

**An evaluation of the forensic accountant's role in criminal law
proceedings**

by

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Dissertation submitted in fulfilment of the requirements for the degree *Master in Forensic Accounting* at the Potchefstroom Campus of the North-West University

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November 2012

ACKNOWLEDGEMENTS

“Trust in the LORD with all your heart; and lean not on your own understanding. In all your ways acknowledge him, and he shall direct your paths.”

Proverbs 3:5-6

I would like to express special thanks to the following people:

- My parents, Aletta and Paul Slot, who supported and motivated me throughout my studies;
- Juan Reid, my pillar of strength and my encouragement;
- My supervisor, Duane Aslett, and assistant supervisor, Jacqui-Lyn McIntyre;
- My sister, Renske Slot, who assisted me throughout; and
- My friends and family, for all the love and support.

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ACRONYMS

ACFE	Association of Certified Fraud Examiners
AICPA	American Institute of Certified Public Accountants
ICFP	Institute of Commercial Forensic Practitioners
IFRS	International Financial Reporting Standards
ISA	International Standards on Auditing
NAFA	National Association of Forensic Accountants
NWU	North-West University
PWC	PriceWaterhouseCoopers
SAICA	South African Institute of Chartered Accountants
UNISA	University of South Africa

Keywords:

Cross-examination; Direct examination; Expert report; Expert testimony; Expert witness; Forensic Accountant; Forensic report; Opinion evidence.

CHAPTER 1

INTRODUCTION AND BACKGROUND

1.1 Introduction and Background

The law consists of a set of rules that regulates the behaviour of citizens in a politically organised society or state by prescribing what acceptable conduct is. The law can be divided into different categories, e.g. international and national law, public law and private law. Public law can furthermore be divided into constitutional law, administrative law, criminal law, law of criminal procedure and law of evidence (Jacobs, 2011).

Forensic accounting firms assist with investigations in several of the abovementioned categories of the law. KPMG is a firm that offers forensic services and assists clients in *inter alia* bribery and corruption investigations, financial reporting and securities, fraud and misconduct investigations and investigations into regulatory violations and violations of policies (KPMG, 2011).

Although forensic accountants may be involved in all areas of the law, this study will focus on the involvement of the forensic accountant in criminal law proceedings.

The case of *S v Prinsloo* (2010) illustrates the significant importance of the forensic accountant's role in the criminal law process. In the judgement of *S v Prinsloo* (2010) one of the accused, Marietjie Prinsloo, was convicted of 118 409 criminal charges. These charges included racketeering and money laundering. She was sentenced to imprisonment for a total of 29 010 years. She would, however, serve an effective 25 years imprisonment because the court ordered that the sentences run concurrently.

The significance that this case has on the forensic accounting profession is that a forensic accountant gave expert testimony during the trial, and it is one of the largest cases ever in which a forensic accountant was involved.

As forensic accounting is a new and growing profession in South Africa, the involvement of the forensic accountant in the legal process has been hampered by the lack of regulation by a regulatory institute for forensic accountants. No standards existed to which persons who practised this profession had to adhere to. Hence

Levanti (2009) states that unlike various other professional fields, there are no specific experience requirements necessary to call oneself a forensic accountant.

This was further illustrated by Gerber (2001:174) as he identified some of the deficiencies in the South African forensic accounting profession. He identified *inter alia* the following:

- Any person can freely call himself/herself a forensic accountant;
- There are no rules, restrictions or laws that prohibit anyone from conducting forensic investigations;
- No formal training, experience or qualification is required for a person to be called a forensic accountant;
- There is no regulation of the profession;
- There are no professional bodies for this profession; and
- There is no code of conduct, ethical code, authoritative standards or guidelines with which a forensic accountant must comply.

In order to overcome this *lacuna* the Institute of Commercial Forensic Practitioners (ICFP) was founded on 1 May 2010. The ICFP is a regulatory institute responsible for cohering and regulating South Africa's forensic industry. The mission of the ICFP is to cohere, co-ordinate and self-regulate the commercial forensic profession in South Africa (ICFP, 2011a). The ICFP was formed by key role players in the industry to recognise the industry of forensic accounting and to act as a gate-keeper to allow South Africa's commercial forensic industry to develop the sophistication needed to effectively address the challenges posed by today's commercial environment (ICFP, 2011).

Although the university training of forensic accountants in South Africa is still in its infancy, the North-West University has been offering a BCom degree in forensic accountancy since 2006 (NWU, 2009). At present this is the only University offering this qualification; there are, however, several academic institutions offering other degrees, certificates or postgraduate diplomas in the field of forensic accounting.

Examples of other academic courses are:

- The University of South Africa (UNISA) offers a National diploma in forensic and investigative auditing (UNISA, 2009), and
- The University of Pretoria offers a postgraduate diploma in investigation and forensic accounting (University of Pretoria, 2011).

1.2 Problem Statement

Until the forensic accounting profession is well-established, several teething problems may arise as the forensic accountants carve out their role in criminal law proceedings.

In the recently reported case of *S v De Clercq* (2008) a forensic accountant was called by the state as a key witness. The forensic accountant testified on the investigation and reporting methods. The credibility of the forensic accountant was however attacked because his testimony was based on the findings of a report compiled by another person and not the forensic accountant himself. Nevertheless, it was argued that the forensic accountant's testimony was not discredited to such an extent that it should be summarily rejected or ignored by the court.

