

Limitations of the Principal-Agent Theory to Explain the Problem of Non-Compliance in South African Municipalities

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ABSTRACT

The obstinate problem of non-compliance with municipal financial legislation in South Africa has largely been explained as a principal-agent problem. Accordingly, the municipal officials as the agents are depicted as potentially non-compliant, dishonest and corrupt. Notably, measures that have been established to address the problem of non-compliance have been disproportionately focused on the municipal officials. This intrinsic bias against municipal officials is flawed and inadequate for the context and dynamics at play in the problem of non-compliance with municipal financial legislation in South African municipalities. In particular, the assumption that non-compliance occurs because the municipal councils are unable to effectively control the behaviour of the bureaucrat is not borne out by reality. This article aims to highlight the theoretical limitations of the principal-agent theory in order to explain the problem of non-compliance with municipal financial legislation in South Africa. The article utilised a qualitative methodology. Secondary data which emanated largely from the Auditor-General of South Africa's reports was employed. Drawing on reports of the South African Auditor-General, the article shows the contribution of the municipal councillors in the problem of non-compliance. The article concludes that municipal councils are not unable but unwilling to exercise oversight obligation and duty and thus must be regarded as complicit and culpable in the problem of non-compliance in South Africa municipalities.

Keywords: non-compliance; principal-agent theory; municipal councils; oversight; auditor reports



Introduction

The problem of non-compliance with municipal financial legislation has been unrelenting and pervasive for many years in South Africa. The Auditor-General of South Africa has repeatedly highlighted non-compliance with municipal financial legislation in numerous consecutive annual audit outcomes. Reports indicate that the perennial failure to ensure compliance has persisted despite several interventions such as the Local Government Turnaround Strategy (Department of Cooperative Governance and Traditional Affairs, 2009). Similarly, the failure of the Operation Clean Audit 2014 to curb non-compliance with municipal financial management law and regulations is well documented (Powell, O'Donovan, Ayele & Chigwata, 2014).

While few municipalities have managed to ensure a strong internal control environment and compliance, the Auditor-General (2019) indicates that the pocket of excellence is very limited and is unfortunately dwarfed by the pervasive incidents of non-compliance in many municipalities across South Africa. According to the Auditor-General (2019: 2), the impact of non-compliance is that the “fiscal resources placed at the disposal of municipalities are either misused or not properly accounted for as required by laws and regulations. Consequently, the problem of non-compliance with municipal finance laws and regulations has effectively disabled the very foundation in which many other municipal processes, including service delivery are anchored.

Several reports highlight that municipalities in South Africa are eclipsed in a culture of non-compliance and this has had devastating consequences for the overall governance and financial health of municipalities. This culture of non-compliance is reported to have contributed towards widespread wasteful, unauthorised and irregular expenditure amounting to billions of Rands. The Auditor-General (2020) reports that non-compliance has contributed towards few municipalities achieving a clean audit and over R32 billion being accumulated as irregular expenditure. This, according to the Auditor-General (2020: 157), has resulted in unauthorised expenditure amounting to R15 billion and fruitless and wasteful expenditure of R3 billion, during the 2018/2019 financial year. The South African Local Government Association (SALGA) (2019a) denounces non-compliance with municipal finance management requirements as contributing towards the apparent inability to stem the devastating tide of the unethical behaviour, corruption and other transgressions.

The literature is consistent and unanimous that the problem of non-compliance engulfing municipalities in South Africa is attributable to the lack of effective accountability and oversight in municipal finance management processes. This is evident in the Auditor-General's consecutive and incessant signals regarding the effect of a lack of effective accountability and an oversight in municipal finances (Auditor-General, 2014/2015 to MFMA 2018/2019). Equally, the Parliamentary Monitoring Group (2019) and SALGA



(2019b) point to the increasing levels of non-compliance, transgressions, irregularities and decrease in clean audits as the direct outcome of the lack of accountability and oversight.

The problem of non-compliance is persisting despite what is generally regarded as stringent, excessive, burdensome and onerous municipal financial accountability measures (Steytler, 2008). The Financial and Fiscal Commission (2014: 7) also indicates that the current plethora of authoritative, complex, intrusive, and inflexible compliance requirements are failing to curb the problem of non-compliance. Likewise, measures such as the establishment and strengthening of the Municipal Public Accounts Committees have failed to enhance the role of the municipal councils in curbing the problem of non-compliance (Maoni, 2013).

