

**Contextualizing the South African Forensic Accountant**

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The new economy, coupled with global economic woes, increasing unemployment, levels of debt, and reliance on information technology and e-commerce, amongst other, has resulted in rampant commercial crime globally. South African commercial crime cases such as Fidentia and Shaik have led to a large growth in private and public forensic investigative entities that employ specialized individuals, of which the forensic accountant is a prominent figure. Not only globally, but also in South Africa, the focus has shifted from mere expressions of opinions on financial statements to a greater awareness, detection and control of commercial crime (Van Romburgh, 2008).

According to Transparency International's Corruption Perception Index, South Africa is ranked 74<sup>th</sup> out of 177 countries (TI, 2013). With such a high rating, forensic accountants are becoming increasingly relevant in the fight against commercial crime. To combat so-called white-collar crime, many accounting firms are adding forensic accounting practices to their operations (Messmer, 2004).

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## **2. THE LEGAL CONTEXT**

### **2.1 *Introduction to the South African legal system***

#### **2.1.1 *Origin and sources***

Unlike most European legal systems, South African law is not entirely codified. This means that law is drawn from various authoritative sources. The main sources of South African law are the following:

a) Common law

The term “common law” refers to those rules of law not contained in an act of parliament but which are, nevertheless, just as binding as any legislation (Snyman, 2008:5). As a result of its colonial past, South Africa’s common law consists of Roman law, fused with Dutch customary law during the 15<sup>th</sup> and 16<sup>th</sup> centuries (known as Roman-Dutch law), to which English law has been added since the British occupation in the early 19<sup>th</sup> century (Havenga *et al.*, 2012:3). For purposes of this study, it should be noted that the South African law of criminal procedure and the entire law of evidence were drawn directly from English law (Havenga *et al.*, 2012:4).

b) Statute law or legislation

Legislation is the most important of all the sources of law, some of which – specifically the Constitution – will be discussed elsewhere in this study as they pertain to the world of commercial forensic practitioners.

c) Customary law

This refers to certain rules of conduct which are observed because it has become customary in a particular group of people to respect such usages. Customary law does not

consist of written rules, but develops from the habits of the community and is carried down from generation to generation (Havenga *et al.*, 2012:6).

d) Judgments of the courts

The judgments of the Dutch courts before 1652, judgments of the Cape Council of Justice before 1827, judgments of the courts of the four provinces before 1910, and judgments of the South African courts after 1910 form an important authoritative source of law known as case law (Havenga *et al.*, 2012:7).

e) Foreign law

When no relevant judgments are found in one or more of the above sources, a judge will turn to the law of other modern countries for guidance. Foreign law is not regarded as an authoritative source of South African law, because it has persuasive authority only.

However, foreign law as a source of law has been recognized in the Constitution in that it provides that, in interpreting the Bill of Rights, a court of law must consider international law and may consider foreign law (Havenga *et al.*, 2012:8).

### 2.1.2 *The Constitution*

The most important source of law in South Africa is the Constitution (1996). Parliament is no longer sovereign, and all rules of law, irrespective of whether they are contained in statutes or common law, must be compatible with the rights contained in Chapter 2 of the Constitution – the Bill of Rights. The Bill of Rights is the cornerstone of democracy in South Africa and confirms the democratic values of human dignity, equality and freedom. The provisions of the Bill of Rights apply to all three branches of government (the executive, the judiciary and the legislature) and all organs of state (S 8(1) of the Constitution).

The Bill of Rights creates a number of rights of which the following are of importance to commercial forensic practitioners:

- a) Human dignity (S 10);
- b) Freedom and security of the person (S 12);
- c) Privacy (S 14);
- d) Fair labor practices (S 23);
- e) Property (S 25);
- f) Just administrative action (S 29);
- g) Access to information (S 30): The Promotion of Access of Information Act (2/2000) was enacted in order to give effect to the constitutional right of access to information held by the state and any information that is held by another person which is required for the exercise or protection of any rights. The Act establishes voluntary and mandatory mechanisms or procedures to give effect to this right in order to generally promote transparency, accountability and effective governance of all public and private bodies (S 9 of the Promotion of Access to Information Act).

In a further attempt to find a balance between the right to privacy and the right to access to information, the Protection of Personal Information Act (4/2013) was enacted. The manner in which personal information may be processed is hereby regulated in harmony with international standards (S 2 of the Protection of Personal Information Act).

Concerns have, however, been raised regarding the proposed Protection of State Information Bill (6B/2010) which aims to protect state information. It appears, at this

stage, that the Bill could hamper transparency and access to information held by state institutions;

- h) Access to courts (S 31);
- i) The rights of arrested, detained and accused persons (S 32) – rights protected in terms of this section include:
  - (i) the presumption of innocence;
  - (ii) the right to remain silent;
  - (iii) the right not to testify during proceedings and the right not to give self-incriminating evidence;
  - (iv) the right not to be compelled to make any confession or admission that could be used in evidence;
  - (v) the right to legal representation;
  - (vi) the right to information, time and facilities to prepare and present a defense, access to information, cross-examination and the right to adduce evidence;
  - (vii) the right to a public trial before an ordinary court; and
  - (viii) the right to have a trial begin and conclude without unreasonable delay.

Aforementioned so-called first-generation rights are not absolute and may be limited in special circumstances (S 36). So-called second-generation rights are also created in the Bill of Rights, for instance, the right to a clean environment, and the right of access to adequate housing, health care services and education. Snyman (2008:9), however, points out that no provision is made for a right to an environment as crime free as possible, or of a right to adequate protection against crime.

The Constitution also regulates government by setting out the structure of the state and its organs and by providing for the functions and powers thereof. It deals with national, provincial and local government, the courts and administration of justice, public administration, security services and financial matters of state (Havenga *et al.*, 2012:6). The following structures, relevant to forensic practitioners, are created in the Constitution:

- a) The court system (Chapter 8 of the Constitution): See the discussion below;
- b) A single national prosecuting authority is created in terms of section 179(1) of the Constitution and has the power to institute criminal proceedings on behalf of the state and to carry out any necessary functions incidental to instituting criminal proceedings (section 179(2)). The National Prosecuting Authority (NPA) is regulated by the National Prosecuting Act (32/1998) which must ensure that the prosecuting authority exercises its functions without fear, favor or prejudice (section 179(4));
- c) Several state institutions are established in terms of Chapter 9 of the Constitution in order to “strengthen constitutional democracy” in South Africa (section 181(1)), of which the following are relevant for purposes of this study:
  - (i) Public Protector (section 182);
  - (ii) South African Human Rights Commission (section 184); and
  - (iii) Auditor-General (section 188).

In terms of section 181(2) of the Constitution, these institutions are independent, subject only to the Constitution and the law. They must be impartial and exercise their powers and perform their functions without fear, favor or prejudice. Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence,

impartiality, dignity and effectiveness of these institutions (section 181(3)). No person or organ of state may interfere with the functioning of these institutions (section 181(4)). These institutions are accountable to the National Assembly and must report on their activities and the performance of their functions to the Assembly at least once a year (section 181(5)).

## **2.2 Criminal law**

The three most important sources of criminal law in South Africa, in order of their use, are legislation, the common law, and case law (Snyman, 2008:5). Before describing these three sources of criminal law, the following influences can be identified in the South African criminal law, namely English law, German criminal-law theory and (since 1994) the Constitution, which briefly need to be considered because of the influence they had and still have on our criminal law.

Although English law did not replace Roman-Dutch law when the Cape became an English colony, according to Snyman (2008:7), it nevertheless exerted a strong influence, particularly on South African criminal law. Conduct that was in general punishable under Roman-Dutch law was often punished under new headings, for example, receiving stolen property knowing it to be stolen, and fraud (which was a combination of the old crime of *stellinatus* and *crimini falsi* (Snyman, 2008:8)). A further interesting example is Act 24 of 1886 of the Cape, also known as the “Native’s Territories’ Penal Code”. This code was an almost exact transcription of a criminal code drawn up and introduced by Sir James Stephen in British parliament, although it was never adopted. In later years, this code exerted a considerable influence on South African criminal law as expounded by the courts, for example, in defining theft (Snyman, 2008:8).

*2.2.1 The common law and case law as sources of criminal law*

The first important source of criminal law in South Africa is the common law. Unlike the law of criminal procedure, South Africa's criminal law is one of very few in the world that has not yet been set out in a single, comprehensive and coherent act or code (Snyman, 2008:5). Consequently, a number of crimes relevant to commercial forensic practitioners, such as fraud, theft, forgery and uttering, are nowhere statutorily defined, and their requirements must, therefore, be sought in our common law (Snyman, 2008:6).