Although the South African forensic accounting profession has ensured diversity by contributing various disciplines, the emerging profession lacks an academic and theoretical basis (Oberholzer, 2002:7).

Information from *S v De Clercq* (2008) and the statement made by Oberholzer (2002) serves to illustrate the problematic nature of the role of the forensic accountant in criminal legal proceedings. The preceding discussion raises the question: What is the role of the forensic accountant in criminal law proceedings?

To solve this problem, the following questions need to be answered:

- What is the difference between a forensic accountant and an auditor?
- What are the techniques available to a forensic accountant when conducting a criminal forensic investigation?

- What are the standards with which a forensic accountant's report should comply?
- What is the forensic accountant's role in testimony?

1.3 Research Objectives and Goals

In order to address the abovementioned issues, the primary goals for this study will be the following:

- to analyse the difference between a forensic accountant and an auditor;
- to determine the techniques available to the forensic accountant when conducting a forensic investigation;
- to determine the standards with which a forensic accountant's factual report should comply; and
- to determine the forensic accountant's role in testimony.

1.4 Research Methodology

1.4.1 Literature study

A literature study has been conducted through the review of available and relevant literature. Literature is written work, in hard copy or in an electronic format, pertaining to the role of the forensic accountant in criminal law proceedings. The following literature was utilised:

- Academic journals;
- Academic textbooks;
- Electronic publications;
- Newspapers; and
- Databases.

1.4.2 Theory building

Because forensic accounting is a growing profession in South Africa, this study was aimed at building new theories to explain uncertainties in the forensic profession regarding the role of the forensic accountant in criminal law proceedings, and therefore made use of theory building. Mouton (2001:176) describes theory building as studies that are aimed at developing new models and theories to explain particular phenomena. Theory building was applied to develop new theories and refine existing theories regarding the role of the forensic accountant in criminal law proceedings (Mouton, 2001:177).

1.5 Conclusion

This chapter summarises the current observations about the forensic accounting profession in South Africa. The foundation of the problem is that the forensic accounting profession in South Africa is a growing profession but there are minimal rules that govern the profession. The ICFP was founded in 2010 but is still in its formative years and therefore there is a need to determine the role of the forensic accountant in criminal legal proceedings. In combination with the research methods, the objectives are subsequently outlined.

CHAPTER 2

THE DIFFERENCE BETWEEN THE FORENSIC ACCOUNTANT AND THE AUDITOR

2.1 Introduction

Du Plessis (2001:4) states that the literature indicates that there is uncertainty with regard to the designation given to individuals rendering forensic accounting services. He further states that the terminology that is often used is *inter alia* forensic accountant, fraud auditor, fraud examiner and risk control manager.

A term that is commonly used in various literature sources is forensic accountant. Singleton and Singleton (2010:4) demonstrate that forensic accounting is seen as one of the oldest professions and that it dates back to the Egyptians.

This term is used by Singleton *et al.* (2006:4) where he states that forensic accountants are experienced, trained, and knowledgeable in different processes of fraud investigation. Telpner and Mostek (2003:1) further refer to forensic accountants and demonstrate that a forensic accountant is a person who has mastered the science of accounting and is able to provide assistance to lawyers and the courts in order to understand and apply accounting issues to the law and to disputed matters.

Another term that is frequently used is fraud examiner. This term is used by the Association for Certified Fraud Examiners, the world's largest anti-fraud organisation (ACFE, 2011:P-1). The ACFE (2011:I-2) indicates that many fraud examiners have an accounting background and that some fraud examiners are employed primarily in the audit function of their organisations. Manning (2005:452) also refers to the term when he states that a fraud examiner should be part accountant and part detective.

The term forensic auditor is also often referred to in the description of a person doing a forensic investigation. In South Africa, the term forensic auditor would not be correct if the individual is not a registered auditor, as the use of the word auditor is regulated by section 41 of the Auditing Profession Act (Act 26 of 2005) that states that a person who is not registered under the Auditing Profession Act (Act 26 of 2005) is prohibited from being called a registered auditor.

After determining what the correct terminology is, this study will have a look at the misconceptions relating to forensic accounting, attempt to define the forensic accountant, consider the training and education of a forensic accountant and an auditor and determine the difference between work performed by a forensic accountant and an auditor.

2.2 South African forensic accountant

2.2.1 Terminology used to describe a person doing a forensic investigation

With regard to the question of what to call a person doing a forensic investigation, this study will determine what the best terminology might be.

“Forensic auditor” - From the introduction paragraph it is made clear that an individual in South Africa cannot be called “forensic auditor” as the term “auditor” is governed by the Auditing Profession Act (Act 26 of 2005).

“Fraud examiner” – This is the term used by the ACFE, a regulatory body for fraud examiners. As a person who is regulated by the ACFE is called a Certified Fraud Examiner, this term may give the impression that the individual only performs fraud investigations, whereas the profession is not limited to only providing this service. The ACFE (2011:I-3) indicates that the services that are performed by certified fraud examiners include the following:

- Examination of records for fraud;
- Interviewing suspects;
- Report writing;
- Presenting investigation findings;
- Testifying in court;
- Forensic accounting;
- Data recovery;
- Conflict of interest investigations;
- Financial systems analysis;

- Calculation of damages;
- Business valuation;
- Litigation support;
- Corporate investigations;
- Locate hidden assets;
- Reconstruct accounting records;
- Computer forensics;
- Transactional analysis;
- Review of financial statements; and
- Litigation support.