Various studies have been undertaken to understand and proffer solutions to the failure of internal control with municipal finance management prescripts. Notably, these studies have largely been conceptualised and empirically interrogated, explained and theorised through the use of the principal-agent theory in understanding the problem of non-compliance with municipal legislation (Napier, 2018; Khaile, 2018; Enwereji & Uwizeyimana, 2019). While a considerable number of other studies are not based on any explicit discernible theory, they, however, still embody non-compliance as a problem of either the municipal officials or councillors, thereby effectively implying assumptions typically advanced in the principal-agent theory.

Although the principal-agent theory is not entirely inappropriate, the problem here is that, its fundamental assumptions are limited to respond adequately to issues, complexities and dynamics at play in the problem of non-compliance with legislation in the South African municipal context. In particular, the principal-agent theory emphasises and focuses on a potential deviant and non-compliant official who must be monitored by a supposedly principled, honest and ethical principal. This is at odds with the reality experienced in most municipalities in South Africa. As Döhler (2018: 190) observes, the “moral hazard by the principal thus appears as an anomaly or even as an impossibility that does not feature in the canonical standard of the principal-agent theory model”. The agent bias intrinsic in the principal-agent theory is also visible in the academic footprints which explore municipal financial accountability and oversight. Accordingly, there is a need to address the disproportionate focus and blame on the municipal councils (principals) in the problem of non-compliance with municipal financial legislation. While it is not the aim of this article to provide an alternative theory, it however, intends to highlight the theoretical limitations of the principal-agent theory in order to explain the problem of non-compliance with municipal financial legislation in South Africa. This article has six sections. The first section, which follows the introduction, provides the methodological approach for the article. The second section discusses the concept of non-compliance. The third section presents the current legal framework governing non-compliance with the municipal financial legislation. This is followed by a discussion on the problem of non-compliance with



municipal finance law and regulations in South African municipalities. The fifth section discusses the principal-agent theory and its limitations when used to respond to the dynamics and challenges of non-compliance in municipalities. The last section argues that the problem of non-compliance with municipal financial legislation is the result of a failure of municipal councils to exercise their duty of oversight.

Methodological Approach

The article utilised a qualitative research approach through the review of literature obtained primarily from the findings of the reports of the Auditor-General of South Africa. These reports were considered appropriate as they contain the most relevant, regular, accurate and timely information to help explain and understand the debates on non-compliance. The findings contained in the Auditor-General's reports serve as the authority and generally inform annual commentary, opinions and academic debates on issues such as corruption and failure of accountability and oversight. Accordingly, relevant data was selected using content analysis from the Auditor-General's reports between 2011 and 2020.

Concept of Non-Compliance

Compliance is defined as “the extent to which there exists a state of accordance between an actor's behaviour on the one side and predefined, relevant and explicit norms, rules, legislation on the other” (Foorthuis, 2012: 161). In this regard, compliance describes adherence, conformity and appropriate behaviour that is in accordance with the requirements or prescriptions. Non-compliance, on the other hand, is commonly regarded as the failure or unwillingness to adhere to the prescriptions of law, rules and regulations. PricewaterhouseCoopers (PWC, 2018) defines non-compliance as any intentional or unintentional act of omission or commission by a person or entity, which are contrary to the prevailing laws or regulations. It is described as a behaviour that is expressly proscribed by the organisation's rules, procedures and policies.

While the benefits of compliance are contested, it does not suggest that it is not necessary. The Institute of Directors in Southern Africa (2016: 37) cautions against what it refers to as ‘mindless compliance’ that is mainly focused on doing things right, even if they do not instil qualitative outcomes relevant to the achievement of the intended governance outcomes. Arguably, while it is often true that compliance does not always denote effectiveness in realising policy outcomes, it should be acknowledged that non-compliance has the potential to negatively affect the credibility of role-players, governance, processes and the rule of law. Likewise, the Auditor-General (2011) remarks that the commitment to ensure compliance is not an obsession with maintaining red-tape, but a commitment to ensuring value for money and respect for public funds. In addition, the Auditor-General (2011) states that compliance is not about ticking the box, but directs leaders and officials in the



public sector to execute their roles, responsibilities and duties in an effective, economic, and most importantly, in accordance with the applicable rules and regulations.

