

THE SOUTH AFRICAN CRIMINAL LAW'S RESPONSE TO THE CRIMES OF  
FRAUD AND CORRUPTION WITHIN LOCAL GOVERNMENT

by

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## **DEDICATIONS**

This research is dedicated in the loving recognition, to my parents Mr Deven Naidoo and Mrs Premie Naidoo, for the unconditional love, support and encouragement. I further dedicated this research to my late grandparents Mr Kistah Naidoo and Mrs Radha Naidoo, you both are greatly revered and never forgotten. My most important praise and appreciation is given to my personal Lord and Saviour Jesus Christ for his unfailing love and blessings.

## SUMMARY

The crime of fraud and corruption is rife within South African municipalities. This negatively impacts on the efficient and effective service delivery through wasteful and uneconomic expenditure incurred by Municipalities through the perpetration of the aforementioned crimes.

The writer envisages researching, investigating, critically analysing and evaluating the South African criminal law's response in combatting the scourge of fraud and corruption within local government. In order to do so the research will examine the efficacy of the Prevention and Combatting of Corrupt Activities Act 12 of 2004, in prosecuting individuals who perpetrate acts of fraud and corruption.

The current Act unlike its predecessor, has enacted special provisions in sections 4 and 26(1)(a) for the prosecution of public officials who commit acts of fraud and corruption. The Act makes provisions for a general offence of corruption and also punishes various specific forms of corruption. The essential purpose of the Act is the 'unbundling' of the offence of corruption. A duty is imposed by the Act to report corrupt practices and keep record of previously convicted persons and enterprises who unlawfully received tenders and contracts as a result of such acts of corruption. This record will ensure that harsh restrictions are placed on such individuals. Furthermore, this Act is designed to reinforce South Africa's obligations under the United Nations Convention against Corruption adopted by the General Assembly on 31 October 2003.

The penal provisions of the Act, serves as a deterrent in that a conviction for corruption invokes a 15 year imprisonment term. All in all, the Act has provisions to effectively prosecute perpetrators of corruption. The same is true for the crime of common law fraud although punishment is at the court's discretion.

Detecting fraud and corruption within local government is extremely difficult because of its disguised form. In view hereof forensic investigative methods have to be adopted in order to produce the standard of proof required in our courts of law to successfully prosecute these crimes.

Finally, the research will produce findings which will inform the recommendations that will be made. The writer envisages making implementable recommendations that may lead to the detection, effective investigation, successful prosecution and ultimately the prevention of the crimes of fraud and corruption within local government.

## TABLE OF CONTENTS

TITLE	PAGE NO
DECLARATION	ii-iii
DEDICATION	iv
SUMMARY	vi
TABLE OF CONTENTS	vii
<b>CHAPTER 1: INTRODUCTION, BACKGROUND AND CONCEPTUALISATION OF FRAUD AND CORRUPTION IN SOUTH AFRICA</b>	<b>1</b>
1. INTRODUCTION	1
2. PURPOSE AND OBJECTIVES OF THE STUDY	3
3. RESEARCH QUESTIONS	4
4. STATEMENT OF THE PROBLEM	5
5. HYPOTHESIS	6
6. METHODOLOGY	6
7. DEFINITIONS OF KEY CONCEPTS	7
8. PLAN OF STUDY	11
<b>CHAPTER 2: THE SOUTH AFRICAN RESPONSE TO THE CRIMES OF FRAUD AND CORRUPTION WITHIN LOCAL GOVERNMENT</b>	<b>13</b>
1. INTRODUCTION	13
2. CONSTITUTIONAL RELEVANCE OF THE CRIMES OF FRAUD AND CORRUPTION WITHIN LOCAL GOVERNMENT	14
2.1 CONSTITUTIONAL OBJECTIVES OF THE MUNICIPALITY	15
2.2 DUTIES OF PROVINCIAL LEGISLATURES	15
2.3 RELEVANCE OF CHAPTER 9 STATE INSTITUTIONS	16

2.4	CONSTITUTIONAL REQUIREMENT FOR PROCUREMENT	17
3.	GOVERNANCE	19
3.1	PARTICIPATION	20
3.2	RULE OF LAW	20
3.3	TRANSPARENCY	21
3.4	RESPONSIVENESS	21
3.5	CONSENSUS ORIENTATED	21
3.6	EQUITY AND INCLUSIVE	22
3.7	EFFECTIVENESS AND EFFICIENCY	22
3.8	ACCOUNTABILITY	22
4.	LEGISLATIVE FRAMEWORK	24
4.1	ELEMENTS OF CORRUPTION IN TERMS OF THE PREVENTION AND COMBATING OF CORRUPT ACTIVITIES ACT	24
4.2	PREVENTION OF ORGANISED CRIME ACT	35
4.3	PROTECTED DISCLOSURE ACT	36
4.4	PROMOTION OF ACCESS TO INFORMATION ACT	37
4.5	PROMOTION OF ADMINISTRATION OF JUSTICE	37
4.6	WITNESS PROTECTION ACT	37
4.7	THE PUBLIC FINANCE MANAGEMENT ACT AND REGULATIONS	38
4.8	FINANCIAL INTELLIGENCE CENTRE ACT	39
4.9	MUNICIPAL FINANCE MANAGEMENT ACT, THE MUNICIPAL SYSTEMS ACT AND THE LOCAL GOVERNMENT: MUNICIPAL STRUCTURES ACT	39
5.	COMMON LAW FRAUD	43
5.1	INTRODUCTION	43
6.	CONCLUSION	45
<b>CHAPTER 3: LEGAL PRECEDENT (CASE LAW) ON THE CRIMES OF FRAUD AND CORRUPTION WITHIN SOUTH AFRICAN MUNICIPALITIES</b>		46
1	INTRODUCTION	46
2	CORRUPTION AND FRAUD CASES WITHIN SOUTH AFRICAN	

MUNICIPALITIES	46
2.1 <i>Viking Pony Africa Pumps (PTY) LTD t/a Tricom Africa v Hidro-Tech Systems (PTY) LTD and Another</i>	46
2.2 <i>Democratic Alliance Western Cape &amp; others v Western Cape Minister of Local government &amp; another</i>	51
2.3 <i>Minister of Local government, Housing and Traditional Affairs (Kwazulu-Natal) v Umlambo trading</i>	53
2.4 <i>Esorfranki Pipelines (PTY)LTD v Mopani District Municipality</i>	55
3 CORRUPTION AND FRAUD PRECEDENTS WITHIN THE PUBLIC SECTOR	57
3.1 S v KGANTSI	57
3.2 S V SHAIK & OTHERS	60
3.3 SELEBI V S	63
3.4 TSHOPO V STATE	66
4 CONCLUSION	68

#### **CHAPTER 4: EARLY WARNING SYSTEMS(EWS) OF FRAUD AND**

<b>CORRUPTION</b>	<b>70</b>
1. INTRODUCTION	70
2. WHAT ARE RED FLAGS?	71
3. MANIFESTATIONS OF FRAUD AND CORRUPTION SCHEMES IN PUBLIC PROCUREMENT	72
4. PHASES OF PROCUREMENT CYCLE WHICH ARE PRONE TO FRAUD AND CORRUPTION	73
4.1 PROJECT IDENTIFICATION AND DESIGN	73
4.1.1 RED FLAGS OF PROJECT IDENTIFICATION AND DESIGN	74
4.2 ADVERTISING, PREQUALIFICATION, BIDDING DOCUMENTS PREPARTATION AND SUBMISSION OF BIDS	74
4.2.1 ADVERTISING	74
4.2.1.1 RED FLAGS IN ADVERTISING	75
4.2.2 PREQUALIFICATION STAGE	76
4.2.2.1 RED FLAGS IN PREQUALIFICATION	76



4.2.3	PREPARATION OF BIDDING DOCUMENTS STAGE	77
4.2.3.1	RED FLAGS IN PREPARATION OF BIDDING DOCUMENTS	78
4.2.4	SUBMISSION OF BIDS STAGE	79
4.2.4.1	RED FLAGS IN BID SUBMISSIONS	79
4.3	BID EVALUATION STAGE	80
4.3.1	RED FLAGS IN BID EVALUATIONS	82
4.4	CONTRACT PERFORMANCE, ADMINISTRATION AND SUPERVISION STAGE	82
4.4.1	RED FLAGS IN CONTRACT PERFORMANCE	83
5.	COMMON RED FLAG INDICATORS OF FRAUD AND CORRUPTION WITHIN THE LOCAL GOVERNMENT	83
5.1	COMPLAINTS FROM BIDDERS AND INTERESTED PARTIES	84
5.2	MULTIPLE CONTRACTS BELOW PROCUREMENT THRESHOLDS	84
5.3	UNUSUAL BID PATTERNS	84
5.4	INFLATED AGENT FEES	85
5.5	SUSPICIOUS BIDS/BIDDERS	86
5.6	NON-SELECTION OF LOWEST BIDDER	86
5.7	REPEATED AWARDS TO SAME CONTRACTOR	86
5.8	CHANGES IN CONTRACT TERMS AND CONDITIONS	87
5.9	MULTIPLE CHANGE ORDERS TO CONTRACTS	87
5.10	POOR QUALITY OF WORKS AND/OR SERVICES	87
6.	CONCLUSION	88

**CHAPTER 5: FORENSIC INVESTIGATION OF FRAUD AND CORRUPTION WITHIN  
THE CRIMINAL JUSTICE SYSTEM OF SOUTH AFRICA** 89

1.	INTRODUCTION	89
2.	ESSENTIAL CHARACTERISTICS OF CRIMINAL INVESTIGATION AND FORENSIC INVESTIGATION?	89
3.	FORENSIC INVESTIGATION INSTITUTIONS THAT INVESTIGATE CRIMES OF FRAUD AND CORRUPTION WITHIN SOUTH AFRICA	91
3.1	THE ROLE OF SOUTH AFRICAN POLICE SERVICE	92

3.1.1	INTRODUCTION	92
3.1.2	INVESTIGATION POWERS OF SAPS	93
3.1.3	FUNCTIONS AND RESPONSIBILITIES OF THE DETECTIVE SERVICE OF SAPS	95
3.2	THE ROLE OF THE NATIONAL PROSECUTING AUTHORITY (NPA)	97
3.2.1	INTRODUCTION	97
3.2.2	INVESTIGATIVE AND PROSECUTORIAL POWERS OF THE NPA	98
3.2.3	FUNCTIONS AND RESPONSIBILITIES OF THE INVESTIGATIVE DIRECTORATE OF THE NPA	99
3.4	THE DIRECTORATE OF SPECIAL OPERATIONS (DSO)	100
3.4.1	INTRODUCTION	100
3.4.2	INVESTIGATIVE POWERS OF THE DSO	101
3.4.3	FUNCTIONS AND RESPONSIBILITIES OF THE DSO	102
3.5	THE ROLE OF THE SPECIAL INVESTIGATIVE UNIT (SIU)	103
3.5.1	INTRODUCTION	103
3.5.2	INVESTIGATIVE POWERS OF THE SIU	104
3.5.3	FUNCTIONS AND RESPONSIBILITIES OF THE SIU	105
3.6	THE ROLE OF THE ASSEST FORFEITURE UNIT (AFU)	106
3.6.1	INTRODUCTION	106
3.6.2	INVESTIGATIVE POWERS AND AUTHORITY	107
3.6.3	FUNCTIONS AND RESPONSIBILITIES OF THE AFU	107
4.	FORENSIC INVESTIGATIVE OF FRAUD AND CORRUPTION	109
4.1	INTRODUCTION	109
4.2	CASE THEORY APPROACH	111
4.2.1	STEP 1: BEGIN THE CASE	112
4.2.1.1	RESPONSE TO A COMPLAINT	112
4.2.1.2	EVALUATE A COMPLAINT	112
4.2.1.3	DISCOVERY OF RED FLAG	113
4.2.1.4	“PROACTIVE AUTOMATED FRAUD DETECTION TESTS	113
4.2.2	STEP 2: TESTING OF ALLEGATIONS	114
4.2.3	STEP 3: CONDUCT DUE DILIGENCE BACKGROUND CHECKS	115

4.2.4	STEP 4: COMPLETING THE INTERNAL STAGE OF INVESTIGATION	116
4.2.5	STEP 5: CHECK FOR PREDICTION AND GET ORGANISED	117
4.2.6	STEP SIX: BEGIN THE EXTERNAL INVESTIGATION	118
4.2.6.1	CORRUPTION CASES	118
4.2.6.2	FRAUD CASES	120
4.2.7	STEP 7: PROOF OF ILLICIT PAYMENTS	122
4.2.8	STEP 8: OBTAINING THE CO-OPERATION OF A WITNESS	123
4.2.9	STEP 9: INTERVIEWING THE PRIMARY SUSPECT	123
4.2.10	STEP 10: PREPARATION OF THE FINAL REPORT	125
5.	CONCLUSION	127
<b>CHAPTER 6: COMPARATIVE ANALYSES: COMBATING OF FRAUD AND CORRUPTION BETWEEN THE EASTERN CAPE AND WESTERN CAPE</b>		128
1.	INTRODCUTION	128
2.	FRAUD AND CORRUPTION WITHIN THE EASTERN CAPE PROVINCE	132
2.1	HISTORIC INTRODUCTION	132
2.2	THE ANTI-CORRUPTION FORUM	134
2.3	THE NETWORK AGAINST CORRUPTION	137
2.4	CURRENT ANTI-CORRUPTION AND FRAUD STRATEGIES BY THE EASTERN CAPE PROVINCE	139
3.	FRAUD AND CORRUPTION WITHIN THE WESTERN CAPE PROVINCE	142
3.1	HISTORIC BACKGROUND	142
3.2	THE DIRECTORATE: FORENSIC AUDIT	144
4.	COMPARISION BETWEEN THE EASTERN CAPE AND THE WESTERN CAPE’S ABILITY TO EFFECTIVELY MANAGE FRAUD AND CORRUPTION IN THE RESPECTIVE PROVINCES	148
5.	CONCLUSION	153
<b>CHAPTER 7: RECOMMENDATIONS AND CONCLUSIONS</b>		155
1.	INTRODUCTION	155
1.1	ORGANIZATION STRATEGY	156

1.1.1	SOUND AND ETHICAL CULTURE	156
1.1.2	ACCOUNTABILITY, TRANSPARENCY AND COMMITMENT FROM SENIOR MANAGERS	157
1.1.3	ASSESSMENT OF FRAUD AND CORRUPTION RISK	158
1.1.4	EMPLOYEE RECRUITMENT AND TRAINING	159
1.2	OPERATIONAL STRATEGY	160
1.2.1	PREVENTION	160
1.2.1.1	ESTABLISHMENT OF ANTI-FRAUD AND CORRUPTION COMMITTEES	160
1.2.1.2	ESTABLISHMENT OF INTERNAL AUDIT DEPARTMENT	161
1.2.2	DETECTION	161
1.2.2.1	AUDIT COMMITTEE	161
1.2.2.2	EMPLOYEE TRAINING AND AWARENESS PROGRAMMES	162
1.2.2.3	WHISTLE BLOWING	163
1.2.3	RESPONSE(S) TO COMMISSION OF FRAUD AND CORRUPTION	163
1.2.3.1	ROLE OF MUNICIPAL MANAGERS	163
1.2.3.2	MANAGING THE ALLEGATION	164
1.2.3.3	DISCIPLINARY HEARINGS	165
1.2.3.4	PROSECUTION	165
1.2.3.5	RECOVERY ACTION	166
1.2.3.6	INTERNAL CONTROL REVIEW AFTER DISCOVERY OF FRAUD OR CORRUPTION	166
1.2.3.7	KEEPING RECORDS OF WRONGDOERS OF EXTERNAL PARTIES	166
1.3	MAINTENANCE STRATEGY	167
1.3.1	REVIEWING OF THE EFFECTIVENESS OF THE ANTI-FRAUD AND CORRUPTION POLICY	167
1.3.2	REVIEWING AND UPDATING THE ANTI-FRAUD AND CORRUPTION POLICY	168
2.	CONCLUSION	168
	<b>ANNEXURE “A”</b>	172
	<b>BIBLIOGRAPHY</b>	173

# THE SOUTH AFRICAN CRIMINAL LAW'S RESPONSE TO THE CRIMES OF FRAUD AND CORRUPTION WITHIN LOCAL GOVERNMENT

## CHAPTER 1

### INTRODUCTION, BACKGROUND AND CONCEPTUALISATION OF FRAUD AND CORRUPTION IN SOUTH AFRICA

#### 1. INTRODUCTION

The scourge of fraud and corruption in South Africa has reached serious proportions. It appears from the perception of the general public that individuals, especially those employed by the local government commit acts of fraud and corruption with impunity. In cases where the employees of the local government are indeed prosecuted for these crimes, the wheels of justice turn slowly.

Fraud and corruption undermines the core values of the Constitution of the Republic of South Africa, 1996<sup>1</sup> which seeks to achieve democratic values in an open society, social justice, fundamental human rights and most importantly open, transparent, honest and good governance. Fraud and corruption committed by government employees and officials erodes the principles of good and honest governance. Furthermore, acts of fraud and corruption are inconsistent with the rule of law and the principles of good governance<sup>2</sup> in an open and democratic society. Should the perpetrators not be brought to book or face the full wrath of the law then the general good moral of our society would be seriously threatened. Furthermore, essential service delivery at the local level is being negatively impacted.

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<sup>1</sup> The Constitution of the Republic of South Africa, 1996. (Hereinafter referred to as the Constitution).

<sup>2</sup> See Chapter 1 para 8.11 *infra* for the definition of the principle of good governance.

Over the past decade there has been an escalation in the perpetration of fraud and corruption within local government. Should this trend continue unabated it would pose a serious threat to the South African society which may result in civil disobedience in the form of protest marches.

Several judges have pronounced themselves on the issue of corruption. In *S v Shaik*<sup>3</sup> it was held that the seriousness of the offence of corruption cannot be over emphasized. It offends against the rule of law and the principles of good governance. It lowers the moral tone of a nation and negatively affects development and the promotion of human rights. As a country we have travelled a long and tortuous road to achieve democracy. Corruption threatens our constitutional order.<sup>4</sup> We must make every effort to ensure that corruption with its putrefying effects is halted. Courts must send out an unequivocal message that corruption will not be tolerated and that punishment will be appropriately severe. In *South African Association of Personal Injury Lawyers v Heath and others*<sup>5</sup> it was held that corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic State. In *S v Yengeni*<sup>6</sup> it was held that to state that corruption and other crimes of dishonesty on the part of elected office bearers and officials in the public service have become one of the most serious threats to our country's well-being, is to state the obvious. Their incidence may well be characterized as a pandemic that needs to be recognized as such and requires concerted and drastic efforts to combat it. In *S v Selebi*<sup>7</sup> it was held that corruption can be compared to a cancer. It operates insidiously destroying the moral fibre of the nation. When it is discovered the damage has already been done. Whilst the particular act of corruption may be excised, just as a malignancy may be removed in a surgical intervention, society is not what it was prior to the corruptive act. The roots of justice and integrity, which are vital in a democratic society, have been permanently scarred by the corruptive act. The moral fibre of society has to be re-built after the excision of the corruption.

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<sup>3</sup> 2007 (1) SACR 247 (SCA) 223.

<sup>4</sup> *S v Shaik and Others* 2007 (1) SACR 247 (SCA) 223.

<sup>5</sup> 2001 (1) SA 883 (CC) at 891 4.

<sup>6</sup> 2006 (1) SACR 405 (T) at 427 b to c.

<sup>7</sup> [2010] ZAGPJHC 53 19.

In an attempt to curb this problem, the South African legislature promulgated the Prevention and Combating of Corrupt Activities Act<sup>8</sup> which specifically makes provision for the prosecution of public officials within local government<sup>9</sup> who perpetrate acts of fraud and corruption.

In order to prevent an exacerbation of the problems, the newly appointed Minister of co-operative government and traditional affairs, has “laid down the gauntlet on corruption”. He pronounces himself on this matter and is quoted as having said that “corruption is a no-go zone.”<sup>10</sup>

This study will critically examine and analyse the nature and extent of the crimes of fraud and corruption within the local government. The effectiveness of the criminal justice system and current laws in prosecuting individuals will also be examined. Recommendations with regard to the implantable steps that could assist in the detection, investigation, prosecution and prevention of fraud and corruption within local municipalities will be made.

In an attempt to ameliorate the problem of fraud and corruption in South Africa, the legislature has enacted the Prevention and Combating of Corrupt Activities Act which makes special provision for the prosecution of public official within local government who commit acts of fraud and corruption.

## 2. PURPOSE AND OBJECTIVES OF THE STUDY

The purpose of this study is to research, investigate, critically analyse and evaluate the South African Criminal law’s response to crimes of fraud and corruption within local government with specific reference to municipalities, focusing more specifically after the Prevention and Combating of Corrupt Activities Act was promulgated. This study aims to explore how forensic investigations are conducted into the activities of municipal officials who fail to carry out their duties and functions in accordance with the Municipal Finance Management Act<sup>11</sup>, the Municipal Systems

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<sup>8</sup> Act 12 of 2004 (Hereinafter referred to as the Prevention and Combating of Corrupt Activities Act).

<sup>9</sup> Section 4 and section 26 (1)(a) of the Prevention and Combating of Corrupt Activities Act.

<sup>10</sup> Gordon, P. The Budget Speech, 2014, <http://www.treasury.gov.za/documents/national%20budget/2014/speech/speech.pdf> (accessed 19 October 2015).

<sup>11</sup> 56 of 2003 (Hereinafter referred to as the Municipal Finance Management Act).

Act<sup>12</sup>, the guide to municipal financial management for councillors and the simple chain management guide for municipal accounting officers. This study will explore how forensic investigations are conducted and whether the South African criminal law effectively and successfully prosecutes municipal officials for non-compliance with certain legislative provisions. A detailed analysis will be conducted of the applicable policies and legislation to address and prosecute fraud and corruption within the local municipalities. This research study will also analyse existing case law relating to fraud and corruption within the local municipalities in order to determine the effectiveness of the legislation<sup>13</sup> and prosecution process. Furthermore, this study will recommend possible anti-corruption strategies to prevent fraud and corruption especially within the procurement and supply-chain management.

Finally, findings will be made with regard to the research strictly and recommendations will be discussed to prevent and combat fraud and corruption within municipalities in South Africa.

### 3. RESEARCH QUESTIONS

The following research questions are relevant to this study:

- 3.1 Is the South African legislation adequate to investigate, combat and prosecute fraud and corruption within the local government specifically within municipalities?
- 3.2 What is the procedure which should be followed when fraud and/or corruption is detected within a municipality?
- 3.3 Are there any supply-chain management policies in place to aid South African Legislation in the Combating of corruption and fraud within local government? And if so what is the ambit of these policies?
- 3.4 Why is fraud and corruption so prevalent in municipalities, whilst there are supply-chain management regulations and procedures in place?

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<sup>12</sup>32 of 2000 (Hereinafter referred to as the Municipal Systems Act).

<sup>13</sup> The Criminal Procedure Act 51 of 1977 and the Criminal Law Amendment (Sentencing) Act 38 of 2007 will be critically analysed in this regard.



- 3.5 What are the roles and responsibilities of municipal councillors and employees and what are their limitations?
- 3.6 Whether municipal councillors and employees are successfully prosecuted for non-compliance with certain legislative requirements?
- 3.7 How effective are forensic investigations in the prosecution of fraud and corruption cases within Local government?
- 3.8 Is the legislation dealing with sentencing procedures stringent enough in punishing the offenders of the crimes of fraud and corruption within Local government?
- 3.9 What is the procedure to be followed and/or requirements to be used when dealing with the prescribed sentencing provisions?
- 3.10 Are the courts effectively imposing the prescribed sentencing provisions as set out in legislation?
- 3.11 Is the sentence in proportion to the crimes of fraud and corruption within Local government?
- 3.12 Are there any recommendations to successfully combat the crimes of fraud and corruption within local government with specific reference to municipalities?

#### **4. STATEMENT OF THE PROBLEM**

In most of the municipalities the following problems are inherent:

- 4.1 Legislation to effectively prosecute individuals for the commission of fraud and corruption exists, however, the prosecution process is always protracted.
- 4.2 Municipalities are unable to effectively detect, investigate, combat and address the problem of fraud and corruption;
- 4.3 Procedures are not followed in the procuring of goods and/or services;
- 4.4 Tenders and other bids are perceived to be favouring certain individuals or companies;
- 4.5 There is a lack of capacity to deal with procurement and supply-chain management challenges;

4.6 Non-compliance with relevant supply-chain management policies is the root cause of fraud and corruption.

## 5. HYPOTHESIS

The following hypothesis will be tested qualitatively:

- 5.1 The lack of anti-corruption strategies is the root cause of fraud and corruption within municipalities;
- 5.2 There is a general lack of systems and mechanisms to detect potential fraudulent and corrupt acts within local municipalities, especially in the supply-chain management process;
- 5.3 There is a general lack of systems and mechanisms to monitor and evaluate the application of procurement and supply-chain management processes in local municipalities;
- 5.4 Existing legislation enables effective prosecution of individuals who commit fraud and corruption within municipalities;
- 5.5 The prosecution process in cases of fraud and corruption is often protracted.
- 5.6 Forensic investigations are very effective in prosecuting fraud and corruption cases.

## 6. METHODOLOGY

The qualitative approach involves the collection of extensive narrative data in order to gain insight into the phenomena under investigation. Data analysis includes the coding of the data and production of a verbal synthesis (induction process) and refers to historical or qualitative research.<sup>14</sup>

In this research study all relevant legislation and selected case law will be reviewed and critically analysed to determine the efficacy thereof in prosecuting the crimes of fraud and corruption within Municipalities in South Africa.

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<sup>14</sup> Snyman-Van Deventer *Guide to legal writing and research* (2010) 102.

Through the qualitative approach extensive narrative data will be gathered and interrogated on the subject of fraud and corruption within municipalities with reference to the forensic investigation of fraud and corruption especially with reference to the procurement and supply chain management process.

Finally, this study will make recommendations with regard to detecting, investigation, prosecution and ultimately preventing the acts of fraud and corruption from occurring within Local government.

## 7. DEFINITIONS OF KEY CONCEPTS

### 7.1 Crime

Snyman defines crime as an unlawful, blameworthy conduct punishable by the State.<sup>15</sup>

### 7.2. Corruption

*Any person who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner, that amounts to the, illegal, dishonest, unauthorised, incomplete, or biased; or misuse or selling of information or material acquired in the course exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation that amounts to the abuse of a position of authority, a breach of trust or the violation of a legal duty or a set of rules designed to achieve an unjustified result or that amounts to any other unauthorised or improper inducement to do or not to do anything is guilty of the offence of corruption.*<sup>16</sup>

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<sup>15</sup> Snyman *Criminal Law* (2008) 4.

<sup>16</sup> Section 3 of the Prevention and Combating of Corrupt Activities Act 12 Of 2004.

Snyman abbreviates the definition of corruption 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 unlawful exercise of any duties, commits corruption.<sup>17</sup>

Corruption can be defined as a form of organised crime<sup>18</sup>.

Offences relating to the improper influencing of people in certain positions of trust.<sup>19</sup>

### 7.3 Fraud

The unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another.<sup>20</sup>

Fraud consists in unlawfully making, with intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudice to another.<sup>21</sup>

Dishonestly making a false (untrue or misleading) representation with a view to gain or with intent to cause loss.<sup>22</sup>

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<sup>17</sup> Snyman (2008) 411; Snyman *Criminal Law* (2014) 403 and Burchell *Principles of Criminal Law 4 ed.* (2013) 780.

<sup>18</sup> Organised crime involves the co-operation of several persons or group, the main activity of the organization is usually crime. See Kruger *Organised Crime and Proceeds of Crime Law in South Africa* (2014) 43. See also Klause von Lampe’s collection of definitions at [www.organized-crime.de/OCDEF1.htm](http://www.organized-crime.de/OCDEF1.htm) (accessed 5 October 2015).

<sup>19</sup> Martin, A. *Dictionary of Law* (2009) 137.

<sup>20</sup> Snyman (2008) 531. See also Snyman (2014) 523. A substantially similar definition of the crime was given or quoted with approval in *S v Myeza* 1985 4 SA 30 (T) 31-32; *Ex parte Lebowa Development Corporation Ltd* 1989 3 SA 71 (T) 101; *Gardener* 2011 1 SACR 570 (SCA) par 29.

<sup>21</sup> Fraud was defined in the *Mia* 2009 (1) SACR 330 (SCA) para 15 as the ‘unlawful and intentional making of a misrepresentation which causes actual or potential prejudice’ (see *Criminal law* 5 ed. (2008) 531, 6 ed. 555). See also Mostert 2010 (1) SACR 223 (SCA) para 30. See also Kruger *Organised crime and proceeds of crime law in South Africa* (2014) 143 and Burchell (2013) 721. See also Kruger *Organised crime and proceeds of crime law in South Africa* (2008) 117.

<sup>22</sup> Law and Martin *A Dictionary of Law* (2009) 239.

#### 7.4 Senior Manager

In terms of the Municipal Finance Management Act a senior manager is defined as follows:

- (a) *in relation to a municipality, means a manager referred to in section 56 of the Municipal Systems Act; or*
- (b) *in relation to a municipal entity, means a manager directly accountable to the chief executive officer of the entity*<sup>23</sup>

#### 7.5 Councilor

A member of a municipal council.<sup>24</sup>

#### 7.6 Municipal Manager

In terms of the Municipal Systems Act a municipal manager is defined as follows:

*A person appointed in terms of section 82 of the Municipal Structures Act.*

*The municipal manager of a municipality is the accounting officer of the*

*Municipality for the purposes of this Act, and, as accounting officer, must -*

- (a) *exercise the functions and powers assigned to an accounting officer in terms of this Act and*
- (b) *provide guidance and advice on compliance with this Act to*
  - (i) *the political structures, political office-bearers and officials of the Municipality and*
  - (ii) *any municipal entity under the sole or shared control of the municipality.*<sup>25</sup>

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<sup>23</sup> Section 1 of the Municipal Finance Management Act 56 of 2003.

<sup>24</sup> Section 1 of the Municipal Systems Act 32 of 2000.

<sup>25</sup> Section 60 of the Municipal Finance Management Act 56 of 2003.

## 7.7 Accounting Officer

In terms of the Municipal Finance Management Act an accounting officer is defined as follows:

- (a) *in relation to a municipality, means the municipal official referred to in section 60 or*
- (b) *in relation to a municipal entity, means the official of the entity referred to in section 93 and includes a person acting as the accounting officer.*<sup>26</sup>

## 7.10 “Bribery”

The common law form of bribery<sup>27</sup> is the practice of tendering (and accepting) the private advantage as a reward for the performance of a duty. The crime is committed both by the person who corrupts another by giving the bribe and by the person who corruptly receives it.<sup>28</sup>

## 7.11 “Good Governance”

An indeterminate term used in international development literature to describe how public institutions conduct public affairs and manage public resources. Governance is "the process of decision-making and the process by which decisions are implemented (or not implemented)"<sup>29</sup>.

The concept of "good governance" often emerges as a model to compare ineffective economies or political bodies with viable economies and political bodies<sup>30</sup>.

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<sup>26</sup> Section 1 of the Municipal Finance Management Act 56 of 2003.

<sup>27</sup> From the old French word of *'briber'*, meaning to beg, something given to a beggar. The English managed to twist this to the present meaning, 'to corrupt by giving gifts'. In common law the crime of corruption was known as bribery, see Snyman (2014) 401 and Patel 1944 AD 511-521.

<sup>28</sup> Burchell (2013) 780. See also Kruger *Organised crime and the proceeds of crime law in South Africa* (2008) 117. See also Kruger *Organised crime and proceeds of crime law in South Africa* (2014) 142.

<sup>29</sup> UNESCAP (2010) "What is good governance?" (2009) <http://www.unescap.org/resources/what-good-governance> (accessed on 10 July 2013).

<sup>30</sup> Khan *State formation in Palestine: viability and governance during a social transformation* (2004) 16.

## 8. PLAN OF STUDY

This research will in **Chapter Two** provide an explanation on the Constitutional relevance of South Africa's response to the crimes of fraud and corruption within the Local government and the legislative framework of fraud and corruption within the local government. The legislative framework to be discussed includes, *inter alia*, the following: the Prevention and Combating of Corrupt Activities Act, the Prevention of Organised Crime Act<sup>31</sup>, the Protected Disclosures Act<sup>32</sup>, the Public Finance Management Act<sup>33</sup> and the Criminal Procedure Act<sup>34</sup> read together with the Minimum Sentences Act<sup>35</sup>.

**Chapter three** will set out in detail the relevant legal precedence (case law) with regard to fraud and corruption within the Municipalities. This chapter will critical analyse the Courts approach to fraud and corruption and the application of existing legislation pertaining to fraud and corruption within municipalities. This chapter will attempt to give an insight into the courts effectiveness or otherwise in administering justice in cases of fraud and corruption.

**Chapter Four** will contain methods and strategies for the detection of fraud and corruption through early warning systems (EWS), for example, whistle-blowers, establishment of integrity management and regular audits. Fraud risk indicators (red flags) will also be identified and discussed in this chapter which will assist in the detection of fraud before it occurs.<sup>36</sup>

**Chapter Five** will contain a detailed explanation of forensic investigative methods of fraud and corruption within the Municipalities in order to gather all relevant evidence for the dispensation of justice.

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<sup>31</sup>121 of 1998. Hereinafter referred to as the Prevention of Organised Crime Act.

<sup>32</sup>23 of 2000.

<sup>33</sup> 1 of 1999 as amended by Act 29 of 1999. (Hereinafter referred to as the Public Finance Management Act).

<sup>34</sup>Act 51 of 1977 as amended (hereinafter referred to as the Criminal Procedure Act).

<sup>35</sup>13 of 2007. Hereinafter referred to as the Minimum Sentences Act.

<sup>36</sup> Powel (2008) "The Procurement Fraud risk to Local government" *IMFO* at 22.

**Chapter Six** will comprise of a comparative study with regard to the prevalence of fraud and corruption. This will be conducted by critically analysing the Eastern Cape and Western Cape Municipalities within the Republic of South Africa.

**Chapter Seven** will contain the conclusion and recommendations for the prevention of fraud and corruption within South African Municipalities. Practical measures to combat the commission of fraud and corruption with the municipalities in South Africa will also be discussed.<sup>37</sup>

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<sup>37</sup> Powel (2008) "The Procurement Fraud risk to Local government" *IMFO* at 22.



## CHAPTER 2

# THE SOUTH AFRICAN RESPONSE TO THE CRIMES OF FRAUD AND CORRUPTION WITHIN LOCAL GOVERNMENT

### 2.1. INTRODUCTION

The common law crime currently known as corruption was previously known as bribery<sup>38</sup>. This common law crime could only be committed by or in respect of state officials in the execution of their official duties.

The Prevention of Corruption Act 6 of 1959 changed the above legal position by creating a separate statutory crime for non-state officials for example, agents and representatives. Both the common law crime of bribery and the abovementioned Act on corruption was repealed and replaced by the Corruption Act 94 of 1992. In turn the 1992 Act was repealed and replaced by the Prevention and Combating of Corrupt Activities Act 12 of 2004.

Fraud in South Africa is a common law crime which was derived from the merging of two different forms of Roman-Dutch law<sup>39</sup> crimes namely; *stellionatus*<sup>40</sup> and the *criminal falsi*.<sup>41</sup> The most significant result of the above merge of crimes in the South African contexts is that fraud may now be committed in cases where there is no actual proprietary prejudice. Non-proprietary or potential prejudice arising from the fraudulent act will suffice to secure a fraud conviction.

This chapter will address the legislative framework which South Africa has enacted in Combating the crimes of fraud and corruption. The legislative framework includes:

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<sup>38</sup> The common law of bribery still exists alongside the new statutory forms of corruption in the Prevention and Combating of Corrupt Activities Act. See Burchell (2013) 782; Snyman (2014) 401 and Patel 1944 AD 511-521.

<sup>39</sup> Snyman (2008) 531. See also Burchell (2013) 722 and Snyman (2014) 402.

<sup>40</sup> The criminal-law equivalent of the delict *dolus* and developed from the *actio de dolo* in private law. See Snyman *Criminal Law* (2008) 531. See also Burchell (2013) 722.

<sup>41</sup> The collective term for a number of crimes relating to falsification, most of which were derived from the *Lex Cornelia de Falsis*. See Snyman (2008) 531. See also Burchell (2013) 722.

- a) the Constitutional relevance of the crimes of fraud and corruption in South Africa,
- b) the elements of the crimes of fraud and corruption as enacted in the Prevention and Combating of Corrupt Activities Act and
- c) other relevant legislation namely; the Prevention of Organised Crime Act<sup>42</sup>, the Protected Disclosure Act<sup>43</sup>, the Promotion of Access to Information Act<sup>44</sup>, the Promotion of Administration of Justice Act<sup>45</sup>, the Witness Protection Act<sup>46</sup>, the Public Finance Management Act<sup>47</sup> and regulations, the Financial Intelligence Centre Act<sup>48</sup>, the Municipal Management Act<sup>49</sup>, the Municipal Systems Act<sup>50</sup> and the Local Government Municipal Structures Act<sup>51</sup>.

## 2. CONSTITUTIONAL RELEVANCE OF THE CRIMES OF FRAUD AND CORRUPTION WITHIN LOCAL GOVERNMENT

The Constitution is the supreme law of the Republic of South Africa and all other legislation including government policies and actions must be aligned with the Bill of Rights entrenched in the Constitution.<sup>52</sup> Considering the foregoing it is imperative to conduct a synopsis of the constitutional relevance of the crimes of fraud and corruption within the local government.

Chapter 7<sup>53</sup> of the Constitution prescribes the rights and duties of local government (municipalities) and affirms it as a distinctive sphere of government.<sup>54</sup> Section 40(1) of the Constitution establishes government into three spheres; national, provincial and local, which are

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<sup>42</sup> 121 of 1988.

<sup>43</sup> 26 of 2000.

<sup>44</sup> 2 of 2000.

<sup>45</sup> 3 of 2000.

<sup>46</sup> 112 of 1998.

<sup>47</sup> 1 of 1999.

<sup>48</sup> 38 of 2001.

<sup>49</sup> 56 of 2003.

<sup>50</sup> 32 of 2000.

<sup>51</sup> 117 of 1998, as amended

<sup>52</sup> Currie and de Waal *The Bill of Rights Handbook* 6<sup>th</sup> edition (2013) 9.

<sup>53</sup> Section 151 to 164 of the Constitution.

<sup>54</sup> Bekink *Principles of South African Local Government Law* (2006) 213.

distinctive, interdependent and interrelated.<sup>55</sup> The local authorities are mandated to govern, provide effective and efficient services and promote social and economic development.

## 2.1 CONSTITUTIONAL OBJECTIVES OF THE MUNICIPALITY

Section 152(1) of the Constitution states that municipalities must strive, within their financial and administrative capacities, to achieve the following objectives:<sup>56</sup>

- a) a democratic and accountable government,
- b) the provision of services in a sustainable manner,
- c) social and economic development,
- d) a safe and healthy environment,
- e) community involvement in matters of local government.

The responsibilities alluded to in section 152(1) of the Constitution gives local government a new mandate which requires each local authority to develop specific policies aimed at satisfying the particular needs of local communities with their consent.<sup>57</sup>

## 2.2 DUTIES OF PROVINCIAL LEGISLATURES

According to sections 114 and 132 of the Constitution provincial legislatures have the responsibility to maintain effective oversight and to ensure the accountability of the Executive and all other organs of state in the province. Section 114(2) of the Constitution requires the legislatures to create a legal framework to prevent corruption and promote government's accountability, exercise oversight over government departments and provide a forum for questioning where members of the executive account for their actions.

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<sup>55</sup> Raga & Taylor "Impact of accountability and ethics on public service delivery: A South African perspective" (2005) *The Public Management*, 34: 3.

<sup>56</sup> Bekink (2006) 214 fn 4.

<sup>57</sup> Bekink (2006) 215 and 216.

### 2.3 RELEVANCE OF CHAPTER 9 STATE INSTITUTIONS

Chapter 9 of the Constitution establishes state institutions<sup>58</sup> to support constitutional democracy which are independent and impartial, able to exercise their powers and perform their functions without fear or prejudice and are subjected only to the constitution and the law. These included the office of the auditor-general<sup>59</sup>, the office of the public protector<sup>60</sup> and the Human Rights Commission. The first two are relevant in the control of corruption.

According to section 188 of the Constitution the duty of the Auditor General is to audit the accounts of government at all levels and thus to provide independent control over the financial activities of the executive. The office of the auditor-general conducts forensic and performance audits of corruption involving government departments.

According to section 182 of the Constitution the public protector<sup>61</sup> is empowered to investigate the following:

- a) maladministration involving the affairs of the state at any level,
- b) the abuse or unjustifiable exercise of power, improper conduct or undue delay by a person performing a public conduct,
- c) an improper or dishonest act, omission or corruption with respect to public money and
- d) improper or unlawful enrichment or receipt of any improper advantage by a person because of an act or omission in the public administration about the affairs of government.

Chapter 10 of the Constitution sets out the basic principles that govern public administration in every sphere of Government, organ of state and public enterprise. These values and principles seek to ensure a public administration that is free from corruption and bad governance. These

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<sup>58</sup> Section 181 of the Constitution.

<sup>59</sup> Section 188 of the Constitution.

<sup>60</sup> Section 182 of the Constitution.

<sup>61</sup> Appointed in terms of the Public Protector Act 23 of 1994 and the South African Constitution Act 200 of 1993.

values and principles include the following namely that:

- a) a high standard of professional ethics must be promoted and maintained;
- b) the efficient, economic and effective use of resources must be promoted;
- c) public administration be development-orientated;
- d) services should be provided impartially, fairly, equitably and without bias;
- e) public administration must be accountable; and
- f) transparency must be fostered by providing the public with timely, accessible and accurate information.

#### 2.4 CONSTITUTIONAL REQUIREMENT FOR PROCUREMENT

Procurement-related matters are dealt with in in terms of section 217 of the Constitution. Subsection (1) of section 217 of the Constitution requires that when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. This sub-section further does not prevent the organs of state or institutions from implementing a procurement policy and allows for:

- (a) categories of preference in the allocation of contracts and
- (b) the protection or advancement of persons, or categories of persons, dis-advantaged by unfair discrimination.