Snyman (2008:6) argues that, today, almost all the most important rules and principles of common law have, over the years, been adopted and expounded in our case law. Our courts play a vital role in describing and developing our criminal law. According to the principle of judicial precedent which is followed in South Africa, as it is in England (but not in continental Europe), a lower court is, in principle, bound to follow the construction placed upon a point in law by a higher court, and a division of the high court is, in principle, also bound by an earlier interpretation of a point of law by the same division (Snyman, 2008:6).

However, all rules of law, irrespective of whether they are contained in legislation, case law or common law, must adhere to the Constitution, specifically the Bill of Rights contained in Chapter 2 thereof. If a rule is incompatible with the Bill of Rights, it may be declared null and void.

*2.2.2 Legislation as source of criminal law*

As stated elsewhere, the Constitution is paramount in South African law. The criminal law, law of criminal procedure and law of evidence should, thus, adhere to the values and rights created in the Constitution. Specific legislation relevant to forensic accounting will be discussed below.



*2.2.3 Crimes relevant to the world of commercial forensic practitioners*

*2.2.3.1 Crimes relating to the appropriation of property*

*2.2.3.1.1 Theft*

Theft is a common law crime in South Africa and can be defined as follows: “A person commits theft if he unlawfully and intentionally appropriates moveable, corporeal property which:

- (a) belongs to, and is in the possession of, another;
- (b) belongs to another but is in the perpetrator’s own possession; or
- (c) belongs to the perpetrator but is in another’s possession and such other person has a right to possess it which legally prevails against the perpetrator’s own right of possession provided that the intention to appropriate the property includes an intention permanently to deprive the person entitled to the possession of the property, of such property” (Snyman, 2008:483).

Aforementioned covers the most important requirements for the crime as it developed in Roman-Dutch law, except for, interestingly enough, the unauthorized appropriation of trust funds. The crucial requirements of the crime can be described with the aid of the concept of “appropriation” in terms of which an act of appropriation, as well as an intention to appropriate, is required for a conviction. This model is applied in the legal systems on the European continent and has been, to a large extent, in English law after 1968 (Snyman, 2008:486).

Theft, as defined in South Africa, however, differs in some important respects from what is regarded as theft in other legal systems. Firstly, theft in the South African context is not limited to acts in respect of other people’s property which is in their possession. According to Snyman (2008:484), it also comprises acts in respect of other people’s property which happens

to be in X's own possession or control. This type of conduct, which consists in appropriating someone else's property already in X's possession or control, is known as embezzlement.

Unlike most other legal systems, embezzlement in South African law is not a separate crime, but merely a form of theft (see subparagraph (b) in the definition above) (Snyman, 2008:484). A second unusual characteristic of theft in South African law is that it can be committed even if X takes back his own property which is temporarily in another's lawful possession (see subparagraph (c) in the definition given above). This form of theft is described as the unlawful arrogation of the possession of a thing (Snyman, 2008:485).

Four forms of committing theft are identified, each of which has particular requirements that need to be established, namely (Snyman, 2008:486-487):

- (a) *The removal of property:* X commits this form of theft if he removes Y's property which is in Y's (or somebody else's) possession, and appropriates it;
- (b) *Embezzlement:* X commits this form of theft if he appropriates Y's property which already happens to be in X's possession or control;
- (c) *Arrogation of possession:* X commits this form of theft if he takes his own property from the possession of Y, who has a right to its possession which prevails against the owner, for example, by virtue of a lien or a pledge; and
- (d) *Theft of credit, including the unlawful appropriation of trust funds:* X commits this form of theft if he steals money in the form of credit. In most cases, the credit has been entrusted to X with the understanding that it is to be used in a certain way, whereupon X then violates the terms under which he is to use it by employing it for some other purpose – usually to his own advantage.

*2.2.3.1.2 Removal of property for use*

The Appeal Court found in *R v Sibiya* (1955 4 SA 247 (A)) that the temporary use of another's property without consent (*furtum usus*) was not a form of theft as opposed to the position in both the Roman and Roman-Dutch law. In an attempt to make such conduct punishable, section 1(1) of the General Law Amendment Act (50/1956) was enacted. This wording of this subsection has been criticized and succeeded only partially in restoring the position under the common law (Snyman, 2008:512).

*2.2.3.1.3 Receiving stolen property*

The common law crime of "receiving stolen property knowing it to be stolen" can be defined as follows: "A person commits the crime of receiving stolen property knowing it to be stolen if he unlawfully and intentionally receives into his possession property knowing, at the time that he does so, that it has been stolen" (Snyman, 2008:521).

This crime coincides with theft and, accordingly, a person who commits this crime is simultaneously an accessory after the fact to theft. Thus, although all "receivers" may be charged with theft, the general practice is to charge them with the more specific crime of receiving.

*2.2.3.1.4 Inability to give account of possession of goods suspected of being stolen  
(contravention of section 36 of Act 62 of 1955)*

This crime is created by statute in terms of section 36 of the General Law Amendment Act (62/1955) which provides as follows: "Any person who is found in possession of any goods, other than stock or produce as defined in section thirteen of the Stock Theft Act, 1923, in regards to which there is reasonable suspicion that they have been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of theft."

The purpose of section 36 is to combat theft. The reason for the crime's enactment is due to the fact that it is often difficult for the prosecution to prove all the requirements for the common law crime of receiving stolen property, knowing it to be stolen, firstly, because it is often difficult to prove that a person in whose possession stolen property was found knew that it was stolen and, secondly, the identification of the owner or person entitled to the property is one of the most important prerequisites for a successful prosecution for theft. Section 36 applies if it were not possible for the prosecution to prove that the goods are stolen (Snyman, 2008:524).

*2.2.3.1.5 Receiving stolen property without reasonable cause (contravention of section 37 of Act 62 of 1955)*

Section 37(1) of the General Law Amendment Act (62/1955) provides as follows:

- “(a) Any person who in any manner, otherwise than at a public sale, acquires or receives into his or her possession from any other person stolen goods, other than stock or produce as defined in section 13 of the Stock Theft Act, 1959, without having reasonable cause for believing at the time of such acquisition or receipt that such goods are the property of the person from whom he or she receives them or that such person has been duly authorized by the owner thereof to deal with or to dispose of them, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of receiving stolen property knowing it to have been stolen except in so far as the imposition of any such penalty may be compulsory.
- (b) In the absence of evidence to the contrary which raises a reasonable doubt, proof of such possession will be sufficient evidence of the absence of reasonable cause.”

Although the constitutionality of this section has been challenged, only certain parts have been changed to bring it in line with the Constitution. However, the basic section has remained intact as the state and society have a vital interest in combatting the evil of the unlawful receipt of stolen property (Snyman, 2008:529).

### *2.2.3.2 Fraud and related crimes*

#### *2.2.3.2.1 Fraud*

The common law crime of fraud can be defined as follows: “Fraud is the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another” (Snyman, 2008:531).

The crime of fraud was derived from two different Roman law crimes, namely (a) *stellionatus* and (b) *crimina falsi*. *Stellionatus* was the criminal law equivalent of the delict *dolus*. It developed from the *actio de dolo* in private law and involved an intentional misrepresentation resulting in harm, or prejudice, to others. *Crimina falsi* was the collective term for a number of crimes relating to falsification (Snyman, 2008:531). The distinction between these two crimes became blurred and the courts have combined them into one crime, namely fraud. The most important result of this merging has been that fraud may now be committed even where there is no actual proprietary prejudice; even non-proprietary or potential prejudice may be sufficient to result in a conviction (Snyman, 2008:532).

#### *2.2.3.2.2 Forgery and uttering*

The common law crime of forgery can be defined as follows: “Forgery consists in unlawfully and intentionally making a false document to the actual or potential prejudice of another” (Snyman, 2008:540).

Forgery is merely a species of fraud. In forgery, the misrepresentation takes place by way of the falsification of a document but, apart from this, all the requirements for the crime of fraud must be present (Snyman, 2008:541). There is, however, one small point of difference between fraud and forgery. Fraud is completed only when the misrepresentation has come to the notice of the representee, whereas forgery is completed the moment the document is falsified (Snyman, 2008:541). If the document is then brought to the attention of others, a separate crime is committed, namely uttering the document.

Uttering is defined as “unlawfully and intentionally passing off a false document to the actual or potential prejudice of another” (Snyman, 2008:543). Uttering, similar to forgery, is merely a species of fraud.

#### *2.2.3.2.3 Theft by false pretenses*

Theft by false pretenses is defined as follows: “A person commits theft by false pretenses if he unlawfully and intentionally obtains movable, corporeal property belonging to another with the consent of the person from whom he obtains it, such consent being given as a result of a misrepresentation by the person committing the crime, and appropriates it” (Snyman, 2008:543).