From the above it is clear that certified fraud examiners do not only provide fraud-related services. This term “fraud examiner” does not only refer to accounting professionals, as members of the ACFE have a variety of qualifications, *inter alia* accountants, lawyers and ex-policemen. The academic requirement that the ACFE has set for individuals to obtain membership is a minimum of a Bachelor’s degree (or equivalent) from an institution of higher learning (no specific field of study is required). The requirements of the ACFE also indicate that if a person does not have a Bachelor’s degree, two years of substitute fraud-related professional experience for each year of academic study will suffice (ACFE, 2012b). This term would then also not suffice as an accurate description of a person performing a forensic accounting investigation.

“Forensic accountant” – This term is the term that is most commonly used to describe a person doing a forensic investigation (Hanson, 2007). Freeman (2012) indicates that the term “forensic accounting” was first used in 1946 by a partner in a New York accounting firm, Maurice E Peloubet, when he wrote about the use of accounting in courtroom proceedings as a part of testimony and as a result journals began to publish articles about the connections between law and accounting. Freeman (2012) further states that a New York lawyer, Max Lourie, also claimed in

1953 that he was the one that invented the phrase “forensic accounting” and stressed the need for forensic accounting literature and training.

It is apparent that the term “forensic accountant” is the term that is best suited for a person doing forensic accounting. The reason for this is not only because the other terms do not suffice as an accurate description, but also that this term best describes what a forensic accountant does, is not limiting and contains the two core words of the profession. Later in this chapter the study will aim to define the term forensic accountant.

2.2.2 Misconceptions relating to forensic accounting

Before the inception of forensic accounting, the popular assumption was that standard audits would identify any irregularities or errors that effected the financial statements of a company (Pirraglia, 2012). This misconception is generally made by the public, as in the general public eye the outcome of fraud is financial loss. Golden *et al.* (2006:1) illustrate this by stating that in the minds of the investing public, fraud deterrence, fraud detection and fraud investigation is inextricably linked to the accounting and auditing profession.

During the past few years South Africa has seen changes in legislation as well as auditing standards. This was due to the emergence of forensic accounting and the identification procedures regarding accounting irregularities. These changes were further influenced by the major corporate accounting scandals that took place around the world. Weil (2004:1) confirms this as he states that the recent wave of corporate fraud raises harsh questions about the auditors who review and bless companies’ financial results.

Silverstone and Sheetz (2007:61) states that there is no doubt that the high-profile cases of WorldCom, Enron, and others brought an increase to the public scrutiny of accountants and that the downfall of the Arthur Andersen firm was directly related to Enron and probably brought the accounting profession to the fore more than any other single incident.

As mentioned by Silverstone, the Enron scandal is one of the major corporate accounting scandals that took place. Jikling (2003:1) indicates that the sudden and

unexpected collapse of Enron Corporation was the first in a series of major corporate accounting scandals that has shaken the confidence in corporate governance and the stock market. Jikling (2003:1) also states that Enron was seen as one of the most innovative, fastest growing, and best managed businesses until a month before they filed for bankruptcy. However, it now appears that Enron was in a terrible financial position since early 2000, it was a company that was burdened with debt and an overall money-losing business, but it had manipulated its financial statements in order to hide these problems.

The question that everyone was asking was: How did the auditors not pick this up? Jikling (2003:1) mentioned that the independent auditors were unwilling to challenge Enron's management and that the auditors turned a blind eye to improper accounting practices although they were involved in devising complex financial structures and transactions that failed detection. Arthur Andersen, Enron's auditor, suffered huge reputational damage because of this scandal and the firm voluntarily surrendered its license to practise as Certified Public Accountants (Princeton, 2013).

This is only one of the many cases that gave rise to the question of what the auditor's role and responsibilities are relating to fraud during an audit of financial statements.

The International Standard on Auditing (ISA) provides standards that auditors must adhere to when conducting an audit of financial statements. ISA 240 specifically provides standards relating to the auditors responsibility to consider fraud in an audit of financial statements. In 2004 ISA 240 was revised and currently sections 5 to 8 of ISA 240R specifically relate to this:

Section 5 of ISA 240R (2011) states that an auditor conducting an audit in accordance with the ISA standards is responsible for obtaining reasonable assurance that the financial statements taken as a whole are free from material misstatements, whether caused by fraud or error. Because of the inherent limitations of an audit, there is an unavoidable risk that some material misstatements of the financial statements may not be detected, even though the audit is properly planned and performed and performed in accordance with the ISA standards.

Section 6 of ISA 240R states that the potential effects of inherent limitations are particularly significant in the case of misstatements resulting from fraud and that the risk of not detecting a material misstatement resulting from fraud is higher than the risk of not detecting one resulting from error. The reason for this may be because fraud may involve sophisticated and carefully organised schemes designed to conceal it, such as forgery, deliberate failure to record transactions, or intentional misrepresentations made to the auditor and these attempts at concealment may be even more difficult to detect when accompanied by collusion. Collusion may cause the auditor to believe that audit evidence is persuasive when it is, in fact, false. The auditor's ability to detect fraud depends on factors such as the skilfulness of the perpetrator, the frequency and extent of manipulation, the degree of collusion involved, the relative size of individual amounts manipulated, and the seniority of those individuals involved. While the auditor may be able to identify potential opportunities for fraud to be perpetrated, it is difficult for the auditor to determine whether misstatements in judgement areas, such as accounting estimates, are caused by fraud or error.