In terms of sub-section 2 of section 217 of the Constitution the National legislation must prescribe a framework<sup>62</sup> within which the policy referred to in sub-section (2) must be implemented. Many South Africans were deprived of a meaningful contribution to the economy, prior to 1994. Section 217 of the Constitution ensures that no more previously dis-advantaged individuals are prejudiced in the procurement process. The threat posed by corruption to the enjoyment of

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<sup>62</sup> The Preferential Procurement Policy Framework Act 5 of 2000 and attached Regulations gives effect to section 217 of the Constitution. Hereinafter referred to as the Preferential Procurement Policy Framework Act.

constitutional/human rights was correctly outlined by Judge Chaskalson in *South African Association of Personal injury lawyers v Heath*.<sup>63</sup>

*Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the Constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedom. They are diametrically opposed to the values of open, accountable and democratic government as envisaged by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic state.*

In *Glenister v President of the Republic of South Africa and Others*<sup>64</sup> the Constitutional court held that there can be no doubt that corruption threatens virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our blossoming constitution. It gives rise to maladministration and public fraudulence and imperils the capacity of the state to fulfil its obligations to respect, protect, promote and fulfil all the rights enshrined in the Bill of Rights. When corruption and organised crime flourish, sustainable development and economic growth are stifled which in turn leads to stability and security of society being placed at risk.

The provisions alluded to *supra* promote the notions of transparency, accountability and good governance as envisaged in the Constitution. These principles are the cornerstone of South Africa's democratic society. It is therefore evident that both the crimes of fraud and corruption prevent the government (more specifically the municipalities) from discharging its constitutional responsibilities.

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<sup>63</sup> [2000] ZACC 22; 2001 (1) BCLR 77 at par. 4 (Constitutional Court of South Africa).

<sup>64</sup> CCT 48/10 [2011] ZACC 6, para 166.

### 3. GOVERNANCE

Corruption stifles and erodes progress, stability and development of a nation.<sup>65</sup> If not properly managed it has the potential to endanger political and social stability and security which undermines the values of democracy and the rule of law.<sup>66</sup> Bad governance effects the development of a country at grass roots level. Conversely corruption negatively impacts the quality of governance.<sup>67</sup> Parliament plays a decisive role in combating corruption through the promulgation of anti-corruption laws.<sup>68</sup> It is imperative for all countries, including South Africa, to focus on good governance. Firstly, governance means the process by which decisions are implemented or not implemented.<sup>69</sup> Governance can be used in several contexts such as national and local governance.<sup>70</sup>

Corruption plagues the South African society.<sup>71</sup> The acts of corruption have been involved in racketeering which has developed into a business risk that requires efficient management.<sup>72</sup> In order to eradicate corruption from our society there needs to be an effective display of good governance.<sup>73</sup>

Good governance has eight major characteristics.<sup>74</sup> The characteristics of good governance are namely, participatory, consensus orientated, accountable, transparent, responsive, effective and

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<sup>65</sup> GPAD, ECA and AUABC (2011) "Combating Corruption, Improving Governance in Africa" <http://www.uneca.org/sites/default/files/PublicationFiles/combating-corruption-improving-governance-in-africa-2011-2016.pdf> (accessed on 5 October 2015).

<sup>66</sup> Arnone and Borlini *Corruption: Economic Analysis and International Law* (2014) 153.

<sup>67</sup> Arnone and Borlini (2014) 153. (See also Pellegrini and Gerlagh 2004).

<sup>68</sup> GPAD, ECA and AUABC (2011) "Combating Corruption, Improving Governance in Africa".

<sup>69</sup> UNESCAP (2010) "What is good governance?" (2009) <http://www.unescap.org/resources/what-good-governance> (accessed on 10 July 2013).

<sup>70</sup> UNESCAP (2010) "What is good governance?" (2009) <http://www.unescap.org/resources/what-good-governance> (accessed on 10 July 2013).

<sup>71</sup> Kruger *Organised Crime and Proceeds of Crime Law in South Africa: A brief note on the fight against corruption and organised crime* (2014) ix.

<sup>72</sup> Kruger (2014) ix.

<sup>73</sup> Kruger (2014) ix.

<sup>74</sup> UNESCAP, "What is good governance" (2009). The King II Report on Corporate Governance for South Africa (2002) sets out the following seven (7) principles of good corporate governance: discipline; transparency; independence; accountability; responsibility; fairness and social responsibility. Although the King Report is not enforceable it provides clear guidelines to ensure compliance to corporate governance principles within both the private and public sectors.

efficient, equitable and inclusive and respects the rule of law.<sup>75</sup> These assure that corruption is minimized, the views of minority communities are taken into account and that voices of the most vulnerable in society are heard in decision-making.<sup>76</sup> It is also responsive to the needs of society.<sup>77</sup>

### 3.1 PARTICIPATION

Participation is the active involvement of both men and women either directly or through legitimate intermediate institutions or preventatives.<sup>78</sup> It is essential for participation to be informed and organised.<sup>79</sup> This means freedom of association and expression on the one hand and an organised civil society on the other hand.<sup>80</sup>

### 3.2 RULE OF LAW

Corruption is the number one obstacle to the rule of law and democratic society.<sup>81</sup> Massive corrupt dynamics deteriorate the rudimentary fundamentals of both representative mechanisms underlying the separation of powers and of human rights.<sup>82</sup> The rule of law acts as a mirror image on the efficacy and effectiveness of the regulations that govern it.<sup>83</sup> A lower standard of the rule of law produces a breeding ground for the dissemination of occurrences of corruption.<sup>84</sup> Good governance requires fair legal structures that are to be enforced impartially.<sup>85</sup> It also necessitates full protection of human rights, in particular those of minorities.<sup>86</sup> Impartial execution of laws requires an independent judiciary and an impartial and incorruptible police force.<sup>87</sup>

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<sup>75</sup> UNESCAP, “What is good governance” (2009). See also Roos and De La Harpe “Good Governance in public procurement: A South African case study” (2008) 2 *PER* 7.

<sup>76</sup> UNESCAP, “What is good governance” (2009).

<sup>77</sup> UNESCAP, “What is good governance” (2009).

<sup>78</sup> UNESCAP, “What is good governance” (2009).

<sup>79</sup> UNESCAP, “What is good governance” (2009).

<sup>80</sup> UNESCAP, “What is good governance” (2009).

<sup>81</sup> Arnone and Borlini (2014) 170.

<sup>82</sup> Arnone and Borlini (2014) 170. See also Roos and De La Harpe (2008) 2 *PER* 4.

<sup>83</sup> Arnone and Borlini (2014) 173.

<sup>84</sup> Arnone and Borlini (2014) 173.

<sup>85</sup> UNESCAP, “What is good governance” (2009).

<sup>86</sup> UNESCAP, “What is good governance” (2009).

<sup>87</sup> UNESCAP, “What is good governance” (2009). See also UNDP, “Good Governance – office of Public Sector Reform” [http://reform.gov.bb/page/GOOD\\_GOVERNANCE.pdf](http://reform.gov.bb/page/GOOD_GOVERNANCE.pdf) (accessed 10 July 2013).



### 3.3 TRANSPARENCY

Transparency means that the enforcement of decisions taken must be in accordance with the rules and regulations. Information must be freely available and directly accessible to those who will be affected by such decisions and their enforcement.<sup>88</sup> Substantial information must be provided in an easily understandable form.<sup>89</sup> This is because without reliable information the public cannot make an informed judgement about public official's performance.<sup>90</sup> Corruption thrives under conditions of secrecy and anonymity as there is little threat of their actions being exposed.<sup>91</sup> Transparency, therefore, is the most powerful weapon against corruption and the cornerstone of democratic governance.<sup>92</sup>

### 3.4 RESPONSIVENESS

Good governance requires institutions and processes to try to server all stakeholders within a reasonable timeframe.<sup>93</sup>

### 3.5 CONSENSUS ORIENTATED

Good governance requires mediation of different interests in society to reach a broad consensus in society on what is the best interest of the community as well as how this can be achieved.<sup>94</sup> A broad and long-term perspective is required for sustainable human development and how to achieve the goals of such development.<sup>95</sup> This can be achieved by understanding the historical, cultural and social contexts of a given society or community.<sup>96</sup>

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<sup>88</sup> UNESCAP, "What is good governance" (2009). See also UNDP, "Good Governance – office of Public Sector Reform".

<sup>89</sup> UNESCAP, "What is good governance" (2009).

<sup>90</sup> UNESCAP, "What is good governance" (2009).

<sup>91</sup> UNESCAP, "What is good governance" (2009).

<sup>92</sup> UNESCAP, "What is good governance" (2009).

<sup>93</sup> UNESCAP, "What is good governance" (2009).

<sup>94</sup> UNESCAP, "What is good governance" (2009).

<sup>95</sup> UNESCAP, "What is good governance" (2009).

<sup>96</sup> UNESCAP, "What is good governance" (2009).

### 3.6 EQUITY AND INCLUSIVE

All members, men and women, must have equal opportunities to maintain and improve their well-being.<sup>97</sup>

### 3.7 EFFECTIVENESS AND EFFICIENCY

Processes and institutions produce results that meet the needs while making the best of use of resources.<sup>98</sup> This characteristic promotes efficient public delivery systems and quality public outputs.<sup>99</sup> It deals with the amount of public respect the civil service has.<sup>100</sup> One aspect of poor service delivery is corruption.<sup>101</sup> One of the ways of fighting corruption is through competitive salaries and motivating staff through incentives.<sup>102</sup> There is also a need to introduce legislation governing civil service and a code of conduct.<sup>103</sup>

### 3.8 ACCOUNTABILITY

Accountability is a vital component of good governance.<sup>104</sup> It is not only vital for governmental institutions, but also private sector and civil society organizations must be answerable to the public and to their institutional stakeholders.<sup>105</sup> Information sharing and transparency form the epicentre of the principle of accountability, which should be upheld by governance structures.<sup>106</sup> This makes accountability difficult to achieve especially in the absence of access to information.<sup>107</sup> Public accountability is established on two pillars.<sup>108</sup> The first pillar is related to accountability by the

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<sup>97</sup> UNESCAP, "What is good governance" (2009).

<sup>98</sup> UNESCAP, "What is good governance" (2009). UNDP, "Good Governance – office of Public Sector Reform".

<sup>99</sup> UNESCAP, "What is good governance" (2009). UNDP, "Good Governance – office of Public Sector Reform".

<sup>100</sup> UNESCAP, "What is good governance" (2009). UNDP, "Good Governance – office of Public Sector Reform".

<sup>101</sup> UNESCAP, "What is good governance" (2009). UNDP, "Good Governance – office of Public Sector Reform".

<sup>102</sup> UNESCAP, "What is good governance" (2009). UNDP, "Good Governance – office of Public Sector Reform".

<sup>103</sup> UNESCAP, "What is good governance" (2009). UNDP, "Good Governance – office of Public Sector Reform".

<sup>104</sup> UNESCAP, "What is good governance" (2009). UNDP, "Good Governance – office of Public Sector Reform".

<sup>105</sup> UNESCAP, "What is good governance" (2009). UNDP, "Good Governance – office of Public Sector Reform".

<sup>106</sup> UNDP, "Good Governance – office of Public Sector Reform".

<sup>107</sup> UNDP, "Good Governance – office of Public Sector Reform".

<sup>108</sup> UNDP, "Good Governance – office of Public Sector Reform".

executive and the second pillar is based on institutional change.<sup>109</sup> Accountability is categorized into four groups.<sup>110</sup> These are public, financial, horizontal and vertical.<sup>111</sup> Horizontal accountability revolves around the relationship between the executive, legislature and the judiciary.<sup>112</sup> Vertical accountability is whereby one person reports to another subject to the interpretation of constitutional provisions.<sup>113</sup> The provincial legislatures will only be able to fulfill their constitutional oversight role if they are presented with accurate and reliable information regarding the level of accountability of public officials as well as monitor the performance of executive members responsible for the efficient running of departments. Accountability proves an indicator that presents the highest degree of persistence.<sup>114</sup> The main reason for this is the fact that institutional accountability is embedded deep within the structure and culture of institutions.<sup>115</sup> Thus accountability significantly affects a country through wide ranging reform of government organizations.<sup>116</sup>

It is evident from the foregoing discussion that good governance is a utopia which is difficult to achieve in its totality. Very few countries and societies have come close to achieving good governance in its totality. The eradication or at least reduction of corruption in South Africa will go a long way towards achieving some degree of good governance within local government.

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<sup>109</sup> UNDP, "Good Governance – office of Public Sector Reform".

<sup>110</sup> UNDP, "Good Governance – office of Public Sector Reform".

<sup>111</sup> UNDP, "Good Governance – office of Public Sector Reform".

<sup>112</sup> UNDP, "Good Governance – office of Public Sector Reform".

<sup>113</sup> UNDP, "Good Governance – office of Public Sector Reform".

<sup>114</sup> Arnone and Borlini (2014) 169.

<sup>115</sup> Arnone and Borlini (2014) 169.

<sup>116</sup> Arnone and Borlini (2014) 169. Both transparency and accountability significantly affect the quality of institutions and the possibility that degeneration dynamics could hinder the attainment of public welfare.

## 4. LEGISLATIVE FRAMEWORK

### 4.1. ELEMENTS OF CORRUPTION IN TERMS OF THE PREVENTION AND COMBATING OF CORRUPT ACTIVITIES ACT

One of the main pillars in the Combating of fraud and corruption within South Africa is the legislative framework. The following legislations will be discussed to demonstrate the criminal prosecution of public officials who commit acts of fraud and corruption within the municipalities.

The **Prevention and Combating of Corrupt Activities Act** legislates the crime of corruption; provides for offences in respect of corrupt activities relating to public officials<sup>117</sup> and prescribes the punishment to be imposed on perpetrators (public officials).<sup>118</sup> This Act is South Africa's first comprehensive anti-corruption legislation which is based on the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention).<sup>119</sup>

The Prevention and Combating of Corrupt Activities Act must be understood in context of the Prevention of Organised Crime Act<sup>120</sup>, the Financial Intelligence Centre Act<sup>121</sup>, the SADC Protocol against corruption, the AU Convention on Prevention and Combating Corruption as well as legislative measures by the United Nations aimed at tackling "white collar-crime".<sup>122</sup>

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<sup>117</sup> Section 4 of the Prevention and Combating of Corrupt Activities Act.

<sup>118</sup> Section 26(1)(a) of the Prevention and Combating of Corrupt Activities Act.

<sup>119</sup> The Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention), OECD/DAFF/IME/BR(97)20, reprinted in (1998) 37 ILM 1. The OECD is a Paris-based organization of countries that together produce not less than two thirds of the world's goods and services. Founded in 1960, the OECD is a successor to the 1948 Organization for European Economic Co-operation (OEEC) which was mandated with administering the Marshall Plan and with helping Europe recover from the economic ills of World War II.

<sup>120</sup> Act 121 of 1998.

<sup>121</sup> Act 38 of 2001.

<sup>122</sup> Pragal "Assessing South Africa's Prevention and Combating of Corrupt Activities Act" (2006) *Acta Criminologica* 18.

Section 3 of the Prevention and Combating of Corrupt Activities Act establishes a general offence of corruption.<sup>123</sup> This section refers to any person who unlawfully **accepts** any gratification and to the person who unlawfully **gives** any gratification. The definitions of ‘gratification’ and ‘private sector’ as defined in section 1 must be read together with section 3 of the Prevention and Combating of Corrupt Activities Act.

Section 4 to 9 of the Prevention and Combating of Corrupt Activities Act establishes the offence of corrupt activities relating to specific persons.<sup>124</sup> These offences include offences relating to public officers<sup>125</sup>; foreign public officials<sup>126</sup>; agents<sup>127</sup>; members of the legislative authority<sup>128</sup>; judicial officers<sup>129</sup> and members of the prosecuting authority<sup>130</sup>.

For the purposes of this research, Section 4 of the Prevention and Combating of Corrupt Activities Act makes provision for offences in respect of corrupt activities relating to public officials which can be described as follows:

- (1) Any -
  - (a) *public officer who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person or*
  - (b) *person who, directly or indirectly, gives or agrees or offers to give any gratification to a public officer, whether for the benefit of that public officer or for the benefit of another person,*

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<sup>123</sup> Pragal (2006) *Acta Criminologica* 19.

<sup>124</sup> Pragal (2006) *Acta Criminologica* 19 and Lambrechts “The Prevention and Combating of Corrupt Activities Act as an investigative instrument pertaining to bribery and corruption” (2004) *Acta Criminologica* at 110.

<sup>125</sup> Section 4 of the Prevention and Combating of Corrupt Activities Act and Lambrechts (2004) *Acta Criminologica* 110.

<sup>126</sup> Section 5 of the Prevention and Combating of Corrupt Activities Act and Lambrechts (2004) *Acta Criminologica* 110.

<sup>127</sup> Section 6 of the Prevention and Combating of Corrupt Activities Act and Lambrechts (2004) *Acta Criminologica* 110.

<sup>128</sup> Section 7 of the Prevention and Combating of Corrupt Activities Act and Lambrechts (2004) *Acta Criminologica* 110.

<sup>129</sup> Section 8 of the Prevention and Combating of Corrupt Activities Act and Lambrechts (2004) *Acta Criminologica* 110.

<sup>130</sup> Section 9 of the Prevention and Combating of Corrupt Activities Act and Lambrechts (2004) *Acta Criminologica* 110.

*in order to act, personally or by influencing another person so to act, in a manner -*

- (i) that amounts to the -*
  - (aa) illegal, dishonest, unauthorised, incomplete, or biased<sup>131</sup> or*
  - (bb) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;*
- (ii) that amounts to-*
  - (aa) the abuse of a position of authority,*
  - (bb) a breach of trust or*
  - (cc) the violation of a legal duty or a set of rules,*
  - (iii) designed to achieve an unjustified result or*
  - (iv) that amounts to any other unauthorised or improper inducement to do or not to do anything,*

*is guilty of the offence of corrupt activities relating to public officers.*

- (2) Without derogating from the generality of section 2(4), "to act" in subsection (1), Includes -*
  - (a) voting at any meeting of a public body,*
  - (b) performing or not adequately performing any official functions,*
  - (c) expediting, delaying, hindering or preventing the performance of an official Act,*
  - (d) aiding, assisting or favouring any particular person in the transaction of any business with a public body,*
  - (e) aiding or assisting in procuring or preventing the passing of any vote or the granting of any contract or advantage in favour of any person in relation to the transaction of any business with a public body,*
  - (f) showing any favour or disfavour to any person in performing a function as a*

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<sup>131</sup> In *S v Boshoff* 2014 (1) SACR 422 (ECG) the respondent, a lieutenant-colonel in the South African Police Service, was convicted in a specialized commercial crimes court under, amongst others, section 4(1)(i)(aa) of the Prevention and Combating of Corrupt Activities Act. The Respondent stole firearms from the SAPS and arranged for the firearms to be planted in or near innocent people's homes. He claimed to have received this information from an informer, which subsequently led to the recovery of the firearms and pocketed the reward for himself.

- public officer,*
- (g) *diverting, for purposes unrelated to those for which they were intended, any property belonging to the state which such officer received by virtue of his or her position for purposes of administration, custody or for any other reason, to another person or*
  - (h) *exerting any improper influence over the decision making of any person performing functions in a public body.*<sup>132</sup>

Section 10 of the Prevention and Combating of Corruption Activities Act precludes the receiving and offering of unauthorised gratification by or to a person who is a party to an employment relationship.<sup>133</sup>

For the purpose of this research, section 13 of the Prevention and Combating of Corrupt Activities Act prohibits any person from accepting or agreeing to accept, any form of gratitude for themselves or someone else or giving, agreeing or offering any form of gratification to benefit that person or anyone else, while procuring or withdrawing tenders.<sup>134</sup>

Section 17, 18 and 19 of the Prevention and Combating of Corrupt Activities Act provides for an offence when any public officer acquires or holds a private interest in any contract, agreement or investment emanating from or connected with the public body in which he or she is employed or which is made an account of that public body.<sup>135</sup>

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<sup>132</sup> In summary section 4 of the Prevention and Combating of Corrupt Activities Act prohibits any public official from accepting, or agreeing to accept, any gratification for themselves or someone else or any person, directly or indirectly, agreeing or offering any form of gratification to the benefit of a public official or anyone else. See also *S v Selebi* (2012) 1 SACR 209 (SCA), the appellant (Selebi) was convicted in the High Court of corruption in contravention of Section 4(1)(a) of the Prevention and Combating of Corrupt Activities Act.

<sup>133</sup> The offence created by section 10 of the Prevention and Combating of Corrupt Activities Act extends to both the public and private sector employment relationships and Lambrechts (2004) *Acta Criminologica* 110.

<sup>134</sup> Lambrechts (2004) *Acta Criminologica* 111.

<sup>135</sup> This section does not apply to a public official who acquires or holds such interest as a shareholder of a listed company or whose conditions of employment does not prohibit him from acquiring or holding such interest and Lambrechts (2004) *Acta Criminologica* 111.

Section 26 of the Prevention and Combating of Corrupt Activities Act provides for the punishment of any person who is convicted of the offence of corruption. Any person found guilty in terms of sections:<sup>136</sup>

- (a) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18 or 21 of this Act is liable
  - (i) in the case of a sentence to be imposed by a High Court, to a fine or to imprisonment up to a period for imprisonment for life;
  - (ii) in the case of a sentence to be imposed by the Regional Court, to a fine or to imprisonment for period not exceeding 18 years or
  - (iii) in the case of a sentence to be imposed by a Magistrate's Court, to a fine or to imprisonment for a period not exceeding five years;
- (b) 17(1), 19, 20, 23(7)(a) or (b) or 34(2), is liable
  - (i) in the case of sentence to be imposed by the High Court or Regional court, to a fine or to imprisonment for a period not exceeding 10 years; or
  - (ii) in the case of a sentence to be imposed by a Magistrate's Court, to a fine or to imprisonment for a period not exceeding three years; or
- (c) 26(6)(b), is liable
  - (i) To a fine of R250 000 or to imprisonment for a period not exceeding three years.

In addition to the above the court may impose a fine equal to five times the value of the gratification involved in the offence. Furthermore, section 269A of the Criminal Procedure Act<sup>137</sup> was inserted to include theft, fraud and extortion as competent verdicts on a charge contravening the Prevention and Combating of Corrupt Activities Act<sup>138</sup>. The Criminal Law Amendment Act<sup>139</sup> which provides for minimum sentences' is also amended to include offences committed in terms of the Prevention and Combating of Corrupt Activities Act.

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<sup>136</sup> Lambrechts (2004) *Acta Criminologica* 115.

<sup>137</sup> Act 51 of 1977 as amended.

<sup>138</sup> See *S v Maphanga* 2004 (1) SACR 96 (NPD).

<sup>139</sup> Act 105 of 1997. Hereinafter referred to as the Criminal Law Amendment Act.



Section 34 of the Prevention and Combating of Corrupt Activities Act imposes a duty to report knowledge or suspicion in respect of the commission of offences stipulated in the Act <sup>140</sup>as well as theft, fraud, extortion, forgery or issuing of forged documents involving an amount of One Hundred Thousand Rands (R100 000) or more on certain persons with authority. This section refers to and includes the Director General, municipality manager and public officers in the Senior Management Service of a public body.<sup>141</sup>

The elements of the general crime of corruption committed by the recipients are as follows:<sup>142</sup>

- a) the acceptance by the recipient (the act);
- b) of a gratification;
- c) in order to act in a certain way (inducement);
- d) unlawfulness;
- e) intention.

A discussion will now follow on each of these elements<sup>143</sup>.

4.1.1. The **acceptance** is the act of the recipient in accepting a gratification from the giver. The meaning of “accept” is broadened in two ways by the legislature.<sup>144</sup>

First, an agreement or an offer by the recipient to accept a gratification fulfils the requirement of acceptance in terms of the Act.<sup>145</sup>

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<sup>140</sup> Sections 1 – 16, 20 and 21 of the Prevention and Combating of Corrupt Activities Act 12 of 2004.

<sup>141</sup> Section 34 (4) lists those persons who hold a position of authority.

<sup>142</sup> Snyman (2014) 404 and Naidoo (2011) The South African Criminal Law’s Response to the Crime of Corruption (unpublished in fulfilment of LLB dissertation, University of Pretoria) 13.

<sup>143</sup> Snyman (2014) 404 and Naidoo (2011) 13.

<sup>144</sup> Snyman (2014) 404 and Naidoo (2011) 13.

<sup>145</sup> S 3(a)(b) of the Prevention and Combating of Corrupt Activities Act 12 of 2004. See also Snyman (2014) 404.

Secondly, the words or terms “accept”, “agree to accept” and “offer to accept” which are used in the Act include the following:<sup>146</sup>

- (a) to demand, ask for, seek, request, solicit, receive or obtain a gratification;
- (b) to agree to commit the acts listed under (a);
- (c) to offer to commit the acts listed under (a).

There are certain instances which are excluded and do not form part of the requirement of the act of corruption and thus do not provide a defence for the recipient or the giver in these instances, namely:<sup>147</sup>

- a) Where the recipient indirectly accepts the gratification, it is immaterial whether the recipient makes use of an intermediary in order to obtain the gratification.
- b) If the recipient had accepted the gratification but did not complete his part of the agreement with the giver, he will still be guilty of the crime of corruption. The explanation for this is the moment the giver consents to accepting the gratification the element of the act of the crime of corruption has been completed.
- c) The corrupt activity between the recipient and the giver was unsuccessful. It is therefore sufficient that there was merely a threatened infringement of the interest. There will be no defence available to the recipient or the giver who has not caused prejudice or loss to the state or an enterprise as a result of such conduct.
- d) Where the recipient accepts the gratification but does not have the authority or power to carry out the demands of the giver and such power is vested in another, the recipient and the giver shall still be found guilty of the crime of corruption.
- e) Where the recipient is requested by the giver to do something which is within his power and which is not an “improper” request, the recipient accepts such demand, he shall be found guilty of the offence of the crime of corruption. The rationale behind this is that under the common law, to bribe an official to do his duty still amounts to the crime of

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<sup>146</sup> Snyman (2014) 404. See also S 2 (3)(a) of the Prevention and Combating of Corrupt Activities Act 12 of 2004.

<sup>147</sup> Section 25 (c) of the Prevention and Combating of Corrupt Activities Act 12 of 2004. See also Snyman (2014) 404 and 405.

bribery<sup>148</sup> and it is said that the Act also encompasses this rule.

- 4.1.2. The **gratification** is given a broad meaning in the Act and it not only refers to money but it also includes corporeal or patrimonial benefit as indicated by the words “any service or favour or advantage of any description”, it is also wide enough to include information, sexual gratification, gifts, entertainment, loans, employment or any other benefit.<sup>149</sup>
- 4.1.3. **In order to act in a certain way (inducement)** means that the recipient must accept the gratification as a bribe (inducement) to act in a certain way. In other words, the recipient must accept the gratification with a certain motive or aim. The Act sets out a wide definition of the aims of the crime of corruption. <sup>150</sup>
- 4.1.4. **Unlawfulness** is not expressly provided for in the Act, however it must be read into the definition of the crime of corruption. Unlawfulness forms part of the requirement of a crime, which means “contrary to the good morals or the legal convictions of society”. This in turn means that the recipient is not protected by a ground of justification. For example, if the recipient or the giver acted under compulsion then they would be able to rely on necessity as a ground of justification.<sup>151</sup>
- 4.1.5. **Intention** is also not expressly provided for by the Act, it must be read into the definition of the crime of corruption. The legislature did not intend to establish a crime in strict liability, that is, one in which no form of culpability is required. The recipient must not only have the intention of accepting the gratification, but must also have the intention to conduct himself/herself in a specific manner in the future to obtain such gratification. Thus corruption is a crime of double intent.<sup>152</sup>

Intention, as a general principle, always requires a certain degree of knowledge, which is

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<sup>148</sup> R v *Lavenstein* 1919 TPD 384 382-383; *Patel* 1944 AD 511 521-523; *Van der Westhuizen* 1974 4 Sa 61 (C) 63.

<sup>149</sup> *Snyman* (2014) 406 and *Naidoo* (2011) 15 and *Lambrechts* (2004) *Acta Criminologica* 107 - 108.

<sup>150</sup> *Snyman* (2014) 407.

<sup>151</sup> *Snyman* (2014) 407.

<sup>152</sup> *Snyman* (2014) 410.

knowledge of the unlawful act. According to section 2 (1) of the Prevention and Combating of Corrupt Activities Act a person is regarded as having knowledge of a fact, or the court is satisfied that the person believes that there is a reasonable possibility of the existence of the fact and the person fails to obtain information to confirm the existence of the fact, and “knowing” shall be construed as satisfying the element of intention.<sup>153</sup>

4.1.6. **Accomplice liability and accessories after the fact**, Section 20 of the Act makes provision for a separate crime punishing accomplices and accessories after the fact in respect of corruption.<sup>154</sup> The common law rules concerning the liability of accomplices and accessories after the fact are broad enough to cover the circumstances of people who assist in the commission of a crime before and after its commission. The common law rules therefore render section 20 of the Act immaterial.<sup>155</sup>

4.1.7. **Attempt, conspiracy and inducing**, Section 21 of the Act provides that any person who:<sup>156</sup>

- a) Attempts,
- b) Conspires or
- c) Aids, abets, induces, instigates, instructs, commands, counsels or procures another person to commit an offence in terms of the Act, is guilty of an offence.

Such a person can be convicted of being a co-perpetrator or an accomplice in the commission of the crime in accordance with the common law principles of criminal liability and section 18 of the Riotous Assemblies Act<sup>157</sup> prescribes the punishment of a person who attempts to commit an offence in terms of common law or statute. Thus it is

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<sup>153</sup> Snyman (2014) 411.

<sup>154</sup> Lambrechts “The Prevention and Combating of Corrupt Activities Act as an investigative instrument pertaining to bribery and corruption” (2004) *Acta Criminologica* at 112.

<sup>155</sup> Snyman (2014) 412.

<sup>156</sup> Snyman (2014) 412. See also Lambrechts 112.

<sup>157</sup> Riotous Assemblies Act 17 of 1956.

submitted that section 21 is rendered immaterial/redundant.

4.1.8. The **punishment** of a person who is convicted of the general crime of corruption is liable for the following verdicts:<sup>158</sup>

- a) If a verdict is reached by the high court, an unlimited fine or imprisonment for life is imposed.
- b) If a verdict is reached by the regional court, an unlimited fine or imprisonment for a period not exceeding 18 years is imposed.
- c) If a verdict is reached by the magistrate's court, an unlimited fine or imprisonment for a period not exceeding five years is imposed.

The elements of the general crime of corruption by the giver are as follows:<sup>159</sup>

1. The giving by the giver to the recipient (the act);
2. Of a gratification;
3. In order to influence the recipient to act in a certain way (the inducement);
4. Unlawfulness;
5. Intention.

Each of these elements will now be discussed.

4.2.1. **The giving by the giver to the recipient.** The act occurs when the giver gives a gratification to the recipient. The meaning of the word "give" is broadened in two ways by the legislature.<sup>160</sup>

Firstly, the mere conspiracy to give or a mere offer to give which amounts to conduct which precedes the giving, is sufficient in fulfilling the requirement of the act to give.

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<sup>158</sup> Snyman (2014) 412. See also Naidoo (2011) 17.

<sup>159</sup> Snyman (2014) 413.

<sup>160</sup> Snyman (2014) 414. See also Naidoo (2011) 18.

Secondly, the words “give or agree or offer to give” as employed in the Act, includes the following:

- a) To promise, lend, grant, confer or procure the gratification;
- b) To agree to lend, grant, confer or procure the gratification;
- c) To offer to lend, grant, confer or procure the gratification<sup>161</sup>.

The factors referring to the element of the act by the recipient apply *mutatis mutandis* to the element of the act by the recipient.<sup>162</sup>

4.2.2. **The gratification**, this requirement for the crime of corruption committed by the recipient is applied the same here.<sup>163</sup>

4.2.3. **In order to act in a certain manner (the inducement element)**, this requirement corresponds the same as that under the crime of corruption committed by the recipient.<sup>164</sup>

4.2.4. **Unlawfulness**, this requirement corresponds the same as that of the crime of corruption committed by the recipient.<sup>165</sup>

4.2.5. **Intention**, this requirement correspond the same as that of the crime of corruption committed by the recipient.<sup>166</sup>

4.2.6. **Accomplices, accessories after the fact, attempt, conspiracy and incitement**, these factors correspond the same as that of the crime of corruption committed by the

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<sup>161</sup> Snyman (2014) 414. See also S2(3)(b) of the Prevention and Combating of Corrupt Activities Act 12 of 2004.

<sup>162</sup> Snyman (2014) 414.

<sup>163</sup> Snyman (2014) 414.

<sup>164</sup> Snyman (2014) 414.

<sup>165</sup> Snyman (2014) 414.

<sup>166</sup> Snyman (2014) 415.

recipient.<sup>167</sup>

4.2.7. **Punishment**, the prescribed punishment for corruption by the giver applies the same as that of the crime of corruption committed by the recipient.<sup>168</sup>

The requirements discussed *supra* form part of the elements of the crime of corruption.

#### 4.2 **PREVENTION OF ORGANISED CRIME ACT**<sup>169</sup>

This Act, *inter alia*, provides for the following:<sup>170</sup>

- a) that any person who is in charge of a business undertaking has to report activities relating to unlawful activities or proceeds,
- b) makes it an offence to belong to a criminal gang or to aid any criminal activity by a criminal gang,
- c) civil forfeiture of criminal assets used in committing offences or are the proceeds of unlawful activity,
- d) the obtaining of restraint orders by the Directorate of National Prosecutions against any person charged or to be charge with an offence form dealing with the property.

A person may be charged with racketeering if they have any property in their possession which they know is linked to any illegal business activity. Anyone who buys or rents or is involved in any dealing linked to property which they suspect has been illegally acquired (or contributes to unlawful activities must report their suspicion within a reasonable time.

The Prevention of Organised Crime Act further provides for the forfeiture of assets which are obtained through criminal activities. Such a person can only be convicted if they know/ought reasonably to have known that the property formed part of an unlawful activity. Fines and/or

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<sup>167</sup> Snyman (2014) 415.

<sup>168</sup> Snyman (2014) 415.

<sup>169</sup> 121 of 1998.

<sup>170</sup> See Prevention of Organised Crime Act 121 of 1998.

imprisonment can be imposed if a person is successfully convicted under the provision of this Act.

#### 4.3 **PROTECTED DISCLOSURE ACT**<sup>171</sup>

This Act is aimed at encouraging whistle-blowing and provides for the protection of employees in both the public and private sector from occupational detriment by reason of having made a protected disclosure. This Act heralded in a more conducive environment for reporting on corruption and fraudulent conduct in the workplace.<sup>172</sup> The Protected Disclosures Act makes provision for public servants or public employees and only when certain types of evidence are disclosed.

The Protected Disclosure Act requires that a disclosure be made to:

- a) a legal advisor with the purpose of obtaining legal advice,
- b) your employer,
- c) the Public Protector,
- d) the Auditor General,
- e) the Minister or the Member of the Executive Council of a Province, under certain circumstances,
- f) Any other person, as long as certain conditions are met, including that the disclosure is made in good faith and that you believed you could not make the disclosure to your employer.

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<sup>171</sup> 26 of 2000.

<sup>172</sup> Naidoo and Jackson *Reviewing South Africa's efforts to combat corruption in its Bureaucracy: 1994 - 2009* (2009) 8.



#### 4.4 **PROMOTION OF ACCESS TO INFORMATION ACT**<sup>173</sup>

This Act enhances transparency by giving effect to the Constitutional right of access to any information held by the state, and information held by any other person that is required for the exercise of protection of any rights.<sup>174</sup>

#### 4.5 **PROMOTION OF ADMINISTRATION OF JUSTICE**<sup>175</sup>

This Act also enhances transparency which is a cornerstone of good governance by giving effect to the Constitutional right to administrative action that is lawful, reasonable and procedurally fair, and the right to written reasons where one's rights have been affected tremendously by administrative action.

#### 4.6 **WITNESS PROTECTION ACT**<sup>176</sup>

State witnesses are encouraged by this Act to give evidence in trial proceedings and commissions of enquiry by providing them with protection. Witnesses include those who are to testify on any offence referred to in the Prevention of Organised Crime Act. The Prevention of Organised Crime Act was enacted to, amongst others, introduce measures to combat organised crime, money laundering and criminal gang activities, prohibit certain activities relating to racketeering activities, provide for an obligation to report, certain information, criminalise activities associated with gangs, provide for the recovery of the proceeds of unlawful activity and forfeiture of instrumentality to crime. People who blow the whistle on corruption are only protected under the Witness Protection Act if they are witnesses in criminal proceedings.

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<sup>173</sup> 2 of 2000.

<sup>174</sup> Naidoo and Jackson (2009) 7.

<sup>175</sup> 3 of 2000.

<sup>176</sup> 112 of 1998.

#### 4.7 THE PUBLIC FINANCE MANAGEMENT ACT<sup>177</sup> AND REGULATIONS

The effective and efficient use of resources by departments and constitutional institutions are promoted by this Act. The Accounting Officers of these institutions must ensure *inter alia*:

- a) Effective, efficient and transparent systems of financial and risk management and internal control;
- b) A system of internal audit under the control and direction of an audit committee and
- c) An appropriate provisioning and procurement system which is fair, equitable, transparent, competitive and cost-effective.<sup>178</sup>

Section 38(1) (a) (iii) of the Public Finance Management Act stipulates that the accounting officer of a department must ensure that the department has and maintains an appropriate procurement and provisioning system, which must be fair, equitable, transparent, competitive and cost effective.<sup>179</sup>

The Treasury Regulations enacted in terms of the Public Finance Management Act sets out specific obligations on organs of state to investigate corruption within the sphere of public procurement. The Public Finance Management Act and Treasury Regulations applies to national or provincial government departments.<sup>180</sup>

The supply chain management officials must ensure that the credibility or integrity of the supply chain management system is not compromised through the acceptance of gifts or hospitality, or any other act<sup>181</sup> and must assist accounting officers or accounting authorities in Combating corruption and fraud in the supply chain management system.<sup>182</sup>

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<sup>177</sup> 1 of 1999.

<sup>178</sup> Salient principle.

<sup>179</sup> See also Luyinda *Effective financial management in public agencies* (2008) 30.

<sup>180</sup> See 3(1)(a) of the Public Finance Management Act read with the definition of “department” in section 1 of the Act.

<sup>181</sup> See Regulation 16A9 1 (b)(i).

<sup>182</sup> See Regulation 16A9 (b)(ii).

#### 4.8 **FINANCIAL INTELLIGENCE CENTRE ACT**<sup>183</sup>

A Financial Intelligence Centre has been created by this Act in the combating of money laundering activities. The objectives of the Centre are to assist in the identification of proceeds of unlawful activities, the combating of money laundering activities, making information available to investigating authorities, and to exchange information with similar bodies in other countries. Accountable Institutions are required to combat money laundering activities. They must establish and verify the identity of a client before engaging in transactions with such a client, to keep record of such identity for a period of five years and to report any transactions exceeding a certain amount. Business owners or managers have a duty in terms of this Act to report any suspicious and unusual transactions to the Centre.

#### 4.9 **MUNICIPAL FINANCE MANAGEMENT ACT**<sup>184</sup>, **THE MUNICIPAL SYSTEMS ACT**<sup>185</sup> **AND THE LOCAL GOVERNMENT: MUNICIPAL STRUCTURES ACT**<sup>186</sup>

The Municipal Finance Management Act aims to modernise financial management practices by placing management on a financially sustainable footing and promotes co-operative governance between all spheres of government. The Municipal Systems Act must be read together with the Municipal Finance Management Act as they are closely linked and aligned.<sup>187</sup> Together the Municipal Systems Act and the Municipal Finance Management Act deal with internal systems, consultative processes, perform systems and reporting and mechanisms to enhance accountability.

The object of the Municipal Finance Management Act is to secure sound and sustainable management of the fiscal and financial affairs of municipalities and municipal entities by

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<sup>183</sup> 38 of 2001.

<sup>184</sup> 56 of 2003.

<sup>185</sup> 32 of 2000.

<sup>186</sup> 117 of 1998, as amended.

<sup>187</sup> A guide to Municipal Finance Management Councilors (2006) assists executive mayors or committees and non-executive councilors, working together with municipal officials, to implement legislation that will bring about reform of municipal finance management practices across South Africa.

establishing norms and standards and other requirements for:

- a) ensuring transparency, accountability and appropriate lines of responsibility in the fiscal and financial affairs of municipalities and municipal entities,
- b) the management of their revenues, expenditures, assets and liabilities and the handling of their financial dealings,
- c) budgetary and financial planning processes and the co-ordination of those processes with the processes of organs of state in other spheres of government,
- d) borrowing,
- e) the handling of financial problems in municipalities,
- f) supply chain management and
- g) other financial matters.

The Municipal Finance Management Act prohibits councillors from participating in the procurement process by barring councillors from serving on the municipal tender committees or any other committee evaluating or approving of tenders, quotes, contacts or other bids. This prohibition eradicates the possibility of councillors being involved in a conflict of interest situation in the procurement process. After tenders, quotations, contracts or bids have been submitted to the vendor the Municipal Finance Management Act specifically prohibits everyone from interfering with the supply chain management systems of a municipality or municipal entity.

Bias or unethical decision-making is equally damaging to the municipal council and councillors, which amounts to actual misconduct. There are two other ways that the Municipal Finance Management Act tries to prohibit biased and unethical decision-making, which is by prescribing stricter requirements to unsolicited bids and the approving of a tender that is not recommended.

Schedule 1 of the Municipal Systems Act sets out the provisions for the code of conduct for councillors in relation to the financial and budget processes.<sup>188</sup> A councillor must:

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<sup>188</sup> Schedule 2 of the Municipal Systems Act sets out similar code of conduct requirements for municipal employees to adhere to. See Bekink (2006) 227.

- a) perform functions of office in good faith, honestly and in a transparent manner,
- b) at all times act in the best interests of the municipality,
- c) participate fully in meetings of the municipal council,
- d) disclose within 60 days of election, financial interests held by the councillor and periodically thereafter,
- e) disclose immediately any direct or indirect personal or private business interest in any matter that may come before the council,
- f) refrain from using the position or privileges of councillor, or information gained as a councillor for any personal gain or to improperly benefit any other person,
- g) refrain from requesting, soliciting, or accepting any rewards, gifts, or favours arising out of the role of councillor,
- h) refrain from improperly disclosing privileged or confidential information obtained out of the role of councillor,
- i) refrain from intervening, interfering, or obstructing management or the implementation of any decision of council or direct or give any instruction to any employee of the municipality except when authorised to do so,
- j) refrain from using, taking, acquiring or benefiting from any property or asset owned, controlled, or managed by the municipality.