This crime is regarded as a form of theft. It comprises those cases of theft where Y is induced to part with her property in favor of X as a result of X’s fraudulent misrepresentation.

All cases of theft by false pretenses are, at the same time, fraud. The converse, however, is not the case. The crime of fraud is completed the moment the misrepresentation has come to the notice of the representee. For theft by false pretenses to be completed, it is further required that the misrepresentation be followed by the handing over of the property to X and his appropriation of it (Snyman, 2008:544).

#### *2.2.3.3 Corruption*

Corruption has been codified and is, at present, punishable in terms of the Prevention and Combating of Corrupt Activities Act (12/2004) (PRECCA). The Act contains a general crime of corruption, followed by a long list of specific crimes of corruption pertaining to specific classes of persons or situations only.

In the common law, the crime presently known as corruption was known as bribery (Snyman, 2008:410). This common law crime could be committed by or in respect of a state official only. In order to punish bribery of people who were not state officials but, for example, agents or representatives in private enterprises, a separate statutory crime was created. Today, the general crime of corruption, as defined in section 3 of the PRECCA can be construed as follows: “Anybody who (a) accepts any gratification from anybody else, or (b) gives any gratification to anybody else, in order to influence the receiver to conduct herself in a way which amounts to the unlawful exercise of any duties, commits corruption” (Snyman, 2008:411).

Corruption can, thus, be committed by the “giver” and the “recipient,” that is the party that gives a gratification (benefit) to another party and the latter that accepts it as inducement to act in a certain way.

Interesting features of the PRECCA are:

- (a) Section 34 that creates an important crime which consists in the failure of a person in a position of authority, who knows or ought reasonably to have known that certain crimes created in the Act have been committed, to report the commission of such crimes to a police officer. Subsection (4) gives a long list of persons who are regarded as people who hold a position of authority, which includes any partner in a partnership to any person who is responsible for the

overall management and control of the business of an employer (Snyman, 2008:425); and

- (b) Section 35 that provides that, if the act alleged to constitute a crime under the Act occurred outside South Africa, a court in South Africa shall have jurisdiction in respect of that crime. It is irrelevant whether the act with which the perpetrator is charged amounts to a crime in the country in which it was committed. However, the perpetrator must be a citizen of South Africa, or ordinarily resident in South Africa, or must have been arrested in South Africa, or be a company registered or incorporated in South Africa.

#### *2.2.3.4 Organized crime and money laundering*

The following acts have been promulgated over the past fifteen years in order to curb commercial and organized crime and include some of the best practices in the world:

- (i) Prevention of Organized Crime Act (121 of 1998) (POCA) in terms of which money laundering and racketeering are criminalized and the Asset Forfeiture Unit (AFU) was established. The aim of the AFU is to seize the proceeds of crime – thus taking the profit out of crime – by forfeiting these proceeds. Asset forfeiture provides a new approach to curbing organized crime by ensuring the financial disruption and forfeiture of criminal infrastructure. This is made possible by some unique measures of the act:
- A lower standard of proof is required (i.e. a balance of probabilities), as the applications are civil in nature;
  - The true owners or bosses are reached;



- Funds are made available for law enforcement or, if there is a direct victim of the crime, then such victim will be compensated from the funds (assets that have been realized) that have been forfeited;
  - The provisions of the POCA are not limited to a specific crime. The main focus areas of the AFU are, however, organized in all the forms thereof, drugs, serious violent crimes with an economic motive (e.g. transit heists), serious economic crimes, crimes regarding precious stones and metals, and endangered species;
  - Chapter 6 of the POCA focuses on the asset and not the person. Forfeiture *in rem* supposes that fault is placed on the asset itself that is involved in crime (instead of actions *in personam* that is focused on the owner of the property);
  - Chapter 5 and 6 of the POCA, which enable asset forfeiture, have a retrospective application;
  - Applications for asset forfeiture (specifically restraint and preservation-of-property orders) in terms of Chapter 5 and 6 are brought on an *ex parte* base and usually *in camera*; and
  - The POCA provides jurisdiction to South African courts in terms of illegal activities, irrespective of whether such activities occurred in or outside South African borders;
- (ii) Financial Intelligence Centre Act (38 of 2001) in terms of which the Financial Intelligence Centre (FIC) was established and reporting duties were created as per the recommendations of the Financial Action Task Force; and

- (iii) Protection of Constitutional Democracy Against Terrorist and Related Activities Act (33 of 2004).

### **2.3 Government procurement**

Corruption and procurement fraud appears to thrive in the public sector. The prevalence of corruption and procurement fraud could be contributed partly to the fact that the state is the biggest consumer of goods and services in South Africa (Bolton, 2007:v). Commercial forensic practitioners are often involved in section 217 of the Constitution (1996), which provides that the state must contract for goods and services in a manner which is fair, equitable, transparent, competitive and cost-effective. A number of statutes have been enacted to reflect the constitutional status of government procurement in South Africa in addition to the common law – particularly the law of contract and law of delict – and the general rules of constitutional and administrative law, namely:

- a) Preferential Procurement Policy Framework Act (5 of 2000), with the primary aim of addressing past discriminatory policies and practices in the government procurement system;
- b) Public Finance Management Act (1 of 1999), which regulates financial management in the national and provincial governments;
- c) Municipal Systems Act (32 of 2000), which enables municipalities to, *inter alia*, provide for municipal services by way of service delivery agreements, the selection of service providers then having to be done through specified selection and pre-qualification processes;<sup>1</sup> and
- d) Municipal Finance Management Act (56 of 2000) which, according to the preamble of the Act aims to, *inter alia*, secure sound and sustainable management

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<sup>1</sup> See s 83.

of the financial affairs of municipalities and other institutions in the local sphere of government.

#### **2.4 Whistle blower protection**

The following legislation has been enacted in order to protect and promote the concept of whistle blowing in South Africa:

- a) The Protected Disclosures Act (26/2000), which provides mechanisms in terms of which an employee can, without fear of negative results for himself, disclose information in respect of the suspect or criminal or other irregular conduct of the employer, irrespective of whether it took place in the private or public sector;
- b) Section 186(2)(d) of the Labor Relations Act (66/1996), which renders unfair any “occupational detriment” in contravention of the Protected Disclosures Act that an employee may suffer in respect of a protected disclosure that such an employee made;
- c) Section 187(1)(h) of the Labor Relations Act (66/1996) renders conduct as automatically unfair when an employee is dismissed who had made a protected disclosure in terms of the Protected Disclosures Act; and
- d) Section 159 of the Companies Act (71/2008) in terms of which a right of and protection for an employee are created to make a disclosure, and in terms of which provisions in a company’s Memorandum of Incorporation or rules that are inconsistent with or purport to limit this right and protection are made void. To whom this protection and right is awarded, the circumstances, nature and manner in which the disclosure is to be made, are set out in this section. Public and state-owned companies are, furthermore, required to establish, maintain and routinely

publicize the availability of a system to receive the disclosures contemplated in this section.

## **2.5 *Judicial authority***

The judicial authority of South Africa is vested in the courts. The courts are independent and subject only to the Constitution and the Law, which they must apply impartially and without fear, favor or prejudice. No person or organ of state may interfere with the functioning of the courts. Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts. An order or decision issued by the courts binds all persons to whom and organs of state to which it applies (Department of Justice, 2014).

The following courts are established in terms of section 166 of the Constitution:

### **2.5.1 *The Constitutional Court***

The Constitutional Court has jurisdiction as the court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of the Constitution.

### **2.5.2 *The Supreme Court of Appeal***

According to the Constitution, the Supreme Court of Appeal functions only as a court of appeal, may decide any matter on appeal and is, except for constitutional matters, the highest court of appeal. The Supreme Court of Appeal has constitutional jurisdiction, but the Constitutional Court is the highest court in all constitutional matters and may decide only constitutional matters and connected issues. The Supreme Court of Appeal may make an order concerning the constitutional validity of an act of Parliament, a provincial act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court (Department of Justice, 2014).

The court is composed of the President and Deputy President of the Supreme Court of Appeal and a number of judges of appeal determined by an act of Parliament. Whereas, previously, the head of the Appellate Division was the Chief Justice, this is no longer the case. The Chief Justice of South Africa is now the head of the Constitutional Court. The seat of the Supreme Court of Appeal is in Bloemfontein (Department of Justice, 2014).