It is widely acknowledged that non-compliance could be the result of intentional or unintentional behaviour. Foorthuis and Bos (2011) state that within the compliance and non-compliance environment, there is an actor who has cognitive capabilities, preferences, beliefs, values and often acts as a rational person pursuing his/her self-interest. Accordingly, there are two dominant explanations of non-compliance, namely “capacity explanation and ethics explanation” (Ledger, 2020: 6). Ledger (2020) explains capacity explanation as the lack of capacity/technical skills or sufficient knowledge as the reason for non-compliance. Ethics explanation on the other hand points to “a lack of the correct ethical behaviour as the reason for non-compliance” (Ledger, 2020: 6). Furthermore, Ledger (2020: 6) argues that the “narrative of ethics explanation is rooted in the belief that when public servants prioritise their interests (such as increasing their personal wealth) hence they will not comply with legislation”.

Legal Framework Governing Non-Compliance

In keeping with South Africa’s constitutional architecture, the National Treasury has enacted laws and regulations to ensure that the obligations imposed by them are complied with. Arguably, it is doubtful whether voluntary and self-regulation will be effective in addressing non-compliance. Thus, enforceable, formal and legal means such as the laws, regulations, policies and other binding mechanisms and procedures are necessary to address non-compliance. Therefore, the legal framework is necessary to institutionalise and enforce a culture of municipal financial accountability and oversight.

In addition, the legal framework removes the arbitrariness and confusion for adherence, compliance and the required conduct. It also becomes easy to distinguish behaviour that is not in accordance with rules, norms and prescripts. In particular, the Municipal Finance Management Act 56 of 2003 (MFMA) (RSA, 2003) presents compliance with municipal financial management prescripts as a legal requirement and the obligations imposed by it to prevent, detect and sanction non-compliance.

Arguably, compliance/non-compliance is central in the political–bureaucratic relationship to ensure that the mandate, aspirations and obligations envisioned and imposed by the MFMA are realised. The National Treasury (RSA, 2011) states that the MFMA, together with the Municipal Systems Act (RSA, 2000), allocate distinct and separate accountability and oversight roles and responsibilities to municipal officials and councillors. In terms of this separation, the municipal officials under the leadership of the Municipal Manager are legally accountable for the financial management and are obligated and have a duty to act with fidelity, honesty and integrity and in the best interests of the municipality at all times (RSA, 2011: 74).



Municipal Officials and Non-Compliance

The MFMA contains explicit, stringent and onerous measures for administrative officials to address non-compliance and administrative accountability. The significance of these measures is that they emphasise preventative internal controls. Importantly, these measures underscore the obligation on the part of the municipal officials to account, to answer and justify conduct. Procedurally, the internal control measures are largely the purview of the municipal administration.

In terms of the Municipal Systems Act (RSA, 2000) and the MFMA (RSA, 2003), the Municipal Manager, as the leader of the administration and accounting officer of the municipality, is obligated to be the steward over the financial administration of the municipality in an effective, efficient and economic manner (section 60 of the MFMA). The exercise of this obligation requires the Municipal Manager to “act with fidelity, honesty, integrity and in the best interests of the municipality in managing its financial affairs” (Section 61 of the MFMA). Furthermore, the Municipal Manager inherits the ultimate responsibility by exercising functions and powers assigned to him/her in accordance with this Act.

One of the compliance roles and responsibilities of the Municipal Manager is to provide guidance and advice on compliance with this Act to the political structures and officials of the municipality (Section 60 of the MFMA). Fundamentally, the Municipal Manager has to ensure compliance by taking all reasonable steps to see to it that acts of unauthorised, irregular, fruitless and wasteful expenditure are prevented (section 62 of the MFMA). Similarly, the Municipal Manager has a legal duty to ensure and maintain an effective system of expenditure control (section 65 of the MFMA). Accordingly, the Municipal Manager is required to ensure compliance with supply chain management regulations and policies (RSA, 2017). The responsibility for compliance on the part of the Municipal Manager is not only confined to the administration but, is also extended to the entire municipality. In particular, the Municipal Manager is required to inform the provincial treasury in writing of any failure by the council of the municipality to adopt or implement a budget-related policy or a supply chain management policy (Section 73 of the MFMA). Also, this section requires the Municipal Manager to inform the provincial treasury, in writing, of any non-compliance by a political structure or office-bearer of the municipality with any such policy (Section 73 of the MFMA).