Section 7 of ISA 240R furthermore states that the risk of an auditor not detecting a material misstatement resulting from management fraud is greater than for employee fraud, because management is frequently in a position to directly or indirectly manipulate accounting records, present fraudulent financial information or override control procedures designed to prevent similar frauds by other employees.

Section 8 of ISA 240R also states that when an auditor obtains a reasonable assurance, the auditor is responsible for maintaining professional scepticism throughout the audit. The auditor must always consider the potential for management to override controls and they should recognise the fact that the audit procedures that may be effective for detecting errors may not be as effective for detecting fraud. The requirements in the ISA are designed to assist the auditor in identifying and assessing the risk of material misstatements due to fraud and in designing procedures to detect such misstatements.

The misconception held by the public relating to the auditor's responsibility relating to fraud is clearly answered by the above paragraphs in ISA 240R. Although the auditor has a responsibility to obtain a reasonable assurance that the financial

statements are free of material misstatements, it is not the primary objective of an auditor to detect fraud during an audit.

2.2.3 Defining the South African forensic accountant

Before the South African forensic accountant can be defined, the profession in which he finds himself should be clearly defined.

2.2.3.1 The forensic accounting profession defined

Forensic accountants have extensive experience in investigations to determine solutions to disputed accounting matters; they are often tasked with writing expert reports on their investigation and to appear in court as expert witnesses (Telpner & Mostek, 2003:1).

A written report is the ultimate presentation of the findings that the forensic accountant made. A forensic accountant's report is prepared with the intention of presenting evidence in a professional and concise manner (Zysman, 2006:1). The forensic accountant's report will be discussed in detail in a later chapter.

Singleton *et al.* (2006:43) further attempt to define forensic accounting by stating that a comprehensive view of a fraud investigation includes the audit of accounting records in order to prove or disprove that fraud occurred, the interview process of all related parties to the possible fraud and the act of serving as an expert witness when applicable.

Singleton *et al.* (2006:43) further state that the involvement of a forensic accountant is almost always reactive and that this factor distinguishes forensic accountants from fraud auditors, who tend to be actively involved in prevention and detection in a corporate or regulatory environment. Singleton *et al.* (2006:43) elaborate by indicating that forensic accountants are trained to react to complaints arising in criminal matters, and that their investigative findings will impact an individual and/or a company in terms of their freedom or a financial reward of loss.

Du Plessis (2001:4-6) states that forensic accounting is the application of financial skills and investigative mentality to unresolved issues and that it is conducted within the rules of evidence. He further states that the discipline should encompass

financial expertise, fraud knowledge and a strong knowledge and understanding of business reality and the working of the legal system.

As indicated above, forensic accounting includes analysis of accounting records, interviewing related parties and acting as an expert witness. Although these factors are some of the main aspects of forensic accounting, the profession is much wider than only this and there is considerable behind the scenes work that contributes to the profession. This statement is shared by Singleton and Singleton (2010:12) as they state that forensic accounting does not only pertain to financial information but also to non-financial information and includes the writing of a report to management or the court.

Another major contribution that forensic accountants make is that they can translate complex financial transactions and numerical data into terms that ordinary laypersons can understand (Singleton and Singleton, 2010:16). Telpner and Mostek (2003:1) state that a forensic accountant is one who has mastered the science of accounting and is able to assist lawyers and the courts to understand and apply accounting issues to the law and to disputed matters.

Therefore it is important that forensic accountants have the necessary training and experience with regard to legal assistance in court as, with increasing frequency, forensic accountants are called upon to assist the court in resolving legal dispute with regard to criminal violations (Pagano & Buckhoff, 2005:71). The role of the forensic accountant in the litigation process is to examine the financial issues that are relevant to the case, to summarise and explain those issues to the relevant parties involved in the case and to offer expert testimony in court, when necessary (Pagano & Buckhoff, 2005:71).

From the above it is evident that forensic accounting is the process whereby forensic accountants use their expertise to investigate potential fraud within the rules of evidence. In doing this, they use their skills to analyse financial and non-financial information, which includes interviewing related parties, in order to give the information that they collected through to the individual/entity that acquired the services of the forensic accountant in a written report and that the forensic accountant can also assist in the legal process.

2.2.3.2 Forensic accountant defined

To fully understand the term “South African forensic accountant” this study will have to start at the beginning by attempting to define and understand the words “forensic” and “accounting”.

The term forensic is defined by The Concise Oxford Dictionary (1996:530) as twofold: firstly, that it is used in connection with courts of law (especially relating to crime detection) and secondly, as the employment of forensic science. The Concise Oxford Dictionary (2002:555) also provides a twofold definition: firstly, that it relates to the application of scientific methods and techniques to the investigation of crime and secondly, that it relates to a court of law.

An inference can be drawn from these definitions provided in The Concise Oxford Dictionary that the word “forensic” relates to an investigation conducted within the context of a legal system.

The Concise Oxford Dictionary (1996:530) defines accounting as the process or skill in keeping and verifying accounts while The Concise Oxford Dictionary (2002:8) defines accounting as the action of keeping financial records. Accounting is further defined as the systematic recording, reporting, and analysis of financial transactions of a business (Investorwords, 2012a).

Van Romburgh (2008:24) best describes accounting and the implication thereof in forensic accounting:

“Accounting is the language in which business transactions are communicated and the end results of this communication are the financial statements. The focus of forensic accounting lies in the findings in commercial and economic circumstances where the language of transactions and economic realities compromise an in-depth knowledge into accounting.”