The Supreme Court of Appeal has jurisdiction to hear and determine an appeal against any decision of a High Court. Decisions of the Supreme Court are binding on all lower courts, and the decisions of the High Courts are binding on Magistrates' Courts within the respective areas of jurisdiction of the High Courts (Department of Justice, 2014).

### *2.5.3 High Courts*

At the moment, there are fourteen provincial divisions of the High Court (Department of Justice, 2014). The High Court divisions have original jurisdiction – the right to hear a case – over defined provincial areas in which they are situated, and the decisions of the High Courts are binding on Magistrates' Courts within their areas of jurisdiction. They usually hear only civil matters involving more than R300 000, and serious criminal cases. They also hear any appeals or reviews from lower courts (Magistrates' Courts) which fall in their geographical jurisdiction. The High Courts usually hear any matter involving a person's status (e.g., adoption, insolvency) (Department of Justice, 2014).

Section 173 of the Constitution provides inherent jurisdiction to the Constitutional Court, the Supreme Court of Appeal and the High Courts, as opposed to the Magistrates' Courts and other courts created by statute, in order to protect and manage their internal processes and to develop the common law.

#### *2.5.4 Magistrates' Courts*

The Magistrates' Courts are the lower courts that deal with less serious criminal and civil cases. They are divided into regional courts and district courts.

The Regional Magistrates' Courts deal with more serious cases than the ordinary Magistrates' Courts, for example, murder, rape, armed robbery and serious assault. A Regional Magistrates' Court can sentence people who have been found guilty of certain offences, such as armed robbery or stealing a motor vehicle, to prison for a period up to 20 years, and may impose a maximum fine of R300 000.

The district courts try the less serious cases; they cannot try cases of murder, treason, rape, terrorism or sabotage. They can sentence a person to a maximum of three years in prison or impose a maximum fine of R100 000. The ordinary Magistrates' Courts can hear civil cases when the claims are for less than R300 000 (Department of Justice, 2014).

#### *2.5.5 Other specialist courts*

##### a) Special Income Tax Courts

The Special Income Tax Courts sit within provincial divisions of the High Court. This court deals with any dispute between a taxpayer and the South African Revenue Service, where the dispute involves an income tax assessment of more than R100 000. Appeals against its decisions are made directly to the Supreme Court of Appeal. Tax disputes involving an assessment of less than R100 000 go to the Tax Board (Department of Justice, 2014).

##### b) Labor Courts and Labor Appeal Courts

The Labor Courts have the same status as a High Court and adjudicate matters relating to labor disputes between an employer and employee. The Labor Appeal Court hears appeals

against decisions in the Labor Courts; this is the highest court for labor appeals (Department of Justice, 2014).

Other specialist courts include the Divorce Courts; the Land Claims Courts, which specialize in disputes that arise out of laws that underpin South Africa's land reform initiative; Small Claims Courts, which have jurisdiction to hear any civil matter involving less than R12 000; Community Courts, which can be described as "district courts", deal with the same cases as normal Magistrates' Court, the difference being that they deal only with petty crimes such as shoplifting and petty theft; Equality Courts, which have been set up to help people who believe that they have suffered unfair discrimination, hate speech or harassment; Child Justice Courts; Maintenance Courts; and Sexual Offences Courts (Department of Justice, 2014).

### **3. ROLE PLAYERS IN THE FORENSIC ACCOUNTANT'S ENVIRONMENT**

#### ***3.1 State institutions***

##### ***3.1.1 National Prosecuting Authority***

The NPA was enacted in terms of the Constitution and specifically the NPA Act (32/1998). The Constitution, read with this Act, provides the NPA the power to institute criminal proceedings on behalf of the state, to perform any necessary functions incidental to the institution of criminal proceedings, and to discontinue criminal proceedings.

Once a crime, such as an alleged case of fraud, has been reported to the police and the docket has been opened and investigated, the docket is sent to court, where after the prosecutor decides whether further investigation is needed. After all the evidence has been collected, the NPA decides whether to prosecute or not. If the NPA decides to prosecute, the case goes to court so that the accused can be charged. Alternatively, the prosecutor may decide to divert the matter for alternative resolution (NPA, 2014).

### *3.1.2 South African Police Services*

The SAPS is the national police force of South Africa and has a responsibility to prevent, combat and investigate crime, maintain public order, protect and secure the inhabitants of the Republic and their property, uphold and enforce the law, create a safe and secure environment for all people in South Africa, prevent anything and investigate any crimes that may threaten the safety or security of any community, ensure criminals are brought to justice, and participate in efforts to address the causes of crime (Department of Police, 2014).

The SAPS plays an important part in the forensic accounting investigative process. The Commercial Crime Investigating Unit of the SAPS and the Directorate for Priority Crime Investigation (The Hawks) are specifically mandated to investigate economic crimes (Corruption Watch, 2014).

### *3.1.3 Special Investigating Unit*

The SIU was promulgated by the President in terms of the Special Investigating Units and Special Tribunal Act, Act No 74 of 1996 (SIU Act). Its primary mandate is to recover and prevent financial losses to the state caused by acts of corruption, fraud and maladministration. The SIU also assists departments with systemic attempts to improve service delivery (SIU, 2014).

The SIU is a public entity with powers of investigation and litigation. Following the issuing of a presidential proclamation, the SIU has powers to subpoena, search, seize and interrogate witnesses under oath. The SIU can take civil action to correct any wrongdoing it uncovers in its investigations. For example, the SIU can obtain a court order to compel a person to pay back the wrongful benefit received and, thus, recover the money for the state. The SIU



also works with the department concerned to cancel contracts when proper procedures were not followed (SIU, 2014).

#### *3.1.4 Auditor General*

As determined by the Constitution, the Auditor General (“AG”) is the only institution that audits and reports on the public sector expenditure of the South African taxpayers’ money (AGSA, 2014).

The AG has to audit and report on the financial management in the public sector and in a manner that will enable the legislature (parliamentarians) to call the executive (cabinet ministers) to account for how they have dealt with taxpayers’ money (AGSA, 2014).

One of the types of audits that the AG conducts is known as discretionary audits or investigations. This is when it reports on factual findings with regard to financial misconduct, maladministration and impropriety, based on allegations or matters of public interest (AGSA, 2014).

In addition, the AG reports on other legal and regularity requirements, such as:

- Findings on the report of predetermined objectives; and
- Findings on compliance with laws and regulations.

#### *3.1.5 Public Protector*

The Public Protector (or Office of the Ombudsman, as it was known previously) is a high level official, independent of government and political parties, who is appointed by Parliament in terms of the Constitution to receive complaints from aggrieved or distressed persons against government departments, agencies or officials. The Public Protector has the power to investigate; mediate, conciliate and negotiate; recommend corrective action; and issue reports (Public Protector, 2014).

### ***3.2 Forensic units of consulting firms***

Forensic services of consulting firms, such as the global big four audit firms, play a vital part in the South African forensic landscape. Although the mandate to investigate commercial crime rests with the SAPS, the judge in *S v Botha* (1995) found that methods of crime have become so complicated and technical that the private sector could be allowed to support the SAPS in investigating complicated commercial crimes.

The forensic units of consulting firms usually consist of very skilled and experienced individuals and forensic accountants who are able to not only assist clients in investigating commercial crime, but also support the various legal options available when dealing with commercial crimes.

### ***3.3 In-house forensic divisions of corporate entities***

Many of the large entities in the private sector have their own forensic divisions that perform internal investigations and also fraud risk management, which includes identifying internal weaknesses and establishing fraud control measures.

### ***3.4 Accounting- and auditing-related entities/bodies?***

#### ***3.4.1 South African Institute for Chartered Accountants (“SAICA”)***

SAICA does not supply forensic accounting training, but various forensic accountants are also members of SAICA and hold the designation Chartered Accountant (South Africa) (CA(SA)) (SAICA, 2013).

#### ***3.4.2 Independent Regulatory Board for Auditors (“IRBA”)***

IRBA is the statutory body that controls the part of the accountancy profession involved with public accountancy in the Republic of South Africa. IRBA provides vital guidance for auditing practices in the public sector, as well as other functions such as guidance on ethics and

adhering to the Companies Act. Moreover, when it comes to commercial crime, it plays an important part in the conduct of an auditor, seeing that it regulates any reportable irregularity, including fraudulent conduct (IRBA, 2014).

IRBA (2014) also provides guidance with regard to combating money laundering and financing terrorism, where it supports the Financial Intelligence Centre in its fight against commercial crime.

The International Standards on Auditing 240 (ISA 240) deals with the auditor's responsibilities relating to fraud in an audit of financial statements (IFAC, 2010). Forensic accountants are often used to perform the fraud risk assessments as required by this standard.