Equally, the MFMA treats reports and the reporting process as a compliance matter. Hence, the MFMA prescribes that the Municipal Manager “must by no later than 10 working days after the end of each month submit to the mayor of the municipality and the relevant provincial treasury a statement in the prescribed format on the state of the municipality’s budget” (Section 71 of the MFMA). Non-compliance with the MFMA also includes the inability by a political structure or office-bearer of the municipality to adopt



and implement policies. Section 93 of the MFMA requires the Municipal Manager to inform the provincial treasury, in writing, of any failure by the council of the municipality to adopt or implement a budget-related policy or a supply chain management policy.

Municipal Councils and Non-Compliance

The legal measures and responsibility for creating a culture that is unreceptive to non-compliance extend to municipal councils as well. Arguably, the enforcement of the compliance function that is closely related to oversight is often a responsibility of political leaders such as councillors as members of the municipal councils. As indicated already, the critical elements of these measures are regular reports that provide timely and reliable information to enable municipal officials to act proactively to identify and solve control failures (RSA, 2011: 77). The mandatory reporting makes it obligatory as well as helpful for the administrative structures to adhere to principles of integrity and ethical behaviour, by reporting, rectifying and sanctioning non-compliance when it occurs.

The mayor of a municipality is obligated to take action against impending and actual non-compliance regarding the tabling and approval of the annual budget (Section 27 of the MFMA). In a case of an impending non-compliance with the provisions of the MFMA, the mayor is obligated to inform the Member of the Executive Council (MEC) for Finance in the applicable province (Section 27 of the MFMA). However, in a case of an actual non-compliance, the mayor is obligated not only to inform the municipal council and MEC of Finance of such non-compliance, but to indicate “any remedial or corrective measures the municipality intends to implement to avoid a recurrence”. Section 131 of the MFMA requires the municipality to address any issues raised by the Auditor-General in the audit report. The mayor of a municipality must ensure compliance with this requirement by the municipality. Section 133 of the MFMA requires that, if the accounting officer of a municipality fails to submit financial statements to the Auditor-General in accordance with the relevant provisions of the MFMA, and equally the mayor fails to table the annual report of the municipality in the council in accordance, then the mayor must promptly table in the council a written explanation setting out the reasons for the failure.

The Problem of Non-Compliance with the MFMA and Regulations

The problem of non-compliance, especially with the MFMA has been a perennial reality for many South African municipalities. The dismal failure of a well-publicised Operation Clean Audit 2014 that was launched in 2009 to ensure that all municipalities achieve clean audits by 2014, is one of the several examples of the protracted problem of non-compliance with the MFMA (Powell et al., 2014). Furthermore, the audit reports dating back from many years illustrate a catalogue of incessant non-compliance with the provisions of the MFMA.



Despite the existence of what is generally considered to be a comprehensive legal framework, South African municipalities have a widespread and pervasive problem of non-compliance. Evidently, the legal framework has not succeeded in creating an environment and a culture for utilising the MFMA processes and mechanisms to effectively deter, detect and punish non-compliance. The blatant disregard for the need to adhere to rules and measures to prevent or correct negligent, deceitful, unethical, unprofessional and incompetent behaviour, continues to dominate the discourse on the failure of municipal governance in South Africa.