The Municipal Systems Act prohibits councillors from participating in supply chain management functions. Therefore, municipal councillors cannot be involved in selecting tenders, quotations, or purchasing or disposing of any goods or services. A councillor or any business that they work for or control cannot do business with any municipality or municipal entity.

The Municipal Structures Act sets out the Code of Conduct for councillors which prescribes the following:

*An official must not allow or*

- a) directly or indirectly disclose confidential or privileged information known to him or her through employment by the council, other than in discharging his or her official duties or pursuant to a lawful instruction or for the protection of his or her rights;*
- b) directly or indirectly use confidential or privileged information know to him or her through employment by the council, for any purpose other than in discharging his or her official duties or the protection of his or her rights;*
- c) directly or indirectly disclose to any company, partnership, association or similar organisation with which he or she, or his or her spouse, parent or child, is associated, such confidential or privileged information that is not openly available to any other company, partnership, association or similar organisation;*
- d) directly or indirectly disclose such confidential or privilege information to any person or organisation unless that person or organisation has legal right to receive it;*
- e) use information gained in his or her official capacity and which is not available to the public generally, for his or her direct or indirect personal advantage.*

The abovementioned prescription as per paragraph (a) to (e) is essential to prevent any potential conflict of interest from taking palace between councillors and the relevant municipal councillors in respect of tender the process. Furthermore, it also reduces any undue advantage accruing to councillors in the tender process. Should there be any breaches of these supply chain provisions, severe penalties may ensue: from pursuant investigations and criminal sanctions against individuals who make themselves guilty of offences in this regard.

## 5. COMMON LAW FRAUD

### 5.1 INTRODUCTION

In South Africa the crime of fraud is defined as the unlawful and intentional making of a misrepresentation which causes actual or potential prejudice.<sup>189</sup>

Fraud consists of the following elements:<sup>190</sup>

- Unlawfulness,
- Misrepresentation,
- Intent and
- Prejudice.

#### 5.1.1 Unlawfulness<sup>191</sup>

Unlawfulness is present when the act constitutes a false representation or when the act committed is in conflict with moral norms of the community. There are various forms of misrepresentation which are not unlawful.

#### 5.1.2 Misrepresentation<sup>192</sup>

Fraud in essence is the deceiving or misleading of the victim of the crime. This element is manifested by way of a misrepresentation in that a false statement or fact or law is made by one person to another.<sup>193</sup> In other words there must be a distortion of the truth in order for misrepresentation to be present. The perpetrator must have made a misrepresentation to the prejudiced party. The representation can be made orally, in writing, by means of conduct or by remaining silent. A misrepresentation in isolation alone does not automatically constitute fraud.

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<sup>189</sup> See *S v Mia* 2009 (1) SACR 330 (SCA) para 15 and *S v Mostert* 2010 (1) SACR 223 (SCA).

<sup>190</sup> Snyman *Criminal Law* (2014) 523.

<sup>191</sup> Snyman *Criminal Law* (2014) 530.

<sup>192</sup> Snyman *Criminal Law* (2014) 524.

<sup>193</sup> Milton & Burchell (2013) 724.

### 5.1.3 Intention<sup>194</sup>

The element intention has two principles namely; an intention to deceive and an intention to defraud. Thus perpetrator must have knowingly made the misrepresentation or foreseen that it might be false.<sup>195</sup>

### 5.1.4 Prejudice<sup>196</sup>

The misrepresentation must have caused harm to the victim. In South African law this element is comprised of two facets namely; proprietary or non-proprietary which means actual or potential prejudice.

In the South African context and with relevance to dealings by employees, corporate enterprises and individuals with municipalities there is not statutory provisions to deal with fraudulent conduct. In light hereof, one should rely on the provisions of common law fraud alluded to above to prosecute criminal behaviour perpetrated against municipalities. Any misrepresentations, perversions or distortion of the truth or facts, either express or implied with the intention to cause actual or potential prejudice against a municipality by an employee, individual or entity will constitute fraud. The misrepresentation could be in the form of a positive act either as a false statement or an omission, for example to declare a fact which can occur when a municipal employee who is closely associated with a company adjudicates upon the awarding of a contract and fails to disclose this fact would be guilty of fraud.

The prejudice suffered by a municipality could be actual or potential prejudice. Even in a case where the prosecution has not proved actual prejudice against a municipality, an individual or entity could still be found guilty of fraud on the basis of a potential prejudice where there was some risk or prejudice that could have been suffered by the municipality as a result of an individual or entities misrepresentation. These provisions elaborated upon above are beneficial

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<sup>194</sup> Snyman *Criminal Law* (2014) 531.

<sup>195</sup> Milton & Burchell (2013) 731.

<sup>196</sup> Snyman *Criminal Law* (2014) 527.



for municipalities who deal with employees, individuals and entities especially in the tender process.

## 6. CONCLUSION

It is evident from the discussion on the characteristics of good governance that it is an ideal which would be difficult to achieve in its totality. Only a few countries, including South Africa, have come close to achieving good governance in its totality. However, to ensure sustainable human development, South Africa strives towards this ideal with the aim of making it a reality. In this chapter the legislation addressing the issue of fraud and corruption were outlined. However, the real challenge in addressing, and ultimately reducing or eradicating the aforementioned crimes, lie in the effective implementation of the various legislations and the subsequent prosecutions and conviction of the individuals responsible for their commission.

This chapter has outlined South Africa's efforts to establish a framework of legislative, regulatory and organisational measures to respond to the crimes of fraud and corruption in government. However, despite the implementation of various measures taken to combat fraud and corruption within local government in South Africa there is a distinct lacuna between the state's ability to enforce anti-corruption rules in the public service through legal, regulatory and functional codes, and the predilection of government to comply with these.

## CHAPTER THREE

### LEGAL PRECEDENT (CASE LAW) ON THE CRIMES OF FRAUD AND CORRUPTION WITHIN SOUTH AFRICAN MUNICIPALITIES

#### 1. INTRODUCTION

This chapter, in the main, will set out in detail the relevant legal precedence (case law) with regard to fraud and corruption that was committed within Municipalities as well as the *Shaik* and *Selebi* cases. It will critically analyse the approach to fraud and corruption within municipalities as enunciated in case law and the application of existing legislation pertaining thereto. Furthermore, insight into the courts' efficacy in administering justice in cases of fraud and corruption will be given. A descriptive approach will be adopted to examine case law. In order to understand the approach adopted by the South African courts, relevant examples of fraud and corruption cases from case law will be discussed.

#### 2 CORRUPTION AND FRAUD CASES WITHIN SOUTH AFRICAN MUNICIPALITIES

##### 2.1 *Viking Pony Africa Pumps (PTY) LTD t/a Tricom Africa v Hidro-Tech Systems (PTY) LTD and Another* <sup>197</sup>

This case concerns the application of the preferential procurement policy by municipalities in South Africa. The nature and extent of the duty of an organ of state when confronted with allegations that an enterprise was awarded a tender due to fraudulent manipulation of a preferential procurement scheme and thereby succeeding in securing a preferential tender.<sup>198</sup>

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<sup>197</sup> 2011 (1) SA 327 (CC) A.

<sup>198</sup> CIDB (2011) "Case Summaries and Analyses January – March 2011" *Construction Industry Development Board* 30.

The applicant, Viking Pony Africa Pumps,<sup>199</sup> is a company that supplies and installs mechanical and electrical equipment for water and sewerage treatment works. The respondent, Hidro-Tech Systems,<sup>200</sup> operates substantially the same business as Viking.

Viking received approximately eighty percent (80%) more tenders than Hidro-Tech from the City of Cape Town<sup>201</sup> and other municipalities<sup>202</sup> over the years. It became a source of concern to Hidro-Tech due to the fact that on the last three occasions it submitted a lower tender than Viking but still lost. HidroTech's concern prompted it to investigate the reason behind Viking's resilient competitive edge over it. It found out that Viking won most of its tenders because of its higher historical disadvantaged individual profile.

The main complaints by Hidro-Tech were that firstly, the historically disadvantaged individuals were neither remunerated nor allowed to participate in the management of Viking to the degree that it was commensurate with their shareholders and directors. Secondly, the benefits that Viking received from tenders awarded by reason of its seemingly progressive shareholding profile were being routed to its sister company Bunker Hills Pumps (Pty) Ltd trading as Tricom systems<sup>203</sup> which is a wholly "white-owned" company.

These allegations suggest that Viking had made fraudulent misrepresentations in its' tender documents to the City about its profile of historical disadvantaged individuals for the purposes of securing a preference.

Hidro-Tech reportedly lodged a complaint with the City. The City responded in the following ways:<sup>204</sup>

- a. A private database management company was sought to verify Viking's shareholding as well as to confirm whether the shareholding was reflected in its tender documents,

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<sup>199</sup> Hereinafter referred to as Viking.

<sup>200</sup> Hereinafter referred to as Hidro-Tech.

<sup>201</sup> Hereinafter referred to as the City.

<sup>202</sup> Predominantly in the Western Cape, Northern Cape as well as in the Easter Cape provinces.

<sup>203</sup> Hereinafter referred to as Bunker Hills Pumps.

<sup>204</sup> *Viking Pony Africa Pumps (PTY) LTD t/a Tricom Africa v Hidro-Tech Systems (PTY) LTD and Another* 23 - 26 par 40 - 45.

- b. The matter was handed over to the city's in-house legal advisers and
- c. advised Hidro-Tech to follow the complaints procedure by referring its complaint to the Department of Trade and Industry.

### **Legal principles:**

In adjudicating the matter, the Western Cape High Court stated that the investigation carried out by Tradeworld (an investigative company appointed by the City) was insufficient as it did not ascertain the essential issues, which were the inner workings of Viking and the actual status of its Historically disadvantaged individual(HDI) directors.<sup>205</sup> Hidro-Tech was justified in forming the opinion that the City's response to its complaint was inadequate to protect its constitutional rights and legitimate commercial interest.<sup>206</sup> The City was under an obligation to "act against" Viking; the content of the letter written by Hidro-Tech was true and it was both in the public's and Hydro-Tech's interest.<sup>207</sup> The continuous opposition by the City to the relief sought justified a mandatory order against it, in light of the compelling evidence before the court.<sup>208</sup> Neither Mr James nor Mr Mosea were involved in the management of, or exercised control over, Viking to the extent commensurate with their respective shareholding at the time of Viking's submission of the tenders awarded in 2006 and 2007.<sup>209</sup> This court also found Viking guilty of fraudulent misrepresentation.<sup>210</sup>

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<sup>205</sup> *Viking Pony Africa Pumps (PTY) LTD t/a Tricom Africa v Hidro-Tech Systems (PTY) LTD and Another* 7 par 12.

<sup>206</sup> *Viking Pony Africa Pumps (PTY) LTD t/a Tricom Africa v Hidro-Tech Systems (PTY) LTD and Another* 8 para 16. "Case Summaries and Analyses January – March 2011" *Construction Industry Development Board* 34.

<sup>207</sup> *Viking Pony Africa Pumps (PTY) LTD t/a Tricom Africa v Hidro-Tech Systems (PTY) LTD and Another* 8 para 16. "Case Summaries and Analyses January – March 2011" *Construction Industry Development Board* 34.

<sup>208</sup> *Viking Pony Africa Pumps (PTY) LTD t/a Tricom Africa v Hidro-Tech Systems (PTY) LTD and Another* 8 para 16. "Case Summaries and Analyses January – March 2011" *Construction Industry Development Board* 34.

<sup>209</sup> Mr James and Mr Mosea were historically disadvantaged individuals who each owned 35% shares in Viking. Mr James terminated his employment with Viking and became an employee of Hidro-Tech. He disclosed detailed information on the extent of the historically disadvantaged individuals' control over Viking which reinforced Hidro-Tech's suspicion against Viking. *Viking Pony Africa Pumps (PTY) LTD t/a Tricom Africa v Hidro-Tech Systems (PTY) LTD and Another* 8 para 16. "Case Summaries and Analyses January – March 2011" *Construction Industry Development Board* 34.

<sup>210</sup> *Viking Pony Africa Pumps (PTY) LTD t/a Tricom Africa v Hidro-Tech Systems (PTY) LTD and Another* 8 para 16. "Case Summaries and Analyses January – March 2011" *Construction Industry Development Board* 34.

The Western Cape High court ruled that the City must take action against Viking<sup>211</sup> in terms of Regulation 15(1)<sup>212</sup> which provides that an organ of state must, upon detecting that a preference in terms of the Act and these regulations have been obtained on a fraudulent basis, or any specified goals that are not attained in the performance of the contract, act against the person awarded the contract in the following ways:<sup>213</sup>

- a) recover all costs, losses or damages incurred;
- b) cancel the contract and claim damages;
- c) impose a financial penalty more severe than the theoretical financial preference and
- d) restrict the contractor, its shareholders and directors from conducting business with any organ of state.

Viking sought leave from the Western Cape High Court to appeal to the Supreme Court of Appeal. The Supreme Court of Appeal only dealt with whether or not the City conducted an adequate investigation into the serious allegations made by Hidro-Tech against Viking. The Appeal Court found that the City was in breach of its duty to investigate.<sup>214</sup>

The Constitutional Court held that a State organ must act against a successful tenderer when detecting that preference was obtained on a fraudulent basis. The organ of state must upon obtaining any information giving rise to a reasonable suspicion of fraud, conduct a thorough investigation. Justice Mogoeng averred that the City was derelict in its duty and failed to honour its constitution and statutory obligation.<sup>215</sup> The nature and seriousness of the complaint imposed an obligation on the City to investigate allegations of non-compliance with the provision of the Regulations.<sup>216</sup> Therefore, Regulation 15(1) of the Preferential Procurement Regulations

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<sup>211</sup> *Viking Pony Africa Pumps (PTY) LTD t/a Tricom Africa v Hidro-Tech Systems (PTY) LTD and Another* 9 para 17.

“Case Summaries and Analyses January – March 2011” *Construction Industry Development Board* 32.

<sup>212</sup> Preferential Procurement Regulations (2001).

<sup>213</sup> Regulation 15(2) of the Preferential Procurement Regulations (2001).

*Viking Pony Africa Pumps (PTY) LTD t/a Tricom Africa v Hidro-Tech Systems (PTY) LTD and Another* 9 para 18. “Case Summaries and Analyses January – March 2011” *Construction Industry Development Board* 35.

<sup>215</sup> *Viking Pony Africa Pumps (PTY) LTD t/a Tricom Africa v Hidro-Tech Systems (PTY) LTD and Another* 32 par 57.

<sup>216</sup> *Viking Pony Africa Pumps (PTY) LTD t/a Tricom Africa v Hidro-Tech Systems (PTY) LTD and Another* 19 - 26 par 34 - 46.

pertaining to the Preferential Procurement Policy Framework Act<sup>217</sup> successfully outlined the duties of an organ of State.

The Constitutional Court had to deliberate in this matter in order to clarify the nature and extent of the duty of an organ of State when presented with factual allegations that an enterprise to which a tender had been awarded, had fraudulently manipulated a preferential procurement scheme.<sup>218</sup> In cases where allegations of fraud and corruption are of a serious nature the City must investigate the complaint itself or refer the matter for investigation to either the Commercial Crimes Unit of the South African Police Service, the Directorate for Priority Crimes Investigation, The National Prosecuting Authority or an independent firm of forensic accountants.<sup>219</sup> The public interest requires a zero tolerance approach towards fraudulent manipulation of any preferential points system to ensure proper implementation of the preferential procurement policy.<sup>220</sup> Upon receipt of credible allegations procuring entities must take immediate and effective remedial/punitive action as prescribed in terms of the Preferential Procurement Regulations.<sup>221</sup> Where uncertainty exists regarding a regulatory violation, the procuring entity is compelled to conduct a thorough and effective investigation. Depending on the outcome, the alleged offender's culpability and appropriate penalty need to be determined.<sup>222</sup> Justice Mogoeng further concluded that the reasons for the promulgation of the Procurement Act and its regulations was to ensure that organs of state

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<sup>217</sup> Act 5 of 2000.

<sup>218</sup> *Viking Pony Africa Pumps (PTY) LTD t/a Tricom Africa v Hidro-Tech Systems (PTY) LTD and Another* 11 par 22. See also CIDB (2011) "Case Summaries and Analyses January – March 2011" *Construction Industry Development Board* 30 and Osode Remedial interventions in public procurement process: An appraisal of recent appellate jurisprudence in search of principles (Professional inaugural lecturer delivered, University of Fort Hare) 23.

<sup>219</sup> *Viking Pony Africa Pumps (PTY) LTD t/a Tricom Africa v Hidro-Tech Systems (PTY) LTD and Another* and 28 par 48. See also CIDB (2011) "Case Summaries and Analyses January – March 2011" *Construction Industry Development Board* 34 and Osode 25.

<sup>220</sup> It is now generally accepted that it is both appropriate and legitimate for governments to use public procurement as an instrument of social policy. See Quinot "Promotion of social policy through public procurement in Africa" in Quinot and Arrowsmith 2013 370 and McCrudden "Social Policy Issues in Public Procurement: A Legal Review" in Arrowsmith and Davies 1998 at 221-223. See also *Viking Pony Africa Pumps (PTY) LTD t/a Tricom Africa v Hidro-Tech Systems (PTY) LTD and Another* 10 para 20. See also CIDB (2011) "Case Summaries and Analyses January – March 2011" *Construction Industry Development Board* at 35 and Osode 25.

<sup>221</sup> *Viking Pony Africa Pumps (PTY) LTD t/a Tricom Africa v Hidro-Tech Systems (PTY) LTD and Another* 31 para 53. See also CIDB (2011) "Case Summaries and Analyses January – March 2011" *Construction Industry Development Board* at 35 and Osode 25.

<sup>222</sup> *Viking Pony Africa Pumps (PTY) LTD t/a Tricom Africa v Hidro-Tech Systems (PTY) LTD and Another* 27 para 48. See also CIDB (2011) "Case Summaries and Analyses January – March 2011" *Construction Industry Development Board* at 35 and Osode 25.

do not remain passive when credible allegations of fronting or tender irregularities exist.<sup>223</sup> The organ of state is placed under a duty in terms of the Procurement Act and has an obligation to investigate the matter properly.

This case is a clear illustration that the City of Cape Town which falls within the jurisdiction of the Western Cape Municipality did not act decisively against an enterprise who used fraudulent means to obtain a preferential procurement scheme for the purposes of securing a preference. The court had to intervene in this matter and ordered the City to “act against” the fraudulent enterprise in terms of the sanctions as stipulated in Regulation 15(1) of the Preferential Procurement Regulations.

## ***2.2 Democratic Alliance Western Cape & others v Western Cape Minister of Local government & another***<sup>224</sup>

The first applicant was the Democratic Alliance (DA), a registered political party represented by elected representatives in municipal councils, provincial legislatures and the national parliament. The first applicant was represented in the municipal council of Langeberg Municipality. The second applicant was the Western Cape leader of the Democratic Alliance and the Parliamentary representatives of the DA for Langeberg municipal area. The third and sixth applicants were DA councillors of the Municipal Council of the Langeberg municipality. The first respondent was a member of Provincial Executive Council (MEC) in the Western Cape and the second respondent was an advocate appointed by the first respondent to conduct an investigation into allegations of serious malpractices<sup>225</sup> in the Langeberg municipality in Western Cape.

The applicants sought the review of the first respondent’s decision to conduct an investigation in

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<sup>223</sup> *Viking Pony Africa Pumps (PTY) LTD t/a Tricom Africa v Hidro-Tech Systems (PTY) LTD and Another* para 53.

<sup>224</sup> [2005] JOL 13412 (C).

<sup>225</sup> Stevenson and Waite eds *Concise Oxford English Dictionary* (2002) defines malpractice as “improper, illegal or negligent professional activity or treatment”. The wrongdoing in context of section 106 is suggestive of a wrongdoing by a person holding a position in the municipality, which wrongdoing pertains to the performance of the functions in the municipality to which he or she is appointed. See also *Democratic Alliance Western Cape v Western Cape Minister of Local Government* [2005] JOL 13412 (C) 22 para 36.

terms of section 106(1)(b) of the Municipal Finance Management Act to investigate allegations of serious malpractices in the Langeberg Municipality area in Western Cape. The applicants contended that the first respondent's decision to appoint the second respondent was *ultra vires* and in violation of the provisions of the abovementioned section.<sup>226</sup>

### **Legal Principles:**

According to Section 106(1)(b) of the Municipal Systems Act, if an MEC has reasonable believe that a municipality cannot or does not fulfil a statutory obligation binding on that municipality or that maladministration, fraud, corruption or any other serious malpractice has occurred or is occurring in a municipality in the province, the MEC is duty bound to initiate an investigation into the matter should he deem it necessary.

Justice Meer stated that in order for the MEC to properly invoke the provisions of section 106(1)(b) of the Municipal Systems Act there must exist a reason to believe that a serious malpractice occurred or was occurring in a municipality.<sup>227</sup> A mere suspicion is insufficient to conduct an investigation into malpractices in a municipality in terms of this section. The test to determine whether a reason believe exists is an objective one and must be supported by facts giving rise to such belief. The phrase 'reason to believe' must be rational and/or reasonable which places a lighter burden of proof on the MEC to initiate an investigation into the malpractice(s) of any municipality. The court was unable to find that the first respondent had reason to believe that a serious malpractice had occurred as contemplated in section 106(1)(b) of the aforesaid Act. The appointment of the second respondent to conduct an investigation into allegations of serious malpractices was accordingly an over-reaction and an unwarranted interference in the internal conduct of an opposition party. The decision by Justice Meer was set aside by the Constitutional Court.

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<sup>226</sup> *Democratic Alliance Western Cape v Western Cape Minister of Local Government* 2 para 4.

<sup>227</sup> *Democratic Alliance Western Cape v Western Cape Minister of Local Government* 17 para 25. See also Reynecke *Testing the boundaries of municipal supervision: an analysis of section 106 of the Municipal Systems Act and provincial legislation* (2012) (unpublished LLM thesis University of Western Cape) 31. See also Steytler and De Visser (2007) 15-11.



It is submitted that section 106(1)(b) provides the legal mechanism to enable an MEC to investigate serious malpractices such as fraud and corruption that have taken place or are taking place within a municipality under his authority or jurisdiction. However, in terms of the decision handed down by Justice Meer in this case it is clear that arbitrary decisions to investigate malpractices within municipalities which are not based on the premise of rationality and reasonableness will not be accepted by the courts. It is also submitted that section 106(1)(b) should not curtail the powers of the MEC to at least institute a preliminary investigation in order to determine if there is sufficient evidence to institute a full scale investigation into alleged malpractices within municipalities which fall under his authority.

### ***2.3 Minister of Local government, Housing and Traditional Affairs (Kwazulu-Natal) v Umlambo trading***<sup>228</sup>

A local chartered accountant firm called Manase and Associates<sup>229</sup> was appointed by the MEC for local government in KZN to investigate tender irregularities into a project called ‘The Mayor’s Container Initiative’<sup>230</sup> at the ILembe District Municipality. Umlambo trading 29 CC<sup>231</sup> was awarded the tender to build the containers for the Mayor’s initiative.<sup>232</sup> Manase required Umlambo to furnish all their bank statements in order to conduct a proper investigation. However, Umlambo refused to comply with the request to provide its bank statements as requested by Manase. Manase believed to be acting in terms of section 106(2) of the Municipal Systems Act issued and served subpoenas on Umlambo requesting their original founding statement and any amendment thereto, a paid-up cheque, a list of authorised signatories to its bank account, the physical address at which the containers were being refurbished.<sup>233</sup> A second subpoena was served on Nedbank requesting Umlambo’s banks statements. The court had to determine whether the MEC had authority to grant Manase the power to subpoena witnesses in order to obtain the financial and

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<sup>228</sup> [2007] SCA 130 (RSA).

<sup>229</sup> Hereinafter referred to as Manase.

<sup>230</sup> Hereinafter referred to as the Mayors initiative.

<sup>231</sup> Hereinafter referred to as Umlambo.

<sup>232</sup> *The Minister of Local Government, housing and traditional affairs v Umlambo Trading 29 (CC)* [2007] SCA 130 para 3 and Reynecke 34.

<sup>233</sup> *The Minister of Local Government, housing and traditional affairs v Umlambo Trading 29* para 5 and Reynecke 34.

banking records of Umlambo.

### **Legal Principles:**

According to section 106(2) of the Municipal Systems Act the relevant provisions of the Commissions Act, which is applicable nationally, applies only in the absence of applicable provincial legislation which enables the Premier to institute a commission of enquiry in terms of section 106(1)(b) of the Municipal Systems Act to investigate maladministration, fraud, corruption or any other serious malpractice(s).

Judge Van Heerden of the Supreme Court of Appeal held that, in terms of section 4(1)(a) KwaZulu-Natal Commissions Act<sup>234</sup>, the MEC had no power of his own to appoint a commission of enquiry and to subpoena witnesses to provide documentary evidence as discussed above. Furthermore, the publication of the ‘investigation’ or ‘commission’ in the *Provincial Gazette* as required by the KwaZulu-Natal Commissions Act was not adhered to.<sup>235</sup> The principle of legality lies at the centre of the appeal in this case. It is a fundamental principle in the rule of law that the exercise of public power is only legitimate when it is lawful.<sup>236</sup> Therefore, in view of the principle of legality the MEC was *ultra vires* in instituting a commission of enquiry.<sup>237</sup>

It is submitted that although the powers of the MEC is curtailed insofar as instituting a commission of enquiry, this in no way should detract from the fact that the MEC can invoke the provisions of section 106(2) of the Municipal Systems Act to investigate maladministration, fraud, corruption or any other serious malpractices taking place within the Municipality. It is also submitted that a commission of enquiry does not always serve the purpose of addressing maladministration, fraud, corruption and any other serious malpractices due to the fact that commissions are inquisitorial in nature and only makes recommendations on wrongdoing which still has to be investigated further for the purposes of prosecution. Commissions can sometimes be protracted, costly and does not serve the interests of justice.

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<sup>234</sup> Act 3 of 1999.

<sup>235</sup> *The Minister of Local Government, housing and traditional affairs v Umlambo Trading* 29 para 16.

<sup>236</sup> *The Minister of Local Government, housing and traditional affairs v Umlambo Trading* 29 para 17.

<sup>237</sup> *The Minister of Local Government, housing and traditional affairs v Umlambo Trading* 29 para 17.

## 2.4 *Esorfranki Pipelines (PTY)LTD v Mopani District Municipality*<sup>238</sup>

In August 2010 the Mopani District Municipality invited tenders for the construction of concrete reservoirs and a welded steel pipeline between Nandoni Dam in Thohoyandou and the Nsami water Treatment Works in Giyani in the Limpopo Province. The purpose of the pipeline was to provide water to the residents of the greater Giyani area. Severe drought in 2009 caused the water levels in the Nsami dam to drop to the extent that there was insufficient water available for domestic use. The Mopani District Municipality was duly appointed by the Department of Water Affairs as an implementing agent to arrange for construction of the above works. The Municipality in implementing its agency agreement awarded the tender to a joint venture comprising Tlong Re Yeng Trading and Base Major Construction (Pty) Ltd.<sup>239</sup>

Two unsuccessful bidders, namely Esorfranki and Cycad, brought review proceedings of the tender award in the North Gauteng High Court. That court found that the tender process was flawed. The decision in awarding the tender by the municipality was found to have been motivated by bias and bad faith. The joint venture in turn made itself guilty of fronting and making false representations in its tender submission in an attempt to secure the tender. The High Court set the award aside and ordered the municipality to re-adjudicate the tenders it received.<sup>240</sup> In February 2011 the municipality re-adjudicated the tender applications and decided to award the tender to the joint venture once again. The appellants appealed to the Supreme Court Appeal (SCA) against that order and individually proceeded to institute review proceedings.

On appeal the main relief sought was to set aside the municipality's decision to once again award the tender to the joint venture and to consider awarding the tender to one of the two appellants.<sup>241</sup> Each application was accompanied by a claim for interim relief in the form of an interdict pending the outcome and final adjudication of the review application in order to prevent the municipality from taking any steps to implement its decision to re-award the tender to the joint venture.<sup>242</sup>

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<sup>238</sup>(40/13) [2014] ZASCA 21 (28 March 2014).

<sup>239</sup> Hereinafter referred to as the joint venture.

<sup>240</sup> *Esorfranki pipelines (PTY) LTD v Mopani District Municipality* para 3.

<sup>241</sup> *Esorfranki pipelines (PTY) LTD v Mopani District Municipality* para 4.

<sup>242</sup> *Esorfranki pipelines (PTY) LTD v Mopani District Municipality* para 4.

According to Rule 49(11) of the Uniform Rules of Court an application for leave to appeal against an order of court is suspended pending the outcome of the decision of such application.<sup>243</sup> When it was evident that the municipality and the joint venture failed to give an undertaking that the award would not be acted upon, Esorfranki proceeded in terms of sub-rule (11) to apply for an order that pending the outcome of the application for leave to appeal, the interim order should continue to operate.<sup>244</sup> This resulted in the granting of an interim order to suspend the joint venture from conducting an further work on the project.<sup>245</sup>

### **Legal Principles:**

The Supreme Court of Appeal per Van Zyl AJ upheld an appeal against a decision in the North Gauteng High Court in which it set aside a tender on the ground that, *inter alia*, the members of the joint venture had made false representations in their tender submission. Despite the High Court declaring the award to be illegal, it nonetheless ordered that the Joint Venture repair all its defective work and proceed to complete the work.<sup>246</sup>

The Supreme Court of Appeal held that the High Court should have set the contract aside. The tender process and the resultant contract were tainted by dishonesty and fraud. It was in breach of the Constitutional imperative that tender awards should be made in accordance with a system that is fair, equitable, transparent and cost effective. The decision of the High Court did not give effect to the public interest which demands that the tender process must be free from corruption and fraud and furthermore public monies should not end up in the pockets of corrupt officials and business people.<sup>247</sup>

The Court further held that the municipality has a duty to act in the public interest and to allow serious allegations of fraud and dishonesty in the tender process<sup>248</sup> to be adjudicated upon through

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<sup>243</sup> *Esorfranki pipelines (PTY) LTD v Mopani District Municipality* para 5.

<sup>244</sup> *Esorfranki pipelines (PTY) LTD v Mopani District Municipality* para 5.

<sup>245</sup> *Esorfranki pipelines (PTY) LTD v Mopani District Municipality* para 3.

<sup>246</sup> *Esorfranki pipelines (PTY) LTD v Mopani District Municipality* para 3.

<sup>247</sup> *Esorfranki pipelines (PTY) LTD v Mopani District Municipality* para 5.

<sup>248</sup> In *Tshopo v State* (29/12) [2012] ZASCA 193 para 37 this court, per Heher Judge of Appeal, stated the following about dishonesty in the procurement of state tenders:

legal proceedings. *In casu*, the municipality decided to identify itself with the interests of the tenderers who stood accused of improper conduct. The municipality also failed to provide undertakings not to implement its decision to award the tender to the joint venture when called upon to do so<sup>249</sup>.

It is submitted that the Mopani District Municipality acted in flagrant disregard of a court order not to award the tender to the joint venture companies.

### 3 CORRUPTION AND FRAUD PRECEDENTS WITHIN THE PUBLIC SECTOR

#### 3.1 *S v Kgantsi*<sup>250</sup>

During August 2006 the accused, a senior advocate working for the National Prosecuting Authority's Special Operations Unit, accepted large sums of cash and the use of a hired vehicle from one of two Nigerian prisoners arrested on charges of obtaining a passport for him and promising both prisoner a plea-bargain.<sup>251</sup> Unbeknown to her, the prisoners suspected that she was deceiving them and alerted the police. The suspect was subsequently arrested by means of a police trap.<sup>252</sup> The accused was charged with, *inter alia*, two counts of fraud (providing false information about her previous conviction to the National Prosecuting Authority and/or the Directorate of Special Operations in her security clearance application) and three counts of corruption under section 9(1)(a)(i)(aa) of the PCCA Act. The accused was found guilty on three counts of corruption and two counts of fraud.<sup>253</sup>

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'Fraud in the procurement of state tenders is a particularly pervasive form of dishonest practice. It undermines public confidence in the government that awards tenders, apparently without regard for nepotism, and it creates perceptions unfavourable to the services provided pursuant to such tenders. It is proving notably difficult for the authorities to identify and root out such malpractices. The courts are obliged to render effective assistance lest the game be thought to be worth the candle.'

<sup>249</sup> *Esofranki pipelines (PTY) LTD v Mopani District Municipality* para 32.

<sup>250</sup> [2007] JOL 20705 (W) – unreported.

<sup>251</sup> *S v Kgantsi* [2007] JOL 20705 (W) para 16 – 26.

<sup>252</sup> *S v Kgantsi* para 53.

<sup>253</sup> *S v Kgantsi* para 1.

## Legal Principles:

In terms of section 9(1)(a)(i)(aa) of the PCCA Act, any member of the prosecuting authority who directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of herself or the benefit of another person in order to act, personally or by influencing another person so to act, in a manner that amounts to the illegal, dishonest, unauthorised, incomplete or biased exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory contractual or any other legal obligation is guilty of the offence of corrupt activities relating to the prosecuting authority.

The state before closing its case wished to submit a written affidavit to the court, made by one of the state witnesses (one Mr Afolabi) who had died before testifying in this case. The State requested Judge Goldstein to admit the affidavit as admissible evidence in order to prove the State's case. Judge Goldstein ruled that the affidavit was admissible. He submitted the following reasons for his decision:<sup>254</sup>

In terms of section 3(1) of the law of Evidence Amendment Act<sup>255</sup> hearsay evidence shall not be admitted as evidence at criminal proceedings, unless:

- (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
- (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
- (c) the court, having regard to-
  - (i) the nature of the proceedings;
  - (ii) the nature of the evidence;
  - (iii) the purpose for which the evidence is tendered;
  - (iv) the probative value of the evidence;

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<sup>254</sup> *S v Kgantsi* para 65.

<sup>255</sup> Act 45 of 1988.

- (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
- (vi) any prejudice to a party which the admission of such evidence might entail; and
- (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.

Courts are generally reluctant to admit hearsay evidence in criminal cases.<sup>256</sup> Firstly, it must be pointed out that the affidavit made by the State witness (Mr Afolabi) which the State tendered as evidence to the court without *viva voce* (oral) evidence due to the death of the aforementioned witness can be construed as hearsay evidence. Since section 3(1) is an exclusionary rule, the court should proceed on the basis that the hearsay evidence is inadmissible unless there is reason to suppose that the interests of justice require its admission.<sup>257</sup> A consideration of the factors listed in section 3(1)(c) must provide a clear, though not overwhelming, preponderance of reasons in favour of admitting the evidence to rebut the presumptive exclusionary rule of hearsay evidence.<sup>258</sup>

Judge Goldstein referred to the case of *Hewan v Kourie NO and Another*<sup>259</sup> wherein Judge Du Plessis remarked that section 3(1)(c) introduces a flexibility which should not be negated by the addition of reliability as an overriding requirement.<sup>260</sup> He also cited the case of *S v Shaik*,<sup>261</sup> where the court stated it is the onus of the State to prove the guilt of an accused person beyond any reasonable doubt which entails the right to challenge evidence.<sup>262</sup> The right to challenge evidence does not always require cross – examination of the original declarant.<sup>263</sup> Judge Goldstein finally stated that cognisance of the true test for hearsay evidence to be admitted is whether the interest of justice demands its admittance which the judge answered in the affirmative.<sup>264</sup>

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<sup>256</sup> *S v Kgantsi* para 55.

<sup>257</sup> *S v Kgantsi* para 68.

<sup>258</sup> *S v Kgantsi* para 68.

<sup>259</sup> 1993 (3) SA 233 (T) at 239C-240B.

<sup>260</sup> *S v Kgantsi* para 68.

<sup>261</sup> [2005] JOL 14601 (D).

<sup>262</sup> *S v Kgantsi* para 70.

<sup>263</sup> *S v Kgantsi* para 70.

<sup>264</sup> *S v Kgantsi* para 70.

The provisions of section 51(2)(a)(i) of the Criminal Law Amendment Act prescribes the minimum sentence to be imposed by a court of law on a conviction of the crime of corruption to be fifteen (15) years' effective imprisonment.<sup>265</sup> Judge Goldstein took into account both the aggravating and mitigating circumstances pertaining to the accused when he deliberated on an appropriate sentence to be imposed on the accused.<sup>266</sup> One of the aggravating factors that was taken into account by Judge Goldstein was the fact that the accused was an official of the Court.<sup>267</sup> In mitigation of sentence the Judge took into account the fact that the accused served one (1) year in prison awaiting trial as well as the fact that the accused was divorced and had three children whom she had to support without assistance from her ex-husband (personal circumstances).<sup>268</sup> The Judge found substantial and compelling reasons without giving any detailed account thereof in this case to deviate from the prescribed minimum sentence of fifteen (15) years for each count of the corruption conviction.<sup>269</sup>

The accused was sentenced to ten (10) years imprisonment on two corruption charges. On the other counts of corruption and fraud the accused was sentenced to seven (7) years imprisonment which was suspended for five (5) years on condition that the accused is not convicted of a crime involving dishonesty committed during the period of suspension.<sup>270</sup> It is submitted that although Judge Goldstein deviated from the compulsory fifteen (15) year term of imprisonment, the offences of fraud and corruption were viewed in a serious light to warrant a term of imprisonment.

### 3.2 *S v Shaik & others*<sup>271</sup>

The first accused, Mr Shaik, and ten (10) other corporate companies were charged for two counts of corruption in contravention of the section (1)(1)(a)(i) and (ii) respectively of the Corruption Act<sup>272</sup> (the previous Act on corruption) and fraud.<sup>273</sup> The first accused was politically connected. One of the charges related to two hundred and thirty-eight (238) payments into the account of a

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<sup>265</sup> *S v Kgantsi* 106 para 6 (judgment on sentencing).

<sup>266</sup> *S v Kgantsi* 106 para 8 (judgment on sentencing).

<sup>267</sup> *S v Kgantsi* 106 para 8 (judgment on sentencing).

<sup>268</sup> *S v Kgantsi* 106 para 8 (judgment on sentencing).

<sup>269</sup> *S v Kgantsi* 106 para 8 (judgment on sentencing).

<sup>270</sup> *S v Kgantsi* 106 para 11 (judgment on sentencing).

<sup>271</sup> 2007 (1) SA 240 (SCA).

<sup>272</sup> Act 94 of 1992. Hereinafter referred to as the Corruption Act.

<sup>273</sup> *S v Shaik* 2007 (1) SA 240 (SCA) para 4.



politician holding an esteemed political office. The second charge (fraud) related to false journal entries in the financial statements of the accused's companies. The third charge related to the soliciting of a bribe by the accused from a French company purportedly to pay a senior politician.<sup>274</sup>

The arrangement of the corrupt relationship<sup>275</sup> as alleged by the State was the payment of five hundred thousand rands (R500 000) per annum by an arms company to a politician for shielding the company from an inquiry into corruption in the bidding process preceding the government's arms acquisition programme.

Judge Squires found the accused guilty on two (2) counts of corruption<sup>276</sup> and imposed a sentence of fifteen (15) years' imprisonment on each count.<sup>277</sup> In relation to the fraud charge Judge Squires on finding the accused guilty thereof imposed a sentence of three (3) years imprisonment. All terms of imprisonment were to run concurrently.<sup>278</sup>

### **Legal principle:**

In terms of section 1(1)(a) of the Corruption Act any person who corruptly gives or offers or agrees to give any benefit of any nature which is not legally due, to a person upon whom;<sup>279</sup>

- i. “any power has been conferred or who has been charged with any duty by virtue of any employment or the holding of any office or any relationship of agency or any law, or to anyone else, with the intention to influence the person upon whom such power has been conferred or who has been charged with such duty to commit or omit to do any act in relation to such power or duty; or
- ii. any power has been conferred or who has been charged with any duty by virtue of any employment or the holding of any officer or any relationship of agency or any law and who committed or omitted to do any act constituting any excess of such power or any neglect

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<sup>274</sup> *S v Shaik* para 5.

<sup>275</sup> Basson *Finish and Klaar: Selebi's fall from Interpol to the underworld* (2010) 200.

<sup>276</sup> *S v Shaik* para 48.

<sup>277</sup> *S v Shaik* para 49 and 229.

<sup>278</sup> Holden *The Arms Deal in your Pocket* (2008) 133 and 178.

<sup>279</sup> *S v Shaik* para 4 fn 3. See also section 1(1)(a)(i) and (ii) of the Corruption Act 94 of 1992.

of such duty with the intention to reward the person who such power has been conferred or who has been charged with such duty because he so acted.” is guilty of the offence of corruption.

The Supreme Court of Appeal upheld the States argument that section 1(1)(a)(i) of the Corruption Act does not expressly require communication of the offer to the person who is sought to be influenced and there is no reason to read such a requirement into the section.<sup>280</sup> In these circumstances an offer, within the natural meaning of the word, was made and there is no reason to think that the intention was to exclude such an offer from the offence of corruption in terms of the section.<sup>281</sup> The State proved that the accused was instrumental in persuading a French company to pay a bribe to a politician. It was for this reason that the accused was found guilty of the offence of corruption in terms of section 1(1)(a)(i) of the Corruption Act.

The Supreme Court of Appeal drew a reasonable inference that the accused in making the payments (whether as inducement or reward) were to influence a politician, to act in conflict of his duties in terms of the Constitution, in the furthering and pursuing of his (the accused’s) personal business interests.<sup>282</sup>

The Supreme Court of Appeal in its judgement made reference to the case of *R v Heyne*<sup>283</sup> wherein it was held that a false statement with regard to a fraud charge must involve a degree of risk of harm, which need not be financial or proprietary, neither must it be too remote or fanciful, to a person, not necessarily, the person to whom it is addressed.<sup>284</sup> The court ruled that communication by the accused to Bester (the internal financial accountant of the accused’s companies) is sufficient to prove the crime of fraud even though the accountant may not have been prejudiced by the false representation.<sup>285</sup>

The accused was convicted in terms of the previous Corruption Act which had very limited enactment and presented numerous difficulties for the criminal justice authorities to secure

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<sup>280</sup> *S v Shaik* para 206.