### *3.4.3 Institute of Commercial Forensic Practitioners ("ICFP")*

The ICFP was brought to life in 2010 as a self-regulatory body. The aim of the ICFP is to regulate the commercial forensic industry in South Africa by defining the borders of this industry, identifying core competencies, benchmarking minimum requirements for defined career paths in accordance with national and international practice, and evaluating and developing an appropriate framework for the continuance of the education of properly qualified practitioners, all while building public confidence (ICFP, 2014).

### *3.4.4 Association for Certified Fraud Examiners South Africa ("ACFE SA")*

ACFE SA's objectives are to actively promote and develop the profession and its credibility, as well as a thriving business environment in South Africa (ACFE SA, 2014).

## **4. EDUCATIONAL REQUIREMENTS**

### ***4.1 Introduction***

The purpose of this chapter is twofold: it will attempt to define the forensic accountant from both a training and experience perspective, and to discuss the knowledge and skills required

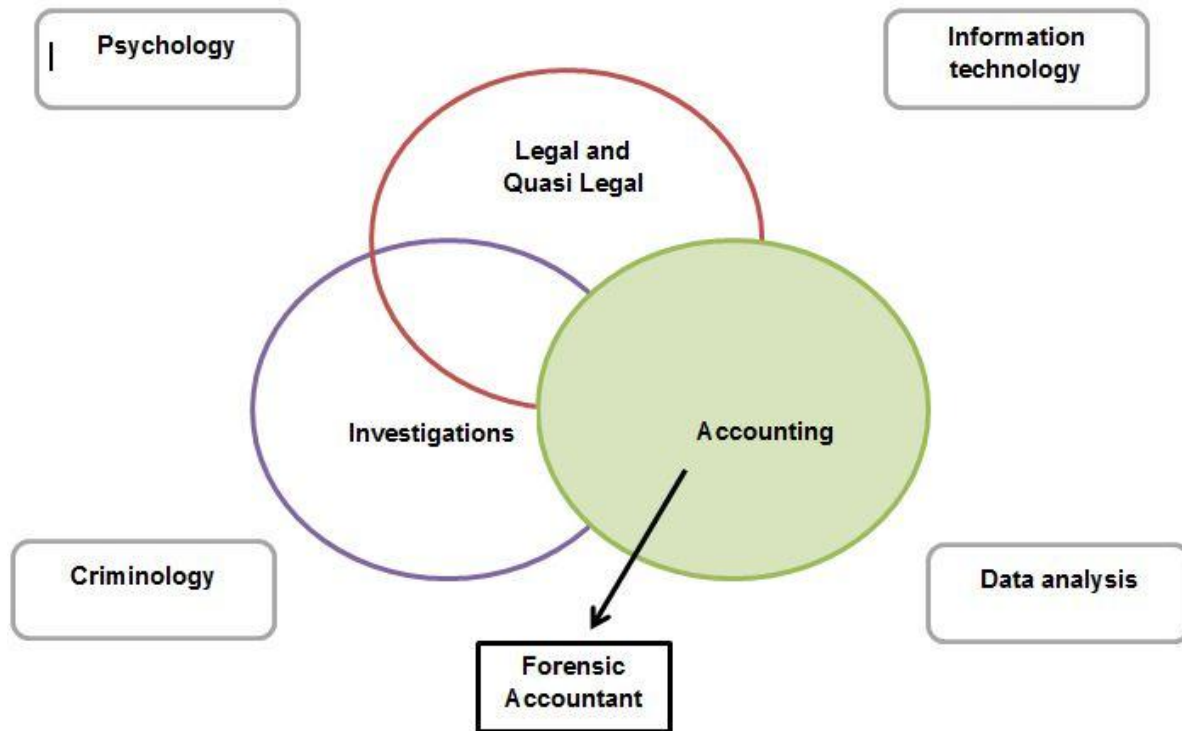
to render forensic accounting services by determining the curriculum content for education in forensic accounting. Thus, this chapter will provide an outline of the perceived necessary abilities and skills that a forensic accountant should have and discuss shortly the topics of content applicable to a forensic accounting curriculum.

#### ***4.2 The South African forensic accountant***

Corporate scandals have shifted the focus of auditing from a mere expression of opinions on financial statements to the detection, control and prevention of corporate crime (Van Romburgh, 2008). The Corruption Perception Index has made it clear that South Africa is in need of the same awareness, control, detection and prevention of these crimes. It is for this reason that the specialized skills of forensic accountants are required to detect manipulation of financial statements, and their knowledge of court requirements will help prevent errors in the investigation of white-collar crimes (Ramaswamy, 2005:68-70).

#### **Definition**

The best definition from a South African source is that of Van Romburgh (2008:32) stating that the South African forensic accountant should be an individual who possesses sufficient legal, accounting, auditing, investigative and interviewing skills to perform investigations in a commercial environment, perform agreed-upon procedures, provide litigation support, act as expert witness, and provide accounting and auditing skills to specific business scenarios. He illustrated this definition by using the following figure:



**Figure 1: Skills of the South African forensic accountant**

(Source: Van Romburgh, 2008:33)

The figure clearly illustrates the profile of the forensic accounting, being primarily accounting based, supported by the fundamentals of the legal and investigative environment.

#### ***4.3 Training of a forensic accountant***

Van Romburgh (2008) performed a survey and identified 46 topics respectively that should form part of the training curriculum for forensic accountants. These topics were then divided into four categories: information technology (IT), law, investigation, and accounting and auditing (Van Romburgh, 2008).

In South Africa, there are various institutions of higher learning that offer several courses, programs and qualifications pertaining to forensic accounting. The following paragraphs

will analyze these courses, programs and qualifications in order to gain some understanding of what the content and outcomes of these programs involve.

### **North-West University (“NWU”)**

The NWU commenced their Program in Forensic Accountancy, hosted at the School of Accounting Sciences of the Potchefstroom campus, in 2006. The program entails a Bachelor, Honors, Master’s and Doctorate degree in Forensic Accountancy.

The curriculum of the three year BCom Forensic Accountancy consists of the following modules (NWU, 2013):

- Three accounting year modules;
- Seven skills modules (Introduction to Business Management; Introduction to Economics; Mercantile Law: Introduction to Contracts and Business Law; Business Forms and Advanced Mercantile Law; Advanced Mathematical Techniques; Introductory Statistics; Professional Ethics for Accountants; and Accounting and Computers: Accounting Computer Applications);
- Six forensic accountancy modules;
- Five law modules (Criminal Law: General Principles; Criminal Procedure; Law of Contract: General Principles; Law of Evidence; and Law of Civil Procedure in the High Courts);
- Four auditing modules; and
- Four taxation modules.

The subjects relating to the honors degree, to be completed within one academic year, are:

- Advanced Financial Accounting;
- Advanced Forensic Accounting and Practice Management;

- Applied research in Forensic Accounting and Investigation; and
- Advanced Forensic Investigation

As for the master's (MCom) and doctorate (DCom) degrees, both involve a full research thesis of which the MCom can be completed within one year (full-time) or two years (part-time).

These are comprehensive and extensive courses that incorporate knowledge from several fields such as accounting, auditing, taxation, law, forensic accounting and investigations. The program is presented by qualified and experienced facilitators and offers sought-after postgraduate degrees in forensic accountancy, as well as various part-time short courses that address the growing demand for forensic accounting skills. These part-time short courses are certificates in (NWU, 2013):

- Commercial Forensic Accounting;
- Commercial Forensic Law;
- Commercial Forensic Investigation;
- Commercial Forensic Information Technology; and
- Practice and Fraud Risk Management.

The examinations that follow after completion of each of these short courses also serve as the Qualifying Examination of the ICFP to become a full member of the ICFP<sup>2</sup> (NWU, 2013).

### **University of Pretoria (“UP”)**

The UP offers a Postgraduate Diploma (PGDip) in Investigative and Forensic Accounting, as well as a Master's degree in Philosophy (MPhil) with an option in Fraud Risk Management and various short courses.

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<sup>2</sup> Refer to 5.2 Certifications

The Postgraduate Diploma is designed for individuals who are interested in a new area of specialization, as well as accountants and legal practitioners who want to refine their professional skills. The key objectives of this program include the development of knowledge and expertise for the prevention, detection and investigation of fraud, the recovering of funds derived from criminal activities and the recovery of financial awards resulting from civil disputes. The course consists of the following six modules (UP, 2014):

- Financial Fraud Schemes;
- Fraud Prevention and Detection;
- Fraud Examination;
- Fraud Examiner and the Law;
- Financial Analysis; and
- Expert Witness and the Law.

