gore* 16.

⁵⁹⁶ *TJ Jonck* case para 986; Siebritz *A Critical Analysis of Section 20(9) of the Companies Act 71 of 2008* 49.

⁵⁹⁷ *TJ Jonck* case para 986; Cassim 2014 *South African Mercantile Law Journal* 314.

⁵⁹⁸ *Ex Parte Gore* case para 36; Cassim 2014 *South African Mercantile Law Journal* 314.

⁵⁹⁹ In *Director of Education, Transvaal v McCagie and others* 1918 AD 616 (*Director of Education* case) para 629 the court also held that the relevant interest need not be a financial or monetary one.

⁶⁰⁰ Section 20(9) of the *Companies Act* 2008; *Ex Parte Gore* case para 31; Zindoga *Piercing of the Corporate Veil in terms of Gore* 47.

provides that the piercing of the corporate veil is used as a measure of last resort.⁶⁰¹ In the *Ex Parte Gore* case, the court stated that there is no clear intention that this provision replaces the common law. The court further held that the principles developed at common law regarding piercing the corporate veil would serve as a useful guide in interpreting the *Companies Act* 2008.⁶⁰² This basically means that the common law remedy of piercing the corporate veil would still apply where the requirements of section 20(9) of the *Companies Act* 2008 are not met and could not be relied upon. This was also confirmed in the *Cape Pacific* case where the court stated that the piercing of the corporate veil is no longer a remedy of last resort.⁶⁰³ This is due to the fact that the corporate veil can be pierced whenever the illegitimate use of the concept of juristic personality adversely affects a third party in a way that reasonably should not be countenanced.⁶⁰⁴ The *Companies Act* 2008⁶⁰⁵ improved the vagueness, ambiguous and unpredictable common law rule; thus, the purposive approach was applied. The legislature has improved this by conferring the courts with the powers to pierce the corporate veil, and such powers did not exist under common law.⁶⁰⁶

4.5.1.8 Own Analysis of the *Ex Parte Gore* Case

The researcher submits section 20(9) of the *Companies Act* 2008 broadens the basis on which a court may pierce the corporate veil and makes the remedy generally available whenever there has been an illegitimate use of the juristic personality of a company. The remedy of piercing the corporate veil is especially available in cases where this illegitimate use affects the interests of a third party adversely.⁶⁰⁷ The purposive approach is one of the democratic values enshrined in the *Constitution of South Africa*.⁶⁰⁸ This was also confirmed in the Constitutional Court ruling *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors*

⁶⁰¹ *Hülse-Reütter v Godde* 2001 (4) SA 1336 (SCA) (*Hülse-Reütter* case) para 23.

⁶⁰² Section 20(9) of the *Companies Act* 2008.

⁶⁰³ *Ex Parte Gore* para 34; Manda *A Comparative Analysis of Piercing the Corporate Veil in English Law and South African Law* 47-48.

⁶⁰⁴ *Ex Parte Gore* case para 34.

⁶⁰⁵ Section 20(9) of the *Companies Act* 2008.

⁶⁰⁶ Cassim 2014 *South African Mercantile Law Journal* 335.

⁶⁰⁷ Zindoga *Piercing of the Corporate Veil in terms of Gore* 57.

⁶⁰⁸ Section 195 of the *Constitution of South Africa*.

(Pty) Ltd.⁶⁰⁹ In the *Hyundai Motor Distributors* case, the Constitutional Court stated that all statutes must be interpreted through in line with the Bill of Rights.⁶¹⁰ This is because the *Constitution of South Africa* is the supreme law of the Republic, and all laws must be interpreted in line with it.⁶¹¹ The *Constitution of South Africa* requires interpreters to look beyond the text of statutory provisions, even when clear and unambiguous.⁶¹² The researcher submits that the purposive approach must be promoted as Moseneke DCJ has stated in the *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd*⁶¹³ that when interpreting a statute, a generous approach should be followed and not an approach that is merely focused on the text.

It must be noted that the intention of the *Companies Act* of 2008⁶¹⁴ is to supplement the common law, where principles developed at common law serve as guidelines. In interpreting section 20(9) of the *Companies Act* 2008, the courts must balance between the policy considerations, to preserve the company's separate legal personality, against policy consideration which rises in favour of piercing of the corporate veil.⁶¹⁵ This is to promote the values enshrined in the *Constitution of South Africa*.⁶¹⁶ The balancing tests act as a check and balance procedure for the courts, and also mitigates any danger where South African courts may disregard the corporate too lightly.⁶¹⁷ However, this does not undermine or negate the policies principles, and consequences that underpin separate legal personality.⁶¹⁸

⁶⁰⁹ *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd. In re: Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 (1) SA 545 (CC) (*Hyundai Motor Distributors* case) para 21.

⁶¹⁰ *Hyundai Motor Distributors* case para 21.

⁶¹¹ Section 2 of the *Constitution of South Africa*.

⁶¹² *Hyundai Motor Distributors* case para 21; Section 39 of the *Constitution of South Africa*.

⁶¹³ 2007 (6) SA 199 (CC) (*Department of Land Affairs* case) para 51.

⁶¹⁴ Section 20(9) of the *Companies Act* 2008; *Ex Parte Gore* case para 34; Manda A *Comparative Analysis of Piercing the Corporate Veil in English Law and South African Law* 89.

⁶¹⁵ *Cape Pacific* case para 31; Manda A *Comparative Analysis of Piercing the Corporate Veil in English Law and South African Law* 90.

⁶¹⁶ Section 39(1)(a) of the *Constitution of South Africa*.

⁶¹⁷ *Ex Parte Gore* case para 27; Manda A *Comparative Analysis of Piercing the Corporate Veil in English Law and South African Law* 90.

⁶¹⁸ Section 19(1) of the *Companies Act* 2008; *Cape Pacific* case para 31; Manda A *Comparative Analysis of Piercing the Corporate Veil in English Law and South African Law* 90.

The court in interpreting the *Companies Act 2008*⁶¹⁹ used a purposive approach which also gives effect to the provisions of the *Constitution of South Africa*.⁶²⁰ The *Companies Act 2008*⁶²¹ provides a proper mechanism to ensure that the values enshrined in the *Constitution of South Africa*⁶²² are upheld in the corporate world. Furthermore, the researcher submits that the crafters of the legislation left the interpretation of the principle of piercing the corporate veil in terms of the *Companies Act 2008*⁶²³ to the courts. This means that the court in the *Ex Parte Gore* case used its own discretion and also used a purposive approach which can also be referred to as the contextual approach. The court considered the meaning of the context, background and surrounding circumstances. This must also apply on a case to case basis.

4.6 Application of Piercing the Corporate Veil

The principle of piercing the corporate was recently applied in the appeal case of *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper NO*.⁶²⁴ The veil was pierced in terms of the *Companies Act 2008*.⁶²⁵

4.6.1 Facts

The *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper NO*⁶²⁶ case involved a property syndication scheme conducted by the Dividend Investment Group (DIG), which consisted of Div- Vest Holdings (Pty) Ltd (DivVest Holdings) and its other two wholly-owned subsidiaries. The DIG promoted some 70 Syndication whereby members of the community acquired 100% of the shareholding

⁶¹⁹ Section 20(9) and 7 of the *Companies Act 2008*.

⁶²⁰ See section 39(2) of the *Constitution of South Africa* which provides for the interpretation of the Bill of Rights.; see also section 7 of the *Companies Act 2008* which provides that the purpose of the Act is to promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law.

⁶²¹ Section 20(9) of the *Companies Act 2008*.

⁶²² Section 18(3) and 39(2) of the *Constitution of South Africa*.

⁶²³ Section 20(9) of the *Companies Act 2008*.

⁶²⁴ *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper NO* (85/2017) [2017] ZASCA 177 (*City Capital SA Property Holdings* case).

⁶²⁵ Section 20(9) of the *Companies Act 2008*; *City Capital SA Property Holdings* case para 25; Manda *A Comparative Analysis of Piercing the Corporate Veil in English Law and South African Law* 47.

⁶²⁶ *City Capital SA Property Holdings* case para 3; Manda *A Comparative Analysis of Piercing the Corporate Veil in English Law and South African Law* 47.

in the holding company.⁶²⁷ The members of the public were defrauded due to this unsustainable syndication and reckless trading of the 5 companies.⁶²⁸ The use of the companies, or the acts by or on behalf of the company, constituted an unconscionable abuse of the juristic personality.⁶²⁹ This justified an order under *Companies Act 2008*,⁶³⁰ which called for the piercing of the corporate veil. The members of the public had invested about R140 million into Zambezi Retail Park property, which was worth only about R45 million.⁶³¹ This left the investors with a loss of nearly R100 million. The syndication value of the property was about R125.5 million, its purchase price was R107.3 million, and the promoter of the scheme had made a profit of more than R19 million.⁶³² This immediately reduced the value of the investors' money.

In the above mentioned case, the investors were liable for about R106 million raised through a mortgage bond. The only way the investors would recover anything in the liquidation proceedings was if the promoter and other companies in the scheme were held liable by holding the persons behind the promoter personally responsible for the losses incurred.⁶³³ The Zambezi Business Park was run as a single indivisible commercial enterprise.⁶³⁴ The corporate identity of the five companies was not maintained, and the financial affairs were not kept apart.⁶³⁵ The funds of the five companies were flowing to and from the various companies as investors were paid dividends promised to them. Therefore, it was contended that the five companies be treated as a single entity.⁶³⁶

⁶²⁷ *City Capital SA Property Holdings* case para 4; Manda *A Comparative Analysis of Piercing the Corporate Veil in English Law and South African Law* 47.

⁶²⁸ *City Capital SA Property Holdings* case para 12; Manda *A Comparative Analysis of Piercing the Corporate Veil in English Law and South African Law* 47.

⁶²⁹ Section 20(9) of the *Companies Act 2008*; *City Capital SA Property Holdings* case para 12; *Ex Parte Gore* case para 33; Manda *A Comparative Analysis of Piercing the Corporate Veil in English Law and South African Law* 47.

⁶³⁰ Section 20(9) of the *Companies Act 2008*; *City Capital SA Property Holdings* case para 12.

⁶³¹ *City Capital SA Property Holdings* case para 12.

⁶³² *City Capital SA Property Holdings* case para 12.

⁶³³ *City Capital SA Property Holdings* case para 12.

⁶³⁴ *City Capital SA Property Holdings* case para 13.

⁶³⁵ *City Capital SA Property Holdings* case para 13.

⁶³⁶ *City Capital SA Property Holdings* case para 14; Manda *A Comparative Analysis of Piercing the Corporate Veil in English Law and South African Law* 47.

4.6.2 Legal Question

The issue was whether the court should pierce the corporate veil and declare five companies a single entity as envisaged by the *Companies Act 2008*⁶³⁷ for liquidation proceedings.

4.6.3 Courts' Findings

The court declared the first to third respondents, Div-Prop 11 (Pty) Ltd and Div-Prop 12 (Pty) Ltd a single entity as envisaged by the *Companies Act 2008*, thus piercing the corporate veil.⁶³⁸ The five entities referred to above shall henceforth be known as the "Dividend Investment Scheme" to be administered as a company in the continuance of the liquidation proceedings of the 4th to 7th Applicants.

4.6.4 Rationale for Court's Decision

The court *City Capital SA Property Holdings* case, interpreted the *Companies Act 2008*⁶³⁹ which is a statutory basis for piercing the corporate veil and applied a purposive approach, in context and consistent with the *Constitution of South Africa*.⁶⁴⁰ This means that when interpreting legislation, the language used, the context in which the relevant provision of the *Companies Act 2008* appears and the apparent purpose to which it is directed must be considered.⁶⁴¹

The statutory piercing of the corporate veil permits a court to disregard the separate legal personality of the company where its incorporation, use or an act performed by or on its behalf constitutes an unconscionable abuse of the juristic personality of the company as a separate entity'.⁶⁴² The five companies were part of an unsustainable syndication scheme which had engaged in reckless trading and defrauded members of the public.⁶⁴³

⁶³⁷ Section 20(9) of the *Companies Act 2008*; *City Capital SA Property Holdings* para 25.

⁶³⁸ Sections 20(9), 22, 141(2)(c) and 141(3) of the *Companies Act 2008*.

⁶³⁹ Section 20(9) of the *Companies Act 2008*; *City Capital SA Property Holdings* case para 25.

⁶⁴⁰ *City Capital SA Property Holdings* case para 26.

⁶⁴¹ *City Capital SA Property Holdings* case para 26; see also *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

⁶⁴² Section 20(9) of the *Companies Act 2008*.

⁶⁴³ *City Capital SA Property Holdings* case para 12.

In the *City Capital SA Property Holdings* case, the court also defined the meaning of the word unconscionable abuse in terms of the Oxford English Dictionary. The Oxford English Dictionary defines unconscionable as showing no regard for conscience, unreasonably excessive, egregious, blatant, and unscrupulous.⁶⁴⁴ It suffices to say that the unconscionable abuse of the juristic personality of a company within the meaning of the *Companies Act* 2008,⁶⁴⁵ includes the use of, or an act by, a company to commit fraud; or for a dishonest or improper purpose; or where the company is used as a device or façade to conceal the actual facts.⁶⁴⁶ The researcher agrees with the interpretation of the term unconscionable conduct adopted in the *City Capital SA Property Holdings* case. The researcher argues that just mere conduct by the director, which results in the abuse of corporate personality, misuse of funds or maladministration, should be regarded as an unconscionable abuse. Thus, failure to by the director in a company to act in good faith or negligently should, be regarded as unconscionable conduct and suffices as the reason to pierce the corporate veil.

In the case of *Re Bungle Pres Ltd*,⁶⁴⁷ the use of a company as a device to cover fraud was refused by the court of the first instance. In this case, there were three shareholders in a company. The two shareholders who held more than 90 percent of the shares of the company wanted to buy out the other shareholder, who refused. To get rid of another shareholder, the two majority shareholders incorporated another company to acquire all the shares of the company. This was done to comply with the law. The new company offered to purchase the company shares at a proper value. The majority shareholders accepted the offer; however, the minority shareholder refused as the offer under-valued his shares. The Court of Appeal held that the intention of the two majority shareholders was to exclude the third director and in pursuance of their plan, they applied to take over the company. The Court of

⁶⁴⁴ *City Capital SA Property Holdings* case para 29; See also *Cape Pacific* case para 804C-D; Zindoga *Piercing of the Corporate Veil in terms of Gore* 43.

⁶⁴⁵ Section 20(9) of the *Companies Act* 2008; *City Capital SA Property Holdings* case para 29; see also *Cape Pacific* case para 804C-D.

⁶⁴⁶ *City Capital SA Property Holdings* case para 29; *Cape Pacific* case para 804C-D; *Amlin* case para 34; Zindoga *Piercing of the Corporate Veil in terms of Gore* 18.

⁶⁴⁷ Mthembu LV *To Lift or Not Lift the veil – the Unfinished Story: A Critical Analysis of Common Law Principles in Lifting the Corporate Veil* (LLM- dissertation University of Natal 2002) 35

Appeal, looking at substance rather than form, disregarded the existence of a company, and therefore held that the company was a mere sham.⁶⁴⁸ The researcher argues that the fact that one is the majority shareholder and abuses his or her corporate status will not preclude the court from piercing the corporate veil. This clearly shows that unconscionable abuse is broad and not just limited to fraud, corruption and maladministration of funds; it also includes the improper conduct of directors or shareholders or controllers of an entity.

4.7 Conclusion

The *Ex Parte Gore* case is an important development in that it was the first case in which the statutory remedy of piercing the corporate veil in terms of section 20(9) of the *Companies Act 2008* was considered. It seems that the South African courts have been able to pierce the corporate veil in different circumstances applying the *Companies Act 2008*.⁶⁴⁹ For example, in the *Ex Parte Gore* case and *City Capital SA Property Holdings* case, among others. It is clear that the courts do not pierce the corporate veil lightly and try by all means to uphold the principle of separate legal personality. The courts need to exercise their discretion cautiously when piercing the corporate veil to ensure that they do not develop a disproportionate and inappropriate application of the doctrine of piercing the corporate veil in the South African jurisprudence.⁶⁵⁰ Notably, the court in piercing the corporate veil always use its discretion and apply the purposive or contextual approach.⁶⁵¹ This is because the statutory provisions of the *Companies Act 2008* should be interpreted purposively, in context and consistent with the *Constitution of South Africa*.⁶⁵² The courts are always willing to pierce the veil, where there is fraud and corruption. The reason for this is that fraud would exist or manifest if the veil is not pierced. The researcher submits that piercing the corporate veil where unconscionable abuse, such as fraud, or the company is used as a façade, and reckless trading of the juristic personality of the company is found, sends a clear warning to the directors and shareholders of a

⁶⁴⁸ Mthembu *To Lift or Not Lift the veil – the Unfinished Story* 35.

⁶⁴⁹ Section 20(9) of the *Companies Act 2008*.

⁶⁵⁰ Cassim 2014 *South African Mercantile Law Journal* 336.

⁶⁵¹ *City Capital SA Property Holdings* case para 26.

⁶⁵² Sections 2, 7 and 39 of the *Constitution of South Africa*; *City Capital SA Property Holdings* case para 26.

company. The next chapter discusses the challenges affecting the accountability of a municipal manager for Mahikeng local municipality, and the need to pierce the corporate veil in this municipality to ensure accountability of the municipal manager and the municipal council.

CHAPTER FIVE

CHALLENGES AFFECTING THE ACCOUNTABILITY OF A MUNICIPAL MANAGER AND THE NEED TO PIERCE THE CORPORATE VEIL IN MAHIKENG LOCAL MUNICIPALITY

5.1 Introduction

The municipal manager for Mahikeng local municipality is the engine of the municipality as he/she is accountable for every action or inaction concerning the municipality.⁶⁵³ As the head of administration or the accounting officer, nothing must ensue within the Mahikeng local municipality without the knowledge or authorisation of the municipal manager.⁶⁵⁴ The municipal manager is responsible for the general administration of the municipality and the implementation of the Integrated Development Plan (IDP).⁶⁵⁵ The municipal manager is also responsible for the formation and development of an economical, effective and accountable administration of the Mahikeng local municipality.⁶⁵⁶ The municipal manager carries out the mandate from the municipal council.⁶⁵⁷ The entire municipal employees report to the municipal manager who reports to the municipal council.⁶⁵⁸ Unfortunately, the Mahikeng local municipality is still struggling with poor financial management and service delivery backlogs while it has a municipal council, municipal manager and the entire municipal workforce.⁶⁵⁹ This is because there have been unauthorised, irregular, fruitless and wasteful expenditures and service delivery

⁶⁵³ Mathiba GL *The Role of the Auditor-General in the Promotion of Efficient Financial Management in Municipalities: A Case Study of the North West Province* (LLM- dissertation University of Western Cape 2019) 35.

⁶⁵⁴ Section 60 and 63 of the *Municipal Finance Management Act* 56 of 2003 (*Municipal Finance Management Act*); See also section 54A(1)(a) of the *Municipal Systems Act* (*Systems Act*); Joubert WA and Faris JA *The Law of South Africa* 2nd ed (LexisNexis Durban 2008) 1, 149.

⁶⁵⁵ Section 55(1)(c) of the *Systems Act*; Section 60 *Municipal Finance Management Act*; Joubert and Faris *The Law of South Africa* 150.

⁶⁵⁶ Section 55(1)(a) of the *Systems Act*.