Although widespread, the problem of non-compliance is mostly reported to be prevalent in the “supply chain management environment, lack of adherence to reporting requirements and lack of prevention, detection on irregular, unauthorised and fruitless and wasteful expenditure” (Auditor-General, 2011). Poor and ineffective internal control measures and a lack of consequence management are also often identified as causes of non-compliance. Quoting the Auditor-General, Middleton (2019) indicates that the problem of non-compliance still revolves around the same old issues, such as “blatant disregard for controls, capacity gaps in the administration, unethical behaviour in the administration and by political leaders and a culture of non-consequences”. Commenting on his latest report, the Auditor-General (2020: 1) bemoans the fact that “billions of rand in funds allocated to municipalities are being managed in ways that are contrary to the prescripts and the consequent exposure to abuse of the public purse”. In the latest report, the Auditor-General (2019) highlights that non-compliance with legislation was at 92% of the municipalities and in particular, non-compliance findings on supply chain management increased from 72% to 81%. This represents the highest percentage on non-compliance since the 2011-2012 reporting period. In the 2018/2019 financial year, only 2% of the municipalities were in full compliance and this represents a regression in compliance with supply chain management legislation (Auditor-General, 2020). Irregular expenditure as a recurrent feature in the list of transgressions and non-compliance, simply means that the expenditure did not comply with processes prescribed by the MFMA and its regulation. Most importantly, irregular expenditure is often related to weaknesses in the supply chain management (SALGA, 2019a). Concerning non-compliance, the audit outcome of 2017/2018 reported irregular expenditure totalling R25,2 billion, while the 2018/2019 audit outcome shows an increase, to a total of R32,06 billion in irregular expenditure (Auditor-General, 2020).

Principal-Agent Theory and the Requirement for Oversight

The accountability and oversight relationship between the elected public representatives and the bureaucracy is often explained through the principal-agent relationship. The principal-agent theory (PAT) is widely regarded as the foremost theoretical framework for explaining the accountability and oversight studies, particularly in public administration (Gailmard, 2010; Schillemans & Busuioac, 2014). Likewise, Döhler (2018: 190) argues that



“the political-bureaucratic relations became the field in which the principal-agent theory and its related approach and framework, flourished most”.

The PAT is rooted in a key assumption that the agent has a divergent interest and opportunistic behaviour, while the principal always acts with integrity as opposed to the agent that must be restrained and controlled (Gailmard, 2010; Akpanuko and Asogwa, 2013; Döhler, 2018). Likewise, Roach (2016: 31) states that “an agent may engage in shirking behaviours which are self-serving and by so doing, an agent engages in non-compliance activities which divert their attentions away from achieving the principals’ primary objectives outlined and expected, to secure their secondary interests”.

Thus, the PAT is often understood as demanding the principal to enforce compliance (Gailmard, 2010). In this way, the actions of the agent are curtailed to ensure that the bureaucrats comply and do not drift or shirk and deviate beyond the parameters laid down by the public representatives through laws and rules (McCubbins, 1999). Therefore, the PAT is regarded as demanding oversight as an antidote to non-compliance. It is considered as fundamental to prevent and deal with the agent shirking (Thomann, Van Engen and Tummers, 2018).

In terms of the above, officials are obligated to comply, conform and account to political leaders, while oversight entails the responsibility of the political leaders to ensure that officials adhere to the predefined rules, procedures, standards and guidelines. In this regard, oversight is an essential requirement to ensure the efficacy of accountability. Thus, Prado, Carson and Correa (2014) suggest that effective accountability is largely dependent on effective oversight. If oversight is flawed or weak, then accountability will be significantly deficient (Santiso, 2005). This means that efforts to achieve accountability must also harness and enhance oversight.

This thinking is consistent with the belief that non-compliance behaviour can only be effectively addressed if enforcement and punishment are part of effective accountability and oversight. Accordingly, oversight is the primary responsibility of the political leaders to monitor and control the behaviour of the officials (Lane, 2007). It explains what political leaders do to secure the responsiveness of the officials as the account-giver (Gailmard, 2010). Therefore, oversight is primarily about demanding and enforcing compliance, while accountability is when the officials assure the political leaders that they conducted themselves appropriately and executed their roles, responsibilities and duties within the parameters of the law and regulations.

In South Africa’s municipal legislative context, the political leadership, meaning, the mayors and councillors, have an obligation to ensure that officials comply with the law and applicable internal controls. It is critical that compliance or the ability to curb non-compliance is dependent on how the municipal council, as the principal, exercise its



oversight obligations, roles and responsibilities to focus and rein in non-compliant and deviant municipal officials. Procedurally, the executive mayor and the executive committee are expected to exercise “political leadership by proposing policies, guiding the development of budgets and performance targets and oversee their implementation by monitoring the performance of municipal officials” (RSA, 2011: 74). Equally, non-executive councillors have the responsibility to exercise oversight on the executive mayor, the executive committee and municipal officials.