<sup>281</sup> *S v Shaik* at para 206.

<sup>282</sup> *S v Shaik* para 131.

<sup>283</sup> 1956 (3) SA 604 (A) 622.

<sup>284</sup> *S v Shaik* para 168.

<sup>285</sup> *S v Shaik* para 168.

convictions.<sup>286</sup> However, the Corruption Act has been replaced by the PCCA Act which is more effective in securing convictions.<sup>287</sup> The previous Corruption Act required the State to prove that the accused provided “a benefit which was not legally due” to another in order to secure a conviction of corruption. The current PCCA Act refers to the term ‘gratification’ which encompasses a wider definition and no longer refers to a “benefit which was not legally due”.<sup>288</sup> The PCCA Act makes provision for blacklisting of individuals and entities that have been convicted of corrupt activities.<sup>289</sup> These parties will then be barred from doing business with the government of South Africa.<sup>290</sup> The higher the status of the beneficiary of corruption the more serious the crime is viewed by the court (aggravating factor), concomitantly a severe punishment will be imposed by our courts. Decision makers in both the public sector should be cautious of individuals and businessmen fostering pretentious good relationships with ulterior motives.

### 3.3 *Selebi v S*<sup>291</sup>

On the 3<sup>rd</sup> of August 2010, Mr J.S Selebi, the former National Commissioner of the South African Police Service was convicted and sentenced by the South Gauteng High Court, Johannesburg for contravention of section 4(1)(a)(i) of the Prevention and Combatting of Corrupt Activities Act and sentenced to fifteen (15) years’ imprisonment. The court confirmed the essential elements of the general crime of corruption committed by a recipient which are the acceptance; of a gratification (payment or some other benefit); in order to act in a certain way (the inducement); unlawfulness and intention being the integral elements of the conduct of the accused.<sup>292</sup>

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<sup>286</sup> Lambrechts (2004) *Acta Criminologica* at 1 and 110 and Sibanda “The South African corruption law and bribery of foreign public officials in international business transactions: A comparative analysis” (2005) *SACJ* 1.

<sup>287</sup> Sibanda (2005) *SACJ* 2.

<sup>288</sup> Pragal (2006) *Acta Criminologica* 19. Lambrechts (2004) *Acta Criminologica* 106.

<sup>289</sup> Lambrechts (2004) *Acta Criminologica* 115 and 116.

<sup>290</sup> Sibanda (2005) *SACJ* at 2.

<sup>291</sup> [2012] 1 All SA 332 (SCA).

<sup>292</sup> *Selebi v State* 26 para 39; Burchell (2013) at 273 and *Snyman* (2008) 412.

In this case the State had succeeded in proving that Mr Selebi, whilst he was the National Police Commissioner, received payment and/or benefit from one Mr Glen Agliotti and secondly provided Mr Agliotti with *quid pro quo*.<sup>293</sup>

In reference to the above, the trial court found that there were four instances which constitutes Mr Selebi providing a benefit to Agliotti in return for gratification received by him. These were namely, a report by the United Kingdom law enforcement authorities<sup>294</sup>, a 2005 National Intelligence Estimate report<sup>295</sup>, an e-mail implicating Agliotti in drug related activities<sup>296</sup> and the attendance of Mr Selebi at meetings and dinners on Agliotti's request with his associates.<sup>297</sup>

The judge in this case held that in a case of corruption, it is the accused's conduct and intent that must be determined. Furthermore, whether the corruptor (Mr Agliotti) believed he bribed the accused or not is irrelevant. The accused was charged with contravention of section 4(1)(a) of the Prevention and Combatting of Corrupt Activities Act. This section creates an offence where any public officer, who directly or indirectly, accepts or agrees or offers to accept any gratification.<sup>298</sup> Furthermore, the aforementioned act creates an offence in instances where any person who directly or indirectly, gives or agrees or offers to give any gratification. It is evident from the aforementioned discussion that both the conduct of the corruptor and the corruptee are criminalised by the Act. In this regard the Prevention and Combatting of Corrupt Activities Act conforms to the common law crime of bribery. The trial judge referred to the case of *S v Shaik* 2007 (1) SA 240 (SCA) where it was held that it would be flying in the face of common sense and ordinary human nature to think that payments to Mr Zuma did not attract a "mutually beneficial symbiosis and generated a sense of obligation in the recipient".<sup>299</sup> Therefore, an absence of the conclusion of any agreement between Mr Selebi and Mr Agliotti was not detrimental to the state's case in securing a conviction on a charge of corruption.<sup>300</sup>

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<sup>293</sup> Oxford Advanced Dictionary 2016 defines 'quid pro quo' as a thing given in return for something else.

<sup>294</sup> Selebi v State 255 para 366.

<sup>295</sup> Selebi v State 260 para 377.

<sup>296</sup> Selebi v State 265 para 385.

<sup>297</sup> Selebi v State 270 para 394; Basson 2010) 211- 213.

<sup>298</sup> Selebi v State 229 para 316.

<sup>299</sup> Selebi v State 230 para 316; Holden (2008) 134 and Basson (2010) 295.

<sup>300</sup> Basson (2010) 299.

## Legal principle:

In this case the appeal court had to consider whether the State succeeded in proving beyond any reasonable doubt that the payments which the accused (Selebi) received from Agliotti were *quid pro quo* with the requisite *mens rea* by the accused.<sup>301</sup> In response to this question the appeal court alluded to the fact that section 4(1)(a)(i) of the PCCA Act does not expressly refer to the element of intention instead it refers to the words ‘in order to act, personally or by influencing another person to act’.<sup>302</sup> Burchell is of the view that an inference can be drawn with regard to the element of ‘intention’ under section 4(1)(a)(i) of the PCCA Act<sup>303</sup> Furthermore, there is a presumption in our law that *mens rea* is required for a contravention of a statutory provision where it is not expressly mentioned in a statute.<sup>304</sup> This interpretation by our law with regard to the presumptive element of intention makes it easier for the State to prove ‘intention’ where a contravention is present as identified in section 4 of the PCCA Act.<sup>305</sup> Section 24 of the PCCA Act provides that where the prosecution proves a gratification (payment) was accepted or agreed upon and the State is not able to establish a reasonable link of the acceptance of the gratification, which raises a reasonable doubt, it suffices to say that the accused accepted the gratification ‘in order to act’ in a manner envisaged in section 4 of the PCCA Act.<sup>306</sup>

Judge Joffe, in the court of first instance, stated that the agreement between the corruptor and corruptee or *quid quo pro* from corruption is not required where abuse of position of authority and breach of trust is clearly shown by the evidence.<sup>307</sup>

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<sup>301</sup> Selebi v State 26 para 39.

<sup>302</sup> Section 4(1)(a)(i) of the Prevention and Combating of Corrupt Activities Act. See also Selebi v State 26 para 39.

<sup>303</sup> Selebi v State 26 para 39.

<sup>304</sup> Burchell (2013) at 273.

<sup>305</sup> Selebi v State 26 para 39.

<sup>306</sup> Selebi v State 27 para 39.

<sup>307</sup> [2012] 1 All SA 332 (SCA) 229 para 316. See also Section 4(1)(a)(ii) of the Prevention and Combating of Corrupt Activities Act.

### 3.4 *Tshopo v State*<sup>308</sup>

During June 2001 the Free State Education Department<sup>309</sup> issued a tender for the delivery of school books and other educational material to various schools within the Province.<sup>310</sup> One of the objectives of the tender was to attract tenders from previously disadvantaged communities. The Treasury Instructions which included tax compliance of the tenderers formed part of the tender document. The tender application also contained a declaration of interest which required prospective tenderers to declare any connection through family, friendship or work, with any member of the Tender Board or the Department of Education. The purpose of this declaration was to satisfy the tender objectives and also to ensure transparency. In July 2001 the second appellant signed and submitted a tender application on behalf of Abelusi Enterprises<sup>311</sup>. According to the tender application the first appellant held a fifty percent (50%) interest in Abelusi and applied for a tax clearance certificate which was one of the requirements for the tender. The first appellant controlled the bank account of Abelusi and used the second appellant as a front to apply for the tender because he foresaw that he might not be successful due to his work and family connections. The first Appellant was under an obligation to disclose that he was an official of the Free State Provincial Administration<sup>312</sup> and was married to a Member of the Executive Council<sup>313</sup> of the Free State Department of Health. The Department of Education awarded the tender to Abelusi in October 2001 where the second appellant signed a memorandum of agreement on its behalf for the distribution and delivery of school stationery and books. A forensic accountant and auditor was employed to conduct a criminal investigation into irregularities in the Abelusi tender. The report by a forensic accountant and auditor who was part of the investigations proved that the first appellant actively withdrew funds from Abelusi which were subsequently deposited into his personal bank account. It was also proved that the second and third appellants did not benefit financially from the award of this tender agreement.

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<sup>308</sup> (29/12) [2012] ZASCA 193.

<sup>309</sup> Hereinafter referred to as the Department of Education.

<sup>310</sup> *S v Tshopo* para 3.

<sup>311</sup> Hereinafter referred to as Abelusi.

<sup>312</sup> Hereinafter referred to as the Administration.

<sup>313</sup> Hereinafter referred to as a MEC.

The appellants were found guilty of fraud. The first appellant was sentenced to four (4) years imprisonment. The second appellant was sentenced to two (2) years imprisonment wholly suspended for five (5) years on certain conditions. The third appellant was sentenced to four (4) years imprisonment of which two (2) years imprisonment was suspended for four (4) years conditionally.

### **Legal Principle:**

Judge Heher of the Supreme Court of Appeal declared that the only reasonable inference to be drawn from the evidence was that the first appellant, who held a fifty percent (50%) interest in Abelusi (albeit as a sleeping partner because of his potential conflict of interest) continued when it tendered for and obtained the contract for distribution of educational material to schools within the Province.<sup>314</sup> The second and third appellant's proprietary interest in Abelusi was of little or no consequence. The first appellant's benefit derived out of the successful tender is relevant.

The second appellant did not disclose her connections to the first and third appellants in the declaration of interest which may have barred her from being successful with the tender.<sup>315</sup>

Judge Heher contended that the subjective understanding of the meaning of the word 'connection' in the Declaration of Interest must be determined when an accused is charged with the crime of fraud.<sup>316</sup> The words 'connected with the tenderer' in the preamble of the Declaration of Interest is interpreted to include any person who stood to derive a financial benefit(s) from the performance of his or her interest in the tender company and/or who directed its affairs.<sup>317</sup> In both situations the second appellant must have known that the first appellant was 'connected' with Abelusi.<sup>318</sup>

The Department of Education and/or other tenderers suffered prejudice or potential prejudice as a result of the accused's non-disclosure of his connections with persons in the Free State Department of Education and Health which would have barred him from being awarded the tender. The non-

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<sup>314</sup> *S v Tshopo* para 21.

<sup>315</sup> *S v Tshopo* para 21.

<sup>316</sup> *S v Tshopo* para 23.

<sup>317</sup> *S v Tshopo* para 23.

<sup>318</sup> *S v Tshopo* para 23.

disclosure resulted in a fraudulent misrepresentation. It was argued by the accused that the Department of Education did not suffer any prejudice or potential prejudice by the non-disclosure of Abelusi because it paid money for services actually rendered. In rebuttal it was argued by the State that the non-disclosure by Abelusi prejudiced the other tenderers and the community at large who always complain that employees use their influence in one way or the other to obtain tender contracts. The non-disclosure also frustrates the State's efforts to eradicate favouritism and bias in the awarding of tender contracts.

#### **4. CONCLUSION**

It is evident from the foregoing discussion of case law, that indeed a number of offences of fraud and corruption committed by public and private officials have been prosecuted by the State and adjudicated upon by our courts. However, it must be emphasized that these cases still remain the “tip of the iceberg” and more needs to be done by municipalities and law enforcement agencies to bring as many cases as possible before our courts for prosecution. It is submitted that the legislative mechanisms such as the Preferential Procurement Policy Framework Act and the PCCA are effective in dealing with fraud and corruption. However, the implementation thereof in bringing perpetrators of fraud and corruption to book by the municipalities is often slow and protracted as evidenced in legal precedents. It would appear that in some instances municipalities are reluctant to pursue cases where persons and institutions have made themselves guilty of committing fraud and corruption.

It is contended that although each case especially fraud and corruption must be decided on its own merits, the legislature has deemed the commission of fraud and corruption to be serious offences, hence they have prescribed a harsh minimum punishment of fifteen (15) years' imprisonment. Furthermore, public officials and officers of Courts who are found guilty of fraud and corruption must expect to be harshly punished by our courts unless there are substantial and compelling reasons to justify a lighter sentence. Furthermore, once the guilt of accused persons in cases of fraud and corruption have been established beyond any reasonable doubt, it is clear that the courts do not hesitate to impose imprisonment as a form of an appropriate punishment.



The courts have held that fraud and corruption in the procurement of state tenders is a particularly pervasive form of dishonest practice. It undermines public confidence in the government departments that awards tenders. There is no doubt that detecting fraud, corruption and malpractices within municipalities can prove difficult. This fact can also inhibit the ability of municipalities to eradicate or root out the scourge of fraud, corruption and malpractices.

Individuals, business persons and enterprises will face the full wrath of the law should they make themselves guilty of fraud and corruption.

## CHAPTER 4

### EARLY WARNING SYSTEMS (EWS)<sup>319</sup> OF FRAUD AND CORRUPTION

#### 1. INTRODUCTION

The South African government initiated budgetary and financial reforms concerning procurement in order to modernise the management of the public sector, make it more people-friendly and sensitive to meeting the needs of the community.<sup>320</sup> Procurement reforms in South Africa were focused on two objectives, namely the promotion of the principles of good governance and the introduction of a preference system to address the development of socio-economic values.<sup>321</sup> Unfortunately individuals within local government especially in municipalities use the procurement process as a means of self-enrichment. The South African procurement reform process is entrenched in section 112 of the Municipal Finance Management Act, section 76(4)(C) of the Public Finance Management Act and the PPPF Act. These Acts can only be effective if it is correctly implemented. The National Treasury completed a joint Country Assessment Review with the World Bank to evaluate procurement practices throughout the public sector.<sup>322</sup> The report also identified red flags which could be an indication of the existence of fraud and corruption in the procurement process which may warrant further investigation.

Public procurement is one of the areas most vulnerable to fraud and corruption.<sup>323</sup> The exorbitant amount of money involved and the expenditure profile of public procurement programs<sup>324</sup> renders

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<sup>319</sup> Early warning systems are referred to as red flags in various different sources. The writer for the purposes of this study will incorporate red flags under the term early warning systems. Early warning systems will hereinafter be referred to as red flag(s).

<sup>320</sup> Ambe and Badenhorst-Weiss "Procurement challenges in the South African public sector" (2012) *Journal of Transport and Supply Chain Management* 245.

<sup>321</sup> Ambe and Badenhorst-Weiss 245.

<sup>322</sup> Ambe and Badenhorst-Weiss 245.

<sup>323</sup> Fraud and corruption awareness handbook. Integrity Vice Presidency, The World Bank Group. [http://siteresources.worldbank.org/INTDOI/Resourses/INT\\_inside\\_fraud\\_text\\_090909.pdf](http://siteresources.worldbank.org/INTDOI/Resourses/INT_inside_fraud_text_090909.pdf) (Accessed on the 23 June 2015) 2.

<sup>324</sup> Corrupt payments to government officials and steering contracts to favoured bidders, collusion among bidders in obtaining contracts and submission of fraudulent bids intended to circumvent the competitive bidding process

public procurement more vulnerable and susceptible to fraud and corruption.<sup>325</sup> The relatively high degree of discretion that public officials, politicians and parliamentarians have over public procurement programs makes it prone to fraud and corruption as compared with the other areas of public expenditure.<sup>326</sup> The most common form of corruption schemes in procurement often involve more than one type of misconduct, beginning with a bribe, followed by bid rigging and finally fraud to cover up the scheme.<sup>327</sup> This chapter will provide an analysis on how fraud and corruption manifests in public procurement. Red flags which are indicative of possible fraudulent and corrupt practices and schemes will also be identified.

## 2. WHAT ARE RED FLAGS?

According to the Concise Oxford English Dictionary<sup>328</sup> a red flag is defined as a warning of inherent danger. A red flag is a set of circumstances that are unusual in nature or vary from the normal activity. It is a signal that something is out of the ordinary and amiss which may warrant further investigation in order to determine, in our case, the existence or non-existence of fraud and corruption in the tender process of municipalities in South Africa.<sup>329</sup> A red flag does not indicate guilt or innocence but merely provides possible warning signs of the existence of fraud and corruption in the procurement process.<sup>330</sup>

Various red flags will be identified in this chapter however the list is not exhaustive. Some red flags are conspicuous in the procurement process whilst others can be difficult to identify and interpret. Therefore, there is a need for constant monitoring and management of the procurement process in order to identify red flags timeously.

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<sup>325</sup> Edgardo and Pradhan *The Many Faces of Corruption: Tracking Vulnerabilities at the Sector Level* (2007) 63.

<sup>326</sup> Edgardo and Pradhan (2007) 296.

<sup>327</sup> Fraud and corruption awareness handbook. Integrity Vice Presidency, The World Bank Group, 7. See also Rodney *et al* *Fraud Prevention and Detection: Warning Signs and the Red Flag System* (2014) 63 and 89.

<sup>328</sup> Pearsell *Concise Oxford English Dictionary* (2002).

<sup>329</sup> Iyer and Samociuk *Fraud and Corruption: Prevention and Detection* (2016) 71. See also Kenny and Musatova "Red Flags of Corruption in World Bank Projects: An analysis of infrastructure contracts" Finance Economics and Urban Unit, *The World Bank* at 3.

<sup>330</sup> Rodney *et al* (2014) 4.

### 3. MANIFESTATIONS OF FRAUD AND CORRUPTION SCHEMES IN PUBLIC PROCUREMENT

Corruption schemes in procurement manifests by means of the following methods;<sup>331</sup>

#### a) Demand for payment

A government official demands a bribe or kickback<sup>332</sup> from a business entity or an individual alternatively a business entity or an individual offers a bribe in exchange for a contract award. In most cases the corrupt official will allow the payer of the bribe to inflate the contract price in order cover the bribe amount and preserve its actual profits.

#### b) Bid rigging

This is done to ensure that the contract will be awarded to the business entity or individual who is willing to pay a bribe for the purposes of influencing the awarding of a contract. Government officials can also manipulate the bidding process to favour a particular supplier, contractor or product by tailoring the bid specifications accordingly.<sup>333</sup> In this case a competitive bid may be rendered useless because the process has been rigged to ensure that only one party will be able to successfully meet the specifications of the proposed bid.<sup>334</sup>

#### c) Fraud

In order to recover the cost of the bribe and to exploit the corrupt relationship the business entity usually, with the knowledge and complicity of a government official, inflates prices, receives compensation for work not performed, does not comply with contract specifications or uses substandard products during implementation. This often results in further corrupt payments to inspectors or auditors whose tasks are to inspect or audit the project compliance.

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<sup>331</sup> Fraud and corruption awareness handbook. Integrity Vice Presidency, The World Bank Group 7.

<sup>332</sup> A Kickback generally occurs when a company who wins a public contract “kicks back” a bribe to the government official (s) who influenced the awarding of the contract (either voluntarily or under duress) to that winning company. A percentage of the value of the contract is often the amount of the kickback. In highly corrupt cases the kickback becomes the added cost that all bidders must take into consideration when bidding on public contracts, which makes even more deceptive. The payment of a kickback by a bidder secures both the influence over the procurement decision-making process and to solicit direct and immediate rewards.

<sup>333</sup> Rodney *et al* (2014) 67.

<sup>334</sup> Rodney *et al* (2014) 67.

## 4. PHASES OF THE PROCUREMENT CYCLE WHICH ARE PRONE TO FRAUD AND CORRUPTION<sup>335</sup>

In order to minimize the risk of fraud and corruption municipalities should examine their procurement system for potential loopholes.<sup>336</sup> It is therefore necessary to identify and analyse the different phases in the procurement cycle where fraud and corruption can be committed. There are four phases in the procurement cycle namely;

- a) identification and design;
- b) advertising, prequalification, bid document preparation and submission of bids;
- c) bid evaluation and
- d) contract performance, administration and supervision.

### 4.1. PROJECT IDENTIFICATION AND DESIGN<sup>337</sup>

This phase deals with the selection of projects and the identification of funding sources thereof.<sup>338</sup> It incorporates the agreements of the contract packages<sup>339</sup> for procuring the identified goods, works, services, the methods for procuring them and the prior review thresholds.<sup>340</sup> At this stage of the cycle projects often face political interference.<sup>341</sup> According to the World Bank Report, for example, the selection of road projects are frequently influenced by politicians, who use their approval authority over budgets to pressure the procuring entity to appoint their favoured business entity. This influence at the outset of a project may lead to bid rigging or collusion in later phases of the procurement process.

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<sup>335</sup> Fraud and corruption awareness handbook. Integrity Vice Presidency, The World Bank Group. 9 and Rodney *et al* (2014) 67.

<sup>336</sup> Edgardo and Pradhan (2007) 308.

<sup>337</sup> Edgardo and Pradhan (2007) 308.

<sup>338</sup> Edgardo and Pradhan (2007) 308 and Rodney *et al* (2014) 68.

<sup>339</sup> Contract Splitting: the packaging of contracts is designed to attract as many qualified bidders as possible in order to secure the best practice and quality. Legitimate considerations regarding decisions to package certain contract include (i) capacity of potential bidders to deliver the outputs specified; (ii) risks related to the bundling or unbundling of items; (iii) centralized versus decentralized procurement and (iv) sequencing of procurement actions in line with needs.

<sup>340</sup> Fraud and corruption awareness handbook. Integrity Vice Presidency, The World Bank Group. 10.

<sup>341</sup> Edgardo and Pradhan (2007) 308.

#### **4.1.1 RED FLAGS OF PROJECT IDENTIFICATION AND DESIGN**

Red flags may manifest in this phase in the following ways.<sup>342</sup> The project approval process lacks clear and objective criteria for selecting projects. In the case of physical works, selected locations are not based on a demonstrated public need or the component parts of the project are numerous and too small to take advantage of potential economies of scale. The government does not have sufficient capacity to monitor decentralized units responsible for conducting the procurement hence government officials exploit the lack of monitoring due to the incapacity of municipalities. The procurement plan relies heavily on local competitive bidding, so contracts are not tendered widely. No affirmative anti-corruption control plan is built into the project design. Cost estimates are inconsistent with market related rates and the most economical solution is not given due consideration.

#### **4.2 ADVERTISING, PREQUALIFICATION, BIDDING DOCUMENTS PREPARATION AND SUBMISSION OF BIDS<sup>343</sup>**

The second phase of the procurement cycle commences once the project has been identified and the responsible municipality decides that a contract is necessary to achieve the desired outcome.<sup>344</sup>

##### **4.2.1 ADVERTISING<sup>345</sup>**

An invitation to bid for a public contract must be advertised in widely circulated newspapers<sup>346</sup> and Government Tender Bulletins.<sup>347</sup> The widespread public advertisement leads to a transparent and inclusive bidding process.<sup>348</sup> The invitation to bid should also be advertised ahead of the bid

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<sup>342</sup> Edgardo and Pradhan (2007) 309 and Rodney *et al* (2014) 68.

<sup>343</sup> Edgardo and Pradhan (2007) 309.

<sup>344</sup> Edgardo and Pradhan (2007) 309.

<sup>345</sup> Edgardo and Pradhan (2007) 309. Rodney *et al* (2014) 69.

<sup>346</sup> Both provincially and nationally.

<sup>347</sup> Bids must be advertised for a minimum period of 21 days before closure except in urgent cases when bids may be advertised for such shorter period as the accounting officer or accounting authority may determine. Edgardo and Pradhan (2007) 309.

<sup>348</sup> Edgardo and Pradhan (2007) 309.

submission deadline in order to provide potential bidders adequate time to obtain the bidding documents, prepare and submit their bids. The purpose of the widespread public advertising is to maximize competition and deter would-be cartels or bid-rigging schemes.<sup>349</sup> Advertisements can be manipulated to exclude bidders. In certain instances, bidding invitations are not advertised. Officials produce false advertisements that were never published or were printed by the newspaper in only one edition.<sup>350</sup> In order to disrupt the collusive scheme, the participation of bidders from outside of the collusive scheme is essential to prevent colluding bidders from limiting invitations which were restrictively advertised or not advertised at all.<sup>351</sup>

#### 4.2.1.1 RED FLAGS IN ADVERTISING<sup>352</sup>

In some instances, an invitation to bid for a public contract is not advertised at all. Limiting circulation of the advertisement by posting it in a local rather than a national newspaper which results in fewer bids being received.<sup>353</sup> An invitation to bid is advertised in only one edition of a single newspaper with limited circulation. The advertisement may also omit all the information that a potential bidder needs in order to decide whether to bid or not, for example, the name and address of the official or organization from which the bidding documents may be obtained or the final date for the bid submission. The advertisement could contain all the required information, but the tender is conducted in a manner that is inconsistent with the published information; for example, the location of the office where bids are required to be submitted is changed at a late stage before submission and not all bidders are notified of the change. An invitation to bid is published at short notice, for example, three or four days prior to submission date. This results in a situation where not all qualifying bidders are able to submit their bids timeously hence they are automatically excluded from the bidding process. The bid specification deliberately provides vague descriptions of goods, works or services required which results in the exclusion of potential qualifying bidders. It is submitted that the only logical explanation for restricted publication of invitations to tender as well as the omission of essential details pertaining to bid advertisements is

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<sup>349</sup> Edgardo and Pradhan (2007) 309.

<sup>350</sup> Fraud and corruption awareness handbook. Integrity Vice Presidency, The World Bank Group. 12.

<sup>351</sup> Edgardo and Pradhan (2007) 309.

<sup>352</sup> Edgardo and Pradhan (2007) 310 and Rodney *et al* (2014) 69.

<sup>353</sup> Fraud and corruption awareness handbook. Integrity Vice Presidency, The World Bank Group. 16.

done to facilitate collusive practices by bidders. This could lead to a situation where a government official who directly or indirectly participates in the bidding process receiving a pecuniary benefit.<sup>354</sup>

## 4.2.2 PREQUALIFICATION STAGE<sup>355</sup>

It is standard practice to embark upon a prequalification or shortlisting process of bidders especially in high-value or technically complex public contracts.<sup>356</sup> This standard practice ensures that only those bidders who possess the necessary experience, capability and resources to successfully complete the contract will be allowed to bid. The bidders must satisfy the contract-specific qualification requirements to be short-listed or prequalified. The purpose of this stage is to eliminate frivolous, unreliable or unqualified bidding entities. However, manipulation of the short-listing and prequalification process can be used as a method to exclude qualified competitive bidders or to favour smaller bidding entities.<sup>357</sup>

### 4.2.2.1 RED FLAGS IN PREQUALIFICATION

The following discussion highlights some of the red flags that can be encountered during the prequalification process and is not an exhaustive list.<sup>358</sup> The invitation to prequalify is insufficiently advertised, for example, it has unusual or unreasonable evaluation criteria. Inadequate time is given for preparing and submitting prequalification applications. Prequalification requirements are stated in vague terms or are unrelated to the contract to be awarded.<sup>359</sup> Applicants are required to submit voluminous administrative documentation in

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<sup>354</sup> Fraud and corruption awareness handbook. Integrity Vice Presidency, The World Bank Group. 24.

<sup>355</sup> Edgardo and Pradhan (2007) 310 and Fraud and corruption awareness handbook. Integrity Vice Presidency, The World Bank Group. 16.

<sup>356</sup> Edgardo and Pradhan (2007) 310.

<sup>357</sup> Edgardo and Pradhan (2007) 310. Fraud and corruption awareness handbook. Integrity Vice Presidency, The World Bank Group. 15.

<sup>358</sup> Edgardo and Pradhan (2007) 310 and 311; Fraud and corruption awareness handbook. Integrity Vice Presidency, The World Bank Group 16 and Rodney *et al* (2014) 70.

<sup>359</sup> For example, for a construction contract estimated to cost R10 million, to be constructed over a period of two years, applicants are required to have access to R15 million in cash, whereas a much lower level of cash flow would be adequate to perform the contract satisfactorily.



multiple copies. The absence of a single bid document results in the rejection of an entities' application in its entirety. The pre-registration of applicants on a government-approved supplier register or database is necessary in order to be allowed to apply for prequalification. Short-listed entities do not have the requisite qualifications as those who have not been shortlisted. The method for evaluating an applicant's qualifications is not stated in the pre-qualification documents. Subjectivity as well as an arbitrary merit points system is adopted in the pre-bidding process. It is for this reason that in certain instances some bidders fail to prequalify for bid contracts.

A government official is directly or indirectly linked to a contractor or supplier through a family relationship or having a vested interest in the business entity. A Bid Evaluation Report (BER) provides no objective or valid reason for the rejection of certain bids. Entities complain that officials refuse to make bidding documents available to potential bidders or to accept the submission of bids. Potential bidders complain that they are coerced by officials to refrain from bidding by means of subtle suggestions, intimidation or physical threats.

### **4.2.3 PREPARATION OF BIDDING DOCUMENTS STAGE<sup>360</sup>**

Bidding documents must be prepared by each bidder for every proposed procurement invitation. The bidding documents set out their rules the bidders have to comply with when preparing and submitting their bids. The rules include technical requirements of the procurement, the technical specifications of the goods to be procured and the evaluation criteria used to select the successful bidder.<sup>361</sup> Bidding documents also contain standard sections<sup>362</sup> which may contain variations in accordance with the contract specifications. Bidding documents can be deliberately altered by corrupt officials to favour one or more bidders to the exclusion of others. <sup>363</sup>

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<sup>360</sup> Edgardo and Pradhan (2007) 311; Fraud and corruption awareness handbook. Integrity Vice Presidency, The World Bank Group. 18 and Rodney *et al* (2014) 70.

<sup>361</sup> Edgardo and Pradhan (2007), 311.

<sup>362</sup> Such as instructions to bidders, general conditions of contract and contract-specific sections.

<sup>363</sup> Edgardo and Pradhan (2007) 311 and Rodney *et al* (2014) 68.

#### 4.2.3.1 RED FLAGS IN THE PREPARATION OF BIDDING DOCUMENTS<sup>364</sup>

The splitting of bid specifications into separate contracts are used to bypass policies or regulations. This allows employees or managers to fraudulently secure the bid contract in favour of a specific bidder. Splitting of contracts may indicate a desire to discourage certain large entities from bidding hence qualifying small local entities could gain a competitive advantage in the bidding process. The fee charged to potential bidders to obtain the bidding documents is excessive in comparison with the value of the goods to be procured.<sup>365</sup> Excessive bidding document fees may be intended to deter certain bidders from purchasing the bidding documents.

The procuring entity submits bidding documents in a non-standard format which is eventually accepted. This may enable the procuring entity to use arbitrary evaluation criteria or to avoid imposing standard contract conditions on favoured bidders thereby harming the public interest in respect of cost effectiveness. Technical specifications in bidding documents stipulate a particular brand name hence the equivalent product by another manufacturer is barred from being used. This limits competition and discriminates against other manufacturers' products. Bidding documents do not provide clear instructions on how bidders should prepare their bids or structure their bid pricing. Bidding documents fail to disclose the criteria used to evaluate bids and how these criteria will be applied to identify the successful bidder. In some instances, the bid specifications are significantly narrower or broader than in previous similar procurement invitations. Project officials gives inadequate responses or clarifications to complaints from bidders about vague, ambiguous or incomplete specifications. Non-compliance of bidding procedures such as the failure to enforce bidding deadlines and taking breaks during opening of bids. This usually results in the bidder sharing the content or making amendments to the original bid. The successful bidder bids just below the lowest bid. Officials and the favoured bidder communicate, for example by e-mail, or during socializing prior to the bidding process.

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<sup>364</sup>Edgardo and Pradhan (2007) 311 and Rodney *et al* (2014) 79.

<sup>365</sup> For example, a fee of R5,000 for a bidding document to procure goods is estimated to cost R200,000.

#### 4.2.4 SUBMISSION OF BIDS STAGE<sup>366</sup>

Collusion amongst bidders in the bidding process with or without the participation of government officials is often prevalent. The colluding bidders may agree secretly that a specific business entity will succeed in obtaining the bid through price manipulation of the contract where after it is shared amongst the colluding parties in the bidding process. One of the colluding parties would thereafter approach an influential government official for the purpose of bribing him and ensuring that a specific bidder who was party to the colluding practice succeeds with the bid contract.<sup>367</sup> This type of agreement between bidders eliminates or limits competition from other bidders.<sup>368</sup>

##### 4.2.4.1 RED FLAGS IN BID SUBMISSIONS

Red flags may manifest in collusive practices in the several ways.<sup>369</sup> Favoured bidders are informed by officials about tender cost estimates for the contract, whilst other bidders are not. Officials fail to provide tender clarification in respect of bidding documents or provide the clarification only to one or more favoured bidders. There is an unusual time delay between the deadline for submission of bids and the public bid opening. The location for submission of bids and/or bid opening is changed at a late stage and not all bidders are informed of the change. Certain bidders or groups of bidders are prevented from submitting their bids to limit competition.<sup>370</sup> Bids are submitted and accepted after the bid submission deadline to favour certain bidders. Some of the bids are not opened in public. The officials of the tender fail to keep accurate minutes of pre-bid meetings, including questions raised and answers given thereto, and to distribute them promptly to all bidders. The price discounts of the bids are not read out at the public bid opening which can result in the ranking of bids being altered. The officials of the bid fail to provide secure storage of bid applications submitted prior to the deadline. This poses a risk of a bidder's

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<sup>366</sup> Edgardo and Pradhan (2007), 313 and Rodney *et al* (2014) 72-73.

<sup>367</sup> Rodney *et al* (2014) 72

<sup>368</sup> Rodney *et al* (2014) 73.

<sup>369</sup> Edgardo and Pradhan (2007) 313.

<sup>370</sup> For example, in a tender for a high-value provincial construction contract in a small country in south-eastern Europe, a cartel of bidders from the province where the works were to be constructed placed armed gunmen outside the provincial government office where the bids were to be submitted to forcibly prevent bidders from outside the province from submitting their bids.

application being prematurely opened and information regarding their prices shared with competing bidders.

The red flags discussed above may result in corrupt tender officials accepting late bids submitted by favoured bidders who have inside information regarding the prices from other bidders.<sup>371</sup> Valid bidders could be denied access to bid drop-off points. Officials could also fail to open their bids.<sup>372</sup>

#### 4.3. BID EVALUATION STAGE<sup>373</sup>

The bid evaluation committee<sup>374</sup> plays an important role in the reviewing and evaluation of submitted bids to ensure that the bids submitted conforms to all the relevant required criteria.<sup>375</sup> The criteria used to evaluate the bids vary from one evaluation system to another during the bid evaluation stage.<sup>376</sup> It is imperative to ensure that the principles of reliability, integrity and transparency are adhered to during the bid evaluation stage because this stage identifies the successful bidder who will be awarded the contract. These principles are dependent on the clarity of the bid evaluation criteria and whether those criteria were fairly applied during the selection process.<sup>377</sup> One of the main evaluation criterion in the public procurement process is pricing.<sup>378</sup> However, there are also non-pricing evaluation criteria which are also applied in the evaluation of the bids.<sup>379</sup> These criteria may include, *inter alia*, the delivery time, payment schedule, costs of operating the equipment, efficiency, the compatibility of the equipment offered with equipment already owned and operated by the municipality, the availability of after-sales service and spare parts, training, safety and environmental impact.<sup>380</sup> The successful bidder is awarded the contract based on who scored the highest points after the bid evaluation stage. The bid evaluation committee members have a wide discretion in awarding and allocating points to bidders during the

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<sup>371</sup> By discarding elements of the bid in order to disqualify the bidder.

<sup>372</sup> Fraud and corruption awareness handbook. Integrity Vice Presidency, The World Bank Group. 18.

<sup>373</sup> Edgardo and Pradhan (2007) 314.

<sup>374</sup> Suitable competent officials form the bid evaluation committee.

<sup>375</sup> Fraud and corruption awareness handbook. Integrity Vice Presidency, The World Bank Group 19.

<sup>376</sup> Quality, suitability, price and abilities of the bidder are also examples of criteria used to evaluate bid applications.

<sup>377</sup> Edgardo and Pradhan (2007) 314.

<sup>378</sup> Edgardo and Pradhan (2007) 314.

<sup>379</sup> Edgardo and Pradhan (2007) 314.

<sup>380</sup> Edgardo and Pradhan (2007) 314.

bid evaluation stage.<sup>381</sup> This opens the process to abuse by public officials or bid evaluation committee members.

The Preferential Procurement Policy Framework Act<sup>382</sup> guides the government procurement point scoring system.<sup>383</sup> In terms of the PPPFA it prescribes that the lowest acceptable bid must receive 80<sup>384</sup> or 90<sup>385</sup> points for pricing.<sup>386</sup> A bid is regarded as acceptable provided:

- a) It complies in all respects with the specification and conditions of the bid;
- b) The bidder submitted the required original tax clearance and other clearances; or registration forms as prescribed by the various Acts and in the bid documentations and
- c) The bidder has the necessary capacity and ability to execute the contract.

According to section 2(1) of the PPPF Act the preference point system operates in the following ways:

- a) Contracts must be awarded to the bidder with the highest point score,
- b) Point scores are to be awarded for pricing, meeting social objectives specified in the PPPFA, and quality,
- c) The social objectives specified include contracting with persons or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability. In respect of contracts over R500 000, a maximum of ten (10) points can be awarded to a bidder for achieving social objectives provided that the bid is the lowest acceptable tender and obtains ninety (90) points for the pricing,
- d) For contracts worth R500 000 or less, a maximum of twenty (20) points may be awarded to a bidder for meeting social objectives, provided that the bid is the lowest acceptable tender and obtains eighty (80) points for pricing,

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<sup>381</sup> Edgardo and Pradhan (2007) 315.

<sup>382</sup> Act 5 of 2000 together with attached Regulations. Hereinafter referred to as the PPPFA.

<sup>383</sup> See section 2(1) of the Preferential Procurement Policy Framework Act.

<sup>384</sup> 80/20 preference point system is used when the Rand value is equal to or above R30 000 and up to a Rand value of R500 000.

<sup>385</sup> The 90/10 preference point system is used when the Rand value is above R500 000.

<sup>386</sup> See the Department of National Treasury circular 3/4/3/2/10.

- e) The contract must be awarded to the tenderer (bidder) who scores the highest combined points for the pricing and achieving social objectives, unless factors such as experience and expertise overrides social objectives for the purposes of achieving quality assurance.

The PPPF Act gives effect to section 217 of the Constitution and stipulates that government institutions are mandated to procure goods and services in a manner which is fair, equitable, transparent, competitive and cost effective. Section 217 of the Constitution further allows public institutions to structure their procurement policies and practices on the basis of preference for previously disadvantaged groups of persons.

#### 4.3.1 RED FLAGS IN BID EVALUATIONS<sup>387</sup>

The bid evaluation members and public officials do not have the necessary technical expertise to evaluate the submitted bids. The committee is too large or dominated by a single individual. Staff involved in contract award decisions become involved in contract supervision. The existence of the foregoing phenomenon may be an indication that either fraud or corruption in the bid evaluation process has taken place. There may be a need to interrogate or scrutinize the bid evaluation process carefully in order to determine or establish whether fraud and or corruption has taken place.

#### 4.4 CONTRACT PERFORMANCE, ADMINISTRATION AND SUPERVISION STAGE<sup>388</sup>

Contract performance commences once the contract is awarded. The bidders are expected to timeously satisfy the terms and conditions of the contract. This includes the management of the contract by the municipality to effectively and efficiently monitor the proper implementation thereof.<sup>389</sup> These monitoring procedures must be established in advance and should ensure that accurate documentation and records are kept in order to prove that monies are being utilized as

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<sup>387</sup> Fraud and corruption awareness handbook. Integrity Vice Presidency, The World Bank Group. 19.

<sup>388</sup> Edgardo and Pradhan (2007) 315.

<sup>389</sup> Edgardo and Pradhan (2007) 315.

specified in the contract. The monitoring of the contract and work performance is essential in order to combat fraud and corruption during this stage of the procurement process. Failure to frequently and properly monitor the bid contract creates opportunities for individuals to siphon money without completing or meeting the standard of quality as set out in the contract specifications. Random forensic spot checks should be conducted throughout the contract performance stage in order to eradicate the possibility of fraud and corruption being committed.

#### 4.4.1 **RED FLAGS IN CONTRACT PERFORMANCE**

Some of the red flags that may rear its “ugly head” during the stage discussed in paragraph 4.4. will be discussed. The contract specifications or scope of work are altered after the contract is awarded. Discrepancies exist when site inspection of work performance is conducted and is usually not in accordance with the contract specifications. The evaluation of a bidder’s performance is not documented and recorded accurately. The approval of poor quality goods and materials exist which require regular maintenance. Records from the contractor’s expenses, payroll and other details indicate that the entity did not incur costs necessary to comply with the contract specifications.<sup>390</sup> The successful bidder resists inspection of the books and records in disregard of the government’s audit rights. The delay in the commencement of work or the delivery of services are outside of the normal timeframes.

## 5. **COMMON RED FLAG INDICATORS OF FRAUD AND CORRUPTION WITHIN THE LOCAL GOVERNMENT**

The World Bank has developed an integrity management system which assists in the early detection of fraud and corruption. This system discusses the dynamics of fraud and corruption as well as the detection thereof during the procurement process.

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<sup>390</sup> For example; the contractor did not purchase the quantity or quality of materials required under the contract; own or lease all the required equipment to carry out the work; have the necessary labour with required skills on the job site.

It must be emphasised that the identified red flags in the procurement process is not an exhaustive list. In order to further elucidate the manifestation of red flags in the procurement process the researcher will attempt to further discuss the most common red flag indicators of fraud and corruption within local government as identified by the World Bank in paragraphs 5.1 to 5.10 hereunder.<sup>391</sup>

### **5.1. COMPLAINTS FROM BIDDERS AND INTERESTED PARTIES**

Complaints from bidders and interested parties are the main source of obtaining information about the commission of fraud and corruption in the bidding process. The complaints in most cases identify irregularities in the bidding process which upon further investigation uncovers the commission of fraud and/or corruption. Investigations have revealed that pursuant to the identification of red flags the supply or use of defective materials could be overlooked in cases where an official has received a bribe from a service provider who has won a bid.