⁶⁵⁷ Section 61(1)(b) of the *Municipal Finance Management Act*; Section 51(i) of the *Systems Act*; Visser JP "Roles and Responsibilities of the Municipal Manager" 2001 *Local Government Working Paper* 1, 2.

⁶⁵⁸ Section 10(1)(b) of the *Municipal Finance Management Act*; Visser 2001 *Local Government Working Paper* 1, 2.

⁶⁵⁹ Mathiba *The Role of the Auditor-General in the Promotion of Efficient Financial Management in Municipalities* 61.

protests in Mahikeng local municipality.⁶⁶⁰ This chapter discusses the challenges affecting accountability of a municipal manager for Mahikeng local municipality and how piercing the corporate veil may enhance such accountability in the municipality.

5.2 Legal Nature of the Mahikeng Local Municipality

Mahikeng local municipality is a category B municipality located within the Ngaka-Modiri Molema District Municipality.⁶⁶¹ The Mahikeng local municipality is an organ of state recognised and established as such by the *Constitution of South Africa*⁶⁶² as well as the *Structures Act*.⁶⁶³ The *Constitution of South Africa*⁶⁶⁴ provides that a municipality has the right to govern the local government affairs of its community on its own initiative. This means that the *Constitution of South Africa* precludes the national or a provincial government from impeding the proper exercise of powers and functions of municipalities.⁶⁶⁵ However, the duties, powers and rights of municipalities have to be exercised by the municipal council and the municipal manager subject to national or provincial legislation as provided for in the *Constitution of South Africa*.⁶⁶⁶

The powers and functions of Mahikeng local municipality are vested in the municipal council. The municipal manager is responsible for the administration of the municipality.⁶⁶⁷ The municipal manager, as the accounting officer of the municipality is responsible for the formation and development of an effective, efficient and accountable municipality.⁶⁶⁸ The municipal manager is responsible for among others, the discipline of staff, administration and implementation of municipality's by-laws,

⁶⁶⁰ Tau P "6 ANC Councillors' houses among 8 torched in violent North West protest" City Press 17 September 2019; Montsho M 2018 Eight North West Municipalities Put Under Administration <https://www.iol.co.za/news/politics/8-north-west-municipalities-put-under-administration-16710117> accessed 01 May 2019.

⁶⁶¹ *Constitution of the Republic of South Africa, 1996 (Constitution of South Africa)*, see section 55(1)(b) which defines a category B municipality as a municipality that shares municipal executive and legislative authority in its area with a category C municipality.

⁶⁶² Sections 151, 155 and 239 of the *Constitution of South Africa*.

⁶⁶³ Sections 12(1) and 14(1) of the *Municipal Structures Act (Structures Act)*.

⁶⁶⁴ Sections 40(3) and 156 of the *Constitution of South Africa*; Section 11 of the *Systems Act*.

⁶⁶⁵ Section 41(1)(g) of the *Constitution of South Africa*; *City of Cape Town and Other v Robertson and Other* 2005 2 SA 323 (CC) para 53 (City of Cape Town Case) para 59.

⁶⁶⁶ Section 151(3) of the *Constitution of South Africa*; *City of Cape Town case* para 59.

⁶⁶⁷ Section 4 of the *Systems Act*; Section 160 of the *Constitution of South Africa*.

⁶⁶⁸ Section 55(1)(a) of the *Systems Act*.

the exercise of any powers, and performance of any duties delegated by the municipal council of the Mahikeng local municipality.⁶⁶⁹ The decisions by the municipal council and/or the municipal manager are the decisions of the municipality.⁶⁷⁰ When the municipal council or the municipal manager performs their functions, their acts or conduct are that of the municipality and not on their personal capacity. The Mahikeng local municipality performs its functions through its municipal council or the municipal manager.⁶⁷¹ This positions of the municipal council and the municipal manager in Mahikeng local municipality are similar to that of a company director and board of directors since the actions of the board of directors are deemed to be the actions of the company.⁶⁷² The Mahikeng local municipality may be classified as a juristic person since it has the capacity to acquire rights and obligations independent from its members.⁶⁷³

5.3 Challenges Affecting the Mahikeng Local Municipality

In the 2015-2016 financial year, the Mahikeng local municipality obtained a disclaimer of opinion from the Auditor General.⁶⁷⁴ A disclaimer Audit opinion meant that the municipality failed to account for its finances and did not provide the Auditor General with the necessary audit evidence upon which to base his/her opinion. In the 2016-2017 financial year, the Mahikeng local municipality obtained a qualified audit opinion.⁶⁷⁵ A qualified audit opinion entails that the financial statements of the municipality contained material misstatements in specific amounts. In the 2017-2018 financial year, the Mahikeng local municipality regressed by obtaining a disclaimer audit opinion.⁶⁷⁶ The municipality failed to provide the Auditor General with sufficient evidence to base his/her opinion. For the 2018-2019 financial year, the Mahikeng

⁶⁶⁹ Section 55(1) of the *Systems Act*.

⁶⁷⁰ Section 4(1) of the *Systems Act*.

⁶⁷¹ Sections 4 and 55 of the *Systems Act*.

⁶⁷² Section 19(1) of the *Companies Act 2008*; Davis D and Geach W *Companies and Other Business Structures in South Africa 3rd Ed* (Oxford Cape Town 2015) 1, 29.

⁶⁷³ Section 2(d) of the *Systems Act*.

⁶⁷⁴ Luhabe N "North West on Mahikeng Local Municipality's Lack of Compliance on Supply Chain Management Laws" *South African Government Media Statement* (29 June 2017) 1, 1; Mokwena TI "Mahikeng Local Municipality 2016/17 Final Annual Report" 1st July 2015 to 30th June 2016) 1, 326.

⁶⁷⁵ Mokgwamme NM "The Mahikeng Local Municipality Annual Report 2018/19" (1st July 2018 to 30th June 2019) 1, 10.

⁶⁷⁶ Mokgwamme "The Mahikeng Local Municipality Annual Report 2018/19" 10.

local municipality obtained a disclaimer of opinion.⁶⁷⁷ The municipal manager failed to account and provide sufficient appropriate audit evidence to the Auditor General to base his/her opinion. During this 2018-2019 financial year, the municipality continued to experience poor service delivery which led to public protests where community members were burning tyres and blocking public roads.⁶⁷⁸ Furthermore, the Mahikeng local municipality experienced serious political and administrative challenges that led to the municipality being put under provincial intervention as per the *Municipal Finance Management Act*⁶⁷⁹ wherein the financial administrator was deployed in October 2018. The municipality failed to perform its executive and legislative functions.⁶⁸⁰ There have been unauthorised, irregular and fruitless and wasteful expenditure that was unaccounted for.⁶⁸¹ This was not for the first time the municipality was placed under administration as in terms of the *Constitution of South Africa*.⁶⁸² It is for similar reasons wherein the municipal council failed to perform its executive and legislative functions. The Mahikeng local municipality was placed under administration after the financial administrator was recalled by the provincial executive committee and deployed the administrator and two assistants.⁶⁸³ The researcher argues that this suffices that as lack of accountability in Mahikeng local municipality, and there is a need for corporate governance measures to be put in place to hold the municipal managers accountable.

Lack of accountability and proper records of the assets of the Mahikeng local municipality is an indication that the municipal council and the municipal manager do

⁶⁷⁷ Mokgwamme "The Mahikeng Local Municipality Annual Report 2018/19" 10.

⁶⁷⁸ Tau P "6 ANC Councillors' houses among 8 torched in violent North West protest" *City Press* 17 September 2019; Mathiba *The Role of the Auditor-General in the Promotion of Efficient Financial Management in Municipalities* 56.

⁶⁷⁹ Section 137 of the *Municipal Finance Management Act*; See also section 139(1) of the *Constitution of South Africa*.

⁶⁸⁰ Tau *City Press* 1; Mathiba *The Role of the Auditor-General in the Promotion of Efficient Financial Management in Municipalities* 56.

⁶⁸¹ Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 14; Makwetu 2018 *Auditor General South Africa* 5; Makwetu TK "Auditor General Reports an Overall Deterioration in the Audit Results of National and Provincial Governments Departments and their Entities" *Auditor General Media Release* (21 November 2018) 1, 10.

⁶⁸² Section 139(1)(a)-(c) of the *Constitution of South Africa*; *Ngaka Modiri Molema District Municipality v Chairperson, North West Provincial Executive Committee and Others* [2014] ZACC 31 (*Ngaka Modiri Molema case*) para 2.

⁶⁸³ Section 139(1)(b) of the *Constitution of South Africa*; *Ngaka Modiri Molema case* para 2.

not comply with the *Systems Act* and *Municipal Finance Management Act*.⁶⁸⁴ This is because the municipal manager and the municipal council failed to take reasonable steps to prevent the unauthorised, irregular, fruitless and wasteful expenditure in Mahikeng local municipality. The municipal council is the decision-maker of the municipality and must hold the municipal manager accountable for the administration of the municipality. Where the municipal manager has failed to meet the standard of performance required in the performance agreement or fulfil his terms of reference, then the municipal council can hold him or her accountable for that.⁶⁸⁵ The municipal manager for Mahikeng local municipality must account for all income, assets, and expenditure of the municipality.⁶⁸⁶ The *Municipal Finance Management Act*⁶⁸⁷ states that the municipal manager is responsible for managing the financial affairs of the municipality, and must take all reasonable steps to ensure that the resources of the municipality are used effectively, efficiently and economically. The *Municipal Finance Management Act*⁶⁸⁸ also requires that full and proper records of the financial affairs of the municipality be kept in accordance with any prescribed norms and standards. The bad audits received by the Mahikeng local municipality from the Auditor General's annual audit reports are a clear indication of lack of compliance with the legislation. The Auditor General indicated in his annual reports that there are unauthorised, irregular, fruitless and wasteful expenditures in the Mahikeng local municipality. Such unauthorised, irregular, fruitless and wasteful expenditures hinder service delivery as the budget for service delivery is misused through material irregularities.

The municipal council of the Mahikeng local municipality has a long record of dysfunctionality and instability within the municipal council due to *inter alia* political infightings between municipal councilors.⁶⁸⁹ The municipal council of the Mahikeng local municipality failed to oversee the performance and financial reporting of the

⁶⁸⁴ Amber IM and Badenhorst-Weiss JA "Procurement Challenges in the South African Public Sector" 2012 *Journal of Transport and Supply Chain Management* 242, 243.

⁶⁸⁵ Sections 53(1) and (2) of the *Systems Act*.

⁶⁸⁶ Section 55(2) of the *Systems Act*; see also section 62 of the *Municipal Finance Management Act*.

⁶⁸⁷ Sections 62(1)(a) and (b) of the *Municipal Finance Management Act*.

⁶⁸⁸ Section 62(1)(b) of the *Municipal Finance Management Act*.

⁶⁸⁹ Gaedie IJ Assessment of Basic Service Delivery in Mahikeng Local Municipality (unpublished Masters Mini thesis, NWU, 2015) 6; Mathiba *The Role of the Auditor-General in the Promotion of Efficient Financial Management in Municipalities* 61.

municipal manager as required by the *Municipal Finance Management Act*.⁶⁹⁰ This affected the ability of the municipal council to play an effective oversight role in the municipality. This resulted in control deficiencies and material misstatements in the financial statements of the Mahikeng local municipality.⁶⁹¹

The eventual implementation of the audit recommendations in a municipality is a shared responsibility among the municipal council, municipal manager and the municipal workforce.⁶⁹² The Auditor General in his 2017-2018 report indicated that the audit outcomes in the North West have been deteriorating in accountability since 2013.⁶⁹³ This is as a result of the blatant disregard to implement the Auditor General's recommendations and a lack of accountability and good corporate governance measures in place to ensure good governance in Mahikeng local municipality.

5.3.1 Non-Compliance with Legislation

5.3.1.1 Unauthorised Expenditure

Unauthorised expenditure is an expenditure incurred by a municipality without provision having been made for it in the budget approved by the municipal council or which does not meet the conditions of a grant.⁶⁹⁴ The *Municipal Finance Management Act*⁶⁹⁵ requires the disclosure of unauthorised expenditure from the municipal manager incurred within the Mahikeng local municipality. This is to ensure openness and transparency within the municipality and to determine whether such unauthorised expenditure is recoverable.⁶⁹⁶ The Auditor General was unable to obtain sufficient appropriate audit evidence that the municipal manager has properly

⁶⁹⁰ Section 129 of the *Municipal Finance Management Act*.

⁶⁹¹ The Auditor General indicated in the 2018-2019 audit report that there were financial misstatements in the financial statements of the Mahikeng local municipality.

⁶⁹² Mathiba *The Role of the Auditor-General in the Promotion of Efficient Financial Management in Municipalities* 61.

⁶⁹³ Auditor General "Auditor Generals's Report Consolidated General Report on the Local Government Audit Outcomes (2017/18)" 1, 11.

⁶⁹⁴ Section 1 of the *Municipal Finance Management Act*.

⁶⁹⁵ Section 125 of the *Municipal Financial Management Act*; Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 1, 3.

⁶⁹⁶ Section 125(2)(d)(i) of the *Municipal Finance Management Act*.

calculated and disclosed unauthorised expenditure.⁶⁹⁷ This was because the municipality did not have adequate systems to monitor and detect unauthorised expenditure.⁶⁹⁸ Furthermore, reasonable steps were not taken to prevent such unauthorised expenditure as required by *Municipal Finance Management Act*.⁶⁹⁹ The researcher argues that such unauthorised expenditures within the Mahikeng local municipality are due to poor systems in place which monitor and detect unauthorised expenditure. The researcher further contends that the unauthorised expenditure is as a result of lack of accountability and non-compliance with the *Municipal Finance Management Act*⁷⁰⁰ and the *Systems Act*.

5.3.1.2 Irregular Expenditure

An irregular expenditure refers to an expenditure that was not incurred in compliance with applicable legislation such as the *Municipal Finance Management Act*, *Systems Act*, *Public Office-Bearers Act*⁷⁰¹ and same was not condoned in terms of the latter Acts. The *Municipal Finance Management Act*⁷⁰² requires the municipal manager for Mahikeng local municipality to disclose irregular expenditure incurred within the municipality. There has been irregular expenditure in the current and previous years in the municipality which contravened the supply chain management (SCM) requirements and were not included in the irregular expenditure disclosed.⁷⁰³ The Auditor General further indicated that the Mahikeng local municipality did not quantify the extent of irregular expenditure disclosed in the financial statements

⁶⁹⁷ Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 3.

⁶⁹⁸ Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 3.

⁶⁹⁹ Section 62(1)(d) of the *Municipal Finance Management Act*; Botlhoko TS Promoting Effective Financial Accountability in Local Government in the North West Province: Developing Operational Guidelines for Municipal Public Accounts Committees (LLD- dissertation Central University of Technology, Free State 2017) 1, 59.

⁷⁰⁰ Section 62(1)(d) of the *Municipal Finance Management Act*.

⁷⁰¹ 20 of 1998 (Public Office-Bearers Act).

⁷⁰² Section 125 of the *Municipal Finance Management Act*; Auditor General "Report of the auditor-general to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 3; Mokgwamme "The Mahikeng Local Municipality Annual Report 2018/19" 344.

⁷⁰³ Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 7.

amounting to the irregular expenditure of R970 094 162.⁷⁰⁴ According to the Auditor General's report, no reasonable steps were taken by the municipal manager to prevent irregular expenditure in the municipality as required by *Municipal Finance Management Act*.⁷⁰⁵ The researcher submits that the municipal manager must be held into account by the municipal council for not taking reasonable steps to prevent the irregular expenditure in the municipality. The municipal manager ought to take reasonable steps to prevent irregular expenditure from occurring in Mahikeng local municipality or hold accountable the person who has caused such irregular expenditure. The municipal manager must recover such irregular expenditures within the Mahikeng local municipality from the person or official who has caused such irregular expenditure.⁷⁰⁶

The majority of the disclosed irregular expenditure in Mahikeng local municipality was caused by not following a competitive bidding process.⁷⁰⁷ The Auditor General also reported similar non-compliance in the previous year.⁷⁰⁸ The researcher maintains that the accounting officer must ensure compliance with the SCM policies and that proper bidding processes are followed. This prevents irregular expenditures from incurring in the Mahikeng local municipality.

5.3.1.3 Fruitless and Wasteful Expenditure

Fruitless and wasteful expenditure means an expenditure that was made in vain and would have been avoided had reasonable care been exercised by the municipal manager.⁷⁰⁹ An official of the municipality, who made or authorised a fruitless and wasteful expenditure, is liable for that expenditure.⁷¹⁰ This is to ensure accountability

⁷⁰⁴ Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 7-8.

⁷⁰⁵ Section 62(1)(d) of the *Municipal Finance Management Act*; Botlhoko *Promoting Effective Financial Accountability in Local Government in the North West Province* 59.

⁷⁰⁶ Section 32(2) of the *Municipal Finance Management Act*.

⁷⁰⁷ Reg 19(a) in GN R31 in GG 40553 20 January 2017, requires the Mahikeng local municipality to follow a competitive bidding process; see also Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 6.

⁷⁰⁸ Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 6.

⁷⁰⁹ Section 1 of the *Municipal Finance Management Act*.

⁷¹⁰ Section 32(1)(d) of the *Municipal Finance Management Act*.

in the Mahikeng local municipality and for the municipality to recover such fruitless and wasteful expenditures from the person liable for that expenditure. This also promotes an ethical culture in the municipality in which the municipal employees uphold the highest standard of ethics. The Auditor General indicated in the 2018-2019 report that there were fruitless and wasteful expenditures of R 4 160 755 incurred in the Mahikeng local municipality in the year 2018-2019.⁷¹¹ The Auditor General also indicated that fruitless and wasteful expenditure of R12 010 502 for 2017-2018 financial year was not dealt with in accordance with the *Municipal Finance Management Act*.⁷¹² This shows that no reasonable steps were taken by the municipal manager to prevent such fruitless and wasteful expenditure from occurring in Mahikeng local municipality during the financial years 2017-2018 and 2018-2019 as required by the *Municipal Finance Management Act*.⁷¹³ The majority of the disclosed fruitless and wasteful expenditure in Mahikeng local municipality was caused by interest and penalties on late payments to suppliers.

5.3.2 Lack of Proper Procurement and Contract Management

The *Municipal Finance Management Act*⁷¹⁴ requires the municipal manager to take all reasonable steps to ensure that the Mahikeng local municipality has an SCM policy and implements such a policy. This is to ensure that goods and services are procured in a manner that is fair, equitable, transparent, cost-effective and competitive.⁷¹⁵ The *Municipal Finance Management Act*⁷¹⁶ also requires that there must be particular processes, procedures, and mechanism to be followed when awarding contracts. However, the Auditor General indicated in the 2018-2019 report,⁷¹⁷ that there was no appropriate audit evidence to show that all contracts in Mahikeng local municipality were awarded in accordance with the legislative

⁷¹¹ Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 6.

⁷¹² Section 32 of the *Municipal Finance Management Act*; Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 6.

⁷¹³ Sections 32 and 62(1)(d) of the *Municipal Finance Management Act*.

⁷¹⁴ Section 62(1)(f)(iv) of the *Municipal Finance Management Act*.

⁷¹⁵ Section 217 of the *Constitution of South Africa*.

⁷¹⁶ Section 112(1)(b) and (c) of the *Municipal Finance Management Act*.