It is clear that accounting involves communicating financial information of entities to the users thereof, *inter alia* shareholders and owners and as this information is used by external parties, it has to be structured information. Financial accounting is governed by a body of rules called International Financial Reporting Standards (IFRS).

The preceding discussion satisfies the definitions of the two words “forensic” and “accounting”. Focus will next be placed on the term “forensic accountant”.

There are a number of definitions used in literature sources for the term “forensic accountant”. One such definition is that a forensic accountant is a person who examines financial documents as well as the compliance of policies and procedures with the goal of detecting and investigating crime and/or company losses (Van Rooyen, 2004:7). This definition, however, does not succeed in capturing the full capabilities of a forensic accountant, as it mentions the investigation procedures that a forensic accountant performs but no mention is made of the other functions that a forensic accountant performs, for example report writing and litigation support.

To incorporate the various aspects relating to forensic accountants the factors that Brennan and Hennessy (2001:5-22) use to define the forensic accountant can be taken into account:

- The integration of accounting, auditing and investigation techniques and the application of this to litigation;
- The application of financial expertise in financial investigations;
- The application of financial expertise on law problems, disputes and conflict resolution;
- Description of expert accounting work done for the court for any legal sensitive cause;
- Doing analytical, investigative tests, inspections or any combination of these services on financial information to determine the merit of the situation and to form an expert opinion;
- Forensic accountants look behind, rather than just at the numbers; and
- Forensic accountants perform their work with a view to the potential use thereof in a legal environment.

When incorporating the abovementioned aspects into a definition, Singleton *et al.* (2006:4) aimed to provide a reasonably accurate definition by stating that forensic accountants are experienced, trained, and knowledgeable in the various processes

of fraud investigation, which includes report writing, providing expert testimony and knowledge of the legal system. Although most aspects are included in this definition, the definition is not yet accurate as it mainly states the various aspects that a forensic accountant is trained in and what he/she is knowledgeable about.

A definition of a forensic accountant that does appeal to the study is the definition that is provided by the University of Canberra (2007), which indicates that the integration of accounting, auditing and investigative skills is often associated with the investigation of criminal matters. It is further indicated that a forensic accountant interprets, summarises and presents complex financial and business-related issues in a manner that is both understandable and properly supported before a court of law.

This definition is supported by the statement made by the Institute of Certified Forensic Accountants, a professional body chartered under Letters of Patent granted by the Federal Government of Canada. It is stated that some of the forensic accountant's primary skills include an understanding of the legal process, how to conduct investigations, conducting financial analyses and other accounting procedures at a level acceptable to the legal system. It is important to add the skills that a forensic accountant should have into the definition of a forensic accountant (Institute of Certified Forensic Accountants, 2012).

By taking into account the primary skills that a forensic accountant should have as well as the duties that the forensic accountant should be able to perform, this study would define the South African forensic accountant as follows:

“An individual whose primary skills include a knowledge of accounting, auditing and investigative procedures and an understanding of the legal process, who possesses the ability to conduct financial analysis and other accounting procedures and who is able to integrate these skills in order to interpret, summarise and present complex financial and business-related issues in a manner that is both understandable and properly supported before a court of law.”

Now that the forensic accountant has been defined, the question that arises is: what training, education and regulation must one have in order to call oneself a forensic accountant.

2.2.4 Training, education and regulation of the South African forensic accountant

A few years ago it would have been correct to state that unlike many other professional fields, there were no experience requirements for one to call oneself a forensic accountant (Levanti, 2009). This statement could, however, currently be challenged, as the forensic accounting industry in South Africa recently established a regulatory authority.

As mentioned before, the ICFP was founded on 1 May 2010. The ICFP is a regulatory institute that is responsible for cohering and regulating South Africa's forensic industry (ICFP, 2011a).

The formation of this regulatory body is beneficial to the forensic practice in South Africa, as it will eventually regulate who gets to call themselves forensic accountants. Herman de Beer, a director at KPMG, made the following comment on the founding of the ICFP (2011):

“The commercial forensic investigative environment has grown exponentially over the last 10 years – but as a career for individuals and as an industry, it is regarded as fragmented and unstructured. I believe the ICFP can be the catalysts in helping us – the practitioners – to address these pertinent issues.”

The ICFP was only founded recently and the formal training of forensic accountants in South Africa is still in its infancy. Although there is currently only one university in South Africa that offers an undergraduate degree in forensic accounting, there are several other institutions and university's that offers diplomas and certificates.

As stated earlier, the North-West University is currently the only university in South Africa that offers a BCom degree in forensic accountancy. This degree comprises various subjects that help to form forensic accountants in their career. These are *inter alia* accounting, tax, forensic, audit, and various law and ancillary subjects. The university also offers an honours and master's degree in forensic accountancy (NWU, 2012).

Examples of the other tertiary institutions that offer forensic accounting-related diplomas or courses are:

- UNISA, which offers a National diploma in forensic and investigative auditing. This programme consists of 4 modules, namely fraud prevention,

fraud detection, fraud investigation and forensic and investigative audit reporting. In order to register for this programme you need to meet the registration requirements, which are a senior certificate, and at least three years relevant working experience or a relevant diploma or degree (UNISA, 2009).