### **5.2 MULTIPLE CONTRACTS BELOW PROCUREMENT THRESHOLDS**

It can happen that perpetrators of fraudulent schemes attempt to avoid a higher level of review or scrutiny. In order to avoid scrutiny, they often adjust a contract to fall below the procurement threshold or alternatively split contracts into smaller ones.

### **5.3 UNUSUAL BID PATTERNS**

Unusual bid patterns can be as a result of collusive bidding practices by the winning bidder. The winning bidder can coordinate the bidding of participants and dictate their bidding prices in order to ensure that the designated successful bidder submits the lowest price. This often includes the co-ordination and preparation of bids on behalf of collusive bidders. The designated winner may also use subsidiaries, affiliates or shell companies to submit complimentary bids. One identifying

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<sup>391</sup> Zoellick Most common Red Flags of Fraud and Corruption in Procurement. Integrity Vice Presidency, The World Bank Group. [http://siteresources.worldbank.org/INTDOI/Resources/Red\\_flags\\_reader\\_friendly.pdf](http://siteresources.worldbank.org/INTDOI/Resources/Red_flags_reader_friendly.pdf) (Accessed 4 June 2015) 1 and 2 and Maphalla, *Blow the whistle on Fraud and Corruption Booklet*. <http://www.education.gpg.gov.za/Documents/Anti-corruption%20booklet.pdf> (accessed on the 11 July 2013) 5 and 6.



feature of the manifestation of this *modus-operandi* in the fraudulent scheme may be the submission of bids from a single telefax machine, use of identical last names, addresses, telephone and telefax numbers on bid documents. A close scrutiny of bid documents could also reveal the use of the same type of face or letter print styles and the same spelling mistakes.

During the 2010 Soccer World Cup held in South Africa collusion between constructions entities took place in the tendering process to build soccer stadia. The red flag indicator of collusion was that all projects experienced time delays and cost overruns. This prompted the National Treasury, municipalities as well as the Competition Commission to conduct an investigation into the increased construction and upgrading costs. The result of the investigation found that the budget estimates submitted in 2006 were significantly higher than the initial 2005 estimates. The Competition Commission laid a complaint into the alleged prohibited practices relating to collusion between a number of construction entities. This matter was resolved by the Competition Commission extending a fast track settlement process which required all construction entities party to the collusion to come clean, in return for a lenient penalty. A total of twenty-one (21) entities applied for leniency and disclosed one hundred and thirty (130) projects. The settlement contained a condition which placed an obligation on the entities not to engage in collusive practices which would distort tender processes.<sup>392</sup>

#### 5.4 INFLATED AGENT FEES

Fees can be used to disguise corrupt payments to agents. This involves the use of “middlemen” known as brokers, agents or facilitators in the fraudulent procurement scheme. In these cases, a contractor hires a “middleman” to assist with the bid preparation and contract negotiations. The fee paid to the local agent not specified in any itemized billing submitted for payment by the winning bidder. A procurement unit places an order, for example, for office equipment and furniture with the “middleman” at a specified price per item. The “middleman” acquires the

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<sup>392</sup> Fuzile, L. The Department of National Treasury “Public Supply Chain Management Review” (2015), <http://www.treasury.gov.za/publications/other/SCMR%20REPORT%202015.pdf> (accessed 16 May 2016).

furniture and equipment from a local supplier at a much lower price and keeps the profit or splits the profit with the procurement public officials.

### 5.5 SUSPICIOUS BIDS/BIDDERS

The authenticity and legitimacy of successful bidders are suspect. Unscrupulous persons set up fictitious business entities to secure bidding contracts or a “shadow bidder” can submit higher priced bids to make it appear as if there is the existence of competition.

### 5.6 NON-SELECTION OF LOWEST BIDDER

The lowest evaluated bidder is declared non-responsive without sound reasons, thereby awarding the bid contract to the preferred bidder. This indicates the possibility of bid rigging by project officials who have a vested interest in a specific contractor with the expectation of receiving undue monetary payment from the preferred winning bidder for themselves or on behalf of other government officials. This results in certain bidders receiving preference in spite of tendering higher prices.

### 5.7 REPEATED AWARDS TO SAME CONTRACTOR

Requests for an exception to the approved procurement plan to allow for the awarding of contracts to a specific bidder is the *modus operandi*. These requests should be closely scrutinized and monitored as it may indicate the possibility of fraud and corruption being committed by a government official(s). These requests are often justified under the guise of expediency or urgency. Procurement thresholds can be manipulated to bring contract values below certain thresholds. Bids can also be split into multiple contracts to subvert procurement threshold amounts.

## 5.8 CHANGES IN CONTRACT TERMS AND CONDITIONS

Prices are increased for the purpose of escalating profits through a change in scope manufacturing rates and general conditions between the contract selection and contract signing period. Once the contract is implemented the contractor could substitute services by those of lesser value, quality and/or not using the agreed upon man hours.

A government department advertised its intention to lease an existing building for a period of two years which required a lettable area of three thousand two hundred square meters (3250m<sup>2</sup>) and eight five (85) under cover parking bays. The bid evaluation committee rejected four (4) bid submissions who offered to construct new buildings for a two-year period lease at a rate of six (6) per cent escalation rate per annum. The Accounting Officer signed the contract however material conditions were subsequently altered to a lease period of ten (10) years, an escalation rate of eight (8) per cent per annum, a lettable area of five thousand four hundred and sixteen square meters (5416m<sup>2</sup>) and the construction of a new building.<sup>393</sup> This example illustrates unauthorised alteration or variation to the bid contract terms and conditions.

## 5.9 MULTIPLE CHANGE ORDERS TO CONTRACTS

This occurs subsequent to the signing of contract(s) and during the implementation phase change orders are often proposed. Barring certain circumstances which justify change orders which are legitimate, there are those where the client and the contractor collude to increase the value of the contract without any real delivery of new services or products.

## 5.10 POOR QUALITY OF WORKS AND/OR SERVICES

Investigations and thorough implementation reviews have revealed that in most cases low quality or undelivered goods, works or services is a strong indicator of the existence of fraud and corruption. When a contractor pays a bribe or colludes with other bidders to secure a procurement, these illicit payments have to be recovered in order for the contract to still remain profitable. The

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<sup>393</sup> The Department of National Treasury (2015) 18.

ways of recovering illicit payments is to inflate the contract price, deliver less or provide poor quality works, services and goods than what was specified in the contract.

## 6. CONCLUSION

This chapter identifies and analyses each stage of the procurement cycle. The early warning indicators in the form of red flags were set out after every stage of the procurement cycle in order to identify the possible existence of fraud and corruption.

It is clear from the discussion in this chapter that there are adequate legislative requirements regulating the public procurement process. However, this is not sufficient as human intervention by public officials in the procurement process can lead to the commission of fraud and corruption. The red flag indicators which may require further investigation in order to identify or determine fraud, corruption or malpractices expose the nature and extent thereof as well as identify the individuals involved. The laws and regulations in the procurement process need to be fairly and equitably enforced by municipalities. Constant and consistent management of the procurement process must be exercised at all times in order to deter fraudulent and corrupt practices. It is also important that public officials involved in the tender administration process make themselves fully *aufait* with the legislative requirements as well as the implications of non-compliance thereof in order efficiently and effectively conduct their duties without prejudice or favour.

## CHAPTER 5

# FORENSIC INVESTIGATION OF FRAUD AND CORRUPTION WITHIN THE CRIMINAL JUSTICE SYSTEM OF SOUTH AFRICA

## 1 INTRODUCTION

In this chapter the roles and responsibilities of the various institutions that investigate fraud and corruption will be discussed. A detailed explanation of forensic methods employed by the institutions in investigating fraud and corruption will be explored. This chapter will also address whether the investigative institutions effectively and efficiently respond to the crimes of fraud and corruption that takes place within local government. An exposé of the “Case Theory Approach” relevant to forensic investigation of the crimes of fraud and corruption will be examined.

South Africa has adopted a multi-agency approach towards fighting fraud and corruption. The effective implementation and application of the anti-fraud and corruption framework relies on having strong investigative institutions to implement and apply the various anti-fraud and corruption legislation and normative frameworks.<sup>394</sup>

## 2. ESSENTIAL CHARACTERISTICS OF CRIMINAL INVESTIGATION AND FORENSIC INVESTIGATION?

Criminal investigation is the systematic collecting of evidence which may sometimes, entail evidence analysis as well as the reconstruction of crime scenes, the apprehension of perpetrators and the preparation of the evidence for the purposes of prosecuting the perpetrator(s) in a court of law.<sup>395</sup>

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<sup>394</sup> National Prosecuting Authority of South African Annual Report 2013/2014 40.

<sup>395</sup> Montesh *A critical analysis of crime investigation system within the South African criminal justice system: a comparative study* (2007) (unpublished PHD thesis University of South Africa) 107; Gillespie *The Best Practices applied by forensic investigators in conducting lifestyle audits on white collar crime suspects* (2014) (unpublished

According to the Advance Oxford Learner's Dictionary<sup>396</sup> "forensic" is defined as being connected with the scientific tests used by the police when trying to solve a crime.<sup>397</sup> Furthermore, forensic investigation comprises of a scientific investigative deduction with the purpose of institution legal proceedings in a court of law and bringing the perpetrators of crime to court to face justice.<sup>398</sup> Forensic (Forensic science) relates to the application of scientific methods to the investigation of crime.<sup>399</sup> Forensic investigation is the systemic examination of crimes to discover facts and truths.<sup>400</sup>

The criminal investigator should conduct criminal investigations for the purposes of resolving the criminal hypothesis and with the intention of presenting all evidence obtained in the course of forensic investigation.<sup>401</sup> The investigator should strive towards gathering admissible and credible evidence in order to prove the guilt of the accused in a court of law.<sup>402</sup> It is submitted for the purpose of this study that forensic investigation is the scientific approach towards gathering evidence in cases of fraud and corruption.<sup>403</sup>

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Thesis of *Master Technologiae*, University of South Africa) 15; Stelfox *Criminal Investigation: An introduction to principles and practice* (2009) 1-2 and Marais *Physical evidence in crime investigation* (1992) 13.

<sup>396</sup> Hornby *Oxford Advanced Learner's Dictionary* (2007) 583.

<sup>397</sup> Gillespie 15; Goss *Forensic Auditing* (2004) (unpublished LLM Thesis Rand Afrikaans University) 6 and Jackson and Jackson *Forensic Science* (2008) 1.

<sup>398</sup> Gillespie 15, Sivnarain (2010) The value of investigative profiling of fraud offenders by forensic investigators (unpublished in fulfilment of *Master of Technologiae*, University of South Africa) 20 and Zysman *Forensic accounting demystified*. Zysman Forensic Accounting. <http://www.forensicaccounting.com/one.htm#start> (accessed on 18 August 2016).

<sup>399</sup> Browne and Walker *Readers Digest word power Dictionary* (2002) 378.

<sup>400</sup> Jacobs *Analyzing Criminal Minds: Forensic investigative science for the 21<sup>st</sup> Century* (2011) 1.

<sup>401</sup> Gillespie 15, Sivnarain 20.

<sup>402</sup> Davia *et al Accountant' guide to fraud and detection and control* (2000) 11.

<sup>403</sup> Sivnarain 31.

### 3 FORENSIC INVESTIGATIVE INSTITUTIONS THAT INVESTIGATE CRIMES OF FRAUD AND CORRUPTION WITHIN SOUTH AFRICA

The Criminal Justice System in South Africa is comprised of three pillars namely; the police, the prosecution service and the court, and the correctional (prison) system.<sup>404</sup> The Constitution is the supreme law of the land in our country which legally mandates the South African Police Service (SAPS) and the National Prosecuting Authority (NPA) to investigate crime. Section 179 of the Constitution deals with the instituting of criminal proceedings as the function of the NPA.<sup>405</sup> Section 205 of the Constitution gives effect to the duties and objectives of the SAPS.<sup>406</sup>

The NPA has been created by virtue of section 179(1) of the Constitution, with its head being the National Director of Public Prosecutions with many prosecutors who execute a prosecution function.<sup>407</sup> In section 179(2) of the Constitution and section 20 of the National Prosecuting Authority Act<sup>408</sup> members of the NPA are vested with the powers to institute and conduct criminal proceedings on behalf of the state.<sup>409</sup> However, this does not include the power to conduct criminal investigations. It is submitted the NPA is not precluded from guiding and managing the criminal investigation process.

Section 205 (1), (2) and (3) of the Constitution prescribes the functions and objectives of the SAPS which is to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and uphold and enforce the law.<sup>410</sup> It is clear that the police have an inherent Constitutional mandate to combat and investigate crime. The SAPS legislative mandate is prescribed in the South African Police Service Act<sup>411</sup> and the Criminal Procedure Act. The Constitution does not prescribe exclusive rights for the South African Police

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<sup>404</sup> Keuthen *The South African Prospective Service: Linchpin of South African Criminal Justice System?* (2007) (unpublished LLM Thesis UNISA) 7.

<sup>405</sup> Montesh (2007) 4 and Keuthen 12.

<sup>406</sup> Montesh (2007) 4.

<sup>407</sup> Keuthen 12 and Matthews *Criminal (in)justice in South Africa: A civil society perspective* (2009) ISS 98.

<sup>408</sup> Act 32 of 1998. Hereinafter referred to as the NPAA.

<sup>409</sup> Montesh (2007) 107.

<sup>410</sup> Montesh (2007) 4.

<sup>411</sup> Act 68 of 1995. Hereinafter referred to as the SAPS. Section 16 of the South African Police Service Act deals with the investigation of organised crime as envisaged by section 179 of the Constitution.

Service to investigate crime. In *S v Botha and others*<sup>412</sup> the court held that crime investigation is not the sole mandate of the SAPS. Furthermore, it was held that it was not improper for a corporation to conduct its own investigations and thereafter hand over the evidence to the police for the institution of prosecution.

The SAPS, NPA, the Directorate of Special Operations (DSO), Special Investigative Unit (SIU), as well as the Asset Forfeiture Unit (AFU) are forensic institutions in South Africa which carry-out forensic investigations in order to combat fraud and corruption within local government. A detailed discussion of the above-mentioned forensic investigative institutions will ensue.

### **3.1 THE ROLE OF SOUTH AFRICAN POLICE SERVICE (SAPS)**

#### **3.1.1 INTRODUCTION**

The draft white paper of safety and security released in May 1998 states that if policing is to improve safety and security, it will do so through arresting and bringing criminal perpetrators to court with sufficient evidence to secure a successful prosecution.<sup>413</sup> This will act as an effective deterrent for potential offenders thereby reducing the perception of criminal impunity which exists within the South African society.<sup>414</sup> This identifies criminal investigation as the core of policing.<sup>415</sup> The document further emphasizes that there should be a renewed focus on criminal investigations and an increase in investigative capacity.

This research will focus mainly on the SAPS method of the investigation. One of the main objectives of the SAPS is to investigate and also initiate the forensic criminal investigation process in response to the commission of the crimes of fraud and corruption within municipalities.<sup>416</sup>

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<sup>412</sup> (1) 1995(2) SACR 598 (W) headnote.

<sup>413</sup> Altbeker *Solving Crime: The State of the SAPS detective service* (1998) ISS 10 and Montesh (2007) 112.

<sup>414</sup> Altbeker 10.

<sup>415</sup> Altbeker 8.

<sup>416</sup> Altbeker 12.



### 3.1.2 INVESTIGATIVE POWERS OF THE SAPS

In order to execute the investigative functions of the SAPS it is mandated to, *inter alia*, search and seize, gather evidence, arrest, detain and charge suspects and to maintain criminal records.<sup>417</sup> These powers enhance the ability SAPS to effectively investigate the crimes of fraud and corruption especially within municipalities.<sup>418</sup> The essential implementation of criminal investigations must result in prosecution, conviction of the accused, otherwise criminal investigation will have no positive impact on the reduction of crime.

In terms of section 20 to 25 of the Criminal Procedure Act the SAPS have the authority to gather evidence by searching any premises associated with a crime and seizing goods which resulted from the commission of the crimes of fraud and corruption.<sup>419</sup> A search warrant can either be issued before a trial or during a trial.<sup>420</sup> Before the trial, a magistrate or justice of peace may be asked to issue a warrant, in light of information subjected under oath, which has to afford a reasonable basis for the belief that an article covered in section 20 is in possession of a person or in a place inside of the jurisdictional area of the magistrate or justice. The warrant issued must authorize a specific SAPS official to seize the objects mentioned in terms of section 20 of the Criminal Procedure Act.<sup>421</sup> This is one of the lawful ways in which the SAPS can gather physical or documentary evidence required to prove a case of fraud and/or corruption emanating from a municipality.

Property can be searched by SAPS with or without a warrant.<sup>422</sup> Section 22 of the Criminal Procedure Act sets out the legal permission for a search to be conducted with a warrant.<sup>423</sup> This section also allows for the SAPS to search and seize property without a warrant should there be a reasonable belief that the obtaining of a search warrant will defeat the object of the search and

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<sup>417</sup> Altbeker 14 and Montesh (2007) 113.

<sup>418</sup> Altbeker 14.

<sup>419</sup> Altbeker 14; Kruger *Hiemstra Criminal Procedure: Chapter 2 Search and Seizure* (2008) 2:1 and Du Toit *et al Commentary on the Criminal Procedure Act: Chapter two Search and Seizure* (2016) 2-14.

<sup>420</sup> Kruger (2008) 2:7 and Du Toit *et al* (2016) 2-14.

<sup>421</sup> Montesh (2007) 113 and Du Toit *et al* (2016) 2-14. .

<sup>422</sup> Montesh (2007) 113 and Du Toit *et al* (2016) 2-14. .

<sup>423</sup> Basdeo "A critical analysis of police powers of search and seizure: A constitutional challenge" (2009) *Acta Criminologica* 82; Montesh (2007) 113 and Du Toit *et al* (2016) 2-14..

seizure and possibly allow the offender to dispose of evidence.<sup>424</sup> The SAPS also have the power to enter premises in connection with state security or any other offence<sup>425</sup> for purposes of obtaining evidence<sup>426</sup> and forfeiture of articles.<sup>427</sup> Chapters five (5) and six (6) of the Prevention of Organised Crime Act together with section 35 of the Criminal Procedure Act may also be used in the forfeiture of articles by the state. The above legislative provisions provide the SAPS with the necessary mandate to execute their investigative functions effectively and gather the relevant evidence that is required to prove a case of fraud and/or corruption that has taken place within a municipality.<sup>428</sup>

In certain cases, where it is difficult to gather the necessary evidence to prove the commission of fraud and corruption it may be necessary for the SAPS to monitor electronic communication of individuals who perpetrate these crimes. The surveillance of electronic communications commonly referred to as ‘wiretapping’ is another effective investigative technique utilized by SAPS to gather evidence, provided it is conducted within the parameters of the law.<sup>429</sup> The Regulation of Interception of Communications and Provisions of Communications-related Information Act<sup>430</sup> governs legal surveillance in South Africa and regulates the interception and monitoring of telecommunications. The SAPS may obtain authorisation by way of application from the High Court only in order to intercept and monitor communications of individuals suspected of being involved in committing fraud and or corruption. The SAPS must provide substantial evidence that the offence committed or about to be committed is serious and cannot be properly investigated in any other matter except for the granting of such interception and monitoring order by the High Court.<sup>431</sup> In view of the fact that the commission of fraud and corruption is committed amidst a veil of secrecy within municipalities the foregoing legislation

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<sup>424</sup> Basdeo (2009) 78-79 and Montesh (2007) 114.

<sup>425</sup> Section 25 of the Criminal Procedure Act; Basdeo (2009) 78 and Montesh (2007) 114.

<sup>426</sup> Section 26 of the Criminal Procedure Act.

<sup>427</sup> Section 35 of the Criminal Procedure Act.

<sup>428</sup> Basdeo (2009) 75.

<sup>429</sup> Cohen (2003) IPSA Advisory 10: The Regulation of interception of Communications and Provision of Communication-related Information Act, No. 70 of 2002. [http://protea.tenet.ac.za/ISPA\\_Advisory\\_RIC%20Act.PDF](http://protea.tenet.ac.za/ISPA_Advisory_RIC%20Act.PDF). (Accessed 8<sup>th</sup> August 2016) 1.

<sup>430</sup> Act 70 of 2002.

<sup>431</sup> Cohen (2003) 6.

provides SAPS with cutting edge investigative tool which enables them to effectively investigate fraud and corruption within municipalities.

The often secretive nature of the commission of the crimes of fraud and corruption renders the criminal investigative thereof extremely difficult. Challenges are faced by SAPS to obtain evidence as there are no crime scenes, fingerprints or eye-witnesses for the exception of the criminal participants involved.<sup>432</sup> The SAPS utilizes its forensic investigative skills and techniques to interview suspicious individuals, examine documents, conduct search and arrest operations, perform physical and technical surveillance, act as an undercover officer, manager informers, conduct an entrapment operation and arrange witness protection.<sup>433</sup>

The commission of fraud and corruption, due to its complexity, often require the employment of a forensic accountant by SAPS to investigate the financial paper trail of crimes and present their expert evidence in court.<sup>434</sup>

### **3.1.3 FUNCTIONS AND RESPONSIBILITIES OF THE DETECTIVE SERVICE OF SAPS**

The Detective Service is tasked with the primary responsibility of investigating crimes including that of fraud and corruption which emanate from within municipalities in South Africa. The Detective Service is comprised of four components namely;<sup>435</sup>

- a) General Investigation,
- b) Serious and Violent Crime,
- c) Organised Crime and
- d) Commercial Branch.

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<sup>432</sup> Man-Wai (2006) Investigation of Corruption Cases: The Eleventh International Training Course on the Criminal Justice Response to Corruption Visiting Expert's papers.

[http://www.unafei.or.jp/english/pdf/RS\\_No79/No79\\_19VE\\_Man-wai2.pdf](http://www.unafei.or.jp/english/pdf/RS_No79/No79_19VE_Man-wai2.pdf) (accessed 8 August 2016) 140-142.

<sup>433</sup> Man-Wai 143 and Lekube, "Manifestations of corruption in the City of Tshwane Metropolitan Municipality" (2015) (unpublished in fulfilment of *Magister Technologiae*, UNISA) 24.

<sup>434</sup> Van Romburgh *The training of a forensic accountant in South Africa* (2008) (unpublished Thesis in fulfilment of the degree *Master Commercii* in Management Accounting, North-West University) 1. The Shaik case has also led to the appointment of forensic accountants to assist in the investigation of commercial crimes in South Africa.

<sup>435</sup> Montesh (2007) 119.

The Detective Service engages the services of the Criminal Record Centre, the Forensic Science Laboratory and Crime Intelligence in order to support effective criminal investigation of crime of fraud and corruption.<sup>436</sup> The detective service mainly focuses on the investigation of general crime and commercial related crimes, operational information service, collection of physical evidence at crime scenes and the reconstruction of scenes by means of scientific techniques.<sup>437</sup>

The Commercial Branch of SAPS is mandated to combat and investigate commercial related crimes which also includes fraud and corruption offences from a syndicated involvement perspective.<sup>438</sup> The main objectives of the Commercial Branch<sup>439</sup> are the prevention and investigation of commercial related crimes by gathering, analysing, utilizing and disseminating evidence of commercial crimes in order to meet the legal responsibilities of the SAPS.<sup>440</sup>

A traditional accusatorial system<sup>441</sup> is used by the SAPS detectives to investigate crime. This means that the SAPS detectives are the primary force for the investigation of the fraud and corruption after which they hand over the evidence obtained to the prosecutor, who then becomes the *dominis litis*. The purpose of the collecting and gathering of evidence is to ensure that there is sufficient evidence for the accused to be prosecuted and convicted.<sup>442</sup>

When a criminal offence has been reported to the SAPS the detectives must conduct a criminal investigation. Once the investigation has been completed a police docket is opened and forwarded to the NPA. The prosecutor is tasked with determining whether sufficient evidence exists in order to secure a conviction of the accused on related charges. The prosecutor may direct further investigations to be conducted for the purpose of obtaining additional supporting evidence.<sup>443</sup>

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<sup>436</sup> Montesh (2007) 119.

<sup>437</sup> Montesh (2007) 119.

<sup>438</sup> Booysen, R Specialised Units of SAPS – A case study of the Waterwing in Gauteng (2009) (unpublished Thesis in fulfilment of *Master Technologiae*, UNISA) 29 and Montesh (2007) 121.

<sup>439</sup> Booysen 30 and Montesh (2007) 121.

<sup>440</sup> Booysen 30 and Montesh (2007) 121.

<sup>441</sup> Montesh (2007) 116. A system of criminal justice in which conclusions as to liability are reached by the process of prosecution and defence. It is the primary duty of the prosecution and the defence to press their respective viewpoints within the constraints of the rules of evidence while the judge acts as an impartial umpire, who allows the facts to emerge from this procedure.

<sup>442</sup> Montesh (2007) 116.

<sup>443</sup> Montesh (2007) 116.

When the prosecutor is satisfied that sufficient evidence exists to prosecute, the accused will be indicted and a court date will be determined for the trial.<sup>444</sup> The service of the summons and the subpoena of witnesses to attend the trial are carried out by the investigating officer.

## 3.2 THE ROLE OF THE NATIONAL PROSECUTING AUTHORITY (NPA)

### 3.2.1 INTRODUCTION

Section 179 (1) of the Constitution led to the establishment of the NPA. This gave rise to the promulgation of the National Prosecuting Authority Act which sought to enhance cooperation between the different government departments of the criminal justice system. The NPA also established as a mechanism for efficient and effective communication and co-operation between the Department of Justice and Constitutional Development and the South African Police Service.<sup>445</sup>

Section 179(2) of the Constitution together with section 20(1) the National Prosecution Authority Act confers express powers upon the NPA to institute criminal proceedings on behalf of the state and carry out any functions incidental to the institution of criminal proceedings. This includes supporting the investigation of a case, or where necessary discontinuing criminal proceedings.<sup>446</sup> Furthermore, Section 179(4) requires that the prosecuting authority must exercise its functions without fear, favour or prejudice. In *S v Ebrahim*<sup>447</sup> the court upheld this principle and cited an American Judge who argued:

*'Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizens. In a government of laws, the existence of government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole*

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<sup>444</sup> Montesh (2007) 116 and Joubert *Criminal Procedure* (2001) 210.

<sup>445</sup> Montesh (2007) 127 and Joubert 13.

<sup>446</sup> Matthews 99 and Montesh (2007) 127.

<sup>447</sup> 1991 (2) SA 553 (AD) and Dintwe (2008) "Oversight in the criminal justice system: A critical analysis" *Journal of Public Administration* 67.

*people by its example. Crime is contagious. If the government becomes the law breaker, it breeds contempt for law, it invites everyman to become a law unto themselves, it invites anarchy.”*

### **3.2.2 INVESTIGATIVE AND PROSECUTORIAL POWERS OF THE NPA**

The NPA plays a vital role in the fight against fraud and corruption by guiding the investigation and conducting the prosecution of person who have committed corruption, whether they be person from the public or private sector.<sup>448</sup> A “zero tolerance” approach has been adopted by the NPA<sup>449</sup> towards bribery and corruption across all functions. Independent decisions making (for example, decisions on dockets relevant to criminal cases) inherent in the trial process can be open to abuse if not closely monitored (docket management and security). Furthermore, non-compliance can easily support fraudulent and corrupt activities within critical processes such as supply chain management, covert operations, handling of dockets and management of seized or forfeited assets.<sup>450</sup> The NPA agrees that any incident of fraud and corruption will negatively impact the public’s confidence in its ability to conduct its investigative and prosecutorial functions which may lead to a miscarriage of justice.

Prior to the promulgation of the NPAA, prosecutors had no authority to investigate crimes.<sup>451</sup> The prosecutors could only monitor and guide police in its investigative capacity, of which police were not obliged to obey their instructions.<sup>452</sup> Sections 24(4)(c) of the NPAA gives the directors of public prosecution the authority to instruct the police to conduct investigations and obtains statements.<sup>453</sup> Furthermore, formal investigative powers are conferred on the NPA through the structure of investigative directorates.<sup>454</sup>

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<sup>448</sup> Nxasana, M. National Prosecuting Authority of South Africa Annual Report 40.  
<https://issafrica.org/crimehub/uploads/NPA%20Annual%20Report%202013-2014.pdf>

<sup>449</sup> The NPA’s current Strategic Plan for the years 2012 up to 2017.

<sup>450</sup> National Prosecuting Authority of South Africa Annual Report 25.

<sup>451</sup> Schönteich “Lawyers for the people: The South African Prosecution Service” (2001) ISS 41 and Keuthen 19.

<sup>452</sup> Schönteich 41 and Keuthen 19.

<sup>453</sup> Keuthen 19.

<sup>454</sup> Keuthen 19. The President of South Africa may establish not more than two additional investigating directions of the National Director and are assisted by prosecutors.

### 3.2.3 FUNCTIONS AND RESPONSIBILITIES OF THE INVESTIGATIVE DIRECTORATE OF THE NPA

Investigative directorates may initiate investigations if it has reason to believe that an offence has been or is being committed.<sup>455</sup> Thereafter, it may decide to prosecute depending on the offences pertaining to the investigations. It is for this purpose that the investigating directives are granted extensive powers which are set out in chapter 5 and chapter 6 of the NPAA.<sup>456</sup> An investigating director is entitled to summon any person(s) to furnish evidence and/or information under oath which is related to its investigation.<sup>457</sup> Documentary evidence as well as any other object can be examined and retained<sup>458</sup> during the investigation and used as corroborative evidence during prosecution. An investigative director also has the power to enter and search a premises to determine whether any evidence exists which is related to the criminal investigation.<sup>459</sup> Any supporting evidence found on the property search may be seized by the investigative director.<sup>460</sup>

The NPA plays a unique role within South Africa as it is the only institution that can prosecute cases of fraud and corruption in a court of law in South Africa. One of the primary roles of the NPA is to conduct prosecution directed forensic investigative techniques to combat the crime of fraud and corruption within municipalities.

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<sup>455</sup> Keuthen 19 and Section 28(1)(a) of the NPA Act as amended.

<sup>456</sup> See section 26-31 of the NPAA as amended. This chapter deals with the power, duties and functions relating to investigation directorates.

<sup>457</sup> Keuthen 20 and section 28(6)(a) of the NPAA as amended.

<sup>458</sup> Keuthen 20 and section 28(6)(b) of the NPAA as amended.

<sup>459</sup> Keuthen 21 and section 29(1) of the NPAA as amended.

<sup>460</sup> Keuthen 21 and section 29(1)(a) of the NPAA as amended.

## 3.4 THE DIRECTORATE OF SPECIAL OPERATIONS (DSO)

### 3.4.1 INTRODUCTION

The Directorate of Special Operations<sup>461</sup> was launched in September 1999 by President Mbeki and was introduced as a special adequately staffed and equipped investigation unit which was to deal with all national priority crimes which included fraud and corruption<sup>462</sup>. The Scorpions came into legal existence in January 2001 when the amendments to the NPAA came into operation<sup>463</sup>. The amendment established the Scorpions as an investigative directorate of the National Prosecuting Authority. The Scorpions consisted of four departments namely; operational support, crime analysis (intelligence), training and investigation.<sup>464</sup> The legal mandate of the Scorpions was to investigate serious organised crimes as well as corruption with the aim of prosecuting such offences. The Scorpions obtained its legal mandate by the following legislations;<sup>465</sup>

- a) Section 43A of the National Prosecuting Authority Act,
- b) Section 179 of the Constitution,
- c) Section 7 of the National Prosecuting Authority Act, and
- d) Section 2 of the national Prosecuting Authority Amendment Act.

The Scorpions were effective in investigating and prosecuting fraud and corruption within government departments. Unfortunately, the Scorpions were disbanded in January 2009.<sup>466</sup> A

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<sup>461</sup> Nicknamed the Scorpions. Herein after referred to as the Scorpions.

<sup>462</sup> It is argued that one of the motivating factors behind establishing the Scorpions was to raise public confidence in the ability of the government to fight crime.

<sup>463</sup> The Scorpions is governed by the National Prosecuting Authority Act which confers on it investigative powers.

<sup>464</sup> Redpath *"The Scorpions: Analysing the Directorate of Special Operations"* (1999) *ISS Monograph* 13. Mashele *"The Khampepe Commission: the future of the Scorpions at stake"* (2006) *ISS* 1 and Montesh (2007) 128.

<sup>465</sup> Montesh (2007) 128.

<sup>466</sup> Berning and Montesh *"Countering Corruption in South Africa: the rise and fall of the Scorpions and Hawks"* (2012) *SA Crime Quarterly* 3. The Scorpions were incorporated into the South African Police Services. The Hawks was established on the 6<sup>th</sup> of July 2009 and was mandated to prevent, combat and investigate national priority offences and any other offences referred to the Directorate by the National Commissioner. According to the *Glenister v President of the Republic of South Africa and others* (2011) (3) SA 347 (CC) the Hawks were declared constitutionally invalid on the 17 March 2011. The Constitutional Court ruled that the legislation establishing the Hawks was unconstitutional and invalid to the extent that it failed to secure an adequate degree of independence



discussion of the DSO, although disbanded, is necessary in order to illustrate how the South African criminal law effectively responds to the crime of fraud and corruption.

### 3.4.2 INVESTIGATIVE POWERS OF THE DSO

In terms of section 7 of the NPAA the Scorpions had both a legislative and operational mandate.<sup>467</sup> Section 7(1)(a) allows the Scorpions to investigate and carry out any functions incidental to investigations in order to gather, keep and analyse information.<sup>468</sup> The broad legislative mandate allowed the Scorpions to do anything necessary for criminal proceedings on offences committed in an organised fashion, or relating to any other offences proclaimed by the President in the Gazette.<sup>469</sup> This broad mandate was intended to enable the scorpions to investigate any matter and avoid “jurisdictional” problems in court.<sup>470</sup> The operational mandate allows the investigative director of the Scorpions to conduct an investigation on any matter which is categorized as a specific offence relating to organised crime or any other category determined by the President.<sup>471</sup>

Section 7 of the National Prosecuting Authority Act read together with section 4 of the national Prosecuting Authority Amendment Act confers the following powers of investigative directorate:<sup>472</sup>

- a) the power to investigate, gather, keep and analyse information,
- b) institute criminal proceedings related to offences committed in an organised fashion,
- c) categories of offences determined by the President by proclamation,
- d) to investigate and carry out any functions incidental to investigations, gather, keep and analyse information and

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for the Directorate for Priority Crime Investigation. The Constitutional Court gave government 18 months to rectify the situation. The government responded to the judgment with the South African Police Service Bill of 2012.

<sup>467</sup> Berning and Montesh 4; Mashele 7 and Redpath 43.

<sup>468</sup> Keuthen 15 and Redpath (2006) 43.

<sup>469</sup> Redpath “*Weathering the storm: Tough questions for the scorpions*” (2004) *SA Crime Quarterly*; Keuthen 15 and Redpath (2004) 46.

<sup>470</sup> Keuthen 15 and Redpath (2004) 43.

<sup>471</sup> Keuthen 15 and Redpath (2004) 46. The operational mandate of the Scorpions is believed to be a “Circular One”, which outlines both the general and particular requirements which the investigating director will apply before authorizing an inquiry or ‘declaring a matter in terms of section 28’.

<sup>472</sup> Montesh (2007) 129; Keuthen 15 and Redpath (2004) 43.

- e) where appropriate, institute criminal proceedings and carry out any necessary functions incidental to instituting criminal proceedings.

The above-mentioned powers indicated that the Scorpions were vested with the powers to adopt a proactive, multidisciplinary approach to fight crime.<sup>473</sup> The rationale behind the establishment of the Scorpions was the integrations of three traditionally separate functions namely: intelligence. Gathering, investigations and ensuing prosecutions.<sup>474</sup>

The Special investigators of the Scorpions had the same powers as those conferred upon a peace officer or the SAPS.<sup>475</sup> These powers related to the investigation of offences, the entry and search of premises, the seizure and removal of articles, the execution of warrants and the attendance of an accused person at court as set out in the Criminal Procedure Act.<sup>476</sup>

### 3.4.3 FUNCTIONS AND RESPONSIBILITIES OF THE DSO

The Scorpions was based on the *troika* principle which integrates the methodology of analysis/intelligence, investigation and prosecution to fight national priority crimes, including fraud and corruption.<sup>477</sup> The investigative team comprised of investigators, prosecutors and analysts who collected intelligence information.<sup>478</sup> This principle applied throughout the duration of the investigation process. The prosecutor involved in the initial stages of the investigation of the case also lead the prosecution in court.<sup>479</sup>

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<sup>473</sup> Redpath (2004) 47 and Montesh (2007) 130.

<sup>474</sup> Montesh (2007) 130 and Redpath (2004) 5.

<sup>475</sup> Section 30 of the NPPA read together with section 14 of the National Prosecuting Authority Amendment Act.

<sup>476</sup> Montesh (2007) 130; Redpath 5 and Mashele 8.

<sup>477</sup> Montesh (2007) 130 and Redpath (2006) 47.

<sup>478</sup> Montesh (2007) 130.

<sup>479</sup> In 2004 the Scorpions successfully obtained the first ever conviction for racketeering in South Africa. By February 2004 the Scorpions had completed 653 cases, comprising 273 investigations and 380 prosecutions. Of the 380 prosecutions 349 resulted in convictions and resulted in an average conviction of 93,1%.

The Scorpions conducted 318 investigations and achieved 243 prosecutions of which approximately 30 percent (%) related to corruption during the year 2001 up until June 2008.<sup>480</sup> The majority of these corruption cases presented in court were successfully finalized and led to the convictions of the accused persons.<sup>481</sup> The corruption cases investigated by the Scorpions included government tenders and contract fraud (procurement), the abuse of power. Authority and benefits by officials, mismanagement of creations of social grants, “ghost employee” fraud in government departments, cyber-crime involving the corrupt co-operation of employees in Home Affairs (travel and residence documentation and marriage certificates) and corruption at ports of entry and exit.<sup>482</sup> The creation of the Scorpions was an innovation in South African law enforcement which made a notable impact on the investigation of complicated cases.<sup>483</sup>

### **3.5 THE ROLE OF THE SPECIAL INVESTIGATIVE UNIT (SIU)**

#### **3.5.1 INTRODUCTION**

The SIU is an independent statutory body set up by the South African government which was previously known as the Heath Commission.<sup>484</sup> The Unit was re-established in August 2001 as the SIU.<sup>485</sup> The SIU addressed fraud, corruption and maladministration within the public service as well as assisting the State in recovering money lost as a result of unlawful or corrupt action.<sup>486</sup> The significant investigations of the SIU have been the investigations into social grants fraud within the Department of Social Development, irregular issuing of driving licenses in the Department of Transport and recovering of losses within the Department of Correctional Services.<sup>487</sup> It is evident

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<sup>480</sup> Chikane, F. “Towards a fifteen-year review: assessing the effectiveness of the National Anti-Corruption Framework” Department of Services and Administration (2008). [http://www.gov.za/sites/www.gov.za/files/toward\\_15year\\_review\\_0.pdf](http://www.gov.za/sites/www.gov.za/files/toward_15year_review_0.pdf) (accessed 19 June 2016).

<sup>481</sup> Department of Services and Administration (2008) 18.

<sup>482</sup> Department of Services and Administration (2008) 18.

<sup>483</sup> Redpath (2004) 35.

<sup>484</sup> Montesh (2007) 139; Department of Services and Administration (2008) 18 and Special Investigative Unit Annual Report (2014/2015) 11.

<sup>485</sup> Department of Services and Administration (2008) 16.

<sup>486</sup> Department of Services and Administration (2008) 16 and Montesh (2007) 138.

<sup>487</sup> Department of Services and Administration (2008) 16.

that the SIU has effectively contributed to the combating and prevention of fraud and corruption in South Africa.

### 3.5.2 INVESTIGATIVE POWERS OF THE SIU

The Special Investigative Unit and Special Tribunals Act<sup>488</sup> set out the legal mandate of the Special Investigating Unit to carry out investigations as referred to by the President. After the completion of the investigation the SIU may institute civil actions for the recovery, savings or prevention of loss of State assets and State moneys should the investigations reveal that such monies or assets were misappropriated and/or unlawfully obtained.<sup>489</sup> The SIU's main focus is to act swiftly to save, recover and protect public assets through civil law procedure and litigation through a Special Tribunal.<sup>490</sup>

The Special Investigative Unit and Special Tribunals Act in the long title of the Act, states the following in respect of its purpose:<sup>491</sup>

- a) to provide for the establishment of Special Investigating Units for the purpose of investigating serious malpractices or maladministration in connection with the administration of State institutions, State assets and public money as well as;
- b) any conduct which may seriously harm the interests of the public, and
- c) for the establishment of Special Tribunals so as to adjudicate upon civil matters emanating from investigations by Special Investigating Units and
- d) to provide for matters incidental thereto

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<sup>488</sup> Act 74 of 1997. The Special Investigative Unit was initially headed by former Judge Willem Heath. Judge Heath resigned in June 2001 after the case of *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC). Where the Constitutional Court indicated that a judge was not able to head an investigative unit. The President established a new Special Investigative Unit by Presidential Proclamation R118 on 31 July 2001 and appointed Willie Hofmeyer as its head.

<sup>489</sup> Montesh (2007) 139.

<sup>490</sup> *ibid* fn 488. The SIU has the mandate to obtain court orders, in accordance with section 5 of the Special Investigating Units and Special Tribunals Amendment Act 2 of 2001, to compel a person to pay back any wrongful benefit they have received, to cancel transactions or other actions that were not properly authorised.

<sup>491</sup> Department of Service and Administration (2008) 16.