⁷¹⁷ Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 7.

requirements as the procurement files could not be provided to the auditors by the municipal manager. The Auditor General also indicated that some of the goods and services with a transaction value below R200 000 were procured without obtaining the required price quotations, in contravention of SCM regulations.⁷¹⁸ Similar non-compliance was also reported by the Auditor General in the prior year in Mahikeng local municipality.⁷¹⁹ The researcher is of the view that the municipal manager is failing to run an accountable administration and provide evidence for his/her decisions.

In addition to the above mentioned, the Auditor General revealed that some of the quotations were accepted from prospective providers who were not on the list of accredited prospective providers and did not meet the listing requirements prescribed by the SCM policy, which was in contravention of SCM regulations.⁷²⁰ Furthermore, some of the quotations were accepted from bidders who did not submit a declaration on whether they are employed by the state or connected to any person employed by the state, as required by SCM regulations.⁷²¹ Similar non-compliance was also reported by the Auditor General in the prior year in Mahikeng local municipality. Some of the contracts were awarded through competitive bidding processes that were not adjudicated by the bid adjudication committee as required by SCM regulations.⁷²²

The 2018-2019 Auditor General's report revealed that tenders in Mahikeng local municipality were awarded to service providers who were in the service of the municipality and they failed to declare that they were in the service of the

⁷¹⁸ Reg 17(a) and 17(c) in GN R31 in GG 40553 20 January 2017; see also Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 7.

⁷¹⁹ Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 7.

⁷²⁰ Reg 16(b) and 17(b) in GN R31 in GG 40553 20 January 2017; Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 7.

⁷²¹ Reg 13(c) in GN R31 in GG 40553 20 January 2017; Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 8.

⁷²² Reg 29(1) in GN R31 in GG 40553 20 January 2017; Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 8.

municipality. This was in contravention with the *Municipal Finance Management Act* and the SCM regulations.⁷²³ Some of the awards were made to service providers who were in service of other state institutions. This was also in contravention with the *Municipal Finance Management Act* and SCM regulations.⁷²⁴ The 2018-2019 report of the Auditor General evidences that similar awards were identified in the previous year and no significant steps were taken to prevent or combat the abuse of the SCM process, as required by SCM regulations.⁷²⁵ The researcher is of the view that this is clear evidence of fraud and corruption happening in the Mahikeng local municipality and no one is to date, held into account.

The Auditor General further revealed that persons who are in the service of the Mahikeng local municipality, who had a private or business interest in the contracts awarded by the municipality, failed to disclose such interests. This was not only in contravention with the SCM regulations but also with the code of conduct for councillors issued in terms of the *Systems Act*.⁷²⁶

Furthermore, the Auditor General revealed that the persons who are in the service of the Mahikeng local municipality and whose close family members had a private or business interest in contracts awarded by the municipality, failed to disclose such interest. This was also in contravention with SCM regulations and the code of conduct for councilors issued in terms of the *Systems Act*.⁷²⁷ The Auditor General indicated that the SCM officials in the Mahikeng local municipality who had a private or business interest in contracts that were awarded by the municipality participated

⁷²³ Section 112(j) of the *Municipal Finance Management Act*; Reg 13(c) and 44 in GN R31 in GG 40553 20 January 2017; Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 8.

⁷²⁴ Section 112(j) of the *Municipal Finance Management Act*; Reg 13(c) and 44 in GN R31 in GG 40553 20 January 2017; Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 8.

⁷²⁵ Reg 38(1) in GN R31 in GG 40553 20 January 2017; Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 8.

⁷²⁶ Reg 46(2)(e) in GN R31 in GG 40553 20 January 2017; see also section 54 of the *Systems Act* which refers to the Code of conduct for councillors contained in schedule 1 *Systems Act*; Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 8.

⁷²⁷ Reg 46(2)(e) in GN R31 in GG 40553 20 January 2017; see also section 54 and schedule 1 of the *Systems Act*; Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 8.

in the processes relating to that contract. This was in contravention with the SCM regulations.⁷²⁸ The researcher argues that contravention with the SCM policies is a clear indication of maladministration, fraud and corruption in the Mahikeng local municipality. It is evident that the municipal manager is not accountable nor holding the committees such as the SCM bid adjudication committees accountable. The municipal council is also not holding the municipal manager accountable nor playing an effective oversight role.

5.3.3 Lack of Oversight

Lack of oversight refers to lack of and poor internal audit monitoring processes in the Mahikeng local municipality. The *Municipal Finance Management Act*⁷²⁹ requires the municipal council of the municipality to consider the annual report of the municipality and adopt an oversight report containing the council's comments on the annual report. This is to assess the performance of the municipality, provide a record of the municipality's activities, provide information that supports the revenue and expenditure decisions made and to promote accountability to the local community for the decisions made. The oversight report must include a statement whether the council has approved or rejected the annual report with or without reservations or has referred the annual report back for revision of those components that can be revised.⁷³⁰ The municipal council of the Mahikeng local municipality failed to adopt an oversight containing the council's resolutions on the 2017-2018 annual report within the prescribed timeline.⁷³¹ The Auditor General also noted that the municipal council in the municipality generally failed to adequately oversee the financial and performance reporting, which resulted in the material misstatements and control deficiencies.⁷³²

⁷²⁸ Reg 46(2)(f) in GN R31 in GG 40553 20 January 2017; Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 8.

⁷²⁹ Section 129(1) of the *Municipal Finance Management Act*.

⁷³⁰ Section 129(1)(a)-(c) of the *Municipal Finance Management Act*.

⁷³¹ Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 6; Mathiba *The Role of the Auditor-General in the Promotion of Efficient Financial Management in Municipalities* 61.

⁷³² Mathiba *The Role of the Auditor-General in the Promotion of Efficient Financial Management in Municipalities* 61

The municipal council and municipal manager for Mahikeng local municipality failed to provide adequate oversight and monitoring of the control environment, financial performance, and implementation of consequence management over recurring SCM transgressions as well as the implementation of the post-audit action plan.⁷³³ This is evidenced by the Auditor General's 2018-2019 report.

Immediately after an annual report is tabled in the council of the Mahikeng local municipality, the accounting officer of the municipality is expected to make the annual report public and invite the local community to submit representations in connection with the annual report.⁷³⁴ The accounting officer of the Mahikeng local municipality failed to make public, the 2017-2018 annual report of the municipality as required by the latter section of the *Municipal Finance Management Act*.⁷³⁵

The Audit Committee and the Municipal Public Accounts Committee (MPAC) within the Mahikeng local municipality are not effective since they are dysfunctional.⁷³⁶ Therefore, there is a need to revitalise and strengthen the roles of the committees to ensure that these committees play an effective oversight role in the Mahikeng local municipality.

It must be noted that the recommendations by the Auditor General for the past years have been ignored by the Municipal council and the municipal manager for Mahikeng local municipality.⁷³⁷ However, there is an infant development in terms of a regulatory framework which is the *Public Audit Act*⁷³⁸ which gave the Auditor General more powers which include, for example, recovering a financial loss incurred

⁷³³ Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 9.

⁷³⁴ Section 129(3) of the *Municipal Finance Management Act*; see also section 21A of the *Systems Act*.

⁷³⁵ Section 129(1) and (3) of the *Municipal Finance Management Act*; Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 6.

⁷³⁶ Gaedie IJ *Assessment of Basic Service Delivery in Mafikeng Local Municipality* (unpublished Masters Mini dissertation North West University 2015) 1, 6; Mathiba *The Role of the Auditor-General in the Promotion of Efficient Financial Management in Municipalities* 61.

⁷³⁷ The Auditor General, Kimi Makwetu indicated in the 2018/19 report that "the audit outcomes of North West, the worst since 2012-13, clearly indicated the deteriorating accountability, a blatant disregard of our messages and recommendations, complacency and a lack of commitment to decisively address key areas of concern as well as a lack of political will to effect consequences".

⁷³⁸ 25 of 2014 (as amended) (*Public Audit Amendment Act*), see section 5A(3).

by the municipality from the responsible person. This can be done by a directive from the Auditor General to the accounting officer to determine the amount of loss and to recover such loss in terms of applicable legislation such as the *Public Audit Act*.⁷³⁹

The municipal council has also failed to play an oversight role within the municipality. This is apparent as the municipal council has, in many instances, failed to carry an investigation in line with the *Municipal Finance Management Act*⁷⁴⁰ to determine if any official was liable, for *inter alia* R34 630 851.00 irregular expenditure, as well as fruitless and wasteful expenditures incurred by the municipality. Whereas municipal officials such as the CFO, report to the municipal manager, the municipal council must have an oversight in respect of all the projects in the municipality. The municipal council must ensure that the municipal manager implements the IDP, municipal prescripts such as the *Municipal Finance Management Act*, municipal by-laws and the Auditor General's recommendations.

The researcher argues that the municipal council of the Mahikeng local municipality is not playing an effective oversight role due to corruption happening in the municipality. The researcher further argues that some members of the council may be benefitting from the contracts awarded by the municipality directly or indirectly as proper SCM processes and procedures are not being followed.

5.3.4 Lack of Consequence Management

Consequence management refers to actions taken to maintain or restore essential services to the community. The *Municipal Finance Management Act*⁷⁴¹ provides that there must be an investigation for an unauthorised, irregular, fruitless and wasteful expenditure incurred by the municipality. This is to ensure that the municipality recovers such unauthorised, irregular, fruitless and wasteful expenditures from the

⁷³⁹ Section 5A of the *Public Audit Act*. However, this is yet to be seen to be done in a municipality. The Auditor General has the powers to refer any matter for further investigations by the relevant authority, this can also include the remedy to apply to court, as an interested person, to have the veil pierced in a municipality, in exceptional circumstances, where the municipality is used as a façade or fraud.

⁷⁴⁰ Section 32(2)(b) of the *Municipal Finance Management Act*.

⁷⁴¹ Section 32 of the *Municipal Finance Management Act*.

responsible person.⁷⁴² In the case of Mahikeng local municipality, no investigations were conducted to hold anyone liable for such expenditures. The Auditor General also indicated that the leadership of municipality did not provide adequate oversight and the implementation of consequence management over recurring SCM transgressions.⁷⁴³

5.3.5 Lack of Proper Knowledge, Skills and Capacity

The most fundamental aspect of running an effective municipality is to appoint or employ competent staff.⁷⁴⁴ It is alleged that some municipalities have made it almost a practice to appoint top officials in strategic positions such as chief financial officers and supply chain managers who only have matric as their highest qualification.⁷⁴⁵ As a result, the municipality suffers from the lack of competent and expert skills to effect proper service delivery to the people of Mahikeng.⁷⁴⁶ Thus, the lack of skilled and capacitated personnel is one of the challenges hindering proper accountability in Mahikeng local municipality. The Auditor General also indicated in the 2018-2019 report that the municipality failed to develop the appropriate systems and procedures to monitor, measure and evaluate staff performance as required by the *Systems Act*.⁷⁴⁷ The Auditor General also indicated in the 2018-2019 report that the Mahikeng local municipality did not have the requisite skills and capacity required to implement the policies and procedures and are reliant on consultants to prepare financial statements.⁷⁴⁸

⁷⁴² Section 32(2) of the *Municipal Finance Management Act*.

⁷⁴³ Auditor General "Report of the auditor-general to the North West provincial legislature and the council on the Mahikeng Local Municipality- 2018/19" 1, 7.

⁷⁴⁴ Bogopa MJ "Challenges of Local Government in South Africa" 2013 *South African Association of Public Administration and Management* 112, 112.

⁷⁴⁵ Manyaka RK and Madzivandhila TS "The Implementation of Integrated Development Plan for Service Delivery Purpose in South African Municipalities: Are we There Yet" 2013 *South African Association of Public Administration and Management* 174, 182; Manyaka and Madzivandhila 2013 *South African Association of Public Administration and Management* 182; Mathiba GL "Time to clean out the Augean Stables of local government" *Daily Maverick* (28 May 2019) 1.

⁷⁴⁶ Theletsane KI "Corruption in Municipalities: A Leadership Crisis" 2013 *South African Association of Public Administration and Management* 134,140.

⁷⁴⁷ Section 67(1d) of the *Systems Act*; Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 7.

⁷⁴⁸ Auditor General "Report of the auditor-general to the North West provincial legislature and the council on the Mahikeng Local Municipality- 2018/19" 1, 7.

The Mahikeng local municipality failed to keep a competent workforce in key positions of finance, procurement and compliance units. There is a norm in municipalities of employing people against recruitment policies and not on the basis of their experience, competency, and qualifications but based on their loyalty to the ruling party in the municipality. This is referred to as the cadre deployment in its political term.⁷⁴⁹ Cadre deployment is an undermining factor for the dream and development of local government. The researcher argues that the appointment on the grounds of political affiliation/loyalty and not skills, knowledge, experience and capacity of a person, can undermine certain fundamental objectives of good governance and hamper with service delivery. Such appointments do not only affect the efficiency of administration in Mahikeng local municipality but also causes a financial strain since the municipality must rely on external consultants for certain tasks.

5.3.6 Lack of, or Prolonged Investigations

The Directorate of Priority Crime Investigation (Hawks) undertook an investigation in Mahikeng local municipality in 2019 into the alleged irregular sale of property to an external party without following the correct disposal processes which was still in progress at the reporting date by the Auditor General.⁷⁵⁰ The municipal council of the Mahikeng local municipality also initiated an investigation into the alleged financial misconduct, maladministration, fraud and corruption against the previous municipal manager. The investigation by an independent law firm was still in progress at the reporting date. The researcher argues that investigations in the Mahikeng local municipality regarding material irregularities or financial misconduct are prolonged or are never concluded. Thus, it becomes a challenge for the municipality to hold people accountable on time. Moreover, the more the investigations are prolonged, the more costly the investigations processes become. The researcher argues further that many people who are in the service of the

⁷⁴⁹ Twala C "The ANC and the Cadre Deployment Policy in the Post-Apartheid South Africa: A Product of Democratic Centralisation or a Recipe for a Constitutional Crisis?" 2014 *Journal of Social Sciences* 159-165.

⁷⁵⁰ Auditor General "Report of the auditor-general to the North West provincial legislature and the council on the Mahikeng Local Municipality- 2018/19" 9.

Mahikeng local municipality benefit either directly or indirectly and this is the reason for lack of or prolonged investigations.

5.3.7 Lack of Accountability

Accountability is a central pillar to the success of municipalities in South Africa. However, management in Mahikeng local municipality did not adequately prepare regular, accurate and complete financial reports that are supported and evidenced by reliable information. Furthermore, management in Mahikeng local municipality did not adequately review and monitor compliance with applicable legislation. The researcher argues that this is as a result of corruption ensuing within the municipality. The researcher further submits that without proper transparent and accountable systems in Mahikeng local municipality, the municipality runs the danger of being entangled with an increase in the misuse of funds.⁷⁵¹

5.3.8 Lack of Political Will

The support from political figures is needed to enforce certain policies in a municipality. In this case, the Mahikeng local municipality needs the municipal council's buy in to achieve the municipal objectives such as providing services to the community. In Mahikeng local municipality, a municipal council consists of different political parties, and such political parties must have a political mandate to serve the community, and the mandate must be clear. The main objective of such a mandate must be to provide service delivery. Failure to have a clear mandate from politicians can hamper service delivery in the municipality. The researcher argues that political will is often present when certain political office bearers are going to benefit.

5.3.9 Political Interference

The political leadership failed to set the right tone for clean administration by creating an environment conducive to accountability, good governance and the

⁷⁵¹ Amber IM and Badenhorst-Weiss JA "Procurement Challenges in the South African Public Sector" 2012 *Journal of Transport and Supply Chain Management* 242, 251.

effecting of consequence management in municipalities.⁷⁵² The intervention by the provincial treasury and cooperative governance department was riddled with political infighting and caused further instability within the municipalities, which also had a negative impact on service delivery. The researcher is of the view that clarity is needed between the roles of municipal councillors and administration.⁷⁵³

Accountability failures by senior management, municipal managers, mayors, internal audit units, audit committees, municipal public accounts committees and councils are indicative of a systemic breakdown in the discipline of financial control. The researcher argues that running of the administration of the municipal is influenced by politicians and political mandate rather than the will of the people. The interests of the politicians are prioritised rather than the needs of the community of the Mahikeng local municipality. The interference by politicians has a negative influence on the accountability of the municipal manager.

5.4 Challenges Affecting the Accountability of the Municipal Manager

5.4.1 Failure to Account

The municipal manager for Mahikeng local municipality is the accounting officer of the municipality, and as such, he or she must carry out the duties and functions of an accounting officer.⁷⁵⁴ The municipal manager is required by the *Municipal Finance Management Act*⁷⁵⁵ to prepare proper records for all the assets, liabilities, resources and finances of the Mahikeng local municipality.⁷⁵⁶ This is to ensure that the municipality is able to provide services to the community within its financial capacity.⁷⁵⁷ The Mahikeng local municipality has been obtaining disclaimers and qualified opinions since 2013 to date. This is an indication that the municipal

⁷⁵² Auditor General "MFMA Consolidated General Report on Local Government Audit Outcomes – 2018/19" 1, 15.

⁷⁵³ Horn GS and Raga K "Municipal Supply Chain Management Challenges and Solutions: An Empirical Study" 2012 *Administratio Publica* 71, 88.

⁷⁵⁴ Section 54A of the *Systems Act*; see also section 60(a) of the *Municipal Finance Management Act*; Thornhill C "The Executive Mayor/Municipal Manager Interface" 2008 *Journal of Public Administration* 725, 731.

⁷⁵⁵ Mathiba *The Role of the Auditor-General in the Promotion of Efficient Financial Management in Municipalities* 63.

⁷⁵⁶ Section 60(a) of the *Municipal Finance Management Act*.

⁷⁵⁷ Section 152(2) of the *Constitution of South Africa*.

manager has been failing to be accountable for all the assets and liabilities of the municipality and has also been failing to provide the Auditor General with a fair presentation of accurate financial records of the municipality. Thus, the municipal manager for Mahikeng local municipal is failing to account for municipal assets and consequently to uphold the principles of good corporate governance in governing the affairs of the municipality.

5.4.2 Failure to Comply with Legislation

The municipal manager has failed to comply with the *Municipal Finance Management Act*,⁷⁵⁸ which requires him/her to recover unauthorised, irregular, fruitless and wasteful expenditure from municipal official liable for it unless such expenditure is written-off or declared irrecoverable by the municipal council following the investigations. There are no investigations that were conducted in Mahikeng local municipality regarding material irregularities to ensure that those who commit financial misconduct are held into account and are liable for such financial misconduct or material irregularities.

5.4.3 Lack of Ethical Behaviour/Non-Compliance with Ethical Standards

The municipal manager for Mahikeng local municipality is expected to act with honesty, integrity, fidelity and in the best interest of the municipality in managing its financial affairs.⁷⁵⁹ The municipal manager can achieve this by taking reasonable steps to ensure that the resources of the municipality are used effectively, efficiently and that unauthorised, irregular, or fruitless and wasteful expenditure and other losses are prevented.⁷⁶⁰ The municipal manager for Mahikeng local municipality must ensure compliance with legislation and conform to the highest standards of ethics. Unfortunately, the former municipal managers for the municipality did not uphold ethics in running the administration of the municipality. This is evidenced by the fact that, in 2014, the municipal manager was suspended following his failure to account for 1.5 billion that was an unauthorised and irregular expenditure incurred by the

⁷⁵⁸ Section 32(2)(b) of the *Municipal Finance Management Act*.