- The University of Pretoria, which offers a postgraduate diploma in investigative and forensic accounting. To qualify for this diploma the applicants must be in possession of a BCom degree with accounting or auditing or a bachelor's degree in law. This diploma consists of two modules, namely the legal aspects of investigative and forensic accounting and the financial aspects of investigative and forensic accounting (University of Pretoria, 2012).

It is obvious that the forensic accounting profession is new in South Africa but it is also clear that it is a growing profession and hopefully, as the profession grows and the ICFP takes control, there will be more guidelines regarding training and more tertiary institutions that offer degrees and courses in forensic accounting.

2.3 South African auditor

As previously discussed, there is a clear distinction between an auditor and a forensic accountant.

The main function of an auditor is to audit financial statements. The Auditing Profession Act (Act 26 of 2005) defines an audit as the examination of, in accordance with prescribed or applicable auditing standards—

- (a) financial statements with the objective of expressing an opinion as to their fairness or compliance with an identified financial reporting framework and any applicable statutory requirements; or
- (b) financial and other information, prepared in accordance with suitable criteria, with the objective of expressing an opinion on the financial and other information.

Not all companies' annual financial statements have to be audited. Section 30 of the Companies Act (Act 71 of 2008) makes provision for which companies' annual financial statements must be audited:

- (2) The annual financial statements must—
 - (a) be audited, in the case of a public company; or
 - (b) in the case of any other profit or non-profit company — be audited, if so required by the regulations made in terms of subsection (7) taking into account whether it is desirable in the public interest, having regard to the economic or social significance of the company, as indicated by any relevant factors.

When the law requires a company to audit its financial records it is called a statutory audit. A statutory audit can be defined as a legally required review of the accuracy of a company's or governments financial records (Investopedia, 2011). The purpose of a statutory audit is the same as the purpose of any other audit – to determine whether an organisation is providing a fair and accurate representation of its financial position by examining information such as bank balances, bookkeeping records and financial transactions (Investopedia, 2011).

Now that there is a better understanding of what an audit and statutory audit is. The study can take a look at the person performing these audits.

An auditor is a person who checks the accuracy of a business's records. The person doing the audit can be affiliated with the company being audited or can be an external auditor. The main function that an auditor performs is to help businesses ensure that they are maintaining accurate and honest financial records and statements (Investopedia, 2011).

Registered auditors are regulated by the South African Institute for Chartered Accountants (SAICA). SAICA (2010c) states that auditors review company systems, financial statements and accounting principles while checking the accuracy of the company's financial reports. They further indicate that the auditor is responsible for issuing an opinion on whether or not annual financial statements fairly present a company's result and financial position.

Section 44 of the Auditing Profession Act (Act 26 of 2005) emphasises that the main task of the auditor is to express an opinion on whether the financial statements and any supplementary information attached thereto, which relates to the entity fairly presents the financial position of the entity and the results of its cash flow and that the financial statements are properly prepared in all material aspects in accordance with the basis of the accounting and financial reporting framework as disclosed in the relevant financial statements.

From the above it is clear that an auditor is the person who uses his/her relevant skills and experience to help businesses maintain accurate financial statements.

2.3.1 Training, education and regulation of the South African Auditor

According to SAICA (2010) there are clear procedures that an individual must follow to become an auditor, as this is a well-established profession. As mentioned previously, the auditing profession in South Africa is regulated by the Auditing Profession Act (Act 26 of 2005).

Section 3 of the Auditing Profession Act (Act 26 of 2005) makes provision for the establishment of the Independent Regulatory Board for Auditors (IRBA), and in section 6 the functions of the board relating to the registration of auditors are set out. These functions include that the board provides for the education, training and professional development of registered auditors; accredited professional bodies; registered auditors; and to regulate the conduct of registered auditors.

Another responsibility of the board according to section 7 of the Auditing Profession Act (Act 26 of 2005) is that they are responsible for prescribing the requirements for and conditions relating to the nature and extent of continued education, training and professional development. They are also responsible for prescribing training requirements, including, but not limited to, the period of training and the form for training contracts.

SAICA is currently the only professional body that is accredited by IRBA (SAICA, 2010b). The process that SAICA (2010a) prescribes for an individual to become a Chartered Accountant is:

- Enrolment for a BCom Accounting degree or equivalent CA(SA) undergraduate qualification at a SAICA-accredited university;
- After completion of the degree completion of the Certificate in the Theory of Accounting (CTA) is required;
- After completion of the CTA individuals become eligible to enter into a 3-year learnership with a registered training office; and
- After successful completion of these 3 years and the passing of both qualifying examinations individuals may register with SAICA and become a CA(SA).

In review of the above it becomes apparent that the auditing profession is a well-established profession and it becomes evident that there is a clear difference between the auditing profession and the forensic accounting profession.

2.4 Difference between work performed by a forensic accountant and an auditor

While auditors and forensic accountants both work in the accounting profession, they play different roles. Auditors focus on the financial statements of an entity, and that these financial statements are stated fairly in all material aspects, while the forensic accountant's concern is not with the financial statements as a whole but with detailed development of factual information derived from both documentary evidence and testimonial evidence (Golden *et al.*, 2006:22).

A very accurate statement was made by Lorraine Horton, owner of L. Horton & Associates in Kingston, R.I. (cited by Wolosky) in this regard as she stated that a significant difference between auditing and forensic accounting exists. She further stated that whilst auditing is governed by materiality, the opposite is true regarding forensic accounting, as forensic accountings try to identify that one transaction that will be the key; the one transaction that is a little different, no matter how small the difference, and that will open the door (Wolosky, 2004).