The MPhil with an option in Fraud Risk Management (coursework of 18 months) focuses on anti-fraud programs; financial fraud schemes; legal framework and the organization; fraud investigation methodologies; electronic evidence and risks; money laundering detection and compliance; and a mini-dissertation (to be completed in six months) (UP, 2014).

UP also offers various other short courses pertaining to the forensic accounting field that include the following (UP, 2014):

- Fraud Examination;
- Advanced Fraud Examination;
- Fraud Risk Management; and
- Anti-money Laundering Investigations and Reviews.

**University of South Africa (“Unisa”)**



Unisa offers a Diploma in Forensic Auditing, as well as a short learning programme in Forensic and Investigative Auditing. The diploma is aimed at individuals who already hold a BCom degree in either accounting or internal auditing. The compulsory modules applicable to this qualification are (Unisa, 2014):

- Applied Law for Forensic Auditors;
- Applied Labour Law for Forensic Auditors;
- Forensic Audit Reporting;
- Financial Fraud Schemes;
- Fraud Prevention and Detection; and
- Fraud Investigation for Forensic Auditors.

The short learning program is aimed at individuals who have a keen interest in the prevention, detection and investigation of commercial crime. This course consists of the following four modules (Unisa, 2014):

- Fraud Prevention;
- Fraud Detection;
- Fraud Investigation; and
- Forensic and Investigative Audit Reporting.

In addition, Unisa offers a Certificate in Anti-corruption and Commercial Crime Investigation (Unisa, 2014).

### **University of Johannesburg (“UJ”)**

UJ offers a Certificate in Money Laundering, as well as a one year (part-time) Diploma in Criminal Justice and Forensic Investigations consisting of four modules which investigate the legal implications of the investigative and auditing functions of the forensic investigator (UJ,

2014). This course seeks to deliver a basic understanding of applicable legal theory in relation to forensic investigations and thereafter teach the students how to deal with the legal problems arising in the practical situations they may encounter in their professional capacity. The four modules entail (UJ, 2014):

- Basic Criminal Law and Specific Offences;
- Forensic Investigation;
- Law of Evidence and the Constitution; and
- Basic Auditing Principles.

#### **University of Kwa-Zulu Natal (“UKZN”)**

UKZN offers a one year (part-time) Certificate in Forensic Investigation and Criminal Justice aimed to develop skills and equip individuals and professionals to effectively undertake forensic investigations, with an appreciation of the legal, ethical and industrial relations implications (UKZN, 2014). The modules consist of Criminal Justice and Forensic Auditing modules (UKZN, 2014).

#### **University of Cape Town (“UCT”)**

UCT (2014) offers a PGDip in Management and Information Systems: Computer Forensics. The modules cover areas such as legal principals, technology, project management and corporate governance.

#### **University of Western Cape (“UWC”)**

UWC (2014) offers a Higher Certificate in Forensic Examination (HCFE), which is designed to assist in reducing deficiencies such as fraud examiners’ and auditors’ having insufficient legal knowledge regarding elements of the suspected crimes and the evidence required for the prosecutions. The latter is important in order to enable these investigators to

embark on their investigation with a better understanding of the legal issues involved. This certificate's modules are presented over 34 weeks and are:

- Criminal Law;
- Labor Law;
- Law of Evidence;
- Administrative Law;
- Investigation of Crime; and
- Internal Auditing.

### **Nelson Mandela Metropolitan University (“NMMU”)**

NMMU (2014) includes Forensic Auditing as one of the modules offered to their accounting students studying towards a PGDip in Internal Auditing.

## **5. EXPERIENCE AND CERTIFICATIONS**

### ***5.1 Experience***

#### ***5.1.1 Introduction***

In South Africa, the forensic accounting profession might be considered relatively new and still in its early stages of development. Although the Commercial Branch of the SAPS has been investigating economic crime for a long time, it appears that the forensic accounting profession started to emerge strongly when the big audit firms commenced with their forensic practices in the early 1990s (Van Romburgh, 2008:14).

These big audit firms such as KPMG, PWC, Ernst & Young (“EY”) and Deloitte have established service lines that are dedicated specifically to helping clients reduce the reputational risk and commercial loss which are caused by economic crime and to providing their clients with

the tools and services to keep on top of the major risks they face in today's corporate environment. By analyzing the forensic services rendered by the big four auditing firms in South Africa, a better understanding is gained as to the work of the South African forensic accountant. This will also illustrate to what extent the forensic accounting profession has developed in South Africa.

#### *5.1.2 Service-line offerings of forensic accountants in South Africa*

The traditional big four audit firms in South Africa all render forensic accounting services within dedicated divisions in these firms.

KPMG's forensic division is aimed at the prevention and resolving of commercial disputes, fraud, misconduct, and breaches of rules and regulations. This is accomplished by the application of accounting, investigation, intelligence, technology and industry skills (KPMG, 2014).

Deloitte's forensic and dispute services specialize in all areas of commercial crime and provide both proactive and reactive fraud, accounting and computer forensic investigation services. The identification and investigation of these irregularities – including collecting evidence, advising on asset recovery strategies, preparing case dockets for submission to authorities, and providing experienced expert witness testimony in disciplinary, civil and criminal proceedings – are all key elements of the specialist forensic services that Deloitte offers (Deloitte, 2014).

EY fraud investigations and dispute services help companies to manage risk, investigate alleged misconduct and measure the financial implications of disputes. This service line of EY seeks to investigate possible irregularities and misconduct, perform electronic evidence discovery and review financial reports when unusual financial activity is suspected (EY, 2013).

PWC's forensic investigations and dispute resolution services also focus on the prevention, investigation and remediation of issues that could damage clients' brands and reputations. This service line provides forensic accounting, financial analysis, advanced technology and regulatory knowledge in order to help companies confront and deal with corporate investigations, litigation and challenges within the regulatory enforcement challenges (PWC, 2013).

### *5.1.3 Skills*

According to Manning (2007), success in detecting and preventing fraud depends on the knowledge, skills and abilities of the forensic accountant. Du Plessis (2001:4-6) states that the forensic accountant should have knowledge of fraud, business reality, the workings of the legal system, and financial expertise, and possess an investigative mentality, all to resolve issues within the rules of evidence.

Brennan and Hennessy (2001:941) list several skills that a forensic accountant should have and be able to apply: financial expertise, analyzing financial statements, inquiring about uncertainties that might arise from analyzing the financial statements, testing the financial statements for fraud, accounting knowledge, understanding the workings of audits, and investigating financial statements, all within the rules of evidence. McMullen and Sanchez (2010:32) state it is important to know the skills and characteristics of a forensic accountant that are required for success in order to assist universities in designing and selecting an adequate course. This knowledge could also help educators to identify suitable students and encourage them to follow a career in forensic accounting (McMullen & Sanchez, 2010:32).

The skills required of a forensic accountant include (McMullen & Sanchez, 2010:33; Gray, 2008:119; Bhasin, 2007:1006; Vorster, 2007:1; Brooks & Labelle, 2006:287-288):

- Basic accounting skills;
- Writing skills;
- Verbal communication skills;
- Analytical skills;
- Personality traits;
- Computer forensic skills;
- Data mining skills;
- Interviewing skills; and
- A background in law enforcement.

Messmer (2004) also stated that, in order to become a successful forensic accountant, one should possess analytical abilities, communication skills, a creative mindset and business knowledge.

According to Mazunder (2011:3-4), the scope of forensic accountants' services is widening ever more, including but not limited to the following activities:

- Fraud detection, documentation, and presentation in criminal trials and claims;
- Calculation of economic damages (the monetary harm that one party allegedly caused another party);
- Tracing income and assets, often in an attempt to find hidden assets or income; and
- Reconstructing financial statements that may have been destroyed or manipulated.

The forensic accountant should form part of an effective multi-disciplinary team consisting of lawyers, accountants, information technology experts and investigators. As mentioned previously, the South African forensic accountant should be an individual who

possesses sufficient legal, accounting, auditing, investigative and interviewing skills to perform investigations in a commercial environment, perform agreed-upon procedures, provide litigation support, act as expert witness and provide accounting and auditing skills to specific business scenarios (Van Romburgh, 2008:32).

## ***5.2 Certifications***

### ***5.2.1 The Institute of Commercial Forensic Practitioners***

In 2010, the ICFP was established by key role players in the commercial forensic industry in order to oversee and steer the commercial forensic profession, to set standards of professional conduct and to develop the commercial forensic professional into a South African brand that can be trusted and recognized by the community. By promoting the commercial forensic professional brand, the Institute develops specified career paths for the commercial forensic practitioner by means of certain designations (ICFP Memorandum of Association).