⁷⁵⁹ Section 61(1)(a) of the *Municipal Finance Management Act*.

⁷⁶⁰ Section 62(1)(a) and (d) of the *Municipal Finance Management Act*.

municipality over a single financial year (2013-2014).⁷⁶¹ In 2018, another municipal manager was suspended due to the Venda Building Society (VBS) scandal. The said municipal manager took a unilateral decision to invest an amount of R 83 million in the VBS bank which was in contravention with the provisions of the *Municipal Finance Management Act*. The municipal manager invested money into VBS mutual bank which was not registered as a bank in terms of the *Banks Act*.⁷⁶² This is an indication that the municipal manager did not follow internal control systems to guard against fraud, theft and financial mismanagement.⁷⁶³

5.4.4 Municipality Having too Many Creditors

One of the major challenges is that any incoming municipal manager finds the municipality already having too many creditors and not being able to meet its obligations. The Mahikeng local municipality has too many creditors, such as Eskom and Sedibeng Water Board. As a result, the municipality is failing to settle its debts timeously, and this is in contravention with the *Municipal Finance Management Act*.⁷⁶⁴ In 2018, the Mahikeng local municipality owed Sedibeng Water Board an amount estimated above R 50 million.⁷⁶⁵ In 2017, the municipal manager admitted his inability to ensure consequence management in respect of the R 144 million illegal sales of land abandoned housing project in Mahikeng.⁷⁶⁶ The researcher argues that the municipal manager has to start implementing SCM policies with care. The municipal manager must ensure that municipal rates and taxes are collected from the community consistently to generate revenue. Failure to collect the municipal rates and taxes will result in the municipality not being able to settle its

⁷⁶¹ Mathiba *The Role of the Auditor-General in the Promotion of Efficient Financial Management in Municipalities* 64.

⁷⁶² Banks Act 94 of 1990 (Banks Act) see section 11.

⁷⁶³ Section 67(1)(b) of the *Municipal Finance Management Act*.

⁷⁶⁴ Section 65(1)(e) of the *Municipal Finance Management Act* which requires the municipal manager to take all reasonable steps to ensure that all money owing by the municipality be paid within 30 days of receiving the relevant invoice or statement, unless prescribed otherwise for certain categories of expenditure.

⁷⁶⁵ Department of Water & Sanitation *National Council of Provinces: Question 152 for Oral Reply* (2018) available at <http://www.dwa.gov.za/communications/Q&A/2018/NCOP%20152.pdf> accessed 25 July 2020; Mathiba *The Role of the Auditor-General in the Promotion of Efficient Financial Management in Municipalities* 58.

⁷⁶⁶ Mathiba *The Role of the Auditor-General in the Promotion of Efficient Financial Management in Municipalities* 64.

debts. Furthermore, the municipal manager has to ensure that municipal officials responsible for causing any unauthorised, irregular and fruitless and expenditure are held accountable and liable for such expenditure.

5.4.5 Failure to Follow Proper Communication Channel

The proper and effective accountability can be achieved through a shared responsibility within the Mahikeng local municipality among the municipal officials. This entails that the municipal council, municipal manager and the entire municipal officials must work together to achieve the constitutional obligations to provide service delivery to the community of Mahikeng and to promote good governance. The major problem is that the municipal officials are not working together in Mahikeng local municipality. In the case of *Mahikeng Local Municipality v Famate Infocast (Pty) Limited*,⁷⁶⁷ there was no meaningful communication between the office of the municipal manager and the finance department.

5.4.5.1 Facts of the Case

During April 2007, the appellant, Mahikeng local municipality, invited interested parties to submit written proposals for a payment incentive scheme.⁷⁶⁸ On 25 May 2007, the respondent, Famate Infocast (Pty) Limited (Famate) submitted its proposal to Mahikeng local Municipality to the total costs of R1 725 000.00.⁷⁶⁹ On 30 April 2008, the municipality issued a letter addressed to Famate, in which it accepted Famate's proposal.⁷⁷⁰

The managing director of Famate held a meeting with the two officials of the finance department of the Mahikeng local municipality regarding the information needed and way forward.⁷⁷¹ Subsequent to that meeting, the director of Famate submitted the

⁷⁶⁷ *Mahikeng Local Municipality v Famate Infocast (Pty) Limited CIV APP FB 11/2019 (Famate case)* para 4.

⁷⁶⁸ *Famate case* para 2.

⁷⁶⁹ *Famate case* para 3.

⁷⁷⁰ *Famate* para 3; The contents of the letter read as follows: "This served to confirm that a proposal to implement an Incentive Scheme has been awarded to you as per your proposal dated 25th May 2007. You will be appointed on a 12 months contracts (01 June 2008 to 31 May 2009) and at a later stage we will have to enter into a service level Agreement.

⁷⁷¹ *Famate case* para 3.

Service Level Agreement (SLA) to the Chief Financial Officer (CFO) of the Mahikeng local municipality.⁷⁷² However, the SLA was never signed although no queries were received and despite follow-ups being made. Despite the fact that the SLA was not signed, Famate was given data on the resident's payment profile and was also given the list of Municipality's debtors to do the work.⁷⁷³ The director of Famate sought the intervention of the Mayor and that of the municipal manager, but the desired results were not achieved.⁷⁷⁴

The municipal manager for Mahikeng local municipality refused to sign the SLA as he was not informed prior. This shows that there was no proper communication channels and procedures followed by the two officials to ensure that the municipal manager is informed about the purported contract between Famate and the Mahikeng local municipality. It is only the municipal manager who has the authority to sign the SLA. It was only at the end of the contract term that the director of Famate approached the municipal manager for signature, who refused to sign the SLA as it was not communicated with him initially.

5.4.5.2 Legal Question

The court, in the above mentioned case determined two issues. Firstly, the court had to determine whether a contract exists between the Mahikeng local municipality and Famate.⁷⁷⁵ Secondly, was there fictional fulfilment.⁷⁷⁶ This study does not discuss the issue of fictional fulfilment as it is not relevant to the research in question.

5.4.5.3 Court's Findings

The appeal was upheld, and the Plaintiff's claim was dismissed with costs as the court found that no agreement exists between Mahikeng local municipality and

⁷⁷² *Famate* case para 5.

⁷⁷³ *Famate* case para 4.

⁷⁷⁴ *Famate* case para 5.

⁷⁷⁵ *Famate* case para 13.

⁷⁷⁶ *Famate* case para 13.

Famate.⁷⁷⁷ The municipal manager did not sign the SLA, therefore, no contractual relationship could exist without the existence of the SLA.⁷⁷⁸

5.4.5.4 Rationale

The court interpreted the *Public Finance Management Act*⁷⁷⁹ which states that only the accounting officer can enter into contracts for and on behalf of the Mahikeng local municipality. The researcher agrees that the accounting officer is the head of administration of the municipality and he or she must ensure that all contractual obligations within the municipality are settled within the prescribed or agreed period.⁷⁸⁰ Mr Smit, who was the then municipal manager for Mahikeng local municipality, testified that he did not enter into a contract with Famate.⁷⁸¹ The *Municipal Finance Management Act*⁷⁸² stipulates that an agreement procured through the SCM system of a municipality must be in writing and must stipulate the terms and conditions of the agreement. The court held that the language of the *latter* section of the *Municipal Finance Management Act* is clear and unambiguous.⁷⁸³ It is imperative that a contract for procurement of goods and services concluded by a municipality must be in writing and must stipulate the terms and conditions as set out in this piece of legislation. These provisions are peremptory and mandatory. An agreement which fails to comply with this provision is invalid and unlawful.⁷⁸⁴ The reliance on an oral agreement concluded between the parties is bad in law, because it does not comply with the legislature prescripts. This destroyed the case of Famate. This is because the case pleaded by Famate in its amended particulars of claim is based on an oral agreement entered into between Mr Mametja on behalf of Famate and Ms Modibela and Mr Mphologela on behalf of the Municipality.⁷⁸⁵

⁷⁷⁷ *Famate* case para 24.

⁷⁷⁸ *Famate* case para 17.

⁷⁷⁹ 1 of 1999 (*PFMA*), see section 38 (1); *Famate* case para 19.

⁷⁸⁰ Sections 65(1) and (2)(e) of the *Municipal Finance Management Act*; see also section 38(1)(f) of the *Public Finance Management Act*.

⁷⁸¹ *Famate* case para 19.

⁷⁸² Section 116(1) of the *Municipal Finance Management Act*.

⁷⁸³ Section 116(1) of the *Municipal Finance Management Act*.

⁷⁸⁴ *Famate* case para 20.

⁷⁸⁵ *Famate* case para 20.

The director of Famate testified that he did not communicate initially with Mr Smit in order to ask him to sign the SLA and that Mr Smit refused to sign it.⁷⁸⁶ The court held that municipal manager was the only relevant official of the Municipality that could sign the SLA.⁷⁸⁷ Therefore, any consultations and/or negotiations with other officials of the Municipality do not help Famate's case at all. These officials could not sign the SLA and bind the Municipality to a contract. No evidence was presented that Mr Smit, who had the authority to sign the SLA and bind the Municipality contractually frustrated the signing of the SLA.⁷⁸⁸

5.4.5.5 Case Analysis

The author is of the view that, even though the court ruled in favour of the Mahikeng local municipality, it is apparent that there was no meaningful communication between the office of the CFO and the office of the municipal manager.⁷⁸⁹ This is due to the fact that the office of the CFO accepted proposals from the Famate Company and did not inform the municipal manager. The CFO also received the SLA drafted by the Famate director, but they did not inform the municipal manager regarding same. Furthermore, the Famate Company also rendered the services to the Mahikeng local municipality, but the municipal manager did not have knowledge of such. The CFO cannot enter into contracts without the knowledge of the municipal manager as the accounting officer of the municipality.⁷⁹⁰ The CFO acts under delegated powers to advise and assist the accounting officer in carrying out a wide range of financial responsibilities⁷⁹¹ such as financial reporting, budget planning and monitoring implementation plan for internal and external audit recommendations.⁷⁹² The relevance of this case is to demonstrate that the miscommunication of municipal officials and the accounting officer, will cause

⁷⁸⁶ *Famate* case para 22.

⁷⁸⁷ *Famate* case para 22.

⁷⁸⁸ *Famate* case para 22.

⁷⁸⁹ Section 81(2) of the *Municipal Finance Management Act* provides that the CFO of a municipality is accountable to the accounting officer for the performance his or her duties.

⁷⁹⁰ Section 78(1)(a) of the *Municipal Finance Management Act*; see also section 53, 55 and 81 of the *Systems Act*. The CFO of a municipality must advise the accounting officer on the exercise of powers and duties assigned to the accounting officer.

⁷⁹¹ Section 63 of the *Systems Act*; see also section 81(1) of the *Municipal Finance Management Act*.

⁷⁹² Section 81(1)(d)-(e) of the *Municipal Finance Management Act*; Mathiba *The Role of the Auditor-General in the Promotion of Efficient Financial Management in Municipalities* 37.

unnecessary consultations and litigation, which cause the municipality to incur unnecessary expenses. This also shows that there are municipal officials who enter into oral agreements or promise people tenders in the municipality. In the labour court case of *Mafikeng Local Municipality v South African Local Government Bargaining Council and Others*,⁷⁹³ the claimants were informed that they should report for duty whereas the municipal manager never approved their appointments. The claimants were not presented with any offers of employment, and no details pertaining to their appointment were agreed upon. The court dismissed the claim of the claimants in that the municipal manager did not approve their appointments and no employment relationship existed between the municipality and the claimants.⁷⁹⁴ In the absence of an employment relationship, no unfair labour practice or dismissal could occur.⁷⁹⁵ The author argues that the matter ended up in the labour court because of lack of communication in the municipality. The claimants were informed that they should report to work without the municipal manager's approval, and this was termed to be an administration error.⁷⁹⁶

5.5 Consequences for Lack of Accountability of Municipal Manager for Mahikeng Local Municipality

The municipal manager for Mahikeng local municipality commits an act of financial misconduct if he or she deliberately or negligently contravenes a provision of the *Municipal Finance Management Act*.⁷⁹⁷ The municipal manager for Mahikeng local municipality commits an act of financial misconduct if he or she deliberately or negligently fails to comply with a duty imposed by a provision of the *Municipal Finance Management Act*.⁷⁹⁸ The municipal manager commits an act of financial misconduct if he or she deliberately makes or permits or instructs another official of the municipality to make any unauthorised, irregular or fruitless and wasteful

⁷⁹³ *Mafikeng Local Municipality v South African Local Government Bargaining Council and Others* JR 668/10 [2011] ZALCJHB 157 (8 July 2011) (*South African Bargaining Council* case) para 2.

⁷⁹⁴ *South African Bargaining Council* case 9.

⁷⁹⁵ *South African Bargaining Council* case 9.

⁷⁹⁶ *South African Bargaining Council* case para 3.

⁷⁹⁷ Section 171(1)(a) of the *Municipal Finance Management Act*.

⁷⁹⁸ Section 171(1)(b) of the *Municipal Finance Management Act*.

expenditure.⁷⁹⁹ The municipal manager must be accountable for all the financial administration of the Mahikeng local municipality and take all reasonable steps to prevent the unauthorised, irregular, fruitless and wasteful expenditures from occurring in the municipality. One of the factors that cause the Mahikeng local municipality to be faced with financial difficulties is financial misconduct and lack of accountability by the municipal manager. Consequently, the Auditor General indicated in 2018-2019 report that there is an unauthorised, irregular, fruitless and wasteful expenditure in Mahikeng local municipality.

The CFO for a municipality commits financial misconduct if he or she deliberately or negligently provides incorrect or misleading information to the accounting officer.⁸⁰⁰ The CFO commits an act of financial misconduct if he or she fails to carry out the duties delegated in terms of the *Municipal Finance Management Act*.⁸⁰¹ The CFO of the Mahikeng local municipality is accountable to the municipal manager and must assist the municipal manager to implement the municipality's budget as he is administratively in charge of the municipal budget.⁸⁰² The CFO further commits an act of financial misconduct also if he or she permits or instructs another official of the municipality to make any unauthorised, irregular or fruitless and wasteful expenditure.⁸⁰³ The CFO plays an essential role in the municipality, and the municipal manager relies on the information provided by the CFO with respect to the municipal budget.⁸⁰⁴

The *Municipal Finance Management Act*⁸⁰⁵ provides that the municipal manager is guilty of an offence if he or she fails to comply with the Act, and to take reasonable steps to implement the Supply Chain Management Policy. The municipal manager is guilty of an offence for failing to take reasonable steps to prevent unauthorised, irregular, fruitless and wasteful expenditure or fails to take reasonable steps to

⁷⁹⁹ Section 171(1)(c) of the *Municipal Finance Management Act*.

⁸⁰⁰ Section 171(2)(d) of the *Municipal Finance Management Act*.

⁸⁰¹ Section 79 and 81(1)(e) of the *Municipal Finance Management Act*.

⁸⁰² Sections 81(1)(a),(b) and (2) of the *Municipal Finance Management Act*.

⁸⁰³ Section 171(2)(c) of the *Municipal Finance Management Act*.

⁸⁰⁴ Section 81(1)(a) of the *Municipal Finance Management Act*.

⁸⁰⁵ Section 173 of the *Municipal Finance Management Act*.

prevent corruptive activities in the management of municipal assets.⁸⁰⁶ The municipal manager is guilty of an offence if he or she deliberately misleads or withholds information from the Auditor General. It is only through thorough investigations that one can determine whether the municipal manager is guilty of an offence or not. The Mahikeng local municipality is empowered by the *Municipal Finance Management Act*⁸⁰⁷ to investigate financial misconduct against the accounting officer, the CFO, a senior manager or other officials of the municipality unless those allegations are frivolous, vexatious, speculative and unfounded. Looking at the status of the Mahikeng local municipality and the Auditor General's report from 2013 to date, there is little in the way of documented evidence to show that investigations are being conducted and that the responsible officials are being dealt with accordingly. It is only in 2018, where the municipal manager who invested money in VBS was suspended.

The researcher is of the view that in an instance where a municipality fails to take such a step, to investigate any act of financial misconduct, any interested party in the municipality, must have a right to institute such investigations.

The *Municipal Finance Management Act*⁸⁰⁸ provides that a municipality may recover any loss or damage suffered by it from a political office bearer of the municipality because of the deliberate or negligent unlawful actions of that official when performing a function of office. Although the *Municipal Finance Management Act*⁸⁰⁹ states that it may recover its monies, it is yet to be seen in Mahikeng local municipality. For over 10 years, the municipality has received bad audit outcomes, yet no one has been imprisoned within the municipality, and no municipal manager has been found guilty of an offence.

The *Municipal Finance Management Act*⁸¹⁰ further provides that a municipal official may be exempted provided that he or she acted in good faith. However, it cannot be true that the municipal manager for Mahikeng local municipality has acted in good

⁸⁰⁶ Section 173 (1)(a)(iii) and (iv) of the *Municipal Finance Management Act*.

⁸⁰⁷ Section 172(3)(a) of the *Municipal Finance Management Act*.

⁸⁰⁸ Section 176 (2) of the *Municipal Finance Management Act*.

⁸⁰⁹ Section 176(2) of the *Municipal Finance Management Act*.

⁸¹⁰ Section 176(1) of the *Municipal Finance Management Act*.

faith. The researcher can conclude that the Mahikeng local municipality is grappling with financial difficulties because of the accounting officer's failure to uphold his fiduciary duties to act in good faith, uphold ethical standards, and act with care, fidelity, honesty, diligence and skill in administering the affairs of the municipality.⁸¹¹

The *Municipal Finance Management Act*⁸¹² provides that any person who commits an offence in terms of section 173 of the same Act in the Mahikeng local municipality is liable to imprisonment for a period not exceeding five years or to an appropriate fine determined in terms of the applicable legislation. There is no evidence indicating that a municipal manager or an official in the Mahikeng local municipality has ever been imprisoned or paid a fine in terms of the *Municipal Finance Management Act*. The researcher argues that, if that was the case, the unnecessary unauthorised, irregular, fruitless and wasteful expenditures would be reduced in Mahikeng local municipality.

5.6 The Need for the Application of the Principle of Piercing the Corporate Veil in Mahikeng Local Municipality

The piercing of the corporate veil is one of the measures that could promote accountability of the municipal manager for Mahikeng local municipality. Piercing the corporate veil is a welcomed and well-developed principle in company law which has proven to be effective. The researcher argues that the application of piercing the corporate veil can also be effective in Mahikeng local municipality if applied by the courts. The Mahikeng local municipality is proven to be facing financial challenges such as irregular, unauthorised, fruitless and wasteful expenditure, despite having the legislative framework such as the *Municipal Finance Management Act* in place to ensure effective, efficient, and accountable administration. It is also evidenced by the report of the Auditor General 2018–2019 financial year that the municipal manager and the municipal council are not complying with the *Systems Act* and the *Municipal Finance Management Act* and not adhering to the Auditor General's recommendations. The Mahikeng local municipality is struggling to account for municipal funds, yet little or no evidence exists to prove that any official in the

⁸¹¹ Section 94(1) of the *Municipal Finance Management Act*.

⁸¹² Section 174 of the *Municipal Finance Management Act*.