Auditors provide only a reasonable assurance that the financial statements are entirely free of material misstatements and cannot provide absolute assurance

because only selective data is being audited by the auditor; not all subsidiaries, divisions, accounts and transactions are audited (Golden *et al.*, 2006:36).

The following table illustrates the difference between auditing and a forensic accounting investigation (Golden *et al.*, 2006:22).

	AUDIT	FORENSIC ACCOUNTING INVESTIGATION
Objective	Form an opinion on the overall financial statements taken as a whole	Determine the likelihood and/or magnitude of fraud occurring
Purpose	Usually required by third-party users of financial statements	Sufficient predication that a fraud has or may have occurred
Value	Adds credibility to reported financial information	Resolves suspicions and accusations, determines the facts
Source of evidence	Inquiry, observation, examination, and reperformance of accounting transactions to support financial statement assertions	Review detailed financial and nonfinancial data, search public records, conduct fact-finding as well as admission-seeking interviews, including third-party inquiries
Sufficiency of evidence	Reasonable assurance	Establish facts to support or refute suspicions or accusations

Source: Golden *et al.*, 2006:20

Financial auditors are required to perform audit procedures in response to the risk of material fraud, while forensic accounting investigations usually begin when there is a concern of specific irregularities and a forensic investigation typically includes a goal

to discover evidence that may be instructive as to the intent of those participating in the irregularity (Golden *et al.*, 2006:111).

While auditing concentrates on financial statements as a whole, a forensic accounting investigation does not concentrate on the financial statements as a whole but, rather, focuses on single transactions and people (Golden *et al.*, 2006:111).

Another difference between the functions performed by auditors versus the functions performed by the forensic accountant is that the auditor's function is performed to serve the public interest of specifically the shareholders and investors while the forensic accountant's function is performed to serve the interest of the party that gave them the mandate, while remaining unbiased (Golden *et al.*, 2006:111).

Although both the auditor's and the forensic accountant's end product is a report, there is a vast difference between the two.

This study will focus on the forensic accountant's factual report in detail in Chapter 4 but some of the major differences between the two are that the audit report stands on its own while the forensic accountant's investigation does not stand alone (Golden *et al.*, 2006:111). If this statement is analysed it comes down to the following: The role of an auditor is to advise users on whether the auditee's financial statements have been prepared in accordance with the accounting principles, whether these statements are free of material misstatement, and whether a true and fair view of the operating results, financial position and cash flow are reflected.

In summary the report is an assurance on whether the financial information presented by the audit committee is materially trustworthy for decision-making purposes (Anon., 2012). This means that the audit report is a document that accompanies the financial information when it is presented to users, thus a report that stands alone and the objective thereof is to present an opinion made by the auditors about the financial statements. The forensic accounting report, however, is a report that is prepared with the objective of presenting evidence in a professional and concise manner (Zysman, 2006). The report also conveys all the evidence to the litigator and provides credence to the fraud examination and to the examiner's work (ACFE, 2011:2.602). It is thus apparent that the forensic accountant's report is

a document that encapsulates all the evidence from the investigation; the evidence will be annexure to the report.

Another clear difference is that in an audit report the auditor's job is to provide an opinion of the financial statements. Golden *et al.* (2006:112) further state that an audit concludes and is essentially complete when an opinion is issued. This opinion is issued in the audit report. In a forensic accounting report on the other hand, the forensic accountant should not state opinions and some associations even prohibit this, for example the ACFE (2011:1118) included in their Code of Professional Ethics that it is specifically prohibited to give statements of opinion regarding guilt or innocence, as this is the job of the judge or jury. It is understandable that while auditors are asked for opinions, forensic accountants are primarily fact finders.

The auditor's work is performed in such a manner that the client's operations are minimally disturbed or not disturbed at all while the forensic accountant's work is often more interruptive. In the latter instance the employees of the company may not know about the investigation, the purpose thereof or the full scope thereof (Golden *et al.*, 2006:112).

The procedures that auditors utilise during an audit also differ from the procedures utilised by a forensic accountant. One such procedure is sampling, which is used for accomplishing various goals. Golden *et al.* (2006:114) indicate the following in this respect: there is a sharp contrast between the methods that are used for sampling by the two related but distinct disciplines. Auditors may utilise quality sampling to test the compliance of internal control procedures, they may use variables sampling to test the random amount of errors or to estimate a population value from sampling techniques or they may test all large transactions in respect of certain accounts.

While forensic accountants are more likely to utilise various discovery sampling techniques, these techniques allow qualification of the likelihood of finding one specified condition in a population. Forensic accountants could further use sampling in proportion to size in order to estimate the upper limit of a population value and they could examine all transactions in a relevant period that meet a particular profile, such as all transactions approved by a certain responsible person, all transactions involving a specific third party or all transactions of an unusual value.

Whilst auditors take materiality into consideration, the forensic accountant looks at all the factors, as there might be one transaction, however small, that can lead them to the fraud.

2.5 Conclusion

In review, the above chapter provides an overview of forensic accountants by attempting to define a forensic accountant by illumination of the misconceptions relating to forensic accountants, terminology that is associated with forensic accountants, the auditing profession in South Africa, as well as the difference between a forensic accountant and an auditor.