The SIU is referred to as a State body that fights corruption through quality investigations and litigations.<sup>492</sup> The SIU has the power to subpoena, search, seize and interrogate witnesses under oath.<sup>493</sup> The SIU institutions civil action to reduce any wrongdoing if it uncovers in its investigations that a wrongful benefit was received and consequently recovers State money.<sup>494</sup> It seeks to achieve its goal of reducing fraud, corruption and maladministration through forensic investigations and civil litigation.<sup>495</sup>

### 3.5.3 FUNCTIONS AND RESPONSIBILITIES OF THE SIU

Investigators, lawyers, forensic accountants and crime analysts are in the employed by the SIU in order to assist in the efficient and effective combating of maladministration, corruption and fraud involving the administration of State institutions, to protect assets and public money and to take civil legal action to correct any wrongdoing.<sup>496</sup>

During 2010 to December 2013 the SIU has conducted investigations into irregular procurement processes, irregular awarding of tenders, nepotism, conflict of interest, fraudulent qualifications, fruitless and wasteful expenditure, fraud and corruption in the Tshwane Metropolitan Municipality.<sup>497</sup> The SIU continues to display accurate measures that reflect the effective role it plays in the fight against fraud, corruption and maladministration. The investigations conducted during the 2014 and 2015 financial year resulted in the following; 12 proclamations were published, the potential value of case and/or assets recovered amounted to R844 million, R145 million in actual value of cash and/or assets recovered, 4 civil matters instituted in court or the Special Tribunal to the value of R1.2 billion, 171 referrals to the NPA for prosecution, 7 referrals to the Asset Forfeiture Unit and 379 instances where potential disciplinary matters were brought to the attention of the relevant State institutions.<sup>498</sup> The SIU has embarked on a dramatic shift in

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<sup>492</sup> Lekube “Manifestations of corruption in the City of Tshwane Metropolitan Municipality” (2015) (unpublished in fulfilment of *Magister Technologiae*, UNISA) 58 and Corruption Watch 2014.

<sup>493</sup> Lekube 57 and Special Investigating Unit Annual Report (2014/2015) 11.

<sup>494</sup> Lekube 57 and Special Investigating Unit Annual Report (2014/2015) 11.

<sup>495</sup> Special Investigating Unit Annual Report (2014/2015) 11.

<sup>496</sup> Montesh (2007) 139.

<sup>497</sup> Lekube 2

<sup>498</sup> Special Investigating Unit Annual Report (2014/2015) 14.

its approach to achieve its desired outcomes after effecting amendments to its legislation.<sup>499</sup> It now has the power to conduct civil litigation in its own name or in name of the affected State institution. This means that the SIU can approach the courts directly for appropriate relief.<sup>500</sup>

These accomplishments render the SIU an important and effective tool in the fight against fraud, corruption and maladministration within the local municipalities.

### **3.6 THE ROLE OF THE ASSET FORFEITURE UNIT (AFU)**

#### **3.6.1 INTRODUCTION**

The AFU was created in May 1999 and is a department within the NPA which is headed by the National Director of Public Prosecution.<sup>501</sup> It was established in order to implement and focus on chapters 5 and 6 of the Prevention of Organised Crime Act.<sup>502</sup> Chapters 5 and 6 of the Prevention and Organised Crime Act allows for seizure of assets used or acquired in criminal activities to further the aims of criminal justice projects.<sup>503</sup>

The AFU is comprised of a litigation department and acts as secondary investigators.<sup>504</sup> The AFU works alongside prosecutors, accountants and lawyers to ensure effective and efficient implementation of the forfeiture of property to the State acquired through ill-gotten means by criminals.

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<sup>499</sup> Amendments made in 2012.

<sup>500</sup> Special Investigating Unit Annual Report (2014/2015) 14.

<sup>501</sup> Montesh (2007) 135 and Department of Service and Administration (2008) 18.

<sup>502</sup> Montesh (2007) 135; Keuthen 16 and Montesh "An analysis of the role of the South African Asset Forfeiture Unit and Special Investigative Unit" (2009) *Acta Criminologica* 33.

<sup>503</sup> Montesh (2009) 31.

<sup>504</sup> Montesh (2007) 137.

### 3.6.2 INVESTIGATIVE POWERS AND AUTHORITY

The Prevention of Organised Crime Act gives the AFU its legal mandate to forfeit property tainted by criminal activity, to the State.<sup>505</sup> This is commonly known as civil asset forfeiture. This allows the State to confiscate a suspected criminal's assets purely through a civil action against the tainted property without the need to obtain a criminal conviction against the owner of the property. The Prevention and Organised Crime Act empowers the AFU with the following functions;<sup>506</sup>

- a) Seizure of large amounts of cash associated with drug trade,
- b) Seizure of property used in drug trade or other crime,
- c) Investigating corruption,
- d) White collar crime,
- e) Targeting serious criminals and
- f) Violent crime.

The AFU does not have a specific anti-corruption mandate to combat corruption.<sup>507</sup> However, it has the capacity to investigate criminal cases, seize and/or freeze assets where forfeiture proceedings are anticipated even in cases of fraud and corruption that takes place within municipalities.<sup>508</sup>

### 3.6.3 FUNCTIONS AND RESPONSIBILITIES OF THE AFU

Upon application by the National Director of Public Prosecutions (NDPP), the High Court can make an order forfeiting property to the State that the court, on a balance of probabilities, finds to be “an instrumentality” of a crime, or is the “proceeds of unlawful activities”.<sup>509</sup>

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<sup>505</sup> Montesh (2007) 137 and Montesh (2009) 33.

<sup>506</sup> Montesh (2009) 33.

<sup>507</sup> Pillay *Development Corruption in South Africa: Governance Matters* (2014) 51-75.

<sup>508</sup> Montesh (2009) 33.

<sup>509</sup> Montesh (2007) 135 and Montesh (2009) 33.

In terms of Chapter 5 of the Prevention of Organised Crime Act the State must make an application to secure a conviction in a criminal court.<sup>510</sup> After conviction, the State may apply to forfeit an amount equal to the benefit derived as a result of the commission of the proven offence. In terms of Chapter 6 of the Prevention of Organised Crime Act the State is permitted to forfeit the proceeds and instrumentalities of a crime in a civil process, this does not require a criminal prosecution or conviction.<sup>511</sup>

In order to recover corruptly acquired assets through the civil process, the AFU must obtain an interim preservation order<sup>512</sup> pending the determination by the court as to whether the assets will be permanently forfeited to the State.<sup>513</sup> After the interim order is granted by the High Court, the Assets will be seized and stored. An independent person, known as the *curator bonis*, is appointed in the interim court order to seize and preserve the assets.<sup>514</sup> Once a final order is obtained the stored assets will be sold and proceeds thereof are deposited into an account known as the Criminal Assets Recovery Account (CARA).<sup>515</sup> The money is distributed to the prosecution and SAPS to assist them in combating crime.<sup>516</sup> The victim(s) of the crimes are also taken into account when an amount is determined which allows for the victim to recover financial losses suffered.

The prevalence of the AFU is to ensure that they take the profit out of the crime by seizing the proceeds of crime. Corruption and fraud are criminal offences which automatically resort under

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<sup>510</sup> Basdeo "The legal challenges of criminal and civil assets forfeiture in South Africa: A comparative analysis" (2013) *African Journal of international and Comparative Law* 304. See for example *Shaik and others v the State* 2007 2 ALL SA 150 (SCA), the AFU relied on a criminal conviction to base the application for confiscation in accordance with Chapter 5 of the Prevention of Organised Crime Act.

<sup>511</sup> Montesh (2007) 135. Basdeo (2013) 315.

<sup>512</sup> In terms of section 38(1) of the Prevention of Organised Crime Act.

<sup>513</sup> Opedayo *Civil recovery of corruptly – acquired assets: a legal roadmap for Nigeria* (2010) (unpublished LLM Thesis, University of Western Cape) 58 and Basdeo (2013) 316.

<sup>514</sup> Section 56(2) of the Prevention of Organised Crime Act and Vrancken *South Africa and the Law of the Sea* (2011) 319.

<sup>515</sup> Section 56(3) of the Prevention of Organised Crime Act and Vrancken 319.

<sup>516</sup> Section 57(1)(c) of the Prevention of Organised Crime Act and Vrancken 319.



the jurisdiction of the AFU.<sup>517</sup> Forfeiture of assets of the crimes of fraud and corruption is imperative as it ensures that crime does indeed not pay.<sup>518</sup>

## 4 FORENSIC INVESTIGATION OF FRAUD AND CORRUPTION

### 4.1 INTRODUCTION

The purpose of a criminal investigation is to systematically and thoroughly examine or enquire into something or someone by collecting facts and recording results in a report.<sup>519</sup> The objective of any investigation is also to determine the truth about how a crime was committed.<sup>520</sup> A forensic investigator is required to conduct forensic investigations of the crimes of fraud and corruption.

A forensic investigator needs to acquire specific skills and guidelines in order successfully investigate the crimes of fraud and corruption.<sup>521</sup> The skills and guidelines that are required are the following: identification and interview of witnesses; establishing a sequences of events; collection and securing of evidence in accordance with the law; identification and interview of the suspect(s) and recording and reporting of findings of the investigation.<sup>522</sup> Forensic investigators are person who are specifically trained to collect evidence, to do scientific tests on and assess various types of physical evidence.<sup>523</sup> A forensic investigator needs to display a strong degree of self-discipline and utilise legally approved methods in conducting forensic investigations without acting with malice or bias.<sup>524</sup> The forensic investigator will also need to be familiar with the red flags<sup>525</sup> associated with the crimes of fraud and corruption within local government in order to conduct a forensic investigation.<sup>526</sup>

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<sup>517</sup> Montesh (2009) 31.

<sup>518</sup> Goredema "Tracing proceeds of crime in Southern Africa challenges and milestones" (2006) ISS 131; Basdeo (2013) 322 ad Opedayo 76.

<sup>519</sup> Dempsey *Introduction to investigations* (2003) 9.

<sup>520</sup> Brown *Criminal Investigation: Law and Practice* (2001) 3.

<sup>521</sup> Lekube 24 and Singleton and Singleton *Fraud auditing and forensic accounting* (2010) 29.

<sup>522</sup> Lekube 24 and Bennet and Hess *Identification and Arresting of suspects: Criminal investigation* (2004) 5.

<sup>523</sup> Berg and Horgan *Criminal Investigation* (1998) 40 and Sefanyetso *Personal description: An Investigation of techniques to identify suspects* (2009) (unpublished Thesis in fulfilment of a *Magister Technologiae*, UNISA) 21.

<sup>524</sup> Lekube 24 and Swanson, Chamelin and Territo *Criminal Investigations* (2003) 9.

<sup>525</sup> As set out in Chapter 4.

<sup>526</sup> Singleton and Singleton (2010) 31 and 145.

The International Anti-Corruption Resource Center (IACRC)<sup>527</sup> is dedicated to developing and implementing advanced education courses as well as resources for the use of public and private entities engaged in combating fraud and corruption internationally.<sup>528</sup> ICARC focuses on humanitarian and development projects where corruption is prevalent and inadequate recourses exists to combat corruption.<sup>529</sup> ICARC created a step-by-step guide to combating fraud and corruption which is known as the “Case Theory” approach. Forensic investigators should apply the “Case Theory” approach to investigate the crimes of fraud and corruption in South Africa.<sup>530</sup> The “Case Theory” approach involves the following steps:<sup>531</sup>

- a) Analyze the available data to create a hypothesis;
- b) Test it against the available facts;
- c) Refine and amend it until reasonably certain conclusions can be drawn.<sup>532</sup>

The above mentioned steps of the “Case Theory” Approach are similar to the scientific method of experimentation.<sup>533</sup> The investigator should begin the investigation with an assumption, after analysing the evidence at hand, formulate an investigative plan to test<sup>534</sup> the assumption<sup>535</sup>.

A simple illustration will be used to expound the “Case Theory” Approach:

1. Analysing of data in order to verify details of the allegations;

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<sup>527</sup> The IACRC is a non-profit organisation headquartered in Washington, DC, USA. Hereinafter referred to as the IACRC.

<sup>528</sup> IACRC, Level the playing field <http://iacrc.org/> (accessed on the 18 August 2016).

<sup>529</sup> International Anti-Corruption Resources Center (IACRC), What we do: practical and on-site instruction, <http://iacrc.org/waht-we-do/> (accessed on the 18 August 2016).

<sup>530</sup> Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation. <http://guide.iacrc.org/10-steps-of-complex-fraud-and-corruption-investigation/> (accessed on 2 December 2014).

<sup>531</sup> IACRC, Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation.

<sup>532</sup> IACRC, Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation.

<sup>533</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation.

<sup>534</sup> Prove or disprove.

<sup>535</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation; Lekube 24 and Gilmore “Key issues in establishing a forensic audit capacity” (2008) *FMI IGR Journal* 29.

2. Creates a simple, initial hypothesis or theory<sup>536</sup> and
3. Makes assumptions which can be used to test the theory.<sup>537</sup>

The investigator must use his hypothesis together with the evidence to prove or disprove the theory.<sup>538</sup> The Case theory approach formulates the investigative plan<sup>539</sup> and if the theory is proven then there is evidence of guilt.<sup>540</sup> If not, then the investigator must amend the assumption accordingly and start the investigative process again.<sup>541</sup> Should the investigator disprove of the assumption this, to a certain extent, assures that the suspected act did not occur.<sup>542</sup> The Case Theory approach is merely an investigative tool designed to formulate a hypothesis that can facilitate and direct an investigation which is tested against the evidence at hand. The investigator must ensure that he keeps abreast with, at every stage of the investigation, the evidence needed to prove or disprove the assumption.

## 4.2 CASE THEORY APPROACH

There are ten basis steps of the Case Theory Approach which will be explained in detail.

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<sup>536</sup> For example, company A is paying kickbacks to government official B for government work.

<sup>537</sup> For example, if the allegations are true, official B would be expected to: favour Company A in buying decisions; bend or break the rules to award contract to Company A and display sudden new wealth or have unexplained income.

<sup>538</sup> Initially the evidence is the “red flags” as set out in Chapter 4. Singleton and Singleton (2010) 31 and 145 and Kranacher, Richard and Wells *Forensic Accounting and Fraud Examination* (2011) 26.

<sup>539</sup> Determines whether a, b or c occur.

<sup>540</sup> Singleton and Singleton (2010) 31 and 145.

<sup>541</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation. Razaee and Riley *Financial Statement Fraud* (2010) 278.

<sup>542</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation.

## **4.2.1. STEP 1: BEGIN THE CASE**

The case begins as soon as a complaint has been lodged, discovery of a red flag or through a “proactive” automated fraud detection system.<sup>543</sup> The Case Theory approach starts with identifying the most probable fraud scheme and how it may have been perpetrated.<sup>544</sup>

### **4.2.1.1 RESPONSE TO A COMPLAINT**

Upon receipt of a complaint the investigator should conduct a quick research to confirm the basic transactions involved in the complaint<sup>545</sup> and thereafter respond to the complainant acknowledging receipt of complaint and obtain additional information.<sup>546</sup> The investigator must also analyse the procurement complaints that do not directly allege underlying corruption.<sup>547</sup>

### **4.2.1.2 EVALUATE A COMPLAINT**

The usefulness and legitimacy of a complaint must be evaluated and assessed. The forensic investigator must determine whether the complaint is credible and the information is substantial enough to continue with the investigation. The investigator should also determine whether corroboratory evidence exist to substantiate the allegation of information provided by the complainant.<sup>548</sup> Not all red flags are an indication that fraud and corruption has taken place within local municipalities. Therefore, the forensic investigator must continue to gather evidence in order to prove or disprove the commission of the crimes of fraud and corruption upon detection of a red flag.<sup>549</sup>

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<sup>543</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation; Kranacher, Richard and Wells 26 and Singleton and Singleton (2010) 31 and 145.

<sup>544</sup> Singleton and Singleton (2010) 96.

<sup>545</sup> For example, confirm that only one bidder was evaluated or that the lowest bid was not accepted.

<sup>546</sup> Singleton and Singleton (2010) 24.

<sup>547</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation.

<sup>548</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation.

<sup>549</sup> Singleton and Singleton (2010) 96.

### 4.2.1.3 DISCOVERY OF RED FLAG

The onset of the investigation of a case of fraud or corruption is identified by a red flag.<sup>550</sup> The investigator should match the red flag to the potential scheme or schemes and then look for other indicators<sup>551</sup> of the suspected scheme(s).<sup>552</sup> Knowing where to look is the first step in fraud detection.<sup>553</sup> The forensic investigator must have the ability to identify the areas that are susceptible to fraud and corruption schemes as well as the transactions which may warrant further review.<sup>554</sup>

### 4.2.1.4 “PROACTIVE” AUTOMATED FRAUD DETECTION TESTS

An automated “proactive” search to obtain fraud indicators can be effective if the necessary data is available.<sup>555</sup> The basic steps of the “proactive” automated fraud detection test are which indicates the prevalence of the crimes of fraud and corruption will be discussed.<sup>556</sup> High risk areas of fraud, corruption and bid rigging or collusion can be identified by examining where previous offences have been detected or controls are weak.<sup>557</sup> The review of prior complaints, audits and investigative reports.<sup>558</sup> The identification of potential red flag schemes that can be detected electronically, for example, unusual bidding patterns.<sup>559</sup> The investigator can match the initial red flags that are detected to other indicators of the potential scheme(s). The electronic database will assist in

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<sup>550</sup> Albrecht et al “Can auditors Detect Fraud: A review of the Research Evidence” *Journal of Forensic Accounting* (2001) 1-12 and Brooks and Labelle “CAP Forum on Forensic Accounting in the Post-Enron World: Education for Investigating and Forensic Accounting” *Canadian Accounting Perspectives* (2006) 293.

<sup>551</sup> For example, the continued acceptance of high priced, low quality work, without complaint, could indicate kickbacks. If these red flags are detected, look for other indicators or kickbacks, such as improper selection of the suspected contractor or sudden unexplained wealth by the approving project officials. Look for a number or pattern of indicators of the suspected scheme.

<sup>552</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation. Singleton and Singleton 96 and 101.

<sup>553</sup> Gillespie 33.

<sup>554</sup> Gillespie 33.

<sup>555</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation

<sup>556</sup> Powell Lifestyle audits are critical management tool to identify fraud. *The Mercury, Advertising Supplement, Business Update*, 29 July 2011 4 [www.ens.co.za/images/news/business%20update\\_110729\\_p4.pdf](http://www.ens.co.za/images/news/business%20update_110729_p4.pdf) (accessed 19 August 2016).

<sup>557</sup> Gillespie 33 and Golden *et al. A guide to forensic accounting investigations* (2006) 122.

<sup>558</sup> Golden *et al* 154.

<sup>559</sup> Bănărescu and Băloi “Modern techniques for detecting and preventing fraud activities” (2015) *Public Security Studies* 167.

identifying the parties (firms and individuals) involved in the indication transactions and schemes.<sup>560</sup> Conducting a due diligence background check on suspect parties is a key component in identifying other evidence in forensic investigations of corruption and/or fraud.<sup>561</sup> This will allow the forensic investigator to discreetly obtain evidenced without alerting the suspect that they are being investigated.<sup>562</sup> Lastly, the forensic investigator must conduct further traditional detection and investigative steps (document reviews and interviews) for each scheme.<sup>563</sup> Financial investigation is a typical traditional investigative method. The forensic investigator need only follow the money trail which usually exposes the facts and the circumstances of a case in a logical and sequential pattern.<sup>564</sup> Physical surveillance should not be overlooked as a traditional investigative method as this may lead to the discovery of assets concealed under another's name and identify possible informants.<sup>565</sup>

#### **4.2.2 STEP 2: TESTING OF ALLEGATIONS**

A preliminary investigation must be conducted in order to ascertain whether the allegations<sup>566</sup> are of a serious nature to warrant further investigation.<sup>567</sup> Verification of the allegations must be conducted expediently to prevent wastage of time and resources. The forensic investigator must examine and test the allegations to determine if they can be supported by evidence or rebutted<sup>568</sup> The analysis of the bidding documents or interview of other witnesses can be conducted to test these allegations. A forensic investigator who interviews witnesses<sup>569</sup> will determine the validity of the allegations furnished and may also formulate an opinion concerning the motives of the

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<sup>560</sup> Bănărescu and Băloi 167.

<sup>561</sup> Powell 4.

<sup>562</sup> Golden *et al* 19 and 144.

<sup>563</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation.

<sup>564</sup> Gillespie 42.

<sup>565</sup> Madinger and Zalopany *Money Laundering – a guide for criminal investigations* (1999) 145; Silverstone & Sheetz *Forensic investigation and fraud investigation for non-experts* (2007) 128 and Pasco *Criminal financial investigations: the use of forensic accounting techniques and indirect methods of proof* (2009) 45.

<sup>566</sup> Red flag scheme identified or complaint from a whistle blower.

<sup>567</sup> Gillespie 44 and 76.

<sup>568</sup> Golden *et al* 84.

<sup>569</sup> At this stage the witness can be a whistle-blower. In the case of a red flag the witness can be an individual from the institute.

witness in providing such allegations.<sup>570</sup> Once the test of the allegations is conducted and proves to be plausible, the investigator may proceed with the further steps of the investigation process.<sup>571</sup> Primarily the forensic investigator must collect evidence that can be used for court purposes to prove or disprove the guilt of the accused.<sup>572</sup> Interviewing of employees who may provide initial insight on systems, processes, procedures, department structures and documents is imperative for a forensic investigator to assess the credibility of the allegations.<sup>573</sup>

### **4.2.3 STEP 3: CONDUCT DUE DILIGENCE BACKGROUND CHECKS<sup>574</sup>**

The investigator must conduct background checks on the suspected business and/or individuals in order to evaluate the allegations and obtain further evidence to assist in establishing credibility.<sup>575</sup> Forensic investigations conduct due diligence background checks for the purposes of seeking direct evidence, delving deeper into related transactions, identifying leads, locating persons to be interviewed and performing asset searches.<sup>576</sup> Due Diligence background checks prove to be a key aspect in the investigative process as it enables the investigator to conduct an investigation without alerting the alleged suspect.<sup>577</sup> There are four ways in which any receipt of funds, honest or dishonest, disposes of income, namely by saving it, purchasing assets, paying off debts or spending it. These methods enable a forensic investigator with a strategy as to where to start conducting the investigation to gather more evidence about a suspect.<sup>578</sup>

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<sup>570</sup> Golden *et al* 84.

<sup>571</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation.

<sup>572</sup> Lambrechts & Theart *Misdaadtoneel* (1996) 1 and Singleton and Singleton (2010) 213.

<sup>573</sup> Golden *et al* 325.

<sup>574</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation.

<sup>575</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation.

<sup>576</sup> Golden *et al* 311 and Gillespie 132 and 134.

<sup>577</sup> Gillespie 35 and Powell 4.

<sup>578</sup> Gillespie 35.

#### 4.2.4 STEP 4: COMPLETING THE INTERNAL STAGE OF INVESTIGATION

The investigator should at this stage finalise the collection of data and documentary evidence<sup>579</sup> from the victim organisation and interview of witnesses who are not involved in the suspected wrongdoing.<sup>580</sup> It must be emphasised that documentary evidence is key to forensic investigation as it assists in the establishment of the facts.<sup>581</sup> A document will be admitted into evidence in court if the original is produced and authenticated.<sup>582</sup> Documents presented with the purpose of proving the content is considered to be documentary evidence.<sup>583</sup> Documents presented as an object, for example counterfeit cheque, is considered as real evidence.<sup>584</sup> Documentary evidence is key to forensic investigation as it assists in the establishment of the facts. Documentary evidence plays a significant role in South African law of evidence.<sup>585</sup> A document can prove to be reliable evidence as the wording is fixed and can be assessed and re-assessed by the courts.<sup>586</sup> The investigator should systematically and tactfully obtain the data and documentary evidence pertaining to the alleged fraudulent transaction, contractor or consultant and the employee of the defrauded organisation. However, the truth can only be determined after structured interviews are conducted.<sup>587</sup> In certain instances, it will be necessary and appropriate to re-interview witness and after the accuracy of the information provided has been corroborated.<sup>588</sup> The interview process

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<sup>579</sup> Analyse bidding documents for evidence of corrupt influence through the manipulation of “SPQQD” factors (Selection, Pricing, Quantity, Quality and Delivery). The careful examination of bids, proposals, CV’s and other documents submitted by a suspect firm for possible fraudulent representations is necessary. Electronic evidence such as e-mails and the computer hard drive information could also assist in the investigation.

<sup>580</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation.

<sup>581</sup> Janse van Rensburg *The impact of electronic evidence in forensic accounting investigations* (2014) (Thesis in fulfilment of *Magister Commercii*, North West University) 37.

<sup>582</sup> Van Tonder *The admissibility and evidential weight of electronic evidence in South African legal proceedings: a comparative perspective*. (2013) (unpublished thesis in fulfilment of an LLM, University of Western Cape) 18. An exception to this rule is that should it be proven that only copies could be obtained and originals could not be found during a search and seizure procedure, the copies will be allowed as admissible and Bredenkamp *The development of an investigation process for commercial forensic practitioners in South Africa* (2015) (Thesis in fulfilment of a *Master Commercii*, North-West University) 86.

<sup>583</sup> Janse van Rensburg 37.

<sup>584</sup> Janse van Rensburg 37.

<sup>585</sup> Janse van Rensburg 37.

<sup>586</sup> Schmidt and Rademeyer *Bewyserg* (1989) 336.

<sup>587</sup> Golden *et al* 325.

<sup>588</sup> Golden *et al* 325.



assists the forensic investigators to determine and evaluate which individuals may have relevant information about the allegations, identification of additional individuals to be interviewed and documentary evidence to be secured and obtained.<sup>589</sup> The questions used during forensic investigations should be introductory, informational, closing, assessment or admission seeking.<sup>590</sup> The forensic investigator at this stage of the investigation conducts an information-seeking interview.<sup>591</sup> Certain witnesses can provide information pertaining to the company, industry or the accounting aspect of the fraud and corruption allegation. Obtaining such evidence from witnesses will propel and sustain further inquiries of the investigation. The information-seeking interviews are non-confrontational and are conducted to ascertain the most relevant witnesses, obtain evidence and identify possible suspects of the fraud and corruption scheme.<sup>592</sup> The forensic investigator sets the tone of the interview. The difficult questions should be followed by a few easy questions throughout the interview process.<sup>593</sup> The investigator should be as open and honest as possible without compromising the interview process. A strategy of being too secretive or aggressive can cause the witness to become defensive which may lead to unproductive results for the forensic investigator.<sup>594</sup>

#### **4.2.5 STEP 5: CHECK FOR PREDICTION AND GET ORGANISED**

It is necessary for the investigator to review the results of his investigation thus far in order to determine if there is adequate “prediction”<sup>595</sup> to proceed with allegation.<sup>596</sup> In essence prediction is the starting point for formal external examination to ensue.<sup>597</sup> Prediction is a key component used to determine if a set of circumstance would lead an expert forensic investigator to believe that an offence of fraud and/or corruption has occurred, is occurring or will occur.<sup>598</sup> The reasons which

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<sup>589</sup> Golden *et al* 326.

<sup>590</sup> Singleton and Singleton (2010) 240.

<sup>591</sup> Golden *et al* 353.

<sup>592</sup> Golden *et al* 354.

<sup>593</sup> Singleton and Singleton (2010) 241.

<sup>594</sup> Singleton and Singleton (2010) 241.

<sup>595</sup> A sufficient factual basis (reasonable grounds). See Bredenkamp 9 and Golden *et al* 297.

<sup>596</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation; Singleton and Singleton (2010) 31 and Golden *et al* 243.

<sup>597</sup> *Ibid* fn 537 at 203.

<sup>598</sup> Singleton and Singleton (2010) 31 and *ibid* fn 537 at 203.

brought about the prediction may be due to the identification of red flags or evidence discovered during the initial investigation process of the fraud and corruption case.<sup>599</sup>

The investigator must ascertain based on the results of the evidence at hand whether to define or refine initial “Case Theory” hypothesis and categorize the evidence according to the elements of proof of the possible claims of the crime.<sup>600</sup> The investigator must determine if it is necessary to solicit the assistance of law enforcement authorities.<sup>601</sup> The investigator must also ensure that a sufficient “probable case” exists in order to obtain their cooperation.

#### **4.2.6 STEP SIX: BEGIN THE EXTERNAL INVESTIGATION**

These steps set out the standard of the investigative process during the external stage of a complex fraud and corruption investigation.<sup>602</sup> The external investigation for fraud and corruption will be detailed and elaborated upon separately. However, the main objective of this step is to identify the most relevant witnesses and documents that can prove the alleged crime in a court of law.

##### **4.2.6.1 CORRUPTION CASES:**

The investigator must search for evidence of payment of a substantial amount that could indicate improper influence the actions of another.<sup>603</sup> Unsuccessful bidders are potential witnesses who could provide valuable information to the investigating officer on the following:<sup>604</sup>

- a) Which project or government officials demanded bribes;
- b) Instructions from the above officials to use preferred agents, suppliers and subcontractors;

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<sup>599</sup> Singleton and Singleton (2010) 31.

<sup>600</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation.

<sup>601</sup> To subpoena documents, exercise search warrants or request international legal assistance.

<sup>602</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation.

<sup>603</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation; Bredenkamp 68 and Golden *et al* 305.

<sup>604</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation.

- c) Bidders that provided “Low ball” price offers yet they were rejected by the selection committee;<sup>605</sup>
- d) Threats received from the government officials during the bidding process, short notification periods to submit bids, inability to acquire or buy bid packages to ensure timeous bid submission and unfair bidding disqualification by bidding committee and
- e) Provide information on corrupt practices by officials who live beyond their economic means.

Documents that may be relevant to the investigation are the following.<sup>606</sup>

- a) Project procurement and implementation files, bid notices, bid scoring sheets and Bid Evaluation Reports will provide valuable information in determining whether any irregularities prejudices and unfairness had taken place during the entire bidding process;
- b) Complaints from losing bidders will provide an insight into the bidding process and any shortcoming may be identified or exposed;
- c) Public records of ownership of the winning bidders, subcontractors and suppliers to determine whether any public official has a vested interest in the winning bid and
- d) Documentation from the winning bidders which may include evidence of bribe payments, fraudulent invoices used to generate such funds and other documents which may indicate that a contractor did not incur the necessary expenses, for example, not leasing the necessary equipment to perform specific work.

This aforementioned information may be obtained by the investigating officer through the enforcement of contract audit rights, serving a subpoena or requesting them from a compliant contractor.

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<sup>605</sup> Edgardo and Pradhan 302.

<sup>606</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation. Doig ed. *Fraud: The counter fraud Practitioner's Handbook* (2016) 194-197.

#### 4.2.6.2 FRAUD CASES

The investigator must conduct a diligent search for evidence of fraudulent acts such as forged documents, false statements or omissions of material facts.<sup>607</sup> Potential witnesses for the investigator include.<sup>608</sup>

- a) Persons who have direct personal knowledge of the falsification of information submitted in bid proposals. This may include, but not limited to, Curriculum Vitae and false claims for payment;
- b) The issuers of bid securities and/or manufacturer's certificates, who confirm or deny the legitimacy of questioned documents and
- c) Inspectors and testing officials who confirm or certify the accuracy of inspection results, submitted tests and work completion certificates.

Documents that may be relevant to the investigation of fraud and corruption cases are the following.<sup>609</sup>

- a) Documents that demonstrate falsification of claims. One of the ways of determining this fact is to compare, for example, a bidders submitted Curriculum Vitae to the original one submitted and to examine public records regarding the incorporation or ownership of a bidder;
- b) Compare the original and submitted securities and certificates to determine the legitimacy of submitted documents and;
- c) Previously submitted reports to identify whether reports have been copied or merely plagiarized.

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<sup>607</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation.

<sup>608</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation and Edgardo and Pradhan 300.

<sup>609</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation and Edgardo and Pradhan 300.

Other possible steps that can be instituted by the investigator are the following:<sup>610</sup>

- a) Engage independent inspectors to re-inspect and re-test goods and works in order to determine whether they comply with the standards determined by the contract specifications and ascertain whether the claims submitted by the contractor for work done and goods supplied are legitimate and
- b) Exercise audit rights, on the contractor, subpoena or request documents from a contractor to facilitate a comparison with internal records pertaining to invoices and claims submitted by the contractors.

The order of the interviews conducted by the investigator must commence with witnesses who are not involved, then work towards the inward “facilitators” followed by the co-conspirators and end of the interview stage with the principal subject.

An example of the above-mentioned logical sequence of interviews is illustrated as follows.<sup>611</sup>

A contractor alleged pays a bribe through an agent to a government official who represents the contracting institution, for example, a municipality in order to win a bid. Thereafter, the contractor utilizes cheaper inferior or non-compliance materials for a project and charges the contracting institution an exorbitant price. The contractor allegedly acquired the product from the manufacturer, who was not involved in or aware of the scheme. The contractor acquires the product through a manufacturer who is not party to bribery scheme.

A logical sequence of the interviews adopted by the investigator could be the following.<sup>612</sup>

- a) Independent manufacturers, suppliers or material experts could provide insight into pricing and quality aspects of the material used by the contractor;

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<sup>610</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation and Edgardo and Pradhan 317.

<sup>611</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation. and Edgardo and Pradhan 315-317.

<sup>612</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation.

- b) Unsuccessful or excluded bidders could provide information on the attempted soliciting of bribes by government officials/employees;
- c) The supplier/manufacturer of materials to the successful bidder could provide information on pricing, quantity and quality of goods supplied;
- d) Former or disgruntled employees of the winning bidder could provide information about the bribery scheme, inferior materials used, *modus operandi* of the bribery scheme and person involved;
- e) The agent's cooperation based on the evidence provided is vital;
- f) The winning bidder could provide financial records through voluntary co-operation failing which an audit of the records could take place or a subpoena served on him to provide or produce financial records relevant to the bribery scheme and
- g) Recipients of the bribes could provide relevant documents and a confession as to their involvement in the alleged bribe, failing which their guilt has to be proved through witnesses, documents or forensic audit of financial records.

#### **4.2.7 STEP 7: PROOF OF ILLICIT PAYMENTS**

The primary method of proving payments and fraudulent transactions are set out as follows:<sup>613</sup>

- a) through the investigation of the books, records and accounts of the entities suspected of paying bribes or engaging themselves in making fraudulent transactions or dealings;
- b) through investigation of the accounts, financial records and lifestyle audit of the person(s) suspected of receiving the illicit funds, or by
- c) Soliciting the co-operation of a reliable witness such as co-conspirators, middlemen or the bribe payer. This approach may be necessary to uncover hidden or laundered payments.

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<sup>613</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation; Singleton and Singleton 41 and Edgardo and Pradhan 317.

#### **4.2.8 STEP 8: OBTAINING THE CO-OPERATION OF A WITNESS**

Many complex corruption and fraud cases cannot be successfully investigated without the co-operation of an inside witness. The witness could be an honest observer or a lesser participant in the offence.<sup>614</sup>

The investigator must use persuasive negotiation methods to engage the co-operation of the witness who might be reluctant to co-operate for fear of reprisals. The investigator can exercise the following strategies to secure the co-operation of the witness:<sup>615</sup>

- a) Building a strong case against the witness which might be based on evidence, on transactions and/or evidence other than those which are the subjects of the investigation in order to obtain his or her co-operation in the case under investigation;
- b) Convincing the witness that action can be taken immediately should he or she not be willing to co-operate in the case under investigation;
- c) Offering the witness, the opportunity to co-operate to avoid prosecution or get a lighter sanction should he or she be prosecuted;
- d) Assure the witness of confidentiality should he or she provide useful leads in the case. It would however, be preferable for the witness to willingly testify in the case.

#### **4.2.9 STEP 9: INTERVIEWING THE PRIMARY SUSPECT**

A thorough interview of the primary suspect is imperative at this stage of the investigation in order to decide whether there is sufficient evidence to obtain a confession.<sup>616</sup> Should it be possible to

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<sup>614</sup> Such as a middleman, the smaller of several bribe payers or perhaps an employee who quit because he or she was aware of the fraud or corruption but did not want to participate.

<sup>615</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation; Williams *Investigating White-Collar Crime: Embezzlement and Financial Fraud* (1997) 94-95 and Doig (2016) 194-197.

<sup>616</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation and Gillespie 122.

obtain a confession from the primary suspect then the investigator must try to obtain an admissions and identify possible defences.<sup>617</sup>

In light of the above the main purpose of conducting an interview of the primary suspect are the following;<sup>618</sup>

- a) Attempt to obtain a confession or admission from the accused where there is a *prima facie* case against him;
- b) If there is strong evidence against the accused but still not sufficient to obtain a confession or admission, gain insight into the accused's possible defences and prepare evidence to counter his defences;
- c) If the evidence does not point to the innocence or guilt of the accused, gather sufficient information from him to fairly resolve the case and
- d) To obtain financial information and request financial or other records thought consent of the suspect or accused person.

The investigator must after carefully considering all the evidence decide on the objective and strategic approach for the interview of the accused.<sup>619</sup> The approach that will be adopted during the interview determines whether investigator will achieve his objective or not. The investigator can adopt the following strategies in order to ensure the objective of the interview is achieved.<sup>620</sup>

- a) In an attempt to obtain a confession, the evidence must be substantial and overwhelming which bars all defences and denials and
- b) The investigator must not openly reveal his evidence and opinions of the case but rather allow the accused to express himself freely and elaborate on his explanations which are not clear.

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<sup>617</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation; Singleton and Singleton (2010) 223; Golden *et al* 173 and Bredenkamp 79.

<sup>618</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation; Singleton and Singleton (2010) 223; Golden *et al* 221-222 and Bredenkamp 79.

<sup>619</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation.

<sup>620</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation; Singleton and Singleton 223.



The interview of the primary subject is conducted near the end of the case theory approach investigation. This allows the investigator to frame the critical questions and evaluate the truthfulness of the subject's answers against the evidence obtained<sup>621</sup>. The investigator can also conduct further interviews with the primary suspect upon perusal of the financial documentation received from him.<sup>622</sup>

#### **4.2.10 STEP 10: PREPARATION OF THE FINAL REPORT**

The final stage of the "Case Theory" approach comprises of the investigator's findings compiled in the form of a report.<sup>623</sup> Reconciliations will be made based on the results of the investigation, to institute either an administrative sanction or criminal referral.<sup>624</sup> The investigator must evaluate the cogency of the evidence against the required standard of proof in criminal trials which is to prove the case beyond a reasonable doubt.<sup>625</sup> The investigator must further ensure that potential defences can be rebutted through the available evidence in the form of witness testimonies and though documentary proof.<sup>626</sup>

The report by the investigator should be completed in the following format:<sup>627</sup>

##### **a) A brief introduction of the case**

Provide a brief synopsis or summary of the case which highlights the most important aspects. Follow-up actions that may be required should be noted. The essential substantive elements of the case should be noted to ensure that the evidence and identity of the suspect(s) are aligned thereto.<sup>628</sup>

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<sup>621</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation.

<sup>622</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation.

<sup>623</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation.

<sup>624</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation.

<sup>625</sup> Bredenkamp 34; Singleton (2006) 229 and Kranacher *et al* 448.

<sup>626</sup> Rao Vallabhaneni *CIA exam review, conducting the Internal Audit Engagement* (2005) 93.

<sup>627</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation.

<sup>628</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation.

**b) Roster of subjects**

In this part of the final report the parties implicated in the case are identified. Information regarding their full legal name, date of birth, identity numbers, previous criminal or civil litigation history and background information that may assist in the case are recorded.<sup>629</sup>

**c) Summary of the facts**

List the witnesses along with a summary of their testimonies. Furthermore, documents they will provide to the court during testimonies are outlined. This ensures that the evidence is provided in a systematic, logical and relevant manner and there are no gaps in presenting the evidence. In complicated cases, references may be made to attached annexures, memoranda, interviews and records for additional evidence. Chronological charts and graphs may be used to simplify the case and highlight the key points, for example, time line charts and communication networks of implicated parties.<sup>630</sup>

**d) Analysis and rebuttal of defences**

Provide evidence on the rebuttal of anticipated defences of the accused which must be rebutted by the prosecutor. The investigator must ensure that this report is not provided to the defence counsel. This information could also be provided verbally to the prosecutor of the case.<sup>631</sup>

**e) Request for sanction or further action**

The investigator could recommend the following remedies in cases of fraud and corruption:<sup>632</sup>

- i. Termination of the employment of a dishonest employee;
- ii. Terminates the business relationship with the dishonest contractor and render the relevant contact void;

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<sup>629</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation.

<sup>630</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation.

<sup>631</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation.

<sup>632</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation.

- iii. Bar a contractor from doing business with, for example, a municipality through administrative action;
- iv. Refer a case for criminal prosecution, civil litigation or disciplinary action of employees;
- v. Institute civil action for damages arising from the commission of corruption or fraud;
- vi. Review and tightening controls.

The weight of the investigation is encapsulated in the final report.<sup>633</sup> Therefore the report needs to be accurate, complete, understandable and cover all the elements of proof for the alleged offenses.<sup>634</sup>

## 5 CONCLUSION

This chapter demonstrates the importance of an integrated criminal justice system that attempts to effectively address the crime of fraud and corruption and bring the perpetrators to book. The National Prosecuting Authority, South African Police Service, Hawks, South Africa Secret Service, National Intelligence Agency, amongst others, are equipped with the legislative mandate to gather intelligence and investigate the crimes of fraud and corruption. Despite the numerous investigative departments there is still a deficiency in the prosecution of perpetrators who commit acts of fraud and corruption within the Local Government.

In order to discharge these responsibilities in this regard effectively, especially with regard to investigative aspects of fraud and corruption forensic investigative methods are crucial in order to gather all the evidence for the dispensation of justice. The forensic investigative methods alluded to in this chapter has to be done in a systematic and methodical manner. Therefore, the researcher has recommended and discussed the “Case Theory” approach in detail because of the complex cases in South Africa which requires thorough investigation in order to gather all the relevant evidence and to prove the case beyond reasonable doubt in a court of law.

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<sup>633</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation.

<sup>634</sup> IACRC Guide to combating Fraud and Corruption in Development Projects: 10 basic steps of a complex Fraud and Corruption Investigation; Manning *Financial Investigation and Forensic Accounting* (2000) 350.