Mahikeng local municipality has ever been held accountable or liable for any irregular, unauthorised or fruitless and wasteful expenditure in the municipality. This conduct, in the researcher's view, constitutes an unconscionable abuse, and it is the basis on which the courts may pierce the corporate veil. The researcher argues that corruption in the Mahikeng local municipality is not exempted from such allegations. Hence, it is for this reason that the researcher submits that the corporate veil must be pierced in Mahikeng local municipality on an application by an interested person.

The author acknowledges that the principle of piercing the corporate veil is a company law principle and submits that it can, to a certain extent, be borrowed by the Mahikeng local municipality. This will be to clarify, the so-called, suspicions or speculations by the researcher that there is corruption within the municipality, particularly, by politicians. This is one of the lessons that one can draw from the corporate sector. If the municipality can be pierced, it will be visible as to why there are always unauthorised, irregular, fruitless and wasteful expenditures for every financial year in the Mahikeng local municipality.

As already demonstrated in Chapter Four, the corporate veil of a company may be pierced on an application by an interested person to a court of law. The court may pierce the corporate veil, on its discretion and if there is an unconscionable abuse of the juristic personality of the company.⁸¹³ The researcher argues that this remedy of piercing the corporate veil must be available in Mahikeng local municipality, and any interested person who suspects that there is an unconscionable abuse or conduct by the municipal manager or municipal council for the municipality must report to the law enforcement officers or the public protector.

Since there is no definition of the term interested person in the *Companies Act 2008*, an interesting person in the case of the Mahikeng local municipality may refer to the Auditor General, the municipal council, any municipal official or member of the local community of Mahikeng.

As stated earlier that the municipal council must structure the administration of the Mahikeng local municipality in a manner that allows the council to hold the municipal

⁸¹³ Section 20(9) of the *Companies Act 2008*.

manager accountable. The municipal manager and the municipal council disregard the audit recommendations by the Auditor General. The researcher is of the view that the municipal council is failing to hold the municipal manager accountable because the entire municipal council is proven to be dysfunctional and corrupt.

It is important to note that the principle of piercing the corporate veil has not yet been applied in any South African municipality, particularly in Mahikeng local municipality. This is because the principle of piercing the corporate veil is meant for companies as it is provided for in the *Companies Act* 2008. The researcher suggests that the principle of piercing the corporate veil should be applied in Mahikeng local municipality to foster accountability. This may be done through an application by any interested person to the court to disregard the separate legal existence of the municipality, as an organ of state and apportion liability to the municipal manager for the municipality. This can be applied in instances where the municipal manager has caused or failed to prevent any material irregularity resulting in a material financial loss for Mahikeng local municipality.⁸¹⁴ The responsibility of the municipal manager is to prevent the unauthorised, irregular and wasteful and fruitless expenditure in Mahikeng local municipality. Furthermore, the municipal manager has to recover the unauthorised, irregular, and wasteful and fruitfulness expenditure from any person liable for that expenditure within the municipality.⁸¹⁵ The researcher submits that failure by the municipal manager to take such reasonable steps to prevent or recover the unauthorised, irregular, fruitless and wasteful expenditure in Mahikeng local municipality warrants such application by an interested person to apply to the court to pierce the corporate veil.

The principle of piercing the corporate veil must be applied in the Mahikeng local municipality where there is maladministration, fraud and corruption in the

⁸¹⁴ Section 1 of the *Public Audit Act* defines material irregularity as "any non-compliance with, or contravention of, legislation, fraud, theft or a breach of a fiduciary duty identified during an audit performed under the Public Audit Act that resulted in or is likely to result in a material financial loss, the misuse or loss of a material public resource or substantial harm to a public sector institution or the general public.

⁸¹⁵ Section 32(2) of the *Municipal Finance Management Act*.

municipality to ensure accountability.⁸¹⁶ The principle of piercing the corporate veil must be applied where the Mahikeng local municipality has been put under administration by the provincial executive for failure to meet its constitutional obligation of providing basic services to the community. This stems from the fact that the municipality is an organ of state,⁸¹⁷ which has rights, duties, and obligations. It can sue and be sued separately from its members, and it has its assets. Thus, the principle of piercing the corporate veil may be easily applied to Mahikeng local municipality as it is an organ of state that is separate from its members.

The concept of separate legal personality of a municipality prevents the municipal council or the municipal manager from being held personally liable for the debts of the Mahikeng local municipality.⁸¹⁸ Accordingly, the researcher suggests that the principle of piercing the corporate veil is easily applicable as the Mahikeng local municipality is an organ of state separate from its members, and its separate personality can be abused by its controllers.

The *Municipal Finance Management Act*⁸¹⁹ stipulates that the writing off of any unauthorised, irregular or fruitless and wasteful expenditure as irrecoverable is not an excuse in criminal or disciplinary proceedings against a person charged with the commission of an offence or breach of the *Municipal Finance Management Act* relating to such unauthorised, irregular or fruitless and wasteful expenditure. In terms of the *Municipal Finance Management Act*,⁸²⁰ the municipal manager for Mahikeng local municipality must report to the South African Police Service all cases of alleged irregular expenditure that constitutes a criminal offence, theft and fraud that occurred in the municipality. Furthermore, it is the responsibility of the

⁸¹⁶ Montsho M 2018 Eight North West Municipalities Put Under Administration <https://www.iol.co.za/news/politics/8-north-west-municipalities-put-under-administration-16710117> accessed 01 May 2019 page number unknown.

⁸¹⁷ Section 2(a) of the *Systems Act*; Section 239 of the *Constitution of South Africa*.

⁸¹⁸ Section 2(a) and (b) of the *Systems Act*; Siebritz *A Critical Analysis of Section 20(9) of the Companies Act 71 of 2008* 20.

⁸¹⁹ Section 32(5) of the *Municipal Finance Management Act*.

⁸²⁰ Section 32(6)(a) and (b) of the *Municipal Finance Management Act*.

municipal council to take all reasonable steps to ensure that all cases are reported to the SAPS if the charge is against the municipal manager.⁸²¹

As highlighted above, the Mahikeng local municipality has a history of receiving poor audit outcomes from the annual audit reports by the Auditor General. According to the annual reports by the Auditor General, the municipality has not obtained a clean audit report since 2013. The municipal manager is also failing to hold the municipal workforce, including senior manager to account, the municipality continues to receive poor audit outcomes. The Mahikeng local municipality is still failing to pay its creditors, implement the recommendations of the Auditor General, and account for the municipal assets. Already, there is mismanagement of funds and allegations of fraud and corruption that the municipal manager cannot account for. Therefore, this warrants for the need for the piercing of the corporate veil in Mahikeng local municipality.

The Mahikeng local municipality has an obligation to provide services to the people of Mahikeng.⁸²² If the municipality fails to provide such services, the *Constitution of South Africa*⁸²³ provides that the provincial executive may step in and take any appropriate steps to ensure fulfilment of that obligation. This is not effective as the remedy is used to place the municipality under administration, but no one is usually held personally liable for failure to provide such services. The researcher argues that at the time when the municipality is placed under administration, that is when the principle of piercing the corporate must be utilised.

The principle of piercing the corporate veil is applied where there is fraud, dishonesty, and/or unconscionable abuse of the company's legal personality.⁸²⁴ The Mahikeng local municipality was placed under administration as a result of the

⁸²¹ Section 32(7) of the *Municipal Finance Management Act*.

⁸²² De Visser J "The Political-administrative Interface in South African Municipalities Assessing the Quality of Local Democracies" 2010 *Commonwealth Journal of Local Governance* 86, 88.

⁸²³ Section 139 of the *Constitution of South Africa*; *Ngaka Modiri Molema District Municipality v Chairperson, North West Provincial Executive Committee and Others* [2014] ZACC 31 (*Ngaka Modiri Molema* case) para 1.

⁸²⁴ Section 20(9) of the *Companies Act 2008*; *Cape Pacific* case para 33; *Davis et al Companies and Other Business Structures in South Africa* 31.

municipal council's failure to fulfil its executive obligations.⁸²⁵ This means that the municipal council of the Mahikeng local municipality is failing to deliver basic services and to improve the lives of the community of Mahikeng, and also failing to implement and enforce legislation such as the *Municipal Finance Management Act* and *Systems Act*.⁸²⁶ The researcher suggests that the principle of piercing the corporate veil can be applied in Mahikeng local municipality by any person affected by the decisions of the municipality as a result of unconscionable conduct of the municipal council or the municipal manager.⁸²⁷

The provincial executive may put the municipality under administration by dissolving the municipal council, and assuming responsibility or appointing an administrator.⁸²⁸ The purpose of putting the municipality under administration is to ensure the fulfilment of the primary mandate of the municipality, which is to deliver basic services.⁸²⁹ The *Constitution of South Africa* further seeks to prevent the municipal council from taking unreasonable action that is prejudicial to the interests of another municipality or the province as a whole and maintaining economic unity. The researcher submits that the municipality may be put under administration, but the municipal council and municipal manager must also be held personally or severally liable for failing to account for the assets and resources of the municipality. Moreover, the continued misuse, irregular or fruitless and wasteful expenditure of such municipal funds constitutes the basis for piercing the corporate veil in Mahikeng local municipality.

The researcher submits that the legislation governing the administration of the municipality is not adequately enforced, as the municipal manager or the municipal council is often not held accountable for municipal funds. The municipal manager is often not held accountable for failure to keep proper records of the municipality or failure to act with fidelity, honesty, and in the best interests of the municipality.

⁸²⁵ Section 139 of the *Constitution of South Africa*.

⁸²⁶ Section 139 of the *Constitution of South Africa*.

⁸²⁷ Section 20(9) of the Companies Act 2008; Davies and Geach *Companies and Other Business Structures in South Africa* 31; Arden 2017 *Journal of Corporate and Commercial Law & Practice* 3.

⁸²⁸ Section 139(1)(a), (b) and (c) of the *Constitution of South Africa*; *Ngaka Modiri Molema* case para 1.

⁸²⁹ Section 139(1) of the *Constitution of South Africa*.

Although legislation such as the *Municipal Finance Management Act*⁸³⁰ and *Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings* impose penalties on offences by the municipal officials, the municipality is often placed under administration, and the municipal manager suspended and does not face harsher or any penalties at all. In most instances, the municipal managers resign when investigations for fraud and corruption against them are being conducted, and thus escape accountability. Once the municipal manager resigns, the municipal council will not be able to hold him/her accountable. In this instance, the unconscionable conduct of the municipal manager will be imputed to the municipality. This means that all the irregular, unauthorised and fruitless and wasteful expenditure incurred by the municipality as a result of the municipal manager's conduct remain with the municipality. The need for piercing the corporate veil in this instance will assist in recovering the debts and holding the municipal manager for Mahikeng local municipality accountable.

5.7 Piercing the Corporate Veil as a Measure of Last Resort

The principle of piercing the corporate veil must be resorted to sparingly and as a very last resort in circumstances where justice will not otherwise be done.⁸³¹ However, the piercing of the corporate veil must be applied in Mahikeng local municipality whenever there has been an unconscionable abuse or illegitimate use of the juristic personality and resources of the municipality that affects the interests of a third party.⁸³² Unfortunately, there is a culture in South African municipalities that protests are regarded as a measure of last resort that prompt the municipality to implement service delivery. The community of Mahikeng local municipality is of the view that the municipal manager and municipal council use the municipal resources and finances for their own benefit and interests. The community is of the view that there is fraud and corruption ensuing within the municipality leading to lack of

⁸³⁰ Section 174 of the *Municipal Finance Management Act*.

⁸³¹ *Hulse-Reutter and Others v Godde* 2001 (4) SA 1336 (SCA); *Amlin (SA) Pty Ltd v Van Kooij* (2008) (2) SA 558 (C) (*Amlin case*); Phiri *Piercing the Corporate Veil: A Critical Analysis of Section 20(9) of the Companies Act 2008*.

⁸³² Section 20(9) of the *Companies Act 2008*; Zindoga WT *Piercing of The Corporate Veil in terms of Gore: Section 20(9) of the New Companies Act 71 of 2008* (LLM- dissertation University of Cape Town 2015) 46.

developments and poor service delivery in the municipality. The researcher suggests that instead of resorting to public protests and alleging the existence of corruption in Mahikeng local municipality, any affected or interest person may apply to the court to pierce the corporate veil of the Mahikeng local municipality.⁸³³ This ensures that the municipal manager and the municipal council of the municipality are held accountable for their unconscionable abuse, maladministration, fraud, corruption or the abuse of the municipal resources. The principle of piercing the corporate veil must be done as a matter of last resort by any affected or interested person.

In *Cape Pacific* case⁸³⁴ Smalberger J held that he sees no reason why the principle of piercing the corporate veil should be precluded if another remedy exists. It was further held in the *Cape Pacific* case⁸³⁵ that if the separate legal personality of a company, in this case of a municipality as a legal person, is misused in a particular instance to perpetrate fraud, or for a dishonest or improper purpose, there is no reason why the separate legal personality cannot be disregarded in relation to the transaction in question. This entails that even if other remedies exist to any affected or interest person, such affected person may also use the principle of piercing the corporate veil against the Mahikeng local municipality.

The principle of piercing of the corporate veil started as a common law remedy which was then adopted into South African jurisprudence and codified by the *Companies Act 2008*.⁸³⁶ The *Companies Act 2008*⁸³⁷ entitles the court to pierce the corporate veil on an application by an interested person where there is an unconscionable abuse of the juristic personality of the company. The court will then pierce the corporate veil by declaring the company not to be a juristic person in respect of any right, obligation or liability of the company.⁸³⁸ There is no reason in principle why such remedy cannot be applied in the Mahikeng local municipality by any interested person or an aggrieved creditor who suffered harm due to the abuse

⁸³³ Section 20(9) of the *Companies Act 2008*; Smith 2016 *Journal for Juridical Science* 72.

⁸³⁴ *Cape Pacific* case para 33; *Ex Parte Gore* case para 28; *Charles Baloyi v Jd Malherbe JR 2661/2007 (Baloyi case)* para 19.

⁸³⁵ Section 20(9) of the *Companies Act 2008*; *Cape Pacific* case para 33.

⁸³⁶ Section 20(9) of the *Companies Act 2008*; Mashiri *A Critical Analysis of the Piercing of the Corporate Veil in South African Corporate Law in Groups of Companies* 56.

⁸³⁷ Section 20(9) of the *Companies Act 2008*.

⁸³⁸ Section 20(9)(a) of the *Companies Act 2008*.

of the separate legal personality of Mahikeng local municipality as an organ of state.⁸³⁹ This will ensure that the municipal manager and the municipal council of the municipality are held liable for their unconscionable abuse, which resulted in the municipality incurring the unauthorised, irregular, fruitless and wasteful expenditures. The unconscionable abuse of the separate existence of the Mahikeng local municipality was as a result of the failure by the municipal manager and the municipal council to exercise their duties with reasonable care, skill and diligence. Placing a municipality under administration is often used by the provincial executive as a measure of last resort. This is one of the reasons the researcher argue that the principle of piercing the corporate veil be applied in the Mahikeng local municipality when the municipality is placed under administration.

5.8 Possible Advantages of Applying the Principle of Piercing the Corporate Veil in Mahikeng Local Municipality

5.8.1 Protect the Interests of Creditors

The principle of piercing the corporate veil seeks to protect the interest of company creditors against fraud, corruption, or unconscionable conduct of company directors or shareholders.⁸⁴⁰ The application of the principle of piercing the corporate veil in Mahikeng local municipality can protect the creditors of the municipality against the unconscionable conduct of the municipal manager or the municipal council of the municipality. This can be done through an application to the courts by the creditors to pierce the corporate veil where there is suspected unconscionable abuse of the Mahikeng local municipality by the municipal manager or the municipal council. If such application is successful, the courts will pierce the corporate veil and strip away the protective covering of the limited liability presented by the structure of the municipality and apportion liability to the municipal manager or the municipal council for their unconscionable abuse.

⁸³⁹ Section 20(9) of the *Companies Act* 2008; Davies and Geach *Companies and Other Business Structures in South Africa* 31; Arden 2017 *Journal of Corporate and Commercial Law & Practice* 3.

⁸⁴⁰ Section 20(9) of the *Companies Act* 2008; Schoeman 2012 *De Rebus* 1; Kathleen 2019 *International Journal of Family Business and Management* 2; Mashiri *A Critical Analysis of the Piercing of the Corporate Veil in South African Corporate Law* 32.

5.8.2 *Protect the Municipality Against Maladministration*

The principle of piercing the corporate veil further protects against maladministration and forces the relevant officials to act with care, diligence, and skill in exercising their functions. Through the application of the principle of piercing the corporate veil, the municipal council, the municipal manager, and the overall workforce of the municipality will be obliged to exercise caution when dealing with municipal funds.

5.8.3 *Reduction of Public Protests*

In 2018, the community of Mahikeng local municipality embarked on a service delivery protest as a result of the community which held a firm belief that lack of service delivery is due to corruption, maladministration and fraud ensuing in the municipality.⁸⁴¹ The application of the principle of piercing the corporate veil increases the possibility of reducing the unnecessary protests by the community as they will be allowed to present their cases before the courts of law and get recourse on their allegations. *Ex Parte Gore* case⁸⁴² held that the remedy of piercing the corporate veil may be used whenever the use of the concept of separate legal existence affects a third party in a way that reasonably should not be allowed. Piercing the corporate veil in Mahikeng local municipality will disclose whether the municipal manager exercised fiduciary duty when performing his or her duties and not for his personal gain.

5.8.4 *Implementation of the Auditor General's Recommendations*

The Auditor General's recommendations have been ignored for so many years by the municipal council and the municipal manager for Mahikeng local municipality. This was due to the fact that the recommendations by the Auditor General were not binding. However, the *Public Audit Act*⁸⁴³ empowers the Auditor General to refer suspected material irregularities arising from the auditing process to the relevant

⁸⁴¹ Montsho M 2018 <https://www.iol.co.za/news/politics/8-north-west-municipalities-put-under-administration-16710117> page number unknown.

⁸⁴² *Ex Part Gore* case para 34; Becker R *Disregarding the Separate Juristic Personality of a Company: An English Case Law Comparison* (LLM- dissertation University of Pretoria 2014) 58.

⁸⁴³ *Public Audit Act* 25 of 2014 (as amended) (*Public Audit Act*), see section 5(1A); Mathiba *The Role of the Auditor-General in the Promotion of Efficient Financial Management in Municipalities* 22.

authorities with requisite investigative capacity and skills such as the Hawks, Special Investigating Unit (SIU), SAPS and others. Once the investigations are conducted by the latter investigative units, this ensures that the responsible person is held accountable for any material irregularity incurred by the Mahikeng local municipality. The Auditor General has the power to follow-up on the progress made by the relevant accounting officer in implementing audit recommendations and to taking appropriate remedial action if there is any failure in that regard. The Auditor General has the power to issue a certificate of debt against the accounting officer or accounting authority who failed to implement remedial actions.⁸⁴⁴ The researcher is of the view that the *Public Audit Act* confers the Auditor General with more powers to ensure that there is accountability in municipalities. Furthermore, the researcher is of view of that if the municipal council fails to hold the municipal manager accountable, then the municipal councillors and municipal manager will be held individually and severally liable, thus piercing the veil.

5.8.5 Enforcement of the Auditor General's Recommendations

The researcher is also of the view that, when the Auditor General refers the matter to the Hawks, SIU, SAPS, and such investigations are conducted, and there is a *prima facie* case, or they suspect that the municipal manager or council, are or have been using the municipality to further their interests, the Auditor General must also have the power to refer the matter to Court and apply for the court to pierce the corporate veil.