Considering that the onus to prevent, detect and sanction non-compliance rests on the municipal council as the political leadership of the municipality, it is, therefore, critical that the nature, content and regularity of the reports provide comprehensive information to enable the political leadership to exercise this obligation. Therefore, regular, appropriate, comprehensive, relevant, reliable and accurate reporting is considered as critical in enabling political leaders to exercise oversight on the behaviour of the bureaucracy. This is consistent with a view that information symmetry enables meaningful and effective oversight.

The MFMA prescribes various reports to enable oversight on the preparation, spending and accounting of the municipal finances. These reports include the monthly budget statement prescribed in terms of section 71 of the MFMA, the mid-year budget and performance assessment provided for in terms of section 72 of the MFMA, and the annual report as required by section 121 of the MFMA. The National Treasury (RSA, 2011) asserts that the development and publication of these reports promote transparency and monitoring of municipal finance management. These reports are designed to provide municipal councils and their various committees with opportunities to exercise ex-ante, concurrent and ex-post oversight on the management of municipal finances.

Limitations of the Principal-Agent Theory

It is clear from the above that the problem of non-compliance with municipal financial legislation is complex and unwieldy for the PAT. As Marquette and Peiffer (2015) suggest, the efficacy of the PAT is largely determined by the context. The context of the problem of non-compliance with municipal financial legislation does not accord entirely with the assumptions of the PAT. As indicated earlier, authors utilising the PAT explain non-compliance and other transgressions in public administration as resulting from information and preference asymmetry between the political leaders and the bureaucrats and that non-compliance occurs because the political leader is unable to effectively control the behaviour of the bureaucrats. Similarly, the PAT has an “implicit assumption of conflict between the principal and leads to a mistrust of the agent. Thus, it requires the principal to correct the behaviour of the agent” (Schillemans & Busuioic, 2014: 193). However, in the context of South African municipalities, the problem of non-compliance with municipal financial legislation does not only occur because of the deceitful municipal officials. As will



be shown later on, available evidence suggests that political leaders who are legally provided with regular, accurate and comprehensive information, are not exercising oversight. Numerous Auditor-General reports indicate that municipal councils, as principals are unwilling to exercise their oversight authority to prevent, detect and sanction non-compliance. The unwillingness of municipal councils to exercise oversight is discussed below.

The Auditor-General (2016) laments that the low level of action in response to the high levels of non-compliance regarding supply chain management, transgressions and the high incidence of unauthorised actions, irregular as well as fruitless and wasteful expenditure, bear evidence of the lack of consequences. According to the Auditor-General (2016), municipal councils have demonstrated an unwillingness to investigate reported findings of non-compliance and possible fraud or improper conduct by municipal officials. In his numerous reports, the Auditor-General indicates that, although he has consistently flagged administrative failures with the political leadership of municipalities charged with oversight, his “constant advice has largely been ignored” (Auditor-General, 2019: 2). Even as early as 2012, the Auditor-General (2012) protested that the political leadership in municipalities is not taking the concerns and recommendations of the Auditor-General seriously. The Auditor-General (2012) infers that mayors and councillors are failing to establish and sustain the culture of accountability, because they lack the commitment to ensure internal controls and discipline.

The Auditor-General (2019: 6) highlights the following specific areas of failure to exercise oversight:

- “A total of 74% of the municipalities did not adequately follow up allegations of financial and supply chain management misconduct and fraud, and 45% of the municipalities did not have all the required mechanisms for reporting and investigating transgressions or possible fraud.
- Inadequate follow-up was also evident in municipalities again not paying sufficient attention to the findings on supply chain management and the indicators of possible fraud or improper conduct that the Auditor-General’s office had previously reported and recommended for investigation.
- More than half of the municipalities did not investigate any of the findings reported. Where investigations did take place, 34% of the municipalities failed to resolve all of the findings satisfactorily, while in 62% of the municipalities, the council failed to conduct the required investigations into all instances of unauthorised, irregular and fruitless and wasteful expenditure”.