## CHAPTER 6

# COMPARATIVE ANALYSES: COMBATING OF FRAUD AND CORRUPTION BETWEEN THE EASTERN CAPE AND WESTERN CAPE PROVINCIAL MUNICIPALITIES

## 1. INTRODUCTION

The Transparency International's 2015 Corruption Perception Index which is based on expert opinion measures corruption within the public sector worldwide. South Africa scored 44 and is ranked 61<sup>st</sup> out of 168 countries in the Transparency International's 2015 Corruption Perception Index. The Transparency International Corruption Perception Index annually measure countries according to their perceived levels of public sector corruption. The lower the score, which falls between 100 and 0, the more corrupt the country is perceived to be.<sup>635</sup> A score obtained by a country lower than 50 is deemed to inhabit significant corruption problems.<sup>636</sup> This, therefore, places South Africa in portentous circumstances.<sup>637</sup>

South Africa is one of the primary investors as well as the engine of economic growth in the Southern African Development Community.<sup>638</sup> Although it is easier and cheaper to forge business relations with South Africa than the rest of the African region, fraud and corruption are mostly found in the granting of government contracts and procurement tenders within local government.<sup>639</sup> Provincial governments are more susceptible than national departments and content with serious challenges such as the crimes of fraud and corruption on a large scale.<sup>640</sup> The poor ability to effectively manage the local government's budget contributes to the vulnerability

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<sup>635</sup> Corruption Watch Annual Report 2015. <http://www.corruptionwatch.org.za/learn-about-corruption/reports/annual-report/> (accessed on the 28 July 2015) 6.

<sup>636</sup> Corruption Watch Annual Report 2015 6.

<sup>637</sup> Corruption Watch Annual Report 2015 6.

<sup>638</sup> Ethics and Compliance Risk Survey 2014. <http://www.usb.ac.za/Shared%20Documents/Ethics%20and%20Compliance%20Risk%20Survey%20FINAL.pdf> (accessed on the 29 July 2015) 38.

<sup>639</sup> Ethics and Compliance Risk Survey 2014 39.

<sup>640</sup> Public Service Commission (2002) State of the Public Service Report [http://www.gov.za/sites/www.gov.za/files/psc03report\\_1.pdf](http://www.gov.za/sites/www.gov.za/files/psc03report_1.pdf) (accessed 29 July 2015) 8.

of public officials and representatives of the private sector to engage in acts of fraud and corruption.<sup>641</sup> The Eastern Cape province is an example, where due to mismanagement of funds, fraud and corruption led to the national government's intervention and assistance to curb these offences from taking place.<sup>642</sup>

The tendering process is central to national government in South Africa. The goods and services bought by national government in South Africa represent a large amount of public money and it is very important that the national government put in place measure to manage how these goods and services are acquired. The number of public resources that national government uses in the tendering process is huge and has direct implications on service delivery and job creation as well as redressing past discrimination by empowering designated groups of peoples receiving preference in tendering.

According to the Auditor General's report on Municipality Audit outcomes for 2015,<sup>643</sup> fifteen new municipalities and two new municipal entries achieved clean audits,<sup>644</sup> on top of the 13 that succeeded in doing so last year. This represents only 9% of the 319 municipal entitles that were audited, this is better than the 5% obtained in 2012. None of the municipalities in the Eastern Cape, Free State, Limpopo or the North West province were able to achieve a clean audit and the City of Cape Town is the only metropolitan municipality to accomplish that feat.<sup>645</sup>

In January 2002 Cabinet authorised a minimum anti-corruption capacity, as part of the implementation of the Public Service Anti-Corruption Strategy, in all departments and organizational components of the Public Service.<sup>646</sup> The objectives of the minimum anti-corruption capacity include the following:

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<sup>641</sup> Van Vuuren 92-93 and Public Service Commission 8.

<sup>642</sup> Van Vuuren 92-93 and Public Service Commission 8.

<sup>643</sup> Auditor General South Africa Media Release. <https://www.agsa.co.za/Portals/0/MFMA%202012-13/2013-14%20MFMA%20Media%20release.pdf> (Accessed 15 August 2015) 1.

<sup>644</sup> 'Clean audits' refers to instances where the financial statements are unqualified, with no reported audit findings.

<sup>645</sup> Auditor General South Africa Media Release 1.

<sup>646</sup> Auditor General South Africa Media Release 1.

- (a) the established of a specified minimum anti-corruption capacity in all government departments and public entities;
- (b) the establishment of guidelines for the minimum functions of anti-corruption capacity;
- (c) national functions concerning the co-ordination within departments and
- (d) an implementation plan and report strategy to all government departments.

Anti- corruption mechanisms within municipalities are meant to conduct inquiries into and investigations of improper conduct or corruption committed by a person holding public office, to give direction to the concerned authority to take appropriate actions such person and to file a case before the court of law against any public official or other person upon investigation of corruption.<sup>647</sup>

An exposé of the establishment and functioning of the anti-corruption mechanisms within the Eastern Cape and Western Cape municipalities will be discussed. The purpose of the discussion will be given an insight as to whether the establishment anti-corruption capacity was effective in combatting fraud and corruption within the identified municipalities.

According to section 114(2) of the Constitution a Provincial legislature is duty bound to create a legal framework for the prevention of corruption and the promotion of accountability of government officials.<sup>648</sup> According to the Canadian Parliamentary Centre corruption tends to flourish where governance is weak and institutions of accountability are marginalized.<sup>649</sup>

The Eastern Cape administration had to face serious challenges and impediments due to the fact that it had to integrate former homelands into their organisational set up.<sup>650</sup> The Western Cape always functioned autonomously and was not exposed to the kind of setbacks and challenges

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<sup>647</sup> Upadhyay “The Anti-Corruption Initiative for Asia-Pacific and the Nepalese Drive Against Corruption” Inter-American Development Bank Washington DC (2002) 4 and Majila *A comparative analysis of anti-corruption legislation and anti-corruption agencies in the Eastern Cape and Northern Cape Provinces: A Governance Perspective* (2012) (Thesis in fulfilment of PHD in Public Administration, UNISA) 4.

<sup>648</sup> Cwati *Comparing anti-corruption strategies in South Africa’s Western and Easter Cape Provinces* (2004) (unpublished LLM thesis University of Western Cape) 22.

<sup>649</sup> Cwati 22.

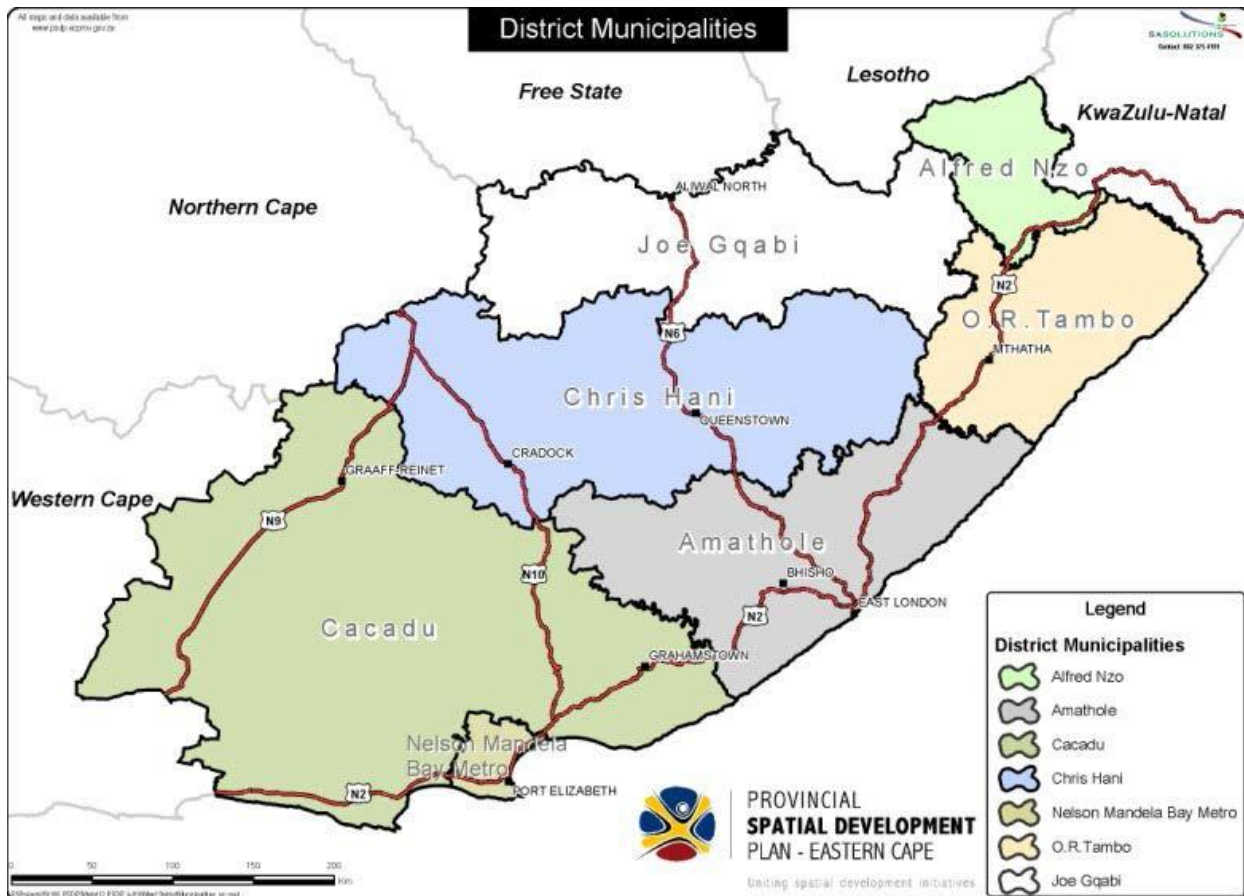
<sup>650</sup> Cwati 25.

faced by the Eastern Cape in its government organisational structures. Management systems, control mechanisms and elements of governance and integrity are also less developed in the Eastern Cape Province than in the Western Cape Province. The comparative analysis between the Eastern Cape Province and the Western Cape Province will discuss the ability and efficacy or otherwise of the respective provinces to respond to the Public Service Anti-Corruption Strategy.

The failure or success of the respective provinces responses to the fraud and corruption strategy can lead to the formulation of best practices and/or recommendations to enhance the ability of provinces to effectively combat fraud and corruption.

## 2. FRAUD AND CORRUPTION WITHIN THE EASTERN CAPE PROVINCE

### 2.1 HISTORIC INTRODUCION



**Fig. 1** District municipalities in the Eastern Cape Province<sup>651</sup>

The Eastern Cape is the second largest of the nine provinces in South Africa.<sup>652</sup> It has a population close to 7 million people living on a 169 580 square kilometers of land.<sup>653</sup> It is the third-largest provincial population in the country and has a rich historical and cultural heritage. The Eastern

<sup>651</sup> Hamann and Tuinder “Introducing the Eastern Cape: A quick guide to its history, diversity and future challenges” (2012) *Stockholm Resilience Centre* at 13. (Source EC provincial spatial development plan).

<sup>652</sup> Cadman *Exploring our Provinces: Eastern Cape* (2007a) 2-12.

<sup>653</sup> Cadman (2007a) 2-12.



Cape has a diverse landscape ranging from the dry desolate Great Karoo to the lush forests of the Wild Coast and the Keiskamma Valley with its pristine coastline beaches.<sup>654</sup> The Eastern Cape is divided into one metropolitan municipality, 6 district municipalities and 38 local municipalities. Despite the magnificent landscape of the Eastern Cape, it is labelled as being the poorest and most corrupt province in the country.<sup>655</sup> This is mostly attributed, *inter alia*, to the legacy of the homeland system that was put in place by the apartheid government.<sup>656</sup> The apartheid policies, economic failure and corruption resulted in very little economic and infrastructural development within the homelands.<sup>657</sup>

In 1994, the Eastern Cape administration comprised of the unification of three apartheid era institutions namely: the Ciskei Homeland Administration, the Transkei Homeland Administration and the Cape Provincial Administration.<sup>658</sup> Each department was guided by its own set of acts and regulations.<sup>659</sup>

In March 1998, the Speaker of the Eastern Cape Legislature<sup>660</sup> proposed a notion to Parliament that the legislature and the executive should launch and promote an anti-corruption and fraud campaign.<sup>661</sup> This notion led to the proposal of establishing anti-corruption and fraud units in all departments to report directly to the Members of the Executive Committee (MEC) and be coordinated by the Premier's office Unit reporting directly to the Premier.<sup>662</sup> The proposed notion was accepted and passed by the legislature.<sup>663</sup> Two structures were created to give effect to the proposed notion. The Premier's office introduced the Anti-Corruption Forum which was tasked with being the central body for strategizing and advancing anti-corruption objectives.<sup>664</sup> The

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<sup>654</sup> Cadman (2007a) 2-12.

<sup>655</sup> National Development Agency "State of poverty and its manifestations in the nine provinces of South Africa: Report outline – State of poverty in South Africa" (2014) *Human Sciences Research Council Economic Performance and Development* at 11.

<sup>656</sup> Hamann and Tuinder 10.

<sup>657</sup> Hamann and Tuinder 11.

<sup>658</sup> Cwati 37.

<sup>659</sup> Cwati 37.

<sup>660</sup> Mr Mkhangelisi Matomela.

<sup>661</sup> Cwati) 38.

<sup>662</sup> Cwati) 38.

<sup>663</sup> Cwati) 38.

<sup>664</sup> Cwati 38.

Provincial Legislature initiated the Network Against Corruption which was tasked to augment the functions of the legislature by acting as a medium through which information was channelled to and from standing committees, the public and even the Anti-Corruption Forum.<sup>665</sup>

## 2.2 THE ANTI-CORRUPTION FORUM

The Eastern Cape Premier's office, in November 1999, halted the initiative and convened a Provincial Anti-Corruption Summit<sup>666</sup> with the representatives from all sectors of society.<sup>667</sup> The Provincial Anti-Corruption Summit established eight resolutions which were adopted by the Provincial Executive Council which are highlighted hereunder.<sup>668</sup>

- a) A Provincial Anti-Corruption Forum was established;
- b) A Provincial anti-corruption campaign in the Province to be implemented;
- c) The anti-corruption investigative agencies effectively co-ordination;
- d) Institutional mechanisms to be streamlined in order to enhance the fight against corruption;
- e) Legislation that hinders the effective fight against corruption to be reviewed;
- f) an effective communication and information strategy to be developed;
- g) effective corruption prevention measures to be put in place and
- h) Ensuring that law enforcement in corruption cases are effectively managed.

The Premier's Office immediately promulgated the Anti-Corruption Forum which was made up of representatives from the government, criminal investigation agencies, business and civil society.<sup>669</sup> The Anti-Corruption Forum was chaired by the Director-General<sup>670</sup> of the Provincial Administration and conducted several meetings between April 2000 and March 2001 in order to set out the mission, objectives and functions of the Anti-Corruption Forum.<sup>671</sup>

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<sup>665</sup> Cwati 38.

<sup>666</sup> Held in East London on the 18 and 19 November 1999.

<sup>667</sup> Cwati 39; Majila (2012) 16 and Anassi *Corruption in Africa: The Kenyan Experience* (2004) 297.

<sup>668</sup> Cwati 39; Majila (2012) 16-17 and Anassi 297.

<sup>669</sup> Cwati 40.

<sup>670</sup> Dr. Tom.

<sup>671</sup> Cwati 40.

The founding document<sup>672</sup> of the Anti- Corruption Forum sets out the mission, objectives and functions as follows:<sup>673</sup>

### **2.2.1 The purpose/mission of the Anti-Corruption Forum**

The purpose of the Anti-Corruption Forum was to formulate strategy and policy for the advancement of anti-corruption objectives.

### **2.2.2 Objectives of the Forum**

The main objectives of the forum were to:

- a) Synergize efforts of anti-corruption units in order to maximize the impact;
- b) Creation of a secretariat to assist the Forum;
- c) The dissemination of information gained with regards to fraud and corruption to relevant law enforcement agencies and
- d) Forging close ties with the National Director of Public Prosecution, the Member of Executive Committee (MEC) for Safety and Liaison, the Provincial Commissioner of the South African Police Service and the National Anti-Corruption Forum.

### **2.2.3 Functions of the Anti-Corruption Forum**

The main functions of the Forum were to:

- a) launch the Anti-Corruption Campaigns;
- b) ensure that all sectors and organizations were involved in the implementation of programmes and strategies aimed at the prevention and combating of corruption, misconduct and maladministration;

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<sup>672</sup> 2000.

<sup>673</sup> Cwati 41 and 42.

- c) coordinate the implementation of programmes and strategies in accordance with the purpose and objectives of the Provincial Anti-Corruption Summit and other national fora;
- d) establish a database which was to record all incidences of corruption, misconduct and maladministration, and of the responses thereto. Undertake and recommend appropriate research with regard to fraud and corruption in the province;
- e) build and develop institutional capacity for the implementation of anti-corruption strategies.
- f) monitor, review and provide advice, guidance and assistance to relevant stakeholders in the investigation and assessment of the effectiveness of programmes and strategies aimed at the prevention and combating of corruption, misconduct and maladministration and
- g) develop a communication strategy in consultation with the Office of the Premier.

The Anti-Corruption Forum reported to the Premier and the Provincial Legislature at least once a year.<sup>674</sup> The members also had to account to the structures or organizations that they represented as well as such other sectoral structures which may be helpful in achieving the purpose and objectives of the forum.<sup>675</sup> A Secretariat was created to assist the Forum with secretarial responsibilities.<sup>676</sup>

After further deliberation, the Provincial Director-General chaired a two hour meeting on the 22<sup>nd</sup> May 2000 to ensure its terms of reference and its programme of action comply with the eight resolutions of the anti-corruption summit.<sup>677</sup> It was revealed in a media briefing after the meeting that the Anti-Corruption Forum would assist in coordinating activities of all investigating and law enforcement agencies to avoid duplication of activities, compile a database of corruption cases as well as the person(s) investigating the matter to ensure that resources were utilized efficiently.<sup>678</sup> The Anti-Corruption Forum would also promote and facilitate the success of campaigns against corruption. The Director-General emphasized that the Anti-Corruption Forum will make sure that corruption cases are being dealt with in an expeditious and effective manner.<sup>679</sup>

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<sup>674</sup> Cwati 42.

<sup>675</sup> Cwati 42.

<sup>676</sup> Cwati 42.

<sup>677</sup> Cwati 42.

<sup>678</sup> Cwati 42.

<sup>679</sup> Cwati 43.

The Anti-Corruption Forum was not successful or effective in contributing to the fight against corruption in the Eastern Cape Province.<sup>680</sup> An explanation for this failure will be discussed below under paragraph 2.4.

## **2.3 THE NETWORK AGAINST CORRUPTION**

The Office of the Speaker of the Eastern Cape Legislature hosted a provincial anti-corruption workshop and launched an anti-corruption campaign which included members of the provincial legislature and their constituencies.<sup>681</sup> This led to the promulgation of the statutory body called the Network Against Corruption by the Provincial Legislature on the 12 October 2000.<sup>682</sup> The Network Against Corruption was created to allow members of the public to escalate reports of corruption to legislative standing committees for onward escalation to the relevant government departments.<sup>683</sup> This process was expected to improve legislative oversight of the executive and government department's performance in combating corruption.<sup>684</sup> A constitution was drafted which set out the mission objectives and functions<sup>685</sup> of the Network Against Corruption which included the following:<sup>686</sup>

### **2.3.1 The Purpose/Mission of the Network Against Corruption**

In order to determine whether the network against corruption executed its functions effectively and achieved the desired outcome, it is important to first highlight the main functions of the network. The purpose of the Network Against Corruption was to monitor the effectiveness of anti-corruption policies and strategies in the Eastern Cape.

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<sup>680</sup> Cwati) 43.

<sup>681</sup> Cwati 43 and 44.

<sup>682</sup> Cwati 44.

<sup>683</sup> Cwati 44.

<sup>684</sup> Cwati 44.

<sup>685</sup> See Network Against Corruption constitution.

<sup>686</sup> Cwati 44, 45 and 46.

### **2.3.2 The Objectives of the Network**

The objectives of the network included the following:

- a) Encouraging support for anti-corruption strategies in the public sector of the Eastern Cape province. Furthermore, striving towards mobilizing and educating public officials, members of the Provincial Legislature and the community;
- b) Educating officials and the public about the existence of mechanisms for efficient receipt, processing and referral of corruption reports. This was aimed at encouraging the reporting of corruption;
- c) Continuous assessment of all anti-corruption strategies, policies and initiatives and
- d) facilitating the oversight function by the Provincial Government on reported cases of corruption in the province.

The Network Against Corruption did not achieve any of its functions and duties as set out in its constitution and consequently did not succeed in combating fraud and corruption within the Eastern Cape Province. A detailed explanation of its failure will be set out below under paragraph 4.

### **2.3.3 The Functions of the Network**

The functions of the network include the following:

- a) to foster strategic relationships with relevant stakeholders;
- b) Function as a resource to the Legislature and its committees;
- c) Facilitation of legislative oversight of all corruption combating initiatives;
- d) Receive corruption reports;
- e) Assist the legislature to monitor efficacy of internal mechanisms of departments to deal with corruption and
- f) Educating and mobilising public support for anti-corruption initiatives and reporting thereof.

## 2.4 CURRENT ANTI-CORRUPTION AND FRAUD STRATEGIES BY THE EASTERN CAPE PROVINCE

The Anti-Corruption Forum was re-established<sup>687</sup> in 2005 to deal with fraud and corruption within the Eastern Cape Province.<sup>688</sup> The Anti-Corruption Forum was mandated to:<sup>689</sup>

- a) Ensure that provincial consensus existed by co-ordinating efforts against corruption throughout all sectors in the Province;
- b) Advise higher political administrators on the implementation of effective strategies to combat corruption;
- c) Information and best practices to combat corruption are shared with other sectors;
- d) Advise sectors on how to improve anti-corruption strategies.

The Anti-Corruption Council was also established to assist with the combating of fraud and corruption within the Eastern Cape Province. The Anti-Corruption Council was comprised of the Heads of Departments, South African Police Service, Special Investigative Unit, Public Protector, the State Security Agency and the Public service commission.<sup>690</sup> The Council was chaired by the Director General and encompassed the following main objectives:<sup>691</sup>

- a) To ensure that the anti-corruption policy in the province was devised, implemented and evaluated;
- b) To ensure that anti-corruption efforts in the Public service entities were well co-ordinated and integrated;
- c) To monitor how ethical behaviour in the public service was promoted;

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<sup>687</sup> This was represented by Business, Organized Labour, BGO sectors, Religious fraternity, Public Service and members of the Executive Council. The Honourable premier appointed a member of the Executive Council as Political Champion and ultimately Chairperson of the Forum.

<sup>688</sup> Province of the Eastern Cape Provincial Treasury, Provincial Anti-Corruption and Fraud Prevention Plan 2011-2016 11.

<sup>689</sup> Provincial Anti-Corruption and Fraud Prevention Plan 2011-2016 12.

<sup>690</sup> Provincial Anti-Corruption and Fraud Prevention Plan 2011-2016 13.

<sup>691</sup> Provincial Anti-Corruption and Fraud Prevention Plan 2011-2016 13.

- d) To facilitate research to understand the most effective ways of combating corruption trend of methodologies thereof and
- e) To ensure that the capacity is necessary to combat corruption is established.

A two-pronged approach was adopted by the Eastern Cape Province which involves:<sup>692</sup>

- a) Create awareness on anti-corruption and ethics through awareness workshops;
- b) Provide training on professional ethics in collaboration with the Ethics Institute of Southern Africa and
- c) Thought training 600 officials were sensitized on issues of procurement fraud , tax evasions and measures adopted to address these issues;

The Whistle Blowing Policy was created in line with the Protected Disclosure Act and Code of Ethics for the Eastern Cape Public Service which was approved by Provincial Executive Council in order to encourage employees to report fraud and corruption.<sup>693</sup> The electronic web database was developed to load and categories cases reported to the National Anti-Corruption Hotline.<sup>694</sup> In order to facilitate efficient monitoring the departmental fraud prevention plans are linked to the Provincial Fraud Preventions plans.<sup>695</sup> A policy forbidding public servants from trading with government is being deliberated upon by the Provincial Executive Council.<sup>696</sup> Inroads are being made at municipal level wherein municipalities are being assisted with the development of Fraud Risk Assessments and the development of Fraud Prevention Plans.<sup>697</sup>

On a quarterly basis the office of the Premier conducts anti-corruption campaigns and fraud awareness programs within the departments.<sup>698</sup> It also monitors investigations in departments and

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<sup>692</sup> Provincial Anti-Corruption and Fraud Prevention Plan 2011-2016 6.

<sup>693</sup> Provincial Anti-Corruption and Fraud Prevention Plan 2011-2016 7.

<sup>694</sup> Provincial Anti-Corruption and Fraud Prevention Plan 2011-2016 7.

<sup>695</sup> Provincial Anti-Corruption and Fraud Prevention Plan 2011-2016 8.

<sup>696</sup> Provincial Anti-Corruption and Fraud Prevention Plan 2011-2016 8.

<sup>697</sup> Provincial Anti-Corruption and Fraud Prevention Plan 2011-2016 8. PALAMA is being approached to assist with capacity building in this regard. PALAMA is the Public Administration Leadership and Management Academy in the Republic of South Africa.

<sup>698</sup> Provincial Anti-Corruption and Fraud Prevention Plan 2011-2016 at 14.



plays an advisory role.<sup>699</sup> The outcomes of National Anti-corruption hotline and the quarterly reports are tabled in this regard.<sup>700</sup> Various other initiatives have been undertaken to minimize fraud and corruption which include the following:<sup>701</sup>

- a) Creation of a Supplier database which would assist to reduce procurement fraud and enable blacklisting of miscreant suppliers;
- b) Proper screening of candidates before employment through the utilization of the National Intelligence Agency processes and
- c) Disclosure of financial interests by provincial employees which could assist in identifying any potential conflict of interest in their day to day performance of their functions.

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<sup>699</sup> Provincial Anti-Corruption and Fraud Prevention Plan 2011-2016 at 14.

<sup>700</sup> Provincial Anti-Corruption and Fraud Prevention Plan 2011-2016 14.

<sup>701</sup> Provincial Anti-Corruption and Fraud Prevention Plan 2011-2016 14.

### 3 FRAUD AND CORRUPTION WITHIN THE WESTERN CAPE PROVINCE

#### 3.1 HISTORIC BACKGROUND



**Fig. 2** District municipalities in the Western Cape Province<sup>702</sup>

The Western Cape Province is situated in the south-western part of the country.<sup>703</sup> It is the fourth largest of the nine provinces in both area and population, with an area of 129,449 square kilometers and a population of 5.8 million.<sup>704</sup> The Western Cape Province resembles an L-shaped which extends north and east from the Cape of Good Hope.<sup>705</sup> The far interior of the Western Cape Province forms part of the dry Karoo and the south coast boasts the lush and evergreen vegetation extending to Table Mountain.<sup>706</sup> The Cape of Good Hope is most popularly known in Western

<sup>702</sup> Google images: District Municipalities of the Western Cape.

[https://www.google.co.za/search?q=district+municipalities+of+Western+Cape+map+picture&biw=1366&bih=623&source=lnms&tbm=isch&sa=X&ved=0CAYQ\\_AUoAWoVChMI8snI4cu1xwIVyZcaCh0fVAhW&dpr=1#imgrc=nT\\_k071L5SwvyM%3A](https://www.google.co.za/search?q=district+municipalities+of+Western+Cape+map+picture&biw=1366&bih=623&source=lnms&tbm=isch&sa=X&ved=0CAYQ_AUoAWoVChMI8snI4cu1xwIVyZcaCh0fVAhW&dpr=1#imgrc=nT_k071L5SwvyM%3A) (accessed 19 August 2015).

<sup>703</sup> Cadman *Exploring our Provinces: Western Cape* (2007b) 1-15.

<sup>704</sup> Cadman (2007b) 1-15.

<sup>705</sup> Cadman (2007b) 1-15.

<sup>706</sup> Cadman (2007b) 1-15.

Cape Province as it was used as a resupply camp between India and the East.<sup>707</sup> The resupply camp was established for the Dutch East India Company and the journey round Africa and Cape Town became known as the “The Tavern of the Seas”.<sup>708</sup>

Historically antecedents together with the methods of incorporation of former homelands in the post-apartheid period is closely related to the current fraudulent and corrupt behaviour of public officials within local government.<sup>709</sup> The Western Cape was not a formerly incorporated homeland and proves to be the least corrupt province.<sup>710</sup> Currently the Western Cape Province is divided into one metropolitan municipality (the City of Cape Town) and five district municipalities. The five district municipalities are further divided into twenty-four local municipalities. The Western Cape has the second-highest Gross Domestic Product per capita and personal income per capita in the country after Gauteng and the highest Human Development Index rating.<sup>711</sup> The Western Cape Province is in a better social-economic development position than the Eastern Cape Province.<sup>712</sup> Despite a better social-economic development standing in the Western Cape Province it also had its corruption and fraud related problems.<sup>713</sup> In order to address these problems the Western Cape Government established a forensic audit unit that focused on fraud and theft by employees of provincial government.<sup>714</sup>

A discussion of the anti-corruption strategy in the Western Cape Provincial Administration will ensue which will focus on the Forensic Audit Component.<sup>715</sup>

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<sup>707</sup> Cadman (2007b) 1-15.

<sup>708</sup> Cadman (2007b) 1-15.

<sup>709</sup> Bussell *Corruption and Reform in India: Public Services in the Digital Age* (2012) 211.

<sup>710</sup> Bussell (2012) 211.

<sup>711</sup> Cwati 34 and 58.

<sup>712</sup> Cwati 58.

<sup>713</sup> Cwati 58.

<sup>714</sup> Cwati 58 and Provincial Government Western Cape (2009) Modernisation Programme: Forensic Investigative Unit 3.

<sup>715</sup> Cwati 60.

## 3.2 THE DIRECTORATE: FORENSIC AUDIT

The first fraud investigation unit in the Western Cape Province was established in 1992 and located within the ex-house of Representatives.<sup>716</sup> In 1994 the Unit was closed<sup>717</sup> and re-established within the Provincial Administration of the Western Cape during 1996.<sup>718</sup> In 1997 cabinet approved of the first fraud, theft and corruption prevention policy.<sup>719</sup> The Directorate: Forensic Audit is located within the Internal Audit Component.<sup>720</sup> In September 1999 cabinet resolved that the function of the Internal Audit Component and the Forensic Investigative unit would remain centralized. This was as a result of the promulgation of the Internal Audit component established in terms of the Public Finance Management Act of 1999.<sup>721</sup> The Forensic Audit is managed by the Director, a Deputy Director, three assistant Directors, a Forensic Auditor and eight Assistant Forensic Auditors.<sup>722</sup>

The Directorate Forensic Audit has its own toll free number<sup>723</sup> which allows employees of the administration as well as the public to anonymously report any information regarding offences related to fraud, theft and corruption.<sup>724</sup> In terms of the Provincial Anti-Corruption Policy<sup>725</sup> officials who fail to report any financial misconduct will be guilty of an offence.<sup>726</sup> The hotline is only one of the mediums within the province to report fraud, theft and corruption.<sup>727</sup> When any misconduct is reported the information is recorded on a database (fraud register) and a case number is allocated.<sup>728</sup> Once the Forensic Audit investigation is complete a report is compiled and

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<sup>716</sup> Cwati 61.

<sup>717</sup> With the disbandment of the ex-House of Representatives.

<sup>718</sup> Cwati 62.

<sup>719</sup> Cwati 62 and Cabinet and Decision Support: Overview (2009) [http://www.westerncape.gov.za/your\\_gov/361](http://www.westerncape.gov.za/your_gov/361) (accessed 29 August 2016).

<sup>720</sup> Cabinet and Decision Support: Overview (2009) and Opperman (2014) Perceptions on fraud and corruption polices and strategies in public procurement within the Western Cape Provincial Treasury (WCPT) (thesis published in fulfilment of a Master in Public Administration, Stellenbosch University) 46.

<sup>721</sup> Cwati 60 and Cabinet and Decision Support: Overview (2009).

<sup>722</sup> Cwati 60 and Cabinet and Decision Support: Overview (2009).

<sup>723</sup> This is a 24-hour service hotline. Managers have official mobile telephones which equipped to re-direct any call from the hotline to them. See Cabinet and Decision Support: Overview (2009) and Opperman (2014) 48.

<sup>724</sup> Cwati 62 and Cabinet and Decision Support: Overview (2009).

<sup>725</sup> Provincial Anti-Corruption Policy 1999.

<sup>726</sup> Cwati 63 and Cabinet and Decision Support: Overview (2009).

<sup>727</sup> Cwati 64; Cabinet and Decision Support: Overview (2009) and Opperman (2014) 46.

<sup>728</sup> Cwati 64; Cabinet and Decision Support: Overview (2009) and Opperman (2014) 51.

addressed to the Head of the relevant department and institution.<sup>729</sup> Investigations are conducted on a weekly basis, in terms of an Audit Plan in order to determine which cause will be further investigated.<sup>730</sup> On a monthly basis the fraud register is made available to the Heads of Department in order for them to keep abreast with all matters reported as well as the progress of the investigation ensuring that the recommendations to manage the risk are timeously executed.<sup>731</sup> Disciplinary action can be implemented against the suspected official as well as a criminal case reported to the South African Police Service for prosecution.<sup>732</sup> If an incident of an alleged financial misconduct is reported, the provincial treasury investigates the allegation internally. If the results of this investigation indicate evidence of suspected fraud and corruption, this matter should be referred to the FIU. The same process should be followed when reporting incidents of alleged non-compliance policies and procedures. Employees who chose to report any incident of fraud and corruption directly to the FIU will not be prejudiced. If there is any doubt regarding a potential referral to the FIU, the department is compelled to immediately contact the FIU to clarify the matter and to document such discussions for future reference and audit purposes.<sup>733</sup> The FIU in its efforts to investigate and bring the perpetrators of fraud and corruption to book also collaborated with external forensic audit companies such as Deloitte for the purpose of forensic investigation, capacity building through training and recovery of lost funds.<sup>734</sup> This collection proved to be very effective due to the fact that they are not internally based and are not susceptible to political pressure and lack expediency.<sup>735</sup>

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<sup>729</sup> Cwati 64; Cabinet and Decision Support: Overview (2009); Public Service Fact Sheet 2013 [http://www.psc.gov.za/documents/2013/FACT%20SHEET%20ON%20THE%20STATE%20OF%20THE%20PUBLIC%20SERVICE%20-%20FINAL\(2\).pdf](http://www.psc.gov.za/documents/2013/FACT%20SHEET%20ON%20THE%20STATE%20OF%20THE%20PUBLIC%20SERVICE%20-%20FINAL(2).pdf) (accessed 27 August 2016) and Opperman (2014) 51.

<sup>730</sup> Cwati 64.

<sup>731</sup> Cwati 64.

<sup>732</sup> Cwati 64.

<sup>733</sup> Opperman (2014) 49-50.

<sup>734</sup> Benjamin Special Unit Leads to 6 arrest in Western Cape. Corruption Watch (2012) <http://www.corruptionwatch.org.za/special-unit-leads-to-16-arrest-in-western-cape/> (accessed 29 August 2016).

<sup>735</sup> Benjamin Special Unit Leads to 6 arrest in Western Cape. Corruption Watch (2012).

The purpose and priorities of the Forensic Audit are:<sup>736</sup>

- a. To make determination with regard to the quantum of the loss incurred in order to make recommendations to prevent future losses and review policies and procedures in consultation with the relevant department;
- b. To ensure that there is sufficient evidence to justify instituting internal disciplinary steps;
- c. To provide sufficient information to the SAPS that warrants police investigation;
- d. To monitor the recovery of the losses;
- e. To make follow-ups on the progress of disciplinary processes;
- f. To make follow-ups on the progress criminal investigation and prosecution of offenders and
- g. To promote ethical conduct and good governance through the education of public officials.

The Forensic Audit Component of the Provincial Administration in the Western Cape is still in operation and addresses reports of irregularities regarding corruption, fraud, theft and misuse of government property.<sup>737</sup> In 2003 it has been reported that there were 110 cases being investigated, three (3) finalized criminal prosecutions, twelve (12) pending criminal prosecutions and 24 disciplinary hearing that recorded guilty verdicts.<sup>738</sup> The Western Cape Province was one of three provinces with the lowest level of corruption at provincial level.<sup>739</sup>

In 2010, the Public Service Commission assessed the Western Cape Provincial Departments on the effectiveness of professional ethics and anti-corruption measures in the public service against the following predetermined indicators: code of conduct for the public service, gift register and policy in place, monitoring absenteeism from work and promotion of the Prevention and Combatting of Corrupt Activities Act.<sup>740</sup> The findings indicated that the code of conduct is regulated and gives the basis for disciplinary action of officials charged with misconduct. The

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<sup>736</sup> Cwati 64 and Opperman (2014) 47.

<sup>737</sup> The Western Cape Government. <https://www.westerncape.gov.za/service/reporting-fraud-and-corruption#forensicaudit> (Accessed 23 August 2015) and Benjamin Special Unit Leads to 6 arrest in Western Cape. Corruption Watch (2012).

<sup>738</sup> Cwati 66.

<sup>739</sup> Opperman (2014) 50 and SA Report Corruption Assessment Report 2003.

<sup>740</sup> Opperman (2014) 50.

findings further indicated that the Department of the Premier is responsible for the promotion of the code of conduct and accomplish this through workshops and training sessions conducted by Public Administration Leadership and Management Academy (PALMA) during induction.<sup>741</sup> The FIU provides training on the PCCA Act to all the 13 provincial departments within the Western Cape. The finding concluded that the Western Cape Provincial Government performed well in all the indicators as mentioned above and this is largely due to the centralization of the management of professional ethics.<sup>742</sup> Statistics South Africa (Stats SA) in collaboration with the Office of the Public Service Commission (OPSC) has established a co-operative affiliation in the fight against fraud and corruption by encouraging the reporting of alleged fraud and corrupt activities via the National Anti-Corruption Hotline. Stats SA keeps a register for all alleged cases of fraud and corruption. During the 2012/2013 financial year, Stats SA received a total of 13 cases which were investigated and successfully resolved.<sup>743</sup> During the 2011/2012 financial year a total number of 74 (out of 583) cases of financial misconduct were reported by the Western Cape Province.<sup>744</sup>

During the 2012/2013 financial year the total number of cases reported for financial misconduct within the Western Cape Province has increased to 105 cases.<sup>745</sup> Western Cape Province reported the second highest number of case for the 2012/2013 financial year. According to the trends contained in the PSC Fact Sheet report 2013, there has been a decrease in the number of finalized cases of financial misconduct reported by provincial departments for the financial year 2012/2013 financial year compared to the previous four financial years. This could be due to either poor or inadequate reporting. The statistics contained in the PSC Factsheet report 2013, indicate that financial misconduct is still a major challenge in the public service.<sup>746</sup> Regardless of the fact that disciplinary action are being taken against the perpetrators, the penalties imposed appear to be too lenient and inconsistent, therefore making it difficult to stop other public servants from committing financial misconduct of a comparable nature in the future.

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<sup>741</sup> Opperman (2014) 50.

<sup>742</sup> Public Service Commission Assessment of the State of Professional Ethics, 2010 and Opperman (2014) 50.

<sup>743</sup> Lehohla, P. Stats SA Annual Report (2013) Stats SA Annual Report (2013), [http://www.statssa.gov.za/wp-content/uploads/2013/09/Annual\\_Report\\_2013\\_Book\\_1.pdf](http://www.statssa.gov.za/wp-content/uploads/2013/09/Annual_Report_2013_Book_1.pdf) (accessed 26 August 2016) and Opperman (2014) 50.

<sup>744</sup> Stats SA Annual Report (2013); Public Service Fact Sheet 2013 and Opperman (2014) 50.

<sup>745</sup> Public Service Fact Sheet 2013 and Opperman (2014) 50.

<sup>746</sup> Public Service Fact Sheet 2013 and Opperman (2014) 50.

The Western Cape's Forensic Investigative Unit arrested sixteen (16) people, which included former health department employees.<sup>747</sup> The suspects were initially arrested for allegedly being involved in the illegal sale of a government-owned product and defrauding the Paarl Hospital in the amount of 2 million rand.<sup>748</sup> This is indicative of the fact, that despite the presence of fraud and corruption, the Western Cape Province is effectively and efficiently combating the crimes of fraud and corruption within the local government. The provincial Anti-Corruption policy focuses on audit/investigation, prevention and education of fraud and corruption. This further enhances the Western Cape Province's fight against fraud and corruption.<sup>749</sup>

#### **4. COMPARISON BETWEEN THE EASTERN CAPE AND THE WESTERN CAPE'S ABILITY TO EFFECTIVELY MANAGE FRAUD AND CORRUPTION IN THE RESPECTIVE PROVINCES**

This research has to analyse the effectiveness of anti-corruption mechanisms and agencies in the Eastern and Western Cape.

There were several material reasons between Premier Stofile's Anti-Corruption Forum and the Legislative Network Against Corruption which ultimately led to the failure of both bodies.<sup>750</sup> The Director General of the Province approached the Public Service Commission to investigate the failure of the two bodies.<sup>751</sup> A multi-disciplinary and a multi-skilled task team was established which was led by the Public Service Commission.<sup>752</sup> It is important to evaluate and in the main understand why the various initiatives, policies and strategies put in place by the Eastern Cape Government failed. Grand plans, strategies and initiatives are meaningless unless they are effectively implemented and evaluated against stated objective/functions. The task team revealed that the anti-corruption strategies and agencies of the Eastern Cape Province failed due to the following reasons, *inter alia*:<sup>753</sup>

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<sup>747</sup> Benjamin Special Unit Leads to 6 arrests in Western Cape. Corruption Watch (2012).

<sup>748</sup> Benjamin Special Unit Leads to 6 arrests in Western Cape. Corruption Watch (2012).

<sup>749</sup> Cwati 69.

<sup>750</sup> Cwati 47.

<sup>751</sup> Cwati 48.

<sup>752</sup> Cwati 48.

<sup>753</sup> Cwati 49 and 50.



- a) Lack of capacity to ensure that the Provincial anti-corruption strategy functioned effectively;
- b) The absence of a central database for the recording, tracking and evaluation of corruption cases;
- c) The inability of the Provincial administration to successfully resolve, criminal, civil and disciplinary cases pertaining to corruption cases;
- d) Ignorance and limited knowledge of the anti-corruption by stakeholders due to the fact that strategy was not publicised;
- e) Majority of employees were not trained on the code of conduct and ethics as a result there was poor buy-in from employees;
- f) There was no interdepartmental ethics unit;
- g) Lack of a centralized database to capture information on appointments, performance agreements, job descriptions, financial disclosure and security vetting practices;
- h) The absence of an unambiguous protocol for co-operation and co-ordination between the SIU, Auditor General and Public Protector which led to duplication of investigations on cases of corruption and maladministration and
- i) Whistle-blowers remained unprotected due to the fact that the Provincial Administration did not implement the Protected Disclosures Act and put measures in place to protect whistle-blowers.