5.8.6 Allows Transparency

In the event where the municipality is put under administration, the principle of piercing the corporate veil must be available to affected persons as a remedy to hold those who are vested with the responsibility of managing municipal funds and resources accountable. The researcher submits that the principle of transparency must be implemented by the administrator and such disclosed information will assist the interested person to apply to the court to pierce the corporate veil. Any person vested with the responsibility of accounting for municipal budget and resources must

⁸⁴⁴ Section 5A of the *Public Audit Act*.

be held personally liable for the debts of the municipality arising from his or her improper conduct and not following municipal prescripts.

5.8.7 Ensuring Accountability

The principle of piercing the corporate veil could be one of the ways in which an accounting officer or any person responsible for the misuse, irregular or fruitless expenditure of municipal funds will be held accountable.⁸⁴⁵ This can be done by applying the principle of piercing the corporate veil in Mahikeng local municipality as applied in companies. The principle of piercing the corporate will be an applicable remedy, in exceptional circumstances,⁸⁴⁶ where a municipality has been put under administration. The municipality is often put under administration if it fails to fulfil its executive obligations in terms of the Constitution of South Africa, *Municipal Finance Management Act*, or *Systems Act*, among others, for example by failing to provide basic services to the people and failing to account for municipal funds and resources.⁸⁴⁷

5.8.8 Improved Service Delivery

The primary mandate of the Mahikeng local municipality is to provide basic services such as the provision of water, sanitation and refuse removal among others to the community of Mahikeng. The municipal manager has failed to account for mismanagement of funds in the Mahikeng local municipality to the municipal council or Auditor General.⁸⁴⁸ At the end of the financial year 2018-2019, there has been irregular, unauthorised, fruitless and wasteful expenditures in the municipality as reported by the Auditor General and no one has been held accountable for that expenditures.⁸⁴⁹ Therefore, once the corporate veil is pierced within the Mahikeng local municipality, and the municipal manager and municipal council are held

⁸⁴⁵ Section 20(9) of the *Companies Act* 2008; Davis *et al Companies and Other Business Structures in South Africa* 31.

⁸⁴⁶ Section 20(9) of the *Companies Act* 2008; Baloyi case 17; Davis *et al Companies and Other Business Structures in South Africa* 31.

⁸⁴⁷ Section 139(1)(c) of the *Constitution of South Africa*; Ngaka Modiri Molema case para 1.

⁸⁴⁸ Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 1, 3.

⁸⁴⁹ Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 1, 3.

accountable for fraud and corruption, service delivery will be improved as the losses incurred by the municipality will be recovered.

5.8.9 Reduces Fraud and Corruption

Piercing the corporate veil means the judicial act of imposing personal liability to the municipal manager or the municipal council for the wrongful acts of the Mahikeng local municipality.⁸⁵⁰ The principle of piercing the corporate seeks to combat fraud and corruption, in that, if the municipal manager or the municipal council is improperly using the separate legal personality of the municipality, the municipal manager or the municipal council can be held personally liable.⁸⁵¹ The corporate veil may be pierced where there is proof of fraud or dishonesty or other improper conduct by the municipal manager, municipal council or other officials in the Mahikeng local municipality.⁸⁵² Therefore, fraud and corruption will be reduced if the principle of piercing the veil is applied by our courts in the Mahikeng local municipality, to hold the municipal manager and the municipal council accountable. Furthermore, the municipal manager will be held accountable for failing to exercise his or her fiduciary duties to act with utmost care, honesty, integrity, and in the best interest of the municipality and for failing to prevent the unauthorised, irregular, fruitless and wasteful expenditures in the municipality.⁸⁵³ If the principle of piercing the corporate veil is available in Mahikeng local municipality, it will assist the creditors, members of the Mahikeng community and other interested persons, to hold the municipal manager and the municipal council accountable.⁸⁵⁴ This can be

⁸⁵⁰ Halliday CE and Ogbonna E "Lifting the Corporate Veil and the War Against Corruption in Nigeria: An Appraisal" 2018 *Port Harcourt Journal of Business Law* 25, 25.

⁸⁵¹ Section 174 of the *Municipal Finance Management Act* imposes penalties such as fine and imprisonment against the accounting officer for not taking reasonable steps to, among other, prevent the unauthorised, irregular, fruitless and wasteful expenditures in the Mafikeng local municipality; see also *Robinson V Randfontein Estates Gold Mining Co Ltd* 1921 AD case para 168.

⁸⁵² *Shipping Corporation of India Ltd v Evdonmon Corporation and Another* 1994 (1) SA 550 (A) (*Shipping Corporation Case*) paras 43 and 44.

⁸⁵³ Sections 94, 173, 174 of the *Municipal Finance Management Act*.

⁸⁵⁴ Section 20(9) of the *Companies Act* 2008.

done by the creditors, members of the community or any interested person by applying to the court to pierce the veil.⁸⁵⁵

5.9 Conclusion

The municipal manager is responsible for the formation and development of an economical, effective and accountable administration of the municipality.⁸⁵⁶ However, the researcher has demonstrated in Chapter Five that the Mahikeng local municipality is still struggling with poor financial management and service delivery backlogs while it has the municipal manager entrusted with the administration of the municipality.⁸⁵⁷ The municipal manager has failed to exercise reasonable care and honesty in exercising his duties in the municipality. This is apparent as the municipal manager has been unable to prevent the unauthorised, irregular, fruitless and wasteful expenditures in Mahikeng local municipality, which resulted in service delivery backlogs in the municipality.⁸⁵⁸ This chapter discussed the challenges affecting accountability of a municipal manager for Mahikeng local municipality and suggested that the principle of piercing the corporate veil be applied by the courts to enhance such accountability in the municipality.

The researcher argues that the challenges faced by the Mahikeng local municipality are not because of inadequate legislation but because of lack of implementation thereof. One may ask, who must carry out an investigation and who must ensure that individuals who do not account for finances as required by legislation are held into account. The researcher submits that the new powers conferred upon the Auditor General will help to hold the municipal manager accountable and improve

⁸⁵⁵ Section 20(9) of the *Companies Act* 2008; see also section 5(1)(a) of the *Systems Act* which confers right on the members of the community to submit written or oral recommendations, representations and complaints to the municipal council. The researcher argues that if such complaints or recommendations are ignored by the municipal council, the members of the community must have a right to approach the court for an appropriate relief if the members of the community are of the view that their submissions are ignored due to fraud and corruption.

⁸⁵⁶ Section 55(1)(a) of the *Systems Act*.

⁸⁵⁷ Mathiba *The Role of the Auditor-General in the Promotion of Efficient Financial Management in Municipalities* 61.

⁸⁵⁸ Tau P "6 ANC Councillors' houses among 8 torched in violent North West protest" City Press 17 September 2019; Montsho M 2018 Eight North West Municipalities Put Under Administration <https://www.iol.co.za/news/politics/8-north-west-municipalities-put-under-administration-16710117> accessed 01 May 2019.

financial reporting and record-keeping in Mahikeng local municipality.⁸⁵⁹ Such powers of the Auditor General include among others, to refer the suspect material irregularities to investigating authorities such the Hawks, SIU, SAPS; to recover financial loss resulting from material irregularity from the person who caused such financial loss.⁸⁶⁰

There are several duties and responsibilities that are imposed on various officials and structures in relation to the implementation of audit recommendations in the Mahikeng local municipality. Often, the audit recommendations of the Auditor General are not enforced. It is often difficult to ensure accountability if the entire system (municipality) is corrupt. In the event that the Mahikeng local municipality continues to receive poor audit outcomes despite the new powers conferred upon the Auditor General, the veil must be pierced. The application of the principle of piercing the corporate veil is a remedy against all the officials involved in the municipality, including municipal entities against their unconscionable conduct or gross abuse.

It is evident that once a municipality is established, the *Structures Act*⁸⁶¹ confers the municipality with the legal status of being an organ of state. As an organ of state, the municipality has rights and duties, and it can sue and be sued in its own name. The establishment of a municipality as an organ of state empowers it to act separate from its members and the members of the community. This means that a veil is created by the incorporation of a municipality under the *Structures Act* separating the liability of the municipality from its members.⁸⁶² The municipality has a similar legal status as a company incorporated as such under the *Companies Act* 2008.

⁸⁵⁹ Section 5A(2) of the *Public Audit Act* empowers the Auditor General to take remedial action against an accounting officer who has failed to implement the recommendations contained in the Auditor General's report.

⁸⁶⁰ Section 5A of the *Public Audit Act*.

⁸⁶¹ Section 12(1) and 14 of the *Structures Act*; Section 151 and 155 of the *Constitution of South Africa*; Bekink *The Restructuring of Local Government under the Constitution of the Republic of South Africa, 1996* 127.

⁸⁶² Section 2(d) of the *Systems Act*; *Mhana* case para 13; Davies and Geach *Companies and Other Business Structures in South Africa* 29.

The principle of piercing the corporate veil is a feasible solution in Mahikeng local municipality, especially, where the municipality has been put under administration for the lack of accountability of municipal funds and resources. It is hoped that the principle of piercing the corporate veil will curb the improper use of municipal funds and resources by the municipal council and manager.

The principle of piercing the corporate veil is not the only remedy available to the community or any interested or affected person. Hence, the next chapter provides other recommendations to the problem identified by the researcher in the first chapter.

CHAPTER SIX

RECOMMENDATIONS AND CONCLUSION

6.1 Introduction

Accountability and good corporate governance are some of the measures that could promote sound, effective, efficient, and sustainable financial administration of the municipality.⁸⁶³ Accountability and corporate governance measures could enable the Mahikeng local municipality to provide better services and promote sustainable development of the Mahikeng area. The municipal manager can do this as an accounting officer of the Mahikeng local municipality by ensuring proper and diligent compliance to all the income, expenditure, all assets and the discharge of all liabilities of the municipality.⁸⁶⁴ Various barriers, such as irregular, unauthorised, fruitless and wasteful expenditure hamper the proper service delivery of the basic needs of the people of Mahikeng municipality.⁸⁶⁵ The lack of appropriate, efficient and effective financial administration of the municipality is as a result of non-compliance with the *Municipal Finance Management Act*⁸⁶⁶ and the *Systems Act* by the municipal manager as the head of administration of the municipality.⁸⁶⁷ This is evident from the Auditor General's report 2018-2019, which indicated that the municipal manager for Mahikeng local municipality failed to prevent the unauthorised, irregular, fruitless and wasteful expenditure.⁸⁶⁸ This chapter provides recommendations that could curb poor financial management, maladministration and improper use of municipal funds and resources in Mahikeng local municipality.

⁸⁶³ Section 55(1)(a) of the *Municipal Systems Act (Systems Act)*; see also section 62(1)(d) of the *Municipal Finance Management Act 56 of 2003 (Municipal Finance Management Act)*; Fredmun M *Effective Top Management: Beyond the Failure of Corporate Governance and Shareholder Value* 1st ed (Wiley-VCH Weinheim 2006) 1, 21.

⁸⁶⁴ Section 55(2) of the *Systems Act*.

⁸⁶⁵ Section 55(1)(a) of the *Systems Act*; Montsho M 2018 Eight North West Municipalities Put Under Administration <https://www.iol.co.za/news/politics/8-north-west-municipalities-put-under-administration-16710117> accessed 01 May 2019 page number unknown; Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 1, 3.

⁸⁶⁶ Section 62(1) of the *Municipal Finance Management Act*; section 55(2) of the *Systems Act*.

⁸⁶⁷ Section 55(1)(a) of the *Systems Act*; Manyaka RK and Madzivhandila TS "The Implementation of Integrated Development Plan for Service Delivery Purpose in South African Municipalities: Are we there yet" 2013 *South African Association of Public Administration and Management* 174, 182.

⁸⁶⁸ Section 62(1)(d) of the *Municipal Finance Management Act*.

6.2 Summary

In Chapter One, an overview of the research was presented; that is, the background of the research. The research outlined the aims, objectives, research questions, literature review, scope, and limitations of the research, statement of the problem, the rationale of the study and the research methodology. In addition as earlier indicated, the research did not discuss all municipal laws in detail as it mainly discussed the importance of piercing the corporate veil to enforce accountability of the municipal manager and the municipal council for Mahikeng local municipality.

Chapter Two discussed the historical aspects of accountability and corporate governance measures in Mahikeng local municipality. The chapter also discussed the role of a municipal manager as the accounting officer of the municipality, the similarity between the role of the municipal manager and the director in a company.⁸⁶⁹ The chapter further discussed the duties and standards that must be complied with by directors under the *Companies Act*.⁸⁷⁰ The duties and standards that must be introduced to a municipal manager for Mahikeng local municipality were provided. It became clear that the roles, duties and standards of both the municipal manager and the director are similar in that they are both expected to execute their duties in good faith and exercise care, diligence and skill.⁸⁷¹ They are both required to uphold the highest standard of ethics and act with honesty, integrity and avoid conflict of interest in executing their duties and promote corporate culture in the municipality. However, the municipal manager for Mahikeng local municipality is struggling to account for municipal accounts as evidenced by the Auditor General's report for the 2018-2019 financial year.⁸⁷²

⁸⁶⁹ Section 54A of the *Systems Act*; Thornhill C "The Executive Mayor/Municipal Manager Interface" 2008 *Journal of Public Administration* 725, 731.

⁸⁷⁰ Section 76 of the *Companies Act* 71 of 2008 (*Companies Act* 2008).

⁸⁷¹ Section 73(a)-(c) of the *Companies Act* 2008; see also section 61(1)(a) of the *Municipal Finance Management Act*.

⁸⁷² See section 62 of the *Municipal Finance Management Act*; Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 1, 3.

In Chapter Three, the researcher analysed the concept of corporate governance in accordance with the King Codes, and King reports on corporate governance as well as the *Companies Act* 2008.⁸⁷³ It must be noted that most of the corporate governance measures in the King IV Code are provided for in the *Systems Act*, and that schedule 2 of the *Systems Act* contains the code of conduct for municipal staff members. In addition, the Court in the case *South African Broadcasting Corporation Ltd and Another v Mpofu*⁸⁷⁴ emphasised that integrity is a key principle underpinning good corporate governance. The researcher argues that the principle of Ubuntu as a principle that is deeply rooted in our society should be one of the principles informing the decision of the municipal manager for Mahikeng local municipality.⁸⁷⁵ The reason for this is that proper and constructive dialogue would enable better outcomes in the decision making process. As stated in Chapter Three, the municipal manager must take into account the needs of the people first and follow the principle of Ubuntu in performing his duties. Ubuntu is an African concept meaning that we are human only through the humanity of others; it is the spirit of togetherness and the ability to work together towards a common goal.

The research further analysed whether the municipal manager should adhere to the corporate governance measures in managing the affairs of the municipality. Furthermore, Chapter Three showed that the King IV Code is only persuasive and not mandatory and that the municipal manager and municipal council may refer to it to enhance their corporate governance practices. This can be done by implementing principles of ethical leadership in the Mahikeng local municipality and referring to the sector supplements in the King IV Report which provide guidance and direction on how the King IV Code can be applied in municipalities.

⁸⁷³ Section 76 of the *Companies Act* 2008.

⁸⁷⁴ *South African Broadcasting Corporation Ltd and Another v Mpofu* 2009 4 All SA 169 (GSJ) para 64 (*SABC case*) the court further elaborated that good corporate governance is based on a clear code of ethical behaviour and personal integrity exercised by the board, where communications are shared openly; Hendrikse JW and Hendrikse LH *Corporate Governance Handbook: Principles and Practice* 2nded (Juta Cape Town 2012) 1, 116.

⁸⁷⁵ *SABC case* para 66; Mokgopo TI *A Legal Analysis of the Application of Corporate Governance Principles in the Local Government Sphere as a Measure to Improve Service Delivery* (LLM-dissertation University of Limpopo 2017) 65; Mkhabele CJMM *A Legal Analysis of the Application of Corporate Governance Principles in Musina Local Municipality* (LLM- dissertation University of Limpopo 2014) 23.

Chapter Four dealt with the principle of piercing the corporate veil in terms of the *Companies Act 2008*⁸⁷⁶ as well as the relevant case law, among others the case *Salomon v Salomon*,⁸⁷⁷ *Ex Parte Gore*,⁸⁷⁸ *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper NO*⁸⁷⁹ as a measure of holding directors in a company personally liable for their unconscionable or unscrupulous conduct. The chapter indicated that the corporate veil is pierced by the courts through an application by an interested person if the court is satisfied that there is an unconscionable conduct by the director in a company. This can also be applied in Mahikeng local municipality by disregarding the separate legal existence of a municipality and apportioning liability on the municipal manager for material losses incurred due to his or her negligence. This ensures that every municipal manager is held accountable, and promotes openness and transparency.

Chapter Five discussed the challenges affecting Mahikeng local municipality and the challenges affecting the accountability of the municipal manager. The chapter also discussed the need to pierce the veil in Mahikeng local municipality.

6.3 Recommendations

The researcher proposes the following recommendations that are aimed at promoting and improving the accountability of the municipal manager and corporate governance measures in Mahikeng local municipality.

(a) municipal council and municipal manager should consider the relevant principles of corporate governance to ensure good governance in Mahikeng local municipality

The municipal manager and the municipal council for the Mahikeng local municipality must apply the principles of corporate governance to ensure good governance in the

⁸⁷⁶ Section 20(9) of the *Companies Act 2008*.

⁸⁷⁷ *Salomon v Salomon* 1897 AC 22 (HL) (*Salomon case*).

⁸⁷⁸ *Ex Parte Gore NNO* 2013 (3) SA 382 (WCC) (*Ex Parte Gore case*).

⁸⁷⁹ *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper NO* (85/2017) [2017] ZASCA 177 (*City Capital SA Property Holdings case*).

municipality.⁸⁸⁰ The application of the principles of corporate governance could improve the economic growth and governance of the municipality. The *Constitution of South Africa*⁸⁸¹ recognises and promotes the basic values and principles of good governance in local government. Such principles include, among others, ethics, transparency and accountability.⁸⁸² The said principles are also provided for in the *Systems Act*⁸⁸³ and the *Municipal Finance Management Act*.⁸⁸⁴ The researcher submits that the Mahikeng local municipality should consider the King IV Code⁸⁸⁵ on corporate governance to enhance its corporate governance measures. The researcher recommends the following principles of corporate governance to be considered by the Mahikeng local municipality to enhance good governance in its administration:

(i) ethical leadership

King IV Code⁸⁸⁶ provides that the municipal council should lead ethically and effectively. The governing body of the municipality in terms of a municipality refers to the municipal council.⁸⁸⁷ Consequently, the King IV Code⁸⁸⁸ requires the municipal council to lead ethically and effectively in running the administration of the municipality. Ethical leadership is demonstrated by integrity, competence, responsibility, accountability,

⁸⁸⁰ South African Institute of Chartered Accountants *Student Handbook 2015/2016: King Code of Governance for South Africa* 1st ed (LexisNexis Durban 2016) 1, 16; Mkhabele CJMM *A Legal Analysis of the Application of Corporate Governance Principles in Musina Local Municipality* (LLM-dissertation University of Limpopo 2014) 36.

⁸⁸¹ Section 195(1)(a) of the *Constitution of South Africa* requires a high standard of professional ethics to be promoted and maintained.

⁸⁸² Section 195(1) of the *Constitution of South Africa*.

⁸⁸³ Section 4(2)(b) of the *Systems Act*.