Another critical area indicating a problem with the principal-agent framework is the inability of the political leadership to sanction the prevalent non-compliant behaviour of municipal officials. The need for consequences is imperative in the political–



bureaucratic relationship for accountability and oversight as an instrument to enforce compliance and prevent and sanction non-compliance. However, the lack of consequences for non-compliance has been a concern for many years. Various assessments of local government have identified a lack of consequences for non-compliance as an issue that requires attention. In particular, the State of Local Government in South Africa (Department of Cooperative Governance and Traditional Affairs, 2009: 31) emphasises that “compliance-based systems to strengthen the accountability of the administration to the municipal council must be enforced and that there must be consequences for non-compliance”.

Hence, it has always been puzzling that despite the well-reported inclination for non-compliance in many municipalities, that for blatant infractions resulting in consecutive adverse and disclaimed findings, there are no visible consequences. The Auditor-General has consistently complained about the lack of consequences in municipalities where there are identified incidences of non-compliance (Auditor-General, 2019). For example, the annual MFMA audit reports of the Auditor-General of South Africa (MFMA dating from 2014/2015 to MFMA 2018/2019) bemoan the general tendency for tolerance of non-compliance and transgressions by all the role-players in most municipalities in South Africa. In addition, the low level of action in response to the high levels of non-compliance, poor audit outcomes, supply chain management transgressions and unauthorised, irregular as well as fruitless and wasteful expenditure demonstrates a lack of consequences for poor performance and transgressions, which has been roundly and constantly condemned (Auditor-General, 2019). However, municipalities that have incurred incessantly unauthorised, irregular and fruitless and wasteful expenditure have avoided and or ignored the investigation of the non-compliance.

When briefing the Select Committee on the State of Local Government and Financial Management as at 30 June 2018, the National Treasury bemoaned the lack of consequences for non-compliance. The South African Institute of Chartered Accountants (2020a; 2020b) highlights that despite the Auditor-General identifying in his audit 2018/2019 report that irregular expenditure in 125 municipalities (55%), fruitless and wasteful expenditure at 116 municipalities (51%), and unauthorised expenditure at 111 municipalities (48%), no investigations and consequence management by the affected municipalities have been undertaken.

The latest reported incident worth mentioning as an example of a municipal council and councillors failing to exercise their oversight duty, is in Sedibeng District Municipality in the Gauteng Province (eNCA, 2020, November 2):

An independent probe found evidence of rampant corruption and maladministration linked to its late Municipal Manager. The Executive Mayor and the municipal council of Sedibeng District Municipality failed to exercise



political and governance oversight over the municipality and Municipal Manager, to discipline and hold him accountable.

As a consequence, the Member of the Executive Council (MEC) of Cooperative Governance, Mr Lebohlang Maine, has recommended that councillors implicated in misconduct be held personally liable for their roles in cases of wasteful, fruitless and irregular expenditure (eNCA, 2020, November 2).

The above-mentioned suggests that in practice municipalities do not only have the problem of drifting municipal officials but equally what Schillemans and Busuioc (2014) refer to as drifting principals. This means that both municipal officials and councils are involved in non-compliance with municipal financial legislation. It provides evidence regarding the complicity of the municipal councils in the problem of non-compliance with municipal financial legislation. It is a clear indication of a collective, purposive, deliberate and planned intention to disregard the prescriptions of the MFMA and regulations. As Villoria, Jiménez, and Revuelta (2016) argue, when there is a systematic failure of controls such as non-compliance, then it becomes an institutional problem implicating both the municipal councils and officials.

The above provides evidence regarding the unwillingness, or what is generally referred to as the lack of political will on the part of municipal councils to exercise oversight on non-compliance and the related consequences. This means that even when municipal councils were provided with reports and recommendations regarding actual non-compliance, these reports were ignored, resulting in a widespread problem of a lack of consequence. This, therefore, highlights that the problem is not information asymmetry, as suggested in the PAT, but one of drifting and shirking municipal councils.

In this regard, the South African problem of non-compliance with municipal financial legislation is what Marquette and Peiffer (2015) describe as collective drift. Schillemans and Busuioc (2014: 192) argue that “collective drift runs counter to the conventional PAT logic”. Collective drift is a consequence of an environment in which the political leaders and officials are involved in a systematic process that disregards legislation (Rothstein, 2011; Marquette & Peiffer, 2015). This means that both the municipal councillors and the officials are individually or collectively engaged in common behaviour that weakens compliance and produces a persistent non-compliance problem.