The Task Team that was established to investigate the failure of the anti-corruption initiatives in the Eastern Cape Province identified the following shortcomings:<sup>754</sup>

- a) Duplication of effort,
- b) Poor definition of roles and responsibilities,
- c) The Provincial Director-General did not provide the necessary support,
- d) Perceptions that the functions of the Network Against Corruption was usurped by the Public Service Accountability Monitor,
- e) Charade assassinations and
- f) Lack of trust between role players.

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<sup>754</sup> Cwati 50.

In light of the above, the major constraint resulting in the failure was the duplication<sup>755</sup> of membership between the Anti-Corruption Forum and the Network Against Corruption.<sup>756</sup> This affected the members of both bodies as it led to their inability to participate fully in the forum.<sup>757</sup>

After the collapse of the Anti-Corruption Forum and the Network Against Corruption bodies the Eastern Cape Government had to create other policies and structures to combat public sector fraud and corruption within the Province.<sup>758</sup> Premier Stofile requested Peter Leon<sup>759</sup> to urgently prepare a report on the establishment of improved anti-corruption measures including an anti-corruption tribunal in his office.<sup>760</sup> The office of the Premier, at the same time of the report, also suggested a number of measures to be effected in order to combat fraud and corruption.<sup>761</sup> The office of the Premier requested the creation of an asset register for public officials, new investigation agency and a corruption ‘hot line’.<sup>762</sup>

The office of the Premier allocated R1.9 million to fight fraud and corruption in the government departments in the Eastern Cape Province in 2003 over the following three years.<sup>763</sup> The Premier’s office set aside R4000 000 for the creation of anti-fraud committees within all 12 provincial departments.<sup>764</sup> R500 000 has been set aside for the professional investigation of fraud and corruption cases.<sup>765</sup> R1 million rand was allocated for the establishment of an independent “ethics line committee” by the end of June 2003.<sup>766</sup> The office of the Premier anticipated that these

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<sup>755</sup> The constitution of the Network overlapped with the function and membership of the Forum. This was evident in its goal to establish relationships with relevant stakeholders while the Forum had the same mandate. As a result of this the Public Service Commission and the same NGO’s became part of both structures. This duplication led to the lack of good relations between the two structures. It also led to the poor co-ordination and planning of their respective activities.

<sup>756</sup> Cwati 51.

<sup>757</sup> Cwati 51.

<sup>758</sup> Cwati 51.

<sup>759</sup> Former Gauteng Democratic Alliance leader and current chairman of the Ministerial Advisory committee on Local Government Transformation.

<sup>760</sup> Cwati 51.

<sup>761</sup> Cwati 51.

<sup>762</sup> Cwati 51.

<sup>763</sup> Cwati 52.

<sup>764</sup> Cwati 52.

<sup>765</sup> Cwati 52.

<sup>766</sup> Cwati 52.

measures would increase the number of reports of suspected ethical offences and improve work ethic.<sup>767</sup>

The National Government had to assist the Eastern Cape Province as the problems of fraud, corruption and mismanagement increased.<sup>768</sup> President Thabo Mbeki established a multi-sectoral management team to be sent to the Eastern Cape Province to intervene in the administrative affairs of the Province.<sup>769</sup> This team was called Interim Management Team which was approved by national Cabinet on the 4<sup>th</sup> December 2002.<sup>770</sup> The Interim Management Team was tasked to assist the Eastern Cape Provincial Administration to improve service delivery and establish sound governance in the province, focus on treasury functions of the Province and dedicate its capacity to focus on the combating of fraud and corruption.<sup>771</sup> The Interim Management Team strived towards promoting ethical standards through training on ethics of corruption and awareness programmes. anti-corruption strategies and enforcement disciplinary were enhanced. A disciplinary cases task team was set up to assist with backlogs and emerging disciplinary cases. A National Hotline was established for the reporting of fraud and corruption cases.<sup>772</sup>

In addition, to the National hotline, a Disciplinary Cases Task Team was set up to assist with backlogs and current disciplinary cases.<sup>773</sup> Training and awareness courses were also introduced and implemented for public servants on ethics and corruption.<sup>774</sup>

It is submitted that weaknesses such as fragmentation, insufficient co-ordination, poor delineation of responsibilities and assimilation of corruption work into a broader mandate of the provincial government in the Eastern Cape has given rise to the break-down of strategies and mechanisms to effectively combat fraud and corruption.

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<sup>767</sup> Cwati 52.

<sup>768</sup> Cwati 53.

<sup>769</sup> Cwati 53.

<sup>770</sup> Cwati 53.

<sup>771</sup> Cwati 53.

<sup>772</sup> Cwati 54.

<sup>773</sup> Cwati 55.

<sup>774</sup> Cwati 55.

Challenges that were faced by the Western Cape Province Forensic Investigative Unit (WCFIU) in combating fraud and corruption.<sup>775</sup> The WCFIU did not have an approved mandate that provided the basis for an investigative function to departments. Due to the fact that the WCFIU did not make use of the memorandum of agreements to regulate its relationship and services to departments blurred clear lines of its roles, responsibilities and obligations. Furthermore, due to the lack of a mandate, a standard memorandum of agreement and a generally operational process, the WCFIU was unable to report instances of non-compliance to higher authority. This resulted in unenforced accountability.<sup>776</sup> Existing operational processes did not support or enable the WCFIU to adequately address the services to be delivered, the efficiencies in the process and the accuracy and usefulness of the reports that were issued. Due to the informal assessment of cases reported, the WCFIU lacked structured approach in deciding which cases would be handled internally and which cases would be referred to external service providers. The structure of the FIU did not make provision for the appointment or retention of experience and skilled staff which led to reports that were issued not always contributing to the successful implementation of recommendations by departments such as instituting of disciplinary steps.<sup>777</sup>

A review of the Western Cape Province Treasury (WCPT) current strategies to combat fraud and corruption emphasized their endeavour to eliminate corrupt and fraudulent activities especially in procurement.<sup>778</sup> The goal of fraud and corruption prevention within WCPT is further enhanced by implementing the Provincial Treasury Fraud and Corruption Policy throughout the organization. The policy was approved and adopted as required by regulations and applied to any actual or suspected fraud, corruption, theft or irregularities of a similar nature involving all employees of WCPT as well as their stakeholders.<sup>779</sup> WCPT strive to establish a zero tolerant environment, which is considered a fundamental aspect of the policy, though appropriate procedures and management support.<sup>780</sup> The Provincial Treasury Fraud and Corruption Policy is aligned to the Western Cape Government's Anti-Corruption Strategy which aims to provide a framework within which to combat fraud and corruption. The WCPT in collaboration with the Department of the

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<sup>775</sup> Provincial Government Western Cape (2009) 6 and Opperman (2014) 7-48.

<sup>776</sup> Provincial Government Western Cape (2009) 6 and Opperman (2014) 7-48.

<sup>777</sup> Provincial Government Western Cape (2009) 7 and Opperman (2014) 7-48.

<sup>778</sup> Provincial Government Western Cape (2009) 7 and Opperman (2014) 7-48.

<sup>779</sup> Provincial Government Western Cape (2009) 7

<sup>780</sup> Opperman (2014) 36.

Premier maintain a general approach to fraud and corruption within the Western Cape Province. WCPT refers all matters relating to fraud, theft and corruption to WCFIU for investigation.<sup>781</sup>

## 5. CONCLUSION

The primary object of this chapter was to compare the Eastern Cape Province and the Western Cape Province methods of combating fraud and corruption within local government. It has been proven in this chapter that the Western Cape Province combats fraud and corruption more effectively and efficiently than the Eastern Cape Province.

This is due to the fact that the Eastern Cape Province inherited an unmotivated, under-skilled and oversized workforce in 1994.<sup>782</sup> It has also been proven in this chapter that the continued failure, after 1994, of the Eastern Cape Province is attributed to the downfall of the Anti-Corruption Forum and the Network Against Corruption agencies.<sup>783</sup> The functioning of the re-established Anti-Corruption Forum<sup>784</sup> is sitting with risk management and internal control issues.<sup>785</sup> General knowledge and expertise to conduct investigations is lacking in these units.<sup>786</sup> This inability to conduct efficiently and effectively investigations hinders the progress of the investigation process within the local government of the Eastern Cape.<sup>787</sup>

The Western Cape Province is able to achieve more success in curbing fraud and corruption due to the efficient functioning of WCFIU which is still operative today. Further the efficacious provincial anti-corruption policy was identified by the Public Service Commission as the best practice model for other provinces.<sup>788</sup> It is submitted that a best practice model analogous to the

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<sup>781</sup> Opperman (2014) 36.

<sup>782</sup> Cwati 29.

<sup>783</sup> See Chapter 6 under paragraph 2.4 Evaluation of the failure of the anti-corruption strategies for the reasons which contributed to both agencies downfall.

<sup>784</sup> Established in 2005.

<sup>785</sup> Provincial Anti-Corruption and Fraud Prevention Plan 2011-2016 and the Province of the Eastern Cape Provincial Treasury at 14.

<sup>786</sup> Provincial Anti-Corruption and Fraud Prevention Plan 2011-2016 and the Province of the Eastern Cape Provincial Treasury at 14.

<sup>787</sup> Provincial Anti-Corruption and Fraud Prevention Plan 2011-2016 and the Province of the Eastern Cape Provincial Treasury at 14.

<sup>788</sup> Cwati 72.

Western Cape Province should be adopted by the Eastern Cape Province to effectively combat fraud and corruption.

Despite existing legislation and anti-corruption strategies, there are still very few public officials being criminally prosecuted for the crimes of fraud and corruption.

## CHAPTER 7

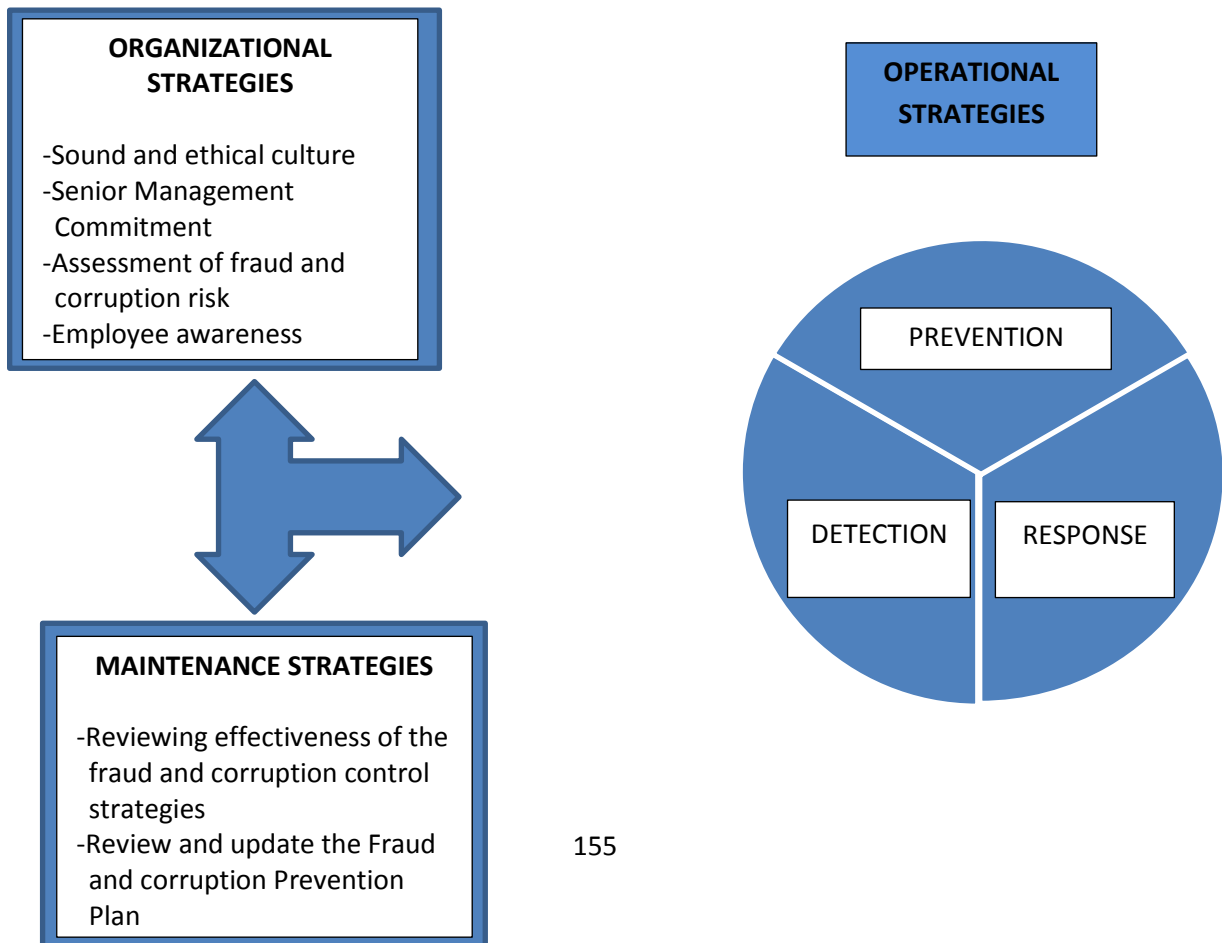
### RECOMMENDATIONS AND CONCLUSION

#### 1. INTRODUCTION

The recommendations in this chapter will focus on the following strategies that have to be implemented in order to combat the prevalence of fraud and corruption within municipalities in South Africa namely;

- an organizational strategy,
- an operational strategy and
- a maintenance strategy.

This diagram illustrates the three control strategies of fraud and corruption which will be explained, *infra*.



## 1.1 ORGANIZATIONAL STRATEGY

The organizational strategy represents the actions to be undertaken in order to address fraud and corruption at the organizational level. The organizational strategy will focus on the aspects of a sound and ethical culture, accountability, transparency and commitment from senior management, assessment of fraud and corruption risk and employee recruitment and training.

### 1.1.1 SOUND AND ETHICAL CULTURE

Setting the right ethical tone and developing a culture of good governance is an imperative for every municipality within the South African context.<sup>789</sup> Good governance requires that municipalities develop codes of conduct (ethics) as part of their corporate governance framework.<sup>790</sup> The code of conduct for municipal employees as well as municipal councilors should include aspects of general ethical conduct, unselfish and unwavering commitment to serving the public interest and provisions for the prohibition of personal gain or undue self-enrichment pursued within the course and scope of their employment contract. The above provisions should be founded on norms and values for good governance, moral conduct and sound business practice within municipalities.<sup>791</sup>

It would be required of municipal employees and managers to acknowledge the code of conduct in writing and abide by it thereto. Concrete steps need to be instituted to audit organizations with

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<sup>789</sup> Deloitte “Preventing procurement fraud and corruption” October 2014 at 2.

[http://www2.deloitte.com/content/dam/Deloitte/za/Documents/risk/ZA\\_Preventing\\_procurement\\_fraud\\_13102014.pdf](http://www2.deloitte.com/content/dam/Deloitte/za/Documents/risk/ZA_Preventing_procurement_fraud_13102014.pdf) (accessed 5 August 2015). See also Disoloane V.P.P. *Reception of a code of conduct at the Capricorn district municipality in the Limpopo Province* (2012) (unpublished LL.D. thesis, University of South Africa) 7.

<sup>790</sup> Fraud and corruption prevention strategy by Fetakgomo local municipality (2015/2016) 16

<http://www.fetakgomo.gov.za/documents/importantdocuments/policies/Fraud%20and%20Corruption%20Prevention%20Strategy.pdf> (accessed 13 November 2015); Robinson *Professional ethics from day to day: a practitioner's reflection* (1999) 157. In Wessels and Pauw (eds) *Reflective Public Administration: Views from the South* and Disoloane 36. Nawa, *Fraud Prevention Plan (Policies and Strategies)* by West Rand District Municipality <http://www.wrdm.gov.za/wrdm/wp-content/uploads/2014/06/Fraud-prevention-Policy-.pdf> (accessed 13 November 2015) 11.

<sup>791</sup> Planning and Development Department Risk Management Unit Dr Ruth S Mompoti District Municipality “Anti-corruption and fraud prevention plan” (2014); Holtzhausen *Whistle blowing and whistle blower protection in South Africa Public Sector* (Published Doctoral of Administration Thesis, University of South Africa) (2007) 116 and Disoloane 36.



regard to determining good governance and ethical standards.<sup>792</sup> It is recommended that an ethical framework be developed by municipalities for individuals and private businesses who do business with them for strict adherence and compliance to ensure that a code of good practice exist.

### 1.1.2 ACCOUNTABILITY, TRANSPARENCY AND COMMITMENT FROM SENIOR MANAGERS

The UNODC<sup>793</sup> advocates that companies should publicly report on their anti-corruption efforts continually. Public reporting demonstrates sincerity and seriousness of companies to prevent and counter corruption. It also illustrates commitment to the fundamental values of integrity, transparency and accountability.<sup>794</sup>

The municipal manager bears the sole responsibility for the management of fraud and corruption risk within the municipality. This includes the co-ordination of risk assessments overseeing the investigation of fraud and corruption cases and reporting thereon.<sup>795</sup>

In discharging the above obligations, it is recommended that municipal managers initiate the establishment of independent and autonomous anti-fraud and corruption committees to audit, discuss and evaluate risk assessment pertaining to fraud and corruption within municipalities.<sup>796</sup>

Heads of departments within municipalities are vested with the primary responsibility of establishing and maintaining internal controls. They should ensure that employees are made fully aware of all policies. Through the process of monitoring and evaluating employee performance, irregularities and non-compliance can easily be detected. Heads of departments must also

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<sup>792</sup> Van der Merwe *Combat corruption collectively: Mobilising South African Civil Society on Corruption, Governance and Ethics* (2001) 24 and Disoloane 46.

<sup>793</sup> United Nations Office On Drugs and Crime (UNODC)

<sup>794</sup> UNODC "Anti-Corruption ethics and compliance programme for business: A practical Guide (2013) at page 18; Fetakgomo local municipality (2015/2016) 16 and West Rand District Municipality 12.

<sup>795</sup> Planning and Development Department Risk Management Unit Dr Ruth S Mompoti District Municipality "Anti-corruption and fraud prevention plan" (2014) 12; Iyer and Samociuk 124 and Disoloane 33 - 38.

<sup>796</sup> Planning and Development Department Risk Management Unit Dr Ruth S Mompoti District Municipality "Anti-corruption and fraud prevention plan" (2014) 12.

undertake to ensure all reported or suspected fraudulent activities are reported to the municipal manager for further investigation.

### 1.1.3 ASSESSMENT OF FRAUD AND CORRUPTION RISK

The fundamental concepts of risk assessment are the probabilities that fraud and corruption risk will occur and the impact of incidents.<sup>797</sup> Risk management requires a continuous ongoing process in order to determine areas where there is potential risk of fraud and corruption taking place.<sup>798</sup> In order to mitigate the risk of fraud and corruption, controls and procedures should be implemented and regularly reviewed and assessed for relevance, adequacy and effectiveness.<sup>799</sup>

Unfortunately, the most carefully designed and tightly controlled system to prevent fraud and corruption within municipalities especially within the procurement process can be circumvented by colluding individuals.<sup>800</sup>

The accounting officers of each municipality under the directive and guidance of the municipal manager must review and monitor the internal control system. The accounting officers must also conduct first level audits and checks on every business transaction within each municipality to ensure that it complies with sound business practices, pricing and quality standards.<sup>801</sup> A comprehensive risk assessment register must be kept by each municipality. Furthermore, a risk assessment plan must be developed inclusive of strategies to mitigate the identified risks pertaining to fraud and corruption within municipalities.<sup>802</sup> There are no “one-size-fits-all” measures to conduct risk assessments within municipalities, however a checklist, marked annexure “A”, will provide a useful guide to municipal managers when conducting risk assessments.<sup>803</sup>

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<sup>797</sup> Singleton and Singleton *Fraud auditing and forensic accounting* (2010) 115.

<sup>798</sup> Singleton and Singleton (2010) 115 and Iyer and Samociuk 124.

<sup>799</sup> Deloitte “Preventing procurement fraud and corruption” (2014) 3; Disoloane 112; Fetakgomo local municipality (2015/2016) 19 and West Rand District Municipality 13.

<sup>800</sup> Deloitte “Preventing procurement fraud and corruption” (2014) 3 and Kroukamp “Corruption in South Africa with particular reference to public sector institutions: the evil of all evils” (2006) *Journal of Public Administration* 212.

<sup>801</sup> Deloitte “Preventing procurement fraud and corruption” (2014) 3 and Disoloane 112.

<sup>802</sup> Deloitte “Preventing procurement fraud and corruption” (2014) 3 and Iyer and Samociuk 67.

<sup>803</sup> UNODC “Anti-Corruption ethics and compliance programme for business: A practical Guide (2013) at page 15 and Singleton and Singleton (2010) 121-125.

#### 1.1.4 EMPLOYEE RECRUITMENT AND TRAINING

*Vital though it is to extricate the bad apples from the barrel it is equally important to prevent them from getting into the barrel at all. How is this done? By simply ensuring that the system doesn't allow the rotten ones to get in.*<sup>804</sup>

Automated procurement and accounting systems produce information; however, these processes are still driven by people. In emerging economies data inputs are done manually, providing a conducive and opportunistic environment for fraudulent and corrupt behaviour. Recruiting the right staff and providing suitable training is imperative to enhance staff efficacy and mitigate against the commission of fraud and corruption by staff.<sup>805</sup> It is recommended that recruitment within municipalities be conducted within the ambit of a strict selection and recruitment policy. Person(s) who are appropriately qualified for the job should be required to perform and undergo elaborate pre-employment interviews and thorough background checks before being employed. The vetting process should include background checks verifications of qualifications and criminal records of prospective employees.<sup>806</sup>

The primary responsibility for establishing and maintaining internal control should rest with the heads of Departments. The heads must ensure that all employees under their supervision are aware of all relevant legislation, conditions of service, ethical codes and policies and procedures and that they abide by them.<sup>807</sup> The primary objectives of internal control are to ensure;

- The reliability and integrity of information,
- Compliance with policies, plans, procedures, laws, regulations and contracts,
- The safeguarding of assets,
- The economical and efficient use of resources and

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<sup>804</sup> Williams and Doig (eds) "Controlling Corruption: The Politics of corruption" page 156 and *An Introduction to the Independent Commission Against Corruption*, ICAC, Hong Kong (1987) 19.

<sup>805</sup> Deloitte "Preventing procurement fraud and corruption" (2014) 2 and Fraud and corruption prevention strategy by Fetakgomo local municipality (2015/2016) 21; Singleton and Singleton (2010) 139; Fetakgomo local municipality (2015/2016) 21 and West Rand District Municipality 12-13.

<sup>806</sup> Tickner "Fraud and Corruption in Public Service" (2016) 156 and Singleton and Singleton (2010) 139.

<sup>807</sup> Williams and Doig (2000) 168.

- The accomplishment of established operational objectives and goals.

No single individual should be employed to oversee an entire transaction and therefore it is recommended segregation of duties should be implemented especially in the area of procurement within municipalities.<sup>808</sup>

## 1.2 OPERATIONAL STRATEGY

The operational strategy will focus on the prevention, detection and response (investigation and prosecution) of fraud and corruption.

### 1.2.1. PREVENTION

#### 1.2.1.1 Establishment of Anti-Fraud and Corruption Committees

A number of combined initiatives will contribute to the preventative environment in respect of fraud and corruption activities within municipalities in South Africa. It is recommended that every municipality establish an Anti-Fraud and corruption committee whose task will be to ensure that the Anti-Fraud and corruption strategies are developed and implemented. It should also be mandatory that fraud and corruption risk assessments take place. The risk assessments will identify the risk exposure on all possible inherent risk factors that could lead to the commission of fraud and corruption. A fraud and corruption risk register must be maintained on identified risks.<sup>809</sup> Each risk exposure should be categorized either as low, medium or high. High risk exposures should receive immediate action. Reviewing existing internal control measures and/or developing new internal control measures must be considered in this regard in order to mitigate against the risk.<sup>810</sup> Risk exposure must be reviewed and revised annually or earlier as circumstances may require.

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<sup>808</sup> Deloitte “Preventing procurement fraud and corruption” (2014) 2; Iyer and Samociuk 30 and Ulric *et al* “Accounting Information Systems” (2012) 259.

<sup>809</sup> Iyer and Samociuk 33.

<sup>810</sup> Iyer and Samociuk 34; Fetakgomo local municipality (2015/2016) 20 and West Rand District Municipality 13.

### 1.2.1.2 Establishment of Internal Audit department

The internal audit department will be responsible for implementing an internal audit program. The main task of the internal audit department will be to ensure adherence to internal controls. It is recommended that the internal audit department carry out regular surprise (spot) audits with regard to usage of assets, expenditure approval, financial expenditure, procurement policies/guidelines and overall financial audit of the municipality to ensure compliance with the policy directives. These audits can serve to deter and detect the commission of fraud and corruption.<sup>811</sup>

## 1.2.2 DETECTION

### 1.2.2.1 Audit Committee

The audit committee referred to in paragraphs 1.2.1.1 may also serve an important function of deterring and detecting fraud and corruption in the following ways;<sup>812</sup>

- a) Conducting surprise internal audits post transaction reviews, review of management reports and data analyses with a view to detecting fraud and corruption.<sup>813</sup>
- b) Engaging with external auditors to examine financial statements and records seriously with a view of detecting possible fraudulent transactions and
- c) Reporting on a fraudulent transaction in the financial statements and reports by external auditors. This would afford the municipalities an opportunity of taking appropriate and responsive action to address the financial misconduct identified in the financial statements and reports.<sup>814</sup>

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<sup>811</sup> Iyer and Samociuk 33 and Singleton and Singleton (2010) 139- 140; Fetakgomo local municipality (2015/2016) 20 and West Rand District Municipality 13.

<sup>812</sup> Singleton and Singleton (2010) 80; Fetakgomo local municipality (2015/2016) 20 and West Rand District Municipality 16.

<sup>813</sup> Singleton and Singleton (2010) 136.

<sup>814</sup> Singleton and Singleton (2010) 149 and Verschoor *Audit Committee Essentials* (2008) 114.

Post transaction reviews can be effective in identifying fraudulent or corrupt activity. Furthermore, the possibility of detecting fraud and corruption in this way may be effective in acting as a deterrent against an employee who may have been contemplating engaging himself in such acts.

Forensic data analysis with the aid of computer systems may be used to identify certain trends that occur within financial accounting reports.<sup>815</sup>

Data analysis could be useful for the following:

- a) to compare and contrast budget reports for each division,
- b) to generate reports or comparing expenditure against industry standards and benchmarks and
- c) to determine unusual expenditure trends.

#### 1.2.2.2 Employee training and awareness programmes

Municipalities must create an internal environment that is conducive for the reporting of incidents or suspected incidences of fraud and corruption by employees. Fraud and corruption training workshops will assist in the prevention, detection and reporting of fraud and corruption by increasing the level of awareness on how fraud and corruption manifests in the work environment. The training should include the following aspects:<sup>816</sup>

- a) Anti-fraud and corruption strategy,
- b) Code of conduct for Municipal employees,
- c) Whistle blowing policy,
- d) How to respond to fraud and corruption as well as reporting mechanisms,
- e) Different types and forms of fraud and corruption in the work environment,
- f) Integrity, management,
- g) Lifestyle audits of municipal employees and, *inter alia*,
- h) Disclosure of private or personal interests.

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<sup>815</sup> Pachghare *Cryptography and information security* (2015) 375; Fetakgomo local municipality (2015/2016) 23 and West Rand District Municipality 14.

<sup>816</sup> Gottschalk *White-Collar Crime: Detection, Prevention and Strategy in Business Enterprises* (2010) 77; Padgett *Profiling the Fraudster: Removing the Mask to Prevent and Detect Fraud* (2015) 13 and Iyer and Samociuk 97.

### 1.2.2.3 Whistle blowing

Whistle blowing is the action of a person within or outside an organization who reports or provides information on illegal activity taking place within the organization.<sup>817</sup> It is imperative for all municipalities to adopt a “Whistle Blowing Policy” which sets out in detail the procedure which must be followed in order to report any incidents of fraud and or corruption.<sup>818</sup> Municipalities must also create mechanisms for the reporting of fraud and corruption, for example, a toll free hotline. One of the key obstacles to detecting and combating fraud and corruption is the fear by employees of being intimidated or identified after “blowing the whistle” on fraudulent and corrupt activities taking place in the work place. The confidentiality of persons providing information should at all costs be maintained and protected to prevent any negative or adverse repercussions imputing to the person who provided the information.<sup>819</sup>

## 1.2.3 RESPONSE(S) TO COMMISSION OF FRAUD AND CORRUPTION

### 1.2.3.1 ROLE OF MUNICIPAL MANAGERS

Should the municipality receive information or a report on an alleged commission of fraud and/or corruption that has taken place within the municipality, the municipal manager must immediately be notified. He must then report the matter to the municipal council. The municipal manager must ensure that the relevant evidence is preserved and that further immediate steps be instituted in order to mitigate against any further loss suffered by the municipality. In the event that fraud or corruption is detected or suspected the municipal manager must embark on the following course of action:

- a) Initiate independent investigations and gather all relevant evidence for the dispensation of justice,
- b) Institute disciplinary proceeding against the offending employer or employees.

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<sup>817</sup> Williams and Doig (eds) “Controlling Corruption: The Politics of corruption” (2000) page 600.

<sup>818</sup> Pande and Basak *Human resources management: Text and cases* (2015) 344; Fetakgomo local municipality (2015/2016) 23 and West Rand District Municipality 18.

<sup>819</sup> Mbatha *The ethical dilemmas of whistleblowing and corruption in South Africa Public Sector* (2005) 91.

- c) Subject the case to be investigated and prosecuted by the South Africa Police Service.
- d) Ensure that losses incurred are recovered from the responsible parties and
- e) Take steps to mitigate against future loss.

### 1.2.3.2 MANAGING THE ALLEGATION

All investigations conducted and evidence gathered must be in accordance with acceptable practices and legal requirements which should measure up to proof beyond a reasonable doubt in a court of law or on a balance of probability should disciplinary action be instituted. Independence and objectivity of investigations must be met at all times. The accounting officer who has been duly instructed by the Municipal Manager should appoint suitable qualified and experienced advisors, consultants or qualified persons such as, an internal or external auditor; a state attorney; external investigative agencies such as the South African Police Service where matters fall within their mandate; external consultants, for example, forensic accounting consultants; officer(s) of the NDPP, officers of the SIU, the Public Protector and/or any other authority as determine by the council to conduct a thorough forensic investigation of the said allegation.<sup>820</sup>

Any investigation instituted should depending on its complexity, be concluded expeditiously and individual(s) involved must be prosecuted without delay. Investigations initiated must culminate by the issue of a report by the person(s) appointed to conduct such investigations.<sup>821</sup> Such reports must only be disseminated on a “need to know” basis in order to implement whatever action is deemed appropriate as a result of the investigation.

Investigations should provide for the following interventions:<sup>822</sup>

- Interviewing relevant witnesses both internal and external as well as obtaining statements in the form of affidavits;
- Reviewing and collating documentary evidence,
- Forensic examinations of computer systems,

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<sup>820</sup> Fetakgomo local municipality (2015/2016) 27 and West Rand District Municipality 21.

<sup>821</sup> Singleton and Singleton (2010) 159.

<sup>822</sup> West Rand District Municipality 20.



- Examination and analysis of telephone records in order to establish links, contacts and time line of fraudulent and corrupt activities.
- Data search and seizures of documents and records relevant to the commission of the crime.
- Enquiries from banks and other financial institutions with the required court orders for the purposes of tracing movement of funds.
- Engaging expert witnesses and specialised testimony,
- Tracing funds, goals and assets,
- Interviewing persons suspected of involvement in fraud and corruption and
- Liaise closely with law enforcement agencies or other regulatory agencies such as the asset forfeiture unit in cases that warrant criminal prosecution.

The investigation into the improper conduct within the Municipality must be subjected to an appropriate level of supervision by a responsible committee.

#### 1.2.3.3 DISCIPLINARY HEARINGS

Disciplinary hearings against offending employees must be instituted without delay and in accordance with the rules and regulations as set out in the disciplinary procedures. Depending on the nature and gravity of the offence, the outcome of disciplinary hearings must culminate in written warnings for minor infractions and consequently the termination of service of the employee in cases of serious breach of trust.<sup>823</sup>

#### 1.2.3.4 PROSECUTION

Should investigations uncover evidence of fraud or corruption in respect of an allegation, the Municipality will review the facts at hand to determine whether the matter was one that ought to be reported to the relevant law enforcement agency for investigation and possible prosecution. Such reports must be submitted to the South African Police Services in accordance with requirements of all applicable acts. The Municipality must give its full co-operation to any such

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<sup>823</sup> West Rand District Municipality 20.

law enforcement agency including the provision of reports compiled in respect of investigations conducted.<sup>824</sup>

#### 1.2.3.5 RECOVERY ACTION

Where there is clear evidence of fraud or corruption which has resulted in financial loss being suffered by the Municipality, it should institute recovery action, criminal, civil or administrative recourse to recover any such losses.<sup>825</sup>

#### 1.2.3.6 INTERNAL CONTROL REVIEW AFTER DISCOVERY OF FRAUD OR CORRUPTION

In each instance where fraud is detected, the departmental Director or the Head of department must reassess the adequacy of the prevailing internal control directly impacting on the fraud incident, in order to consider the need to tighten the internal control mechanisms.<sup>826</sup>

#### 1.2.3.7 KEEPING RECORDS OF WRONGDOERS OF EXTERNAL PARTIES

It is recommended that a register be kept and maintained by the municipality of external parties who have engaged themselves in an act of fraud or corruption with the specific Municipality.<sup>827</sup>

Records of wrongdoers should include the following information, namely,

- Full names and surnames of the individual(s),
- Identity numbers of individual(s),
- Nature of transaction which led to the commission of fraud or corruption and date thereof,

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<sup>824</sup> Singleton and Singleton (2010) 157-160 and West Rand District Municipality 21.

<sup>825</sup> Singleton and Singleton (2010) 164; Masiloane and Dintwe “Developing an anti-corruption strategy for the South African Public Sector” (2014) *Journal of Public Administration* 192 and West Rand District Municipality 22.

<sup>826</sup> West Rand District Municipality 22.

<sup>827</sup> Ogundokun *A Human rights approach to combating corruption in Africa: Appraising the AU Convention using Nigeria and South Africa* (2005) (in fulfilment of LLM, University of Pretoria) 29 and West Rand District Municipality 12.

- Full names and surnames of members of close corporation and directors of companies and other entities,
- Close corporation and company registration numbers
- Nature of transaction which led to the commission of fraud or corruption and date thereof by a close corporation, company or other entity.

The municipality must refrain from doing business with external parties (blacklisted) who are under investigation for the alleged commission of fraud and corruption, who are suspects thereof or who have been found guilty by a court of law for committing fraud or corruption in their dealings with the Municipality.

### 1.3 MAINTENANCE STRATEGY

It is recommended that the maintenance strategy must focus on two main aspects, *viz*,<sup>828</sup>

- Review of the effectiveness of the Anti-Fraud and corruption Policy and
- Review and updating the Anti-Fraud and Corruption Policy.

#### 1.3.1 REVIEWING OF THE EFFECTIVENESS OF THE ANTI-FRAUD AND CORRUPTION POLICY

The municipality must review the Anti-Fraud and Corruption prevention plan on an annual basis to determine the effectiveness thereof. This should be done in conjunction with the findings from the Internal Audit division and External Audit findings. The accounting officer must be accountable for this review and may appoint a person to take responsibility for this.<sup>829</sup>

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<sup>828</sup> Fetakgomo Local Municipality 15 and West Rand District Municipality 23.

<sup>829</sup> West Rand District Municipality 23.

### 1.3.2 REVIEW AND UPDATING THE ANTI – FRAUD AND CORRUPTION POLICY

An integral part of any fraud and corruption control programme should be the on-going review of fraud and corruption risk exposures. Fraud and corruption risk assessments must also be conducted annually at the same time as the review of the Anti-Fraud and Corruption plan. As with the review, the accounting officer is ultimately accountable for this and may delegate a person to take responsibility. A risk assessment register must also be maintained by the municipality in which all risk exposures faced by the municipality are endorsed.<sup>830</sup>

## 2 CONCLUSION

There is no doubt that the scourge of fraud and corruption depletes the financial resources of municipalities and impacts negatively on their ability to render efficient services to the respective communities.

The commission of fraud and corruption undermines the values and principles of the Constitution that seeks to ensure a public administration that is free from corruption and bad governance. It is evident from the research that if this situation is allowed to go unchecked and unpunished, it will pose a serious threat to our democratic state.

The research has shown that in South Africa there is adequate legislation such as the Prevention and Combating of Corrupt Activities Act that provides for corrupt activities relating to public officials and prescribes the punishment to be imposed on such perpetrators. The challenge lies in detecting, investigating and prosecuting perpetrators expediently.

There have been several prosecutions for the commission of fraud and corruption within the Municipalities. However, several cases go undetected due to inadequate control mechanisms. Furthermore, several cases of fraud and corruption have been identified, yet the perpetrators have not been prosecuted to date. This could be attributed to several factors including insufficient

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<sup>830</sup> West Rand District Municipality 23.

evidence, a protracted investigation process and protection of the perpetrators from prosecution by municipalities.

One of the primary areas that is vulnerable to fraud and corruption is in public procurement. Demand for the payment of a bribe, bid rigging and fraud to recover the cost of the bribe paid is the order day within municipalities. However, the yellow flags and red flags as discussed in Chapter 4 under early warning systems may be useful in detecting fraud and corruption at an early stage. Bidding documents can also contain standard sections which vary according to the contract being tendered. Bidding documents can be manipulated or altered by corrupt officials to favour a few bidders. Government's efforts to centralize the bidding process will go a long way in the prevention the large scale commission of fraud and corruption. This system will dispense with each municipality having to have their own bid evaluation committee. The research has also discussed the red flags at paragraph 6.1 to 6.1.10 of Chapter 4 which may also assist in detecting fraud and corruption at an early stage.

The case theory approach in forensic investigation is critical in the investigation and prosecution of fraud and corruption. It ensures that all the relevant evidence is gathered in a systematic and scientific manner and held in readiness for the dispensation of justice. There are ten basic steps of the case theory approach which need to be followed when conducting forensic investigations of fraud and corruption cases. The ten basic steps which have been discussed in detail under paragraph 4.2 of chapter 5 in this research include the following; commence with the case, test the allegations, conduct due diligence, do background checks, complete the internal stage of investigation, check for prediction and get organised, begin the external investigation, prove illicit payments, obtain the co-operation of a witness, interview the primary suspect and prepare the final report. This method generates a forensic investigative plan to test, prove or disprove the prevalence of fraud and corruption.

Asset forfeiture is also another effective method in ensuring that the proceeds of crime are seized and forfeited to the State. The South African criminal justice system makes use of the principles of asset forfeiture as a restorative measure by depriving the offender from benefiting from what he

is not legally entitled to.<sup>831</sup> Criminal asset forfeiture aids the law enforcement agencies in their abilities to combat organised criminal activity including fraud and corruption by circumventing the proceeds of crime from being circulated.<sup>832</sup>

The authorization by Cabinet in 2002 of the minimum anti-corruption capacity as part of the implementation of the Public Service Anti-Corruption Strategy gave all government departments the impetus to fight fraud and corruption. In pursuance of the Anti-Corruption Strategy, the Eastern Cape Province established a Provincial Anti-Corruption Forum and the Network Against Corruption whose main objective was to strategize on and advance anti-corruption objectives as well as to co-ordinate implementation of policies for the Combating and prevention of corruption within their public sectors. Unfortunately, the Anti-Corruption Forum and the Network against Corruption did not yield the desired objectives and were a failure. This led to the Anti-Corruption Forum being re-established in 2005 on an integrated and inter-departmental model involving Heads of Departments, South African Police Service, Public Protector and the Special Investigative Unit, the State Security Agency and the Public service commission. This effort illustrates that in the fight against fraud and corruption there should be a multi-disciplinary and inter-departmental approach.

The Western Cape Province created a forensic audit unit in order to curb fraud and corruption by employees of provincial government. Cabinet approved the first fraud, theft and corruption prevention policy in 1997. The forensic audit unit's main priorities are to determine, facilitate and make appropriate recommendations to prevent loss suffered, gather and present supporting evidence for successful internal disciplinary processes and criminal cases as well as to pro-actively follow up the losses, disciplinary process and criminal investigation. The Forensic unit further advocated ethical conduct and good governance through the education of public officials.

The forensic audit unit is still operative within the Provincial Administration in the Western Cape and continues to uphold its priorities by addressing reports of irregularities regarding corruption, fraud, theft and misuse of government property.

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<sup>831</sup>Basdeo "The law and practice of criminal asset forfeiture in South African Criminal Procedure: a Constitutional Dilemma" PER/PELJ 2014 (17)3 1061.

<sup>832</sup> Basdeo 1049 and 1061.

This research has proved that adequate measures to prevent as well as detect fraud and corruption within the local government in South Africa exists, however, it is evident that there is a lacuna between the state's capability to enforce anti-corruption rules in the public service, through legal, regulatory and functional codes, and the predilection of the government to comply with these.

**Annexure “A”**

Checklist			
RISK ASSESSMENT	YES	NO	IN PROGRESS
The company conducts a standard risk assessment on a regular basis (at least annually).			
The company identifies operational roles and responsibilities in charge of conducting the risk assessment.			
The company defines and documents operational processes for conducting the risk assessment.			
The company defines oversight responsibilities.			
The company embeds risk assessment in existing process.			
The company is aware of the negative consequences of failing to prevent corruption (legal commercial and operational, reputational risks).			
The risk assessment includes all major areas of risk (e.g. industry and geographical location).			
The company identifies corruption-related risk by using internal and external sources.			
The company defines priorities based on the overall risk exposure.			
The company develops a risk strategy to minimize the overall risk exposure and identified residual risk.			
The company documents the overall assessment.			
The company reports publically on its assessment.			



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