⁸⁸⁴ Section 2(a) of the *Municipal Finance Management Act* which requires transparency, accountability and appropriate lines of responsibility in the fiscal and financial affairs of municipalities.

⁸⁸⁵ King IV Report "King IV Report on Corporate Governance for South Africa 2016" 2016 *Institute of Directors Southern Africa* (King IV Report) 1, 11; Kilian C "A Practical Explanation of Ethics as a Good Corporate Governance Principle in South Africa and New Zealand – A Case Study" 2020 *Bulletin for Christian Scholarship Journal* 1, 1.

⁸⁸⁶ King IV Code "King Code of Governance for South Africa 2016" 2016 *Institute of Directors Southern Africa* (King IV Code) 1, 39, see principle 1; Section 195(1)(a) of the *Constitution of South Africa*; Kilian 2020 *Bulletin for Christian Scholarship Journal* 2.

⁸⁸⁷ Principle 1 of the King IV Code; King IV Report 2016 *Institute of Directors Southern Africa* 80.

⁸⁸⁸ Principle 1 of the King IV Code; King IV Report 2016 *Institute of Directors Southern Africa* 81.

fairness, and transparency.⁸⁸⁹ Members of the municipal council and the municipal manager must possess these qualities in their conduct when making decisions for Mahikeng local municipality. The municipal council, as the governing body, as well as the municipal manager as head of administration, should lead ethically, and maintain high standards of professional ethics to ensure proper, efficient, effective, sound and sustainable financial administration of the municipality.⁸⁹⁰

The municipal manager and the municipal council must not only lead ethically but must also encourage organisational ethics.⁸⁹¹ This means that the municipal manager and council must provide guidance and ensure that the staff of the Mahikeng local municipality adheres to the code of conduct for municipal staff members.⁸⁹² The municipal manager can achieve this by ensuring that he holds liable those who deliberately or negligently committed, made or authorised an irregular expenditure.⁸⁹³ The researcher suggests that the municipal manager must ensure that he/she implements the code of conduct and the relevant statutory provisions to ensure accountability and recover the unauthorised, irregular and fruitless and wasteful expenditure from the official liable for that expenditure. This can be done by conducting investigations and referring the matter to the South African Police Service (SAPS) for further investigations for material mismanagement of funds.

- (ii) The municipal manager and council must adopt a reporting strategy that promotes an accountable administration

The municipal council and the municipal manager must adopt the reporting principle as per the King IV Code.⁸⁹⁴ The reporting principle

⁸⁸⁹ King IV Report 2016 *Institute of Directors Southern Africa* 81.

⁸⁹⁰ Section 50 of the *Systems Act*; see also schedule 1 of the *Systems Act*; Section 195 of the *Constitution of South Africa*, Section 2 of the *Municipal Finance Management Act*.

⁸⁹¹ Principle 2 of the King IV Code.

⁸⁹² Schedule 2 of the *Systems Act* contains the code of conduct for municipal staff members.

⁸⁹³ Section 32(2) of the *Municipal Finance Management Act*.

⁸⁹⁴ Principle 5 of King IV Code; Distell Group Holdings Limited Application of the KING IV Code Principles 5.

requires the Mahikeng local municipality to ensure that its annual reports are shared with the stakeholders for them to make informed assessments on the short, medium and long term prospects and performance of the municipality.⁸⁹⁵ The municipal manager of the municipality is expected to table a report to the municipal council at the end of each financial year.⁸⁹⁶ The annual report of the Mahikeng local municipality must be made public, for example in the municipal website and must also be submitted to the Auditor General and the relevant provincial treasury.⁸⁹⁷ The municipal manager must ensure that the annual report of the municipality is drafted in a way that shows the root cause of the irregular, unauthorised, and fruitless and wasteful expenditures in the Mahikeng local municipality.⁸⁹⁸ It must be noted that in most of the reports by the Auditor General, there was no evidence to show how the irregular, unauthorised, and fruitless and wasteful expenditure was incurred in the Mahikeng local municipality.⁸⁹⁹ The researcher is of the view that the financial statements and the annual reports of the Mahikeng local municipality must be detailed and show the reason behind every cent that is irregular, unauthorised, and fruitless and wastefully incurred.⁹⁰⁰

- (iii) the municipal council must enforce compliance with laws, rules, codes and standards

The municipal council should ensure that the Mahikeng local municipality complies with the *Systems Act* and the *Municipal Finance Management Act* and considers adherence to non-binding rules, codes, and standards.⁹⁰¹ Compliance with the *Systems Act* and *Municipal Finance Management Act* will ensure sound and sustainable financial administration of the

⁸⁹⁵ Principle 5 of the King IV Code.

⁸⁹⁶ Section 121 of the *Municipal Finance Management Act*.

⁸⁹⁷ Section 127(5) of the *Municipal Finance Management Act*.

⁸⁹⁸ Section 121(3)(a) of the *Municipal Finance Management Act*.

⁸⁹⁹ Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 3.

⁹⁰⁰ Section 121 of the *Municipal Finance Management Act*.

⁹⁰¹ King III Code "King Code of Governance for South Africa 2009" 2009 *Institute of Directors Southern Africa* (King III Code), see principle 6.

municipality.⁹⁰² The Mahikeng local municipality incurred irregular, fruitless, and unauthorised expenditures in the 2018-2019 financial year.⁹⁰³ This was caused by non-compliance with the municipal laws, particularly the *Municipal Finance Management Act* which requires the municipal manager to take reasonable measures to prevent unauthorised, irregular or fruitless and wasteful expenditure and other losses.⁹⁰⁴ The researcher submits that compliance with the municipal laws will curb these irregular, fruitless and unauthorised expenditures in the Mahikeng local municipality.

(b) consistent enforcement and compliance with the law by the municipal council and the municipal manager

The municipal council is entrusted with executive and legislative powers of the Mahikeng local municipality.⁹⁰⁵ Accordingly, the Mahikeng municipal council ought to lead by example and execute their roles and responsibilities ethically and promote an ethical culture within the municipality.⁹⁰⁶ This helps the municipality to achieve positive results and run an effective administration. The researcher suggests that the municipal council must play an effective oversight role and hold the municipal manager accountable. The municipal council must ensure that the municipal manager complies with all the applicable legislation such as the *Municipal Finance Management Act* and hold the municipal manager accountable. This could reduce the chances of the Mahikeng local municipality from unnecessarily incurring unauthorised, irregular and fruitless and wasteful expenditure. The municipal council

⁹⁰² Section 2 of the *Municipal Finance Management Act*; Principle 6.1 of the King III Code; South African Local Government Association *Guideline Document on the Roles and Responsibilities of Councillors and Officials* (March 2011) 1, 4.

⁹⁰³ Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 1.

⁹⁰⁴ Section 62(1)(d) of the *Municipal Finance Management Act*; Mokwena TI Mahikeng Local Municipality Annual Report 2015/16 (19 January 2017 Mahikeng) 1, 19.

⁹⁰⁵ Section 43(c), 151(2) and 156 of the *Constitution of South Africa*; see also section 4(1)(b) and 11 of the *Systems Act*.

⁹⁰⁶ Section 195(1)(a) of the *Constitution of South Africa*; Section 19 of the *Municipal Structures Act* 117 of 1998 (*Structures Act*); Freedman W "The Legislative Authority of the Local Sphere of Government to Conserve and Protect the Environment: A Critical Analysis of *Le Sueur v Ethekwini Municipality* [2013] ZAKZPHC 6 (30 January 2013" 2014 *Potchefstroom Electronic Law Journal* 567, 568.

must ensure that the municipal manager complies with messages and recommendations by the Auditor General. The Auditor General's recommendations are aimed at assisting the municipal manager and the municipal council to achieve its municipal objectives and high standard of reporting.

The municipal manager as the accounting officer and the director for the municipality is vested with a huge responsibility of leading the Mahikeng local municipality effectively, by, *inter alia*, running a proper financial administration of the municipality.⁹⁰⁷ Failure by the municipal manager to lead ethically and/or to run an efficient and effective administration of the municipality may prejudice the municipality as well as the community, stakeholders and the creditors of the municipality. The researcher submits that the municipal manager must ensure compliance with the legislation such as the *Municipal Finance Management Act*,⁹⁰⁸ and the *Systems Act*⁹⁰⁹ and must be held accountable for failing to account.

The researcher recommends that the general oversight mechanisms must be strengthened. This can be done by establishing oversight committees such as MPAC's and audit committees. There must also be clear terms of reference for the audit committees to provide clarity and insight on the committees' duties and responsibilities. The audit committee must be skilled, informed and probing in fulfilling its oversight functions.

(c) enforcement of the Public Audit Act by the Auditor General

The Auditor General has referral powers in terms of the *Public Audit Act*. The Auditor General must enforce such powers as provided for in the *Public Audit Act*.⁹¹⁰ The powers of the Auditor General as provided for in the *Public Audit Act* include among others, to refer suspected material irregularities arising from the auditing process to

⁹⁰⁷ Section 51(i) of the *Systems Act*; Mashamaite MM "Improving Accountability in South African Local Government: Elements for Effective Local Government Accountability" 2013 *South African Association of Public Administration and Management* 1, 91.

⁹⁰⁸ Section 104(2) of the *Municipal Finance Management Act*; Mashamaite 2013 *South African Association of Public Administration and Management* 91.

⁹⁰⁹ Section 51(i) and 55 of the *Systems Act*; Mashamaite 2013 *South African Association of Public Administration and Management* 93.

⁹¹⁰ 25 of 2014 (as amended) (*Public Audit Act*), see section 5(1A); Mathiba GL *The Role of the Auditor-General in the Promotion of Efficient Financial Management in Municipalities: A Case Study of the North West Province* (LLM- dissertation University of Western Cape 2019) 22.

the relevant authorities with requisite investigative capacity and skills, such as the Hawks, SIU, SAPS and others.⁹¹¹ The investigations will provide sufficient proof of such material irregularities and hopefully ensure that those who have committed material irregularities are being prosecuted. The Auditor General has the power to follow-up on the progress made by the relevant accounting officer in implementing audit recommendations and take appropriate remedial action if there is any failure in that regard.⁹¹² The Auditor General has the power to issue a certificate of debt against the accounting officer or accounting authority who failed to implement remedial actions.⁹¹³ This is to ensure that the financial losses incurred as a result of such material irregularities are recovered from the municipal manager or the responsible person.⁹¹⁴ The researcher submits that the Auditor General must implement his/her powers as per the *Public Audit Act*⁹¹⁵ to ensure that there is accountability in the Mahikeng local municipality. This can be done by taking the appropriate remedial action to address the failure to implement the Auditor General's recommendations.⁹¹⁶ The Auditor General must ensure that municipal councillors and municipal manager for Mahikeng local municipality are held individually and severally liable for any financial misconduct. This can be done by taking the appropriate remedial action to address the failure to implement the Auditor General's recommendations. When the accounting officer has failed to comply with remedial actions, the Auditor General must issue a certificate of debt to the accounting officer to repay the debt.⁹¹⁷ The Auditor General must submit the copy of the certificate of debt to the responsible executive authority to collect the amount specified in the certificate of debt. The new amendments in the *Public Audit Act*, if implemented effectively by the Auditor General will ensure that the Mahikeng local municipality recovers its financial losses from the municipal manager or the responsible person. This will further ensure that the municipal manager adheres to his or her roles and

⁹¹¹ Sections 4(2)(a) and (b) of the *Public Audit Act*.

⁹¹² Section 5A of the *Public Audit Act*.

⁹¹³ Section 5A of the *Public Audit Act*. This is yet to be seen to be done in Mahikeng local municipality.

⁹¹⁴ Section 5A(3) of the *Public Audit Act*.

⁹¹⁵ Section 5A of the *Public Audit Act*.

⁹¹⁶ Section 5A(2) of the *Public Audit Act*.

⁹¹⁷ Section 5B(1) of the *Public Audit Act*.

responsibilities as the accounting officer and enhance the accountability and good corporate governance measures by the municipal manager.

(d) municipal employees must be fully equipped with skills, knowledge and capacity to a level that enables the municipality to perform its functions and exercise its powers

The municipal manager for Mahikeng local municipality is tasked with the responsibility of forming and developing an economical, effective, efficient and accountable administration.⁹¹⁸ Such administration must be equipped to implement the IDP and provide service to the community of Mahikeng.⁹¹⁹ In order to enable the municipal manager to achieve the latter duties, he has the powers to establish staff.⁹²⁰ The *Systems Act* requires the municipality to develop its human resources capacity to a level that enables the municipality to perform its functions and exercise its powers in an economical manner.⁹²¹ It was demonstrated in Chapter Five that lack of skilled and capacitated personnel hinder service delivery. The Auditor General also reported this in the 2018-2019 report that the Mahikeng local municipality did not have the requisite skills and capacity required to implement the policies and procedures of the municipality and relied on consultants to prepare financial statements.⁹²² Furthermore, the employment of persons on the basis of their loyalty or political affiliation (cadre deployment), also hinders effective and accountable administration in Mahikeng local municipality. This is because such an appointment is based on political affiliation and not the skills, knowledge and capacity to carrying out the tasks so required by the municipality.

The Auditor General indicated in the 2018-2019 annual report that the Mahikeng local municipality failed to develop and adopt appropriate systems and procedures to monitor, measure and evaluate staff performance.⁹²³ Therefore, the researcher

⁹¹⁸ Section 55(1)(a) of the *Systems Act*.

⁹¹⁹ Section 55(1)(1) of the *Systems Act*.

⁹²⁰ Section 66(1) of the *Systems Act*.

⁹²¹ Section 68(1) of the *Municipal Finance Management Act*.

⁹²² Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 10.

⁹²³ Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 6.

recommends that the municipality must develop such systems and procedures that will help to monitor, measure and evaluate staff performance as required by the *Systems Act*.⁹²⁴ The researcher also recommends that the Mahikeng local municipality must employ people with relevant skills and capacity required to implement the policies and procedures as per the municipal laws such as the *Municipal Finance Management Act*, *Systems Act* and the municipal by-laws. There are certain key areas within the Mahikeng local municipality such as finance, internal audit, performance management and the SCM that require persons with appropriate skills and expertise to perform their duties and responsibilities effectively. This will ensure that the municipality does not rely on external consultants to perform certain tasks that can be performed by internal staff and thus save municipal funds. The researcher recommends that the appointment of a municipal official must be based on the idea of professionalism of local government which entails that the appointments must be made on the basis of professional qualifications, knowledge and subjection to a code of professional ethics.⁹²⁵ This will enhance municipal performance and reduce unauthorised, irregular, fruitless and wasteful expenditures in the Mahikeng local municipality.

The municipal manager is responsible and accountable for the management, effective utilisation and training of staff in the Mahikeng local municipality.⁹²⁶ The researcher recommends that the municipal manager must organise training on corporate governance to equip municipal staff with the skills, knowledge and understanding on how to interpret and apply the municipal laws such as the *Municipal Finance Management Act*,⁹²⁷ and the *Systems Act*⁹²⁸ in relation to the implementation of the SCM and IDP programme, and budget of the municipality.

⁹²⁴ Section 67(1d) of the *Systems Act*; Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 7.

⁹²⁵ Sections 67 and 72(1)(c) of the *Systems Act*.

⁹²⁶ Section 55(1)(f) of the *Systems Act*.

⁹²⁷ Section 2 of the *Municipal Finance Management Act*; South African Local Government Association *Guideline Document on the Roles and Responsibilities of Councillors and Officials* 4.

⁹²⁸ Sections 2 and 7 of the *Systems Act*; South African Local Government Association *Guideline Document on the Roles and Responsibilities of Councillors and Officials* 4.

The above mentioned workshops or training must focus on the interpretation and application of the principles of corporate governance.⁹²⁹ The workshops should also be aimed at interpretation, understanding and implementation of the IDP programmes and the King IV Code⁹³⁰ on corporate governance. This will ensure that the highest form of ethics is promoted and maintained and an ethical culture is promoted in Mahikeng local municipality.⁹³¹ The King IV Code⁹³² also requires the municipal council to possess the appropriate knowledge, skills, experience diversity and independence for it to discharge its governance role and responsibilities objectively and effectively. The researcher suggests that the municipal council should also be involved or attend the training for municipal staff members on the principles of good governance. This will ensure that the members of the municipal council uphold the highest form of ethics when governing the affairs of the municipality or enacting by-laws.

(e) investigations into financial misconduct or irregular, unauthorised and fruitless and wasteful expenditures must be conducted expeditiously by the municipal council

It was stated in the 2018-2019 Auditor General's report that the investigations undertaken by the Hawks on the alleged sale of property without following the correct disposal processes were still in process.⁹³³ Moreover, the municipality initiated an investigation into alleged financial misconduct, maladministration, fraud and corruption against the municipal manager.⁹³⁴ The investigations were conducted by an independent law firm and were still in progress at the reporting date.⁹³⁵ The researcher recommends that the investigations conducted in the Mahikeng local municipality must be done expeditiously, and without any favour, fear or prejudice.

⁹²⁹ Principle 1 of the King IV Code; South African Institute of Chartered Accountants *Student Handbook 2015/2016: King Code of Governance for South Africa* 16.

⁹³⁰ Principle 1 of the King IV Code; Mkhabele A Legal Analysis of the Application of Corporate Governance Principles in Musina Local Municipality 36.

⁹³¹ Section 195(1)(a) of the *Constitution of South Africa*.

⁹³² Principle 7 of the King IV Code; King IV Report 2016 *Institute of Directors Southern Africa* 83.

⁹³³ Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 10.

⁹³⁴ Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 10.

⁹³⁵ Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 10.

There must be a time frame stipulated for internal processes for investigations. This will ensure that relevant officials are dealt with accordingly by the municipality or the municipal council, and it will also save costs. The more the investigations prolong, the more costly it becomes to the Mahikeng local municipality and strains the municipal budget.

The researcher also recommends that the municipal manager must refer all cases of alleged irregular expenditure that constitute a criminal offence, theft and fraud that occurred within the municipality to the SAPS as required by the *Municipal Finance Management Act*.⁹³⁶ This is to ensure that further investigations are done to hold the responsible person accountable. The municipal council must also ensure that all reported cases of irregular expenditure that constitute a criminal offence, theft and fraud that occurred within the municipality, are reported to the SAPS.

(f) the outcomes of investigations conducted within the Mahikeng local municipality must be made public

The researcher recommends that the investigations on financial offences that are conducted in the Mahikeng local municipality must be made public to enable the stakeholders of the municipality to make informed decisions. The local community will be able to make the decision to trust their representative and in exercising their voting rights. This will also assist the investors in making their decision on whether they continue investing in the Mahikeng local municipality or not. The acts or decisions of the Mahikeng local municipality affect the rights of the members of the community, especially with regards to service delivery. The publication of the investigations reports on financial misconduct will allow the interested persons to seek the necessary relief, for example, apply to the court for piercing of the veil or refer such outcomes to the public protector for further investigations. The publication of the financial reports of the municipality will also serve as a measure of deterrence for the municipal manager to adhere to accountability and exercise good corporate governance measures.

⁹³⁶ Section 32(6)(a) and (b) of the *Municipal Finance Management Act*.