Municipal Councils as Accomplices to Non-Compliance

It has been extensively articulated and emphasised in numerous reports that municipal officials tend not to comply with the prescripts of the law governing municipal finances. The posture of these reports is consistent with the dominant PAT approach that typically explains governance problems such as persistent non-compliance as a consequence of the



principal not being able to monitor the behaviour and activities of the agent, because the agent is better informed and manipulates the uninformed principal. To address these problems, the PAT puts a spotlight on the ability of the principals to monitor, change and punish the potentially deviant agent (Prado et al., 2014). However, this article has demonstrated that the municipal councils are also complicit in the problem of non-compliance with municipal financial legislation. While it is acknowledged that municipal officials have the obligation and responsibility to comply, it is the duty of the municipal councils through their councillors and communities to enforce compliance with municipal financial legislation. Municipal councils' oversight role bequeaths to them a substantial authority to establish values, ethics and a culture that permeate the entire municipality. This means that, if the municipal councils, as the political leaders, do not institute any "remedial or corrective measures to avoid a recurrence" of non-compliance with the legal provisions, as prescribed by (section 27 of the MFMA), then the municipal officials are likely to be indifferent to non-compliance.

The reported unwillingness, abdication and drifting by municipal councils in the process of making the officials comply with applicable municipal legislative requirements, is itself an instance of non-compliance. This unwillingness to exercise oversight on non-compliance with municipal financial legislation effectively means that municipal councils are aiding and abetting the problem of non-compliance in municipalities. In this regard, municipal councils are accomplices in non-compliance with municipal financial legislation. Logically, this non-compliance is also a serious transgression necessitating investigation and sanctioning. Consequently, the disregard or oversight failures should engender the same or a much more serious rebuke of municipal councils and municipal councillors. The other area of culpability of municipal councils in non-compliance results from a flagrant disregard of lawful recommendations from the Auditor-General. The Auditor-General indicates that, although he has consistently flagged administrative failures with the political leadership of municipalities charged with oversight, his "constant advice has largely been ignored" (Auditor-General, 2019: 2). The findings and the recommendations of the Auditor-General do not allow for hortatory prevarications, but obligation and duty to implement. This view is consistent with the Constitutional Court Judgment in the case of *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* [2017] ZACC 47, which held the National Assembly collectively responsible for not meaningfully implementing the remedial actions of the Public Protector to hold the President accountable for the disregard of his mandate.

In terms of the above, it is clear that the theoretical foundation of PAT that overwhelmingly de-emphasises the complicity and culpability of oversight principals, such as municipal councillors, in problems such as non-compliance, is extremely flawed, especially in the South African municipal context where non-compliance is pervasive. Likewise, the PAT assumes that the agent is self-interested and his/her behaviour is likely to contribute towards agency loss. This assumption also underplays the oversight failure of the municipal



councils as the principal, to frustrate the institutional viability and sustainability. This means that the non-compliance problem is largely dependent on unprincipled stakeholders who are willing to drift and focus on their particularistic interest rather on higher institutional procedure, ideals and ethics. In this regard, Marquette and Peiffer (2015: 3) argue that it is important to understand entrenched problems such as non-compliance as a collective rather than as an individual problem.

Conclusion

The South African efforts to explain the problem of non-compliance with municipal financial legislation has gravitated more towards the principal-agent theory. This theory suggests that the problems such as non-compliance occur as a result of municipal officials transgressing and behaving in an unethical manner, while underplaying the role of the municipal councils as principals in the problem of non-compliance with municipal financial legislation. In this regard, this article aimed to highlight the inadequacy of this explanation in the non-compliance problem afflicting municipalities in South Africa.

In this article, we highlighted, through using the information derived mainly from the reports of the Auditor-General, that the problem of non-compliance is attributable to both the municipal officials and the councillors. We have also shown the complicity and culpability of the municipal councillors in contributing to the problem of non-compliance with municipal financial legislation. Overall, the article revealed a lack of proper theorisation of the nuanced dynamic of political-bureaucratic complicity in the problem of non-compliance with municipal financial management prescripts in South African municipalities.

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