In order to practice as a forensic accountant in South Africa, one has to obtain full membership of the ICFP. The rules of eligibility for membership as contained in Addendum 1 of the ICFP's By-laws will be discussed accordingly in the paragraphs that follow.

The membership of the Institute consists of the following categories (ICFP By-Laws, 2011):

- Full membership;
- Associate membership; and
- Honorary membership.

#### **Full membership**

Any fit and proper person who applies will qualify as a full member on the following grounds: (a) in terms of a pre-approved grandfather period, which expired on 31 March 2011; or (b) proof of having passed a pre-approved qualifying examination, as determined by the Board, with at least three years' relevant commercial forensic experience; or proof of any relevant degree, diploma or other qualification having a rating of at least NQF 7, with at least 10 years' relevant commercial forensic experience; or (d) proof of a senior certificate (Grade 12) with at least 15 years' relevant commercial forensic experience.

Relevant commercial forensic experience will be determined by the Board (ICFP, 2014).

### **Associate membership**

Any fit and proper person, having passed a senior certificate and who is obtaining experience in the commercial forensic field or studying towards a relevant qualification, may apply for and be awarded associate membership (ICFP, 2014).

#### *5.2.2 The Association of Certified Fraud Examiners*

In addition, one has the option to qualify as a certified fraud examiner through the ACFE. The membership requirements for the South African Chapter of the ACFE are identical to the broad ACFE prerequisites (ACFE SA, 2014).

## **6. EXPERT WITNESSING**

### ***6.1 Introduction***

Accountants are conservative by nature and are often reluctant to involve themselves as expert witnesses in the dispute process, even when they have all the required qualifications and experience (Misuraca & Weinstein, 2012). According to Misuraca and Weinstein (2012), an expert witness is someone who is independent and objective and has a firm knowledge of the



subject in the matter. Experts provide expert opinions based on their findings and must follow the rules of the court and evidence (Sanchez & Zhang, 2012).

### ***6.2 Characteristics of a forensic accountant acting as an expert witness***

A forensic accountant may be tasked with the role of an expert witness in order to assist the court in understanding complicated subjects that are not within the knowledge of the average person. The forensic accountant will, typically, be tasked with providing expert testimony regarding forensic accounting matters. Wecht (2006:524) identifies aspects that a forensic accountant can bring to the legal process, such as accounting, auditing techniques and data analytics, to prove or disprove a legal standing.

Before they can provide such technical evidence, forensic accountants must convince the court of their skills, knowledge and experience to be able to provide an opinion on the issue at hand. Matson (1999:20) states that this can be done by gathering the expert's credentials into a well-documented résumé or curriculum vitae. Eiya and Otalor (2013) argue that "[t]he principal role of a forensic accountant as an expert witness is to analyze, interpret, summarize and present complex business and financial deals in a logical, understandable manner supported with facts".

According to Vouras *et al.* (cited in Ojo, 2012), the overall obligation of an expert witness is to approach a question with independence and objectivity. The roles of the lawyers who work closely with the expert witness must be distinguished, otherwise the expert might be seen as a member of the litigation team and the lawyers could influence the content of the expert witness's testimony.

In the case of *R v Sole* (2004), the role of the forensic accountant was defined and the use of the words "appears" and "apparently" in forensic reports were explained. The accused, the chief executive of the Lesotho Highlands Development Authority, was charged with 16 counts of

bribery and two of fraud. During the trial, a forensic accountant testified for the prosecution, *inter alia*, placing a document before the Court that was a report on his investigation. The words “appears” and “apparently” figured prominently in the report and in the witness’s evidence the accused’s legal representative stated that the forensic accountant is not sure about his case and his report should be deemed as not credible, as it is not reliable. In his evidence, the forensic accountant pointed out that his use of these words had not been an indication of any uncertainty of conclusion, but rather an awareness of the fact that it is the function of the Court to make ultimate findings. The forensic accountant further indicated that it remained the Court’s job to make its own findings and that he should remain an objective expert (R v Sole, 2004), because a forensic accountant should give the facts of the case in such a manner that the Court will be able to make its own findings without the opinion of the expert.

According to Eiya and Otalor (2013), a forensic accountant as expert witness must:

- Communicate his findings in a report and documents;
- Assist in legal proceedings;
- Help to obtain documentation that supports the claim;
- Review documentation and determine the loss;
- Assist with the examination of discovery to review the testimony;
- Assist with the understanding of financial issues;
- Review the opposing expert’s damages reports and report on both the weaknesses and the strengths of the report;
- Assist with settlement discussions; and
- Attend trial to hear the testimony of the opposing expert and to provide assistance with cross-examination.

In the case of *Holtzhauzen v Roodt* (1997), principles applicable to the admissibility of expert opinion evidence included the following:

a) The expert witness must be called to give evidence on matters requiring specialized skill or knowledge. The Court should, therefore, determine whether the subject of the enquiry does raise issues calling for specialized skill or knowledge. Evidence of opinion on matters which do not call for expertise is excluded because it does not help the Court. At best, it is superfluous and, at worst, it could be a cause of confusion.

b) The Courts are accustomed to receiving the evidence of psychologists and psychiatrists, particularly in the criminal courts. However, the expertise of the witness should not be elevated to such heights that sight is loss of the Court's own capabilities and responsibilities in drawing inferences from the evidence.

c) The witness must be a qualified expert. It is for the judge to determine whether the witness has undergone a course of special study or has experience or skill as will render him an expert in a particular subject. It is not necessary for the expertise to have been acquired professionally.

d) The facts upon which the expert opinion is based must be proved by admissible evidence. These facts are either within the personal knowledge of the expert or on the basis of facts proved by others. If the expert has observed them, then the expert must testify as to their existence. The expert must furnish criteria for testing the accuracy and objectivity of his conclusion and the Court must be told of the premises upon which the opinion is based. Since it is likely to carry more weight, the testimony of an expert should be subjected to higher standards of accuracy and objectivity.

e) The guidance offered by the expert must be sufficiently relevant to the matter in issue which is to be determined by the Court.

f) Opinion evidence must not usurp the function of the Court. The witness is not permitted to give an opinion on the legal or general merits of the case. The evidence of the opinion of the expert should not be proffered on the ultimate issue. Also, the expert must not be asked or answer questions which the Court has to decide.

There is no hard and fast rule about the qualifications and experience that the forensic accountant should have in order to be regarded as an expert witness. However, various literature sources provide guidelines as to the characteristics that an expert witness should possess.

### ***6.2 Procedure in calling expert witnesses in South Africa***

According to Wagner (2013), the elements of the testimony consist of different examinations. During examination-in-chief, the witness is examined by the party who called him in order to either weaken the opponent's case or to strengthen or weaken the credibility of other witnesses. Cross-examination is confrontational and is the test for credibility. The purpose is to introduce alternative explanations, weaken the credibility of the witness, find support for the opponent's theory, and clarify or confuse the issues. Following the cross-examination, the party who called the witness has the opportunity to re-examine him. The Uniform Rules of Court (2009) Section 36 (9) states that:

“No person shall, save with the leave of the court or the consent of all parties to the suit, be entitled to call as a witness any person to give evidence as an expert upon any matter upon which the evidence of expert witnesses may be received unless he shall -

a) Not less than fifteen days before the hearing, have delivered notice of his intention so to do; and

b) Not less than ten days before the trial, have delivered a summary of such expert's opinion and his reasons therefor.”

In the case of *Nel v Tshitangano* (2014), the defendant testified and also called as an expert witness a forensic auditor, Mr Allan Greyling. Greyling was mandated by the defendant to provide an expert accounting opinion, particularly on the issue whether the accounting for mineral rights in respect of Miranda for its financial year 2006 to 31 August 2011 complied with International Financial Reporting Standards. Judge Moshidi made the following judgment regarding the expert witness, a forensic auditor, in the above case:

“The evidence of the defendant and his witness, Greyling, was extremely impressive, particularly on pertinent issues and for numerous reasons. There is no conceivable reason not to accept their testimony. For example, Greyling, who also prepared a written expert report on this matter, testified that for the Miranda board, which included the plaintiff as the CEO, to have reflected Rozynenbosch as an asset in the Annual Reports of 2006 to 2010, amounted to a clear misrepresentation about the true financial affairs of Miranda. This evidence is not only supported by the documentation referred to above, which is uncontested, but there is also no other evidence to counter it. Greyling is an admitted chartered accountant and a director of Accountants at Law (Proprietary), a company specializing in forensic accounting. He is often appointed by the High Courts as a rescue business practitioner. His expertise as a forensic auditor is not in question.”