(g) interested persons must apply to the court to pierce the corporate veil in Mahikeng local municipality in exceptional circumstances where there are wrongful acts, fraud or corruption in the municipality

The principle of piercing the corporate veil empowers the courts to look behind the Mahikeng local municipality's dealings and have regard to the controllers of the municipality for some legal purpose.⁹³⁷ There are unauthorised, irregular, fruitless and wasteful expenditure in Mahikeng local municipality, and no one was held accountable for the past three years. All the material irregularities and expenditures incurred in the municipality, are in the name of the municipality and not directed to the municipal manager himself/herself or the person who has caused such material irregularity. The municipal manager has failed to prevent financial losses in the municipality and failed to recover any financial loss from a responsible person. It is for this purpose that the liability of the Mahikeng local municipality should be apportioned to the municipal manager together with the relevant official who has caused such material financial loss. The municipal manager has breached his or her fiduciary duties to the extent that the municipality incurred material financial losses.⁹³⁸ Those financial losses the third parties must have suffered harm due to fraud, corruption and unconscionable abuse of the municipal manager. The interested person who has suffered harm can apply to the court for the piercing of the corporate veil. The researcher proposes the company law method of piercing the corporate veil. The reason for this is that this will be at the discretion of the court, and there will be no political influence or corruption. Furthermore, this will include interested persons such as the Auditor General, members of the Mahikeng community, opposition parties and Non-profit organisations, etc. The researcher submits that the principle of piercing the corporate veil should be utilised in Mahikeng local municipality by any interested person to curb maladministration of municipal funds and resources and poor service delivery to the people in

⁹³⁷ *Atlas Maritime Co SA v Avalon Maritime Ltd the Coral Rose* No.1 1991 4 All SA 769 (CA) (*Atlas* case) para 779.

⁹³⁸ Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 3.

Mahikeng.⁹³⁹ This can be done through an application by an interested person to the court to pierce the veil in the municipality where there is proof of fraud or corruption in the Mahikeng local municipality. The interested person can apply to the court to pierce the veil where there is failure by the municipal manager to exercise his or her fiduciary duties of acting with care, skills and diligence and in the interest of the municipality. The principle of piercing the corporate veil should be applied to investigate and expose maladministration, lack of accountability of municipal funds and the abuse of the separate legal existence of the Mahikeng local municipality by the municipal manager or the municipal council.⁹⁴⁰ This is because there has been unauthorised, irregular, fruitless and wasteful expenditures in the municipality since 2013, which to date has not been accounted for and no one has been held accountable. The municipality is regarded as a legal person that has its own rights and responsibilities. Accordingly, it has similar status of a company, in that, both can sue and be sued in their own names and can act in their own names.⁹⁴¹ The researcher argues that the relevant provisions of the *Companies Act* 2008⁹⁴² dealing with the piercing of the corporate veil should be applied to Mahikeng local municipality. This is to enforce accountability in the municipality and ensure that the municipal manager and municipal council do not use the municipal assets or their positions for their own interests.

The application of the principle of piercing the corporate veil will hopefully deter or prevent the municipal manager, municipal council or any official of the Mahikeng local municipality from using the assets or resources of the Mahikeng local municipality for personal gain.⁹⁴³ This is because the acts or omissions of the

⁹³⁹ *Cape Pacific v Lubner Controlling Investments (Pty) Ltd and Others* 1993 (4) SA 790 (A) (*Cape Pacific* case) para 33.

⁹⁴⁰ Schoeman N "Piercing the Corporate Veil Under the New Companies Act" (1 June 2012) *De Rebus* 1, 1.

⁹⁴¹ Section 2(a) and (d) of the *Systems Act*; Mongalo T *A Global Picture of Business Undertakings in South African Corporate Law, with Special Reference to the Position in Groups of Companies* (LLM- dissertation University of Kwa-Zulu Natal 2016) 84.

⁹⁴² 71 of 2008 (*Companies Act* 2008), see section 20(9); *Ex Parte Gore NNO* 2013 (3) SA 382 (WCC) (*Ex Parte Gore* case) para 2.

⁹⁴³ Section 20(9) of the *Companies Act* 2008; Smith BS "Statutory Discretion or Common Law Power? Some Reflections on 'veil piercing' and the Consideration of (the value of) Trust Assets in Dividing Matrimonial Property at Divorce – Part One" 2016 *Journal of Juridical Science* 68, 72; Mkhabele *A Legal Analysis of the Application of Corporate Governance Principles in Musina Local Municipality* 36.

responsible person acting in the name of the municipality, will be deemed to have acted in his or her personal capacity when causing such unconscionable conduct. Piercing the veil will further oblige the municipal manager as the accounting officer of the Mahikeng local municipality to follow the *Municipal Finance Management Act*⁹⁴⁴ and account for all the municipal funds and resources, thus exercising reasonable care. This is because when courts pierce the veil, the responsible person for breach of any fiduciary duties, for causing material irregularities, will be held personally liable. The application of the principle of piercing the corporate veil will mean that those who are allegedly involved in corrupt activities within the municipality or using the municipal assets for their interests must be held accountable and liable for material irregularities and for breach of their fiduciary duties.⁹⁴⁵

(h) an effective Integrated Development Plan to improve service delivery should be adopted and implemented in Mahikeng local municipality

Every municipality in South Africa is required in terms of the *Systems Act* to develop and adopt the Integrated Development Plan (IDP).⁹⁴⁶ An IDP is a strategic plan that must be developed by a municipality in order to ensure that it achieves the objects of local government set out in section 152 of the *Constitution of South Africa*. An IDP is an approach that involves the community to find the best solutions to achieve good long term developments. The IDP is the principal strategic planning instrument that guides and informs all planning, budgeting, management and decision making in the Mahikeng local municipality.⁹⁴⁷ The IDP should look at the economic and social development of the area as a whole. Some of the major IDP plans should be on

⁹⁴⁴ Section 62 of the *Municipal Finance Management Act*.

⁹⁴⁵ Mkhabele *A Legal Analysis of the Application of Corporate Governance Principles in Musina Local Municipality* 36.

⁹⁴⁶ Section 25 of the *Systems Act* provides that every municipal council must adopt a single, inclusive and strategic plan for the development of the municipality.

⁹⁴⁷ Asha AA "Challenges in the Implementation of Integrated Development Plan and Service Delivery in Lepelle-Nkumphi Municipality, Limpopo Province" 2020 *International Journal of Economics and Finance Studies* 1, 3.

distribution of water, electricity, sanitation, maintenance of roads and refuse removal.⁹⁴⁸

The Mahikeng local municipality has a management planning processes challenge in the implementation of the IDPs.⁹⁴⁹ Some of those challenges affecting the implementation of the IDP in Mahikeng local municipality include among others lack of accountability of the municipal manager. This is evidenced by the Auditor General's report, where he indicated that he was not able to obtain sufficient appropriate audit evidence on the number of pump stations maintained, the number of gravel roads maintained. Furthermore, the municipality reported an achievement of 1 349 tanks provided with free basic water by 30 June 2019 against the target of 4 000 tanks, however, the municipality did not have an adequate performance management system to maintain records to enable reliable reporting on the achievement of targets.

There must be proper implementation of the IDP in the Mahikeng local municipality and community participation must be encouraged when implementing the IDP to ensure effective and efficient service delivery.⁹⁵⁰ It must be noted that the process of developing and implementing the IDPs is a complex one and requires officials with requisite skills and technical capacities such as the town planners and stakeholders.⁹⁵¹ The IDP guides and informs planning, budgeting, management and decision making in a municipality; hence it requires officials with requisite skills and technical capacities.

The lack of proper planning of the IDP often leads to poor implementation of the IDP programme in the Mahikeng local municipality. The poor implementation of the IDP

⁹⁴⁸ Sebola MP, Tsheola JP, Phago KG and Balkaran S "Editorial: The 21st Century Challenges of Local Government in South Africa" 2013 *South African Association of Public Administration and Management* 1, 7.

⁹⁴⁹ Mathebula NE, Nkuna NW and Sebola MP "Integrated Development Plan for Improved Service Delivery: A Comparative Study of Municipalities Within the Mopani District Municipality, Limpopo Province" 2016 *International Journal of Business and Management Studies* 70, 70.

⁹⁵⁰ Mathebula, Nkuna and Sebola 2016 *International Journal of Business and Management Studies* 83.

⁹⁵¹ Manyaka and Madzivhandila 2013 *South African Association of Public Administration and Management* 182. Avoid dissertation/internet sources/newspapers. Put credible sources?? Put correct sections; More sources/cite well?? Remember each time you cite a source for the first time in each chapter, cite it fully??

programme in the municipality affects service delivery and increase service delivery protests. The researcher argues that workshops must be held in the municipality to teach or enlighten the overall workforce of the Mahikeng local municipality on how the IDP works or is executed.⁹⁵² Furthermore, the overall workforce as well the community or the residents of Mahikeng local municipality must be included in the participatory management processes, the formulation as well as the implementation of the IDP. This will promote accountability, openness and transparency, and ensure the enhancement and speeding up service delivery and consequently, alleviates poverty. The IDP will enable the municipality to effectively use the resources to satisfy the most critical needs for communities.

(i) a board for municipal managers should be established to provide training for municipal managers on how to run the administration of a municipality

The municipal council should establish a board for municipal managers that will establish standards which municipal managers must conform to. For example, a board for municipal managers may be similar to the legal practise council and a bar of advocates. The legal practise council set norms and standards for attorneys to comply with. Such standard may include, among others, being a fit and proper person. An attorney who fails to comply with such standards of being fit and proper may be struck off the roll. Thus, the board for municipal managers will also set norms and standards that the municipal managers must comply with when running the affairs of the municipalities. If the municipal manager is not running the administration of the Mahikeng local municipality in an accountable, transparent, effective and efficient manner, such municipal manager will be struck off the roll.

The board for municipal managers must provide training for the municipal managers on how to run the administration of a municipality. This will assist the municipal manager in running the municipal affairs of the Mahikeng local municipality and maintaining a standard of high professional ethics. The training must include teaching the municipal managers the municipal laws, corporate governance

⁹⁵² Mathebula, Nkuna and Sebola 2016 *International Journal of Business and Management Studies* 70.

principles, and reporting standards or how to keep proper records of the municipality.

(j) there should be no political interference in the discharge of the duties of the municipal manager

It was noted in Chapter Five that the role of the municipal manager is a complex one. This follows the fact that the municipal manager has a political and administrative mandate. It was also noted that the municipal council consists of members from political parties. It was also indicated in the 2018-2019 report of the Auditor General that the political leadership failed to set the right tone for clean administration by creating an environment conducive to accountability, good governance and the effecting of consequences in municipalities.⁹⁵³ The intervention by the provincial treasury and cooperative governance department was riddled with political infighting and caused further instability within the municipalities, which also had a negative impact on service delivery. Therefore, the researcher recommends that the role of the municipal manager must be purely an administrative one, and not be influenced by politicians.

The researcher recommends that the municipal manager in administering the affairs of the Mahikeng local municipality must consider the will of the people rather than being influenced by politicians and political mandate. The municipal manager must adhere to and uphold the *Constitution of South Africa* and the *Municipal Finance Management Act* in administering the affairs of the municipality. The interests of the politicians must not be prioritised than the needs of the community of the Mahikeng local municipality. The interference by politicians has a negative influence on the accountability of the municipal manager.

(k) the municipal manager and municipal council must ensure accountability of the municipal funds and general administration of the Mahikeng local municipality

⁹⁵³ Auditor General "MFMA Consolidated General Report on Local Government Audit Outcomes – 2018/19" 1, 15.

It was stated above that accountability is a central pillar to the success of municipalities in South Africa. Therefore, the researcher recommends that the municipal manager for Mahikeng local municipality must adequately prepare regular, accurate and complete financial reports that are supported and evidenced by reliable information. This will assist the municipality in getting the unqualified opinion from the Auditor General, and it will be an indication that there is accountability in the municipality. The researcher further recommends that the Municipal council in Mahikeng local municipality must adequately review and monitor compliance with the *Municipal Finance Management Act* and the *Systems Act* and hold the municipal manager accountable. This will assist in ensuring that the municipal manager is held accountable and refrains from committing acts of fraud or corruption. When a person is held accountable, such person will refrain from committing unlawful acts. The municipal manager must report any allegations of irregular conduct to the South African Police Service. The municipality must have a proper transparent and accountable system.⁹⁵⁴ This will ensure that services are delivered to the people of Mahikeng in an accountable and sustainable manner.

(I) Mahikeng local municipality must have effective oversight mechanisms concerning the financial management and operational activities

The term oversight can be defined as overseeing the work of the executive in order to enhance service delivery to achieve improved living conditions for the community of Mahikeng local municipality.⁹⁵⁵ Furthermore, oversight can be described as a constitutionally assigned function of the legislative structure to analyse and evaluate the work of executive of organs of state.⁹⁵⁶ The Auditor General indicated in his 2018-2019 report that the municipal council and the municipal manager for Mahikeng local municipality failed to provide adequate oversight and monitoring the financial performance, implementation of consequence management over recurring

⁹⁵⁴ Amber IM and Badenhorst-Weiss JA "Procurement Challenges in the South African Public Sector" 2012 *Journal of Transport and Supply Chain Management* 242, 251.

⁹⁵⁵ Kraai S, Holtzhausen N and Malan L "Oversight Mechanisms in Local Government" 2017 *African Journal of Public Affairs* 59, 63.

⁹⁵⁶ Kraai, Holtzhausen and Malan *African Journal of Public Affairs* 63.

SCM transgressions and the implementation of the post-audit action plan.⁹⁵⁷ The lack of oversight in Mahikeng local municipality has resulted in poor financial viability and recurrence of material findings over financial and performance and compliance with laws and regulations.

The researcher recommends that the Mahikeng local municipality must have a sound oversight mechanism in both its financial management and operational activities. The municipal council for the Mahikeng local municipality must adopt an annual oversight report containing council's resolutions within the prescribed timeline.⁹⁵⁸ The municipal council for the municipality must try by all means to adequately oversee the financial and performance reporting, which prohibit the Mahikeng local municipality from having material misstatements and control deficiencies.⁹⁵⁹

The researcher also recommends that the municipal manager for Mahikeng local municipality must make the annual report public immediately after an annual report is tabled before the municipal council, and invite the local community to submit representations in connection with the annual report.⁹⁶⁰

It was also noted in Chapter Five that the audit committee and the MPAC within the Mahikeng local municipality are not as effective since they are dysfunctional.⁹⁶¹ The researcher is of the view that there is a great need to revamp or revitalise the roles of the committees and other role players within the committees to ensure that these committees play an effective oversight role in the Mahikeng local municipality.

⁹⁵⁷ Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 10.

⁹⁵⁸ Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 6; Mathiba The Role of the Auditor-General in the Promotion of Efficient Financial Management in Municipalities 61.

⁹⁵⁹ Mathiba The Role of the Auditor-General in the Promotion of Efficient Financial Management in Municipalities 61

⁹⁶⁰ Section 129(3) of the *Municipal Finance Management Act*; see also section 21A of the *Systems Act*.

⁹⁶¹ Gaedie IJ Assessment of Basic Service Delivery in Mafikeng Local Municipality (unpublished Masters Mini dissertation North West University 2015) 1, 6; Mathiba The Role of the Auditor-General in the Promotion of Efficient Financial Management in Municipalities 61.

(m) proper communication channels must be followed by the municipal manager, senior managers and other officials in the Mahikeng local municipality

The municipal manager relies on various role players in order for him/her to run the administration of the Mahikeng local municipality. The various role players are among others, the municipal council, office of the CFO, internal committees and sub-committees and the entire municipal employees or officials. Therefore, the researcher recommends that there must be clear communication between various role players and various departments in the Mahikeng local municipality. This will ensure that there are no misunderstandings and that certain officials will not enter into oral contracts on behalf of the municipality without the knowledge or consultation with the municipal manager. The researcher discussed the Famate case which ended up in the appeal stage because of lack of communication between the office of the CFO and the municipal manager who almost got the municipality into trouble and unnecessary litigation processes

6.4 Conclusion

Mahikeng local municipality must improve the development and betterment of the lives of its people and provide services to the community in a sustainable manner.⁹⁶² For the municipality to provide better service delivery mandate to the community and run an effective and efficient administration, the municipal council and manager must be accountable for the resources and funds of the municipality. The municipal manager for Mahikeng local municipality is failing to account for the municipal funds and resources of the municipality, and this is evidenced by the report of the Auditor General for the 2018-2019 financial year.⁹⁶³ Both the Municipal council and manager must adhere and comply with the *Systems Act, Municipal Finance Management Act*, and policy directives of the Mahikeng local municipality. This will ensure accountability and may improve service delivery in the municipality. The municipal

⁹⁶² Section 152(b) of the *Constitution of South Africa*; De Visser J "The Political-administrative Interface in South African Municipalities Assessing the Quality of Local Democracies" 2010 *Commonwealth Journal of Local Governance* 86, 88.

⁹⁶³ Auditor General "Report of the Auditor-General to the North West Provincial Legislature and the Council on the Mahikeng Local Municipality- 2018/19" 1.

manager must exercise their duties in utmost good faith and in the best interest of the municipality. The municipal council must consider upholding the principles of good corporate governance as per King III and King IV Code.⁹⁶⁴ This may assist the municipal council and municipal manager to achieve the desired outcomes of the municipality such as providing services to the community of Mahikeng in a sustainable manner and promoting good governance in the Mahikeng local municipality. The non-compliance with the municipal prescripts or failure to apply the principle of good governance will affect service delivery and also hamper the basic human rights of the community.⁹⁶⁵ It is for this reason that the researcher suggests harsh punishments such as holding the municipal council members and manager personally liable for their conduct or non-compliance with the municipal prescripts as it violates the peoples' basic human rights.

The municipal council and municipal manager for Mahikeng local municipality must promote and maintain the highest standards of professional ethics, ethical leadership and face punishment for non-compliance the *Constitution of South Africa*,⁹⁶⁶ *Municipal Finance Management Act*,⁹⁶⁷ and the *Systems Act*. This will hopefully ensure that the municipal manager prevents the irregular expenditure, unauthorised, fruitless and wasteful expenditure in the municipality as required by the *Municipal Finance Management Act*. The principle of piercing the corporate veil must be applied in Mahikeng local municipality in the event where there is maladministration or purported acts of corruption and fraud. This will ensure that the veil is pierced in the Mahikeng local municipality and those who have caused such fraud and corruption are held personally liable for such acts.

⁹⁶⁴ Section 51 of the *Systems Act*; Principle 1 of King IV Code; also see Principle 1 of King III Code.

⁹⁶⁵ Section 7(2) of the Constitution of South Africa.

⁹⁶⁶ Section 195(1)(a) of the *Constitution of South Africa*.

⁹⁶⁷ Section 174 of the *Municipal Finance Management Act*.

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List of Abbreviations

AJPA	African Journal of Public Affairs
APSA	American Political Science Association
CDI	Communications Development Incorporated
CFO	Chief Financial Officer
IDP	Integrated Development Plan
IJBM	International Journal of Business Management
JPA	Journal of Public Administration
JTRSA	Journal for Transdisciplinary Research in Southern Africa
KFH	Financial Holdings Limited
MEC	Member of Executive Council
MPAC	Municipal Public Accounts Committee
PERJ	Potchefstroom Electronic Law Journal
PWC	Price Waterhouse Coopers
IIAS	International Review of Administrative Sciences
IODSA	Institute of Directors Southern Africa
SABC	South African Broadcasting Corporation
SAJSEP	South African Journal of Social and Economic Policy
SCM	Supply Chain Management

SLA

Service Level Agreement

SOEs

State-Owned Enterprises

JTRSA

Journal for Transdisciplinary Research in