## **7. CODES OF CONDUCT AND ETHICAL STANDARDS**

### ***7.1 Introduction***

There are several regulatory and organizational bodies that coordinate and regulate the forensic accounting profession around the world. As mentioned earlier, the ICFP is a self-

regulating body that seeks to cohere, coordinate and regulate the commercial forensic practitioners in South Africa. The South African chapter of the ACFE follows in its international body's footsteps by enforcing its code in South Africa. The codes of conduct for dealing with the public, other professionals and clients are set by these governing bodies.

## **7.2 ICFP**

The ICFP has drawn up and established an extensive Code of Ethics and Rules of Conduct which are included in Addendum 3 of the ICFP's By-laws. The Code of Ethics, together with other relevant policy documents and guidelines approved by the Institute, provides guidance to commercial forensic practitioners. This code is a valuable framework to both individuals and entities that offer commercial forensic services and it binds members of the Institute. Any breaches by members of the Institute are seen as a serious offence and will be dealt with in terms of the Institute's disciplinary procedures included in Addendum 2 of the Institute's By-laws (ICFP, 2014).\

As stated in the introductory paragraph of Addendum 3 of the ICFP's By-laws, the purpose of this Code of Ethics is to promote an ethical culture and high ethical standards in the commercial forensic profession in order to enhance the image of the profession and the Institute.

The Code of Ethics includes two essential components, namely:

1. Principles that are relevant to the profession and the practice of commercial forensics;  
and
2. Rules of Conduct that describe the norms of behavior that are expected of commercial forensic practitioners. These rules are an aid to integrate the principles into practical

applications and are intended to guide the ethical conduct of commercial forensic practitioners.

The Principles and Rules of Conduct mentioned above lay the foundation for ethical behavior in the corporate environment and provide effective guidelines for professional conduct when dealing with clients, other professionals and the public. When a commercial forensic practitioner is faced with an ethical dilemma where the right choice is not obvious, he should consult this Code of Ethics and Rules of Conduct for guidance.

The five principles that all commercial forensic practitioners are expected to apply and uphold are the following:

- Integrity

Trust is established by the integrity of commercial forensic practitioners, which provides the basis for reliance on their professional services and advice.

- Objectivity

Commercial forensic practitioners should exhibit the highest level of professional objectivity in gathering, evaluating and communicating information about the activity or process being examined. A balanced assessment of all the relevant circumstances should be made and, in drawing inferences and conclusions, commercial forensic practitioners should not be unduly influenced by their own or others' interests.

- Confidentiality

Commercial forensic practitioners uphold the right to privacy, respect the value and ownership of information they receive, and do not disclose information

without appropriate authority, unless there is a legal or professional obligation to do so.

- Competency

Commercial forensic practitioners must apply the knowledge, skills and experience that are required in the performance of commercial forensic services.

- Legality

Commercial forensic practitioners respect and apply the law as applicable to the profession and, in particular, the fundamental rights of all persons as set out in the Constitution.

### **7.3 ACFE**

The ACFE's Code of Ethics and Standards of Professional Conduct in South Africa is identical to the broad ACFE international Code of Ethics, which applies to all members.

### **7.4 SAICA and IRBA**

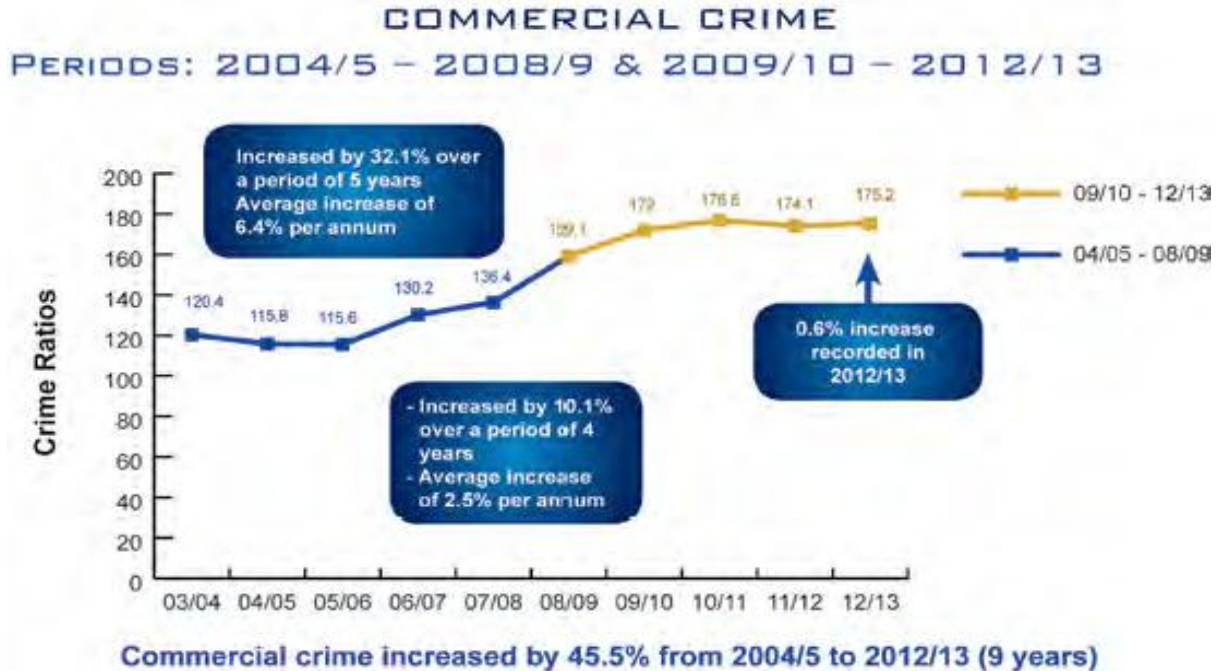
Forensic accountants who are also Chartered Accountants or registered auditors should consider the standards set by SAICA and / or the IRBA as guidelines for forensic accounting engagements. However, the South African forensic accountant is not necessarily bound by these standards.

## **8. THE PREVALENCE OF COMMERCIAL CRIME IN SOUTH AFRICA**

According to the SAPS, commercial crime has increased by 45.5% over the past nine years, by 10.1% during the past four years, and by a further 0.6% during the past financial year.

The graph below depicts these increases:





**Figure 2: Commercial crime reported by SAPS for the period 2004 to 2012**

(Source: Department of Police, 2014)

The 2014 PWC Global Economic Crime survey states that South African companies experience more fraud and bribery than their counterparts elsewhere in the world and that they were being hit by a higher incidence in every category of economic crime except intellectual property infringement and mortgage fraud. Since 2011, bribery and corruption have been the fastest growing economic crime category in South Africa, and results from the survey indicate that economic crime remains a serious challenge to business leaders, government officials and private individuals in South Africa. Almost three quarters (69%) of the South African respondents in the survey indicated that they had been subjected to some form of economic crime in the preceding 24 months. South African companies' responses to the profile of the perpetrators of economic crimes were consistent with those of other countries and indicated that senior and middle management committed 77% of all internal fraud.

The commercial crimes in South Africa that drew attention in the PWC survey, especially in comparison to other countries, are depicted in the table below:

Table 1: Commercial crimes in South Africa vs. other countries

Commercial crime	Percentage of SA respondents indicating experience of crime	Percentage of other countries' respondents indicating experience of crime
Asset misappropriation	77%	69%
Procurement fraud	59%	29%
Bribery and corruption	52%	27%
Human resources fraud	42%	15%
Money laundering	14%	11%
Financial statement fraud	34%	22%
Tax fraud	11%	6%

It is clear from the table that South African respondents reported significantly more instances of procurement fraud, bribery and corruption, and human resources fraud than their global counterparts.

## **9. CONCLUSION**

As South African law is not entirely codified, forensic accountants in this country needs to be aware of the various laws applicable to their work, of which the Constitution is pivotal, together with other sources of law such as common law and customary law. The three most important sources of criminal law in South Africa, in order of use, are legislation, the common

law and case law (Snyman, 2008:5) which should adhere to the value and rights of the Constitution.

The state institutions which act as role players in the forensic accountant's environment, include the National Prosecuting Authority, the South African Police Services, the Special Investigating Unit, the Auditor General, and the Public Protector. Aforementioned are supported by growing forensic concerns in the private sector.

In light of the above discussion on experience needed, the service line offerings and the skills required to act as expert witness, this article concludes that the training and education available to forensic accountants in South Africa cover all the specialized areas mentioned. It does not, however, exclude the constant development needed to supply in the demand for new skills to keep abreast of the constant change within the market.

It is evident from the article that commercial crime is increasing in South Africa and, in comparison with other countries, South Africa has reported higher percentages in individuals who have experienced commercial crime.

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