The term “forensic accountant” is the term that is most appropriate to be used to refer to someone who does forensic accounting. Another term that is currently used in the profession is “fraud auditor”. This term may not be used in South Africa because as the Auditing Profession Act (Act 26 of 2005) states, a person is not allowed to call themselves an auditor if they are not registered under this act. The term “fraud examiner” that is used by the ACFE does not justify the various services that are offered in the forensic accounting profession.

The common misconception that an auditor performs forensic investigations is clearly proven wrong in this chapter. Although these professions overlap in certain areas, the professions as a whole are entirely different. ISA 240R clearly states that although the auditor has a responsibility to obtain a reasonable assurance that the financial statements are free of material misstatements, it is not the primary objective of an auditor to detect fraud during an audit.

In analysing the difference between the work performed by a forensic accountant versus the work performed by an auditor it can be concluded that their methods, report writing objectives, purpose, source of evidence, and sufficiency of evidence differ.

And as the two professions are clearly not the same, forensic accounting has various investigation techniques that are unique to the profession, which will be discussed in the following chapter.

CHAPTER 3

INVESTIGATION TECHNIQUES USED DURING A FORENSIC INVESTIGATION

3.1 Introduction

An investigation is the examination, study, searching, tracking and gathering of factual information that answers questions or solves problems (Sennewald & Tsukayama, 2006:1). As stated in the previous chapter it is clear that there are differences between the auditor and the forensic accountant and also differences in the work performed by the two parties. While the auditor's role is to fairly present the financial position of the company, the forensic accountant's role is to analyse, investigate and substantiate the actual amounts that were reported. In order to do this, the forensic accountant can make use of certain investigation techniques. When conducting an investigation in conjunction with the police for criminal matters, the forensic accountant must take the law into account when applying these investigation techniques.

Dorrell and Gadawski (2005:17) indicates that forensic accounting is part art and part science and that it is most effective when applied in a logical manner that considers all issues and alternatives. Forensic accounting techniques are techniques that are used by investigative accountants when they look at financial statements, dig into their background and thereafter present a clear and concise account of what these mean and how they impact on the matter in question.

The techniques that are used in forensic accounting differ from techniques that are used in normal accounting methods. Although these methods differ, the use of other techniques and skills may be used along with investigation techniques, a legal understanding and a natural tenacious desire to uncover a hidden issue (Jenner, 2011).

There are no specific rules set that forensic accountants should follow when performing a forensic investigation. However, the forensic accountant must ensure that the evidence of the investigation is admissible in a court of law.

Forensic accountants in the private sector regularly work with the police and share information (Loxton, 2011). The forensic accountant must therefore ensure that when he is conducting the investigation he is following the correct procedures and that he is complying with the relevant legislation (Loxton, 2011).

Section 35 of the Constitution indicates that evidence that is obtained in a manner that violates any rights in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

The various forms of evidence that can be used during a criminal trial are:

- 1) *Viva Voce* evidence

Section 161 of the Criminal Procedure Act (Act 51 of 1977) states that a witness at criminal proceedings shall, except where the Act or any other law expressly provides otherwise, give his evidence in *viva voce*. This section further expresses that *viva voce* shall, in the case of a deaf and dumb witness, be deemed to include gesture-language and, in the case of a witness under the age of eighteen years, be deemed to include demonstrations, gestures or any other form of non-verbal expression.

Viva voce entails that evidence for either party must be given orally by the witnesses in presence of the parties. Schwikkard and Van der Merwe (2009:362) states that the rationale of the practice of orality is that parties should have the opportunity to confront the witness who testify against them. Schwikkard and Van der Merwe (2009:362) states that a further reason for oral evidence is that parties should have the opportunity to challenge the evidence by questioning in a situation where the parties as well as the court, can observe the demeanour of the witness, the purpose of this is to assess the credibility of the witness.

Section 17 of the Criminal Procedure Act (Act 51 of 1977) makes provision for circumstances where the examination of a witness who is a resident of South Africa is necessary and in the interest of justice and that the attendance of such witness will cause undue delay, expense or inconvenience to the court. In these circumstances the magistrate may

proceed to the place where the witness is or summon the witness before him in order to take down his evidence under oath or affirmation. The evidence must be recorded and read back to the witness whereafter it must be signed by the witness and the magistrate.

2) Documentary evidence

Section 221 of the Criminal Procedure Act (Act 51 of 1977) defines a document as any device by means of which information is recorded or stored. Schwikkard and Van der Merwe (2009:404) state that in order for a document to be admissible during criminal proceedings, the following conditions must be met (a) the original document must be produced and (b) the document must be authenticated.

3) Real evidence

Schwikkard and Van der Merwe (2009:395) state that real evidence is an object which, upon proper identification, becomes, of itself, evidence. In criminal cases, the party producing the real evidence must call a witness to identify the material object (Schwikkard & Van der Merwe, 2009:405). If the evidence is properly identified and relevant and if there is no other rule of evidence that excludes it as evidence, it will be included as an exhibit that will be duly labelled and numbered and available for the court to inspect (Schwikkard & Van der Merwe, 2009:405).

4) Electronic evidence

Section 15 of The Electronic Communications Act (Act 25 of 2002) regulates the admissibility and evidential weight of data messages.

Section 15(4) further assists with the admissibility of business records. It is stated that a data message that was made by a person during the ordinary course of their business, or a certified copy thereof, is admissible as evidence in criminal proceedings (Schwikkard & Van der Merwe, 2009:416).

Further to the different types of evidence that can be used, evidence can also be classified as direct or circumstantial evidence (Osterburg & Ward, 2000). Direct

evidence is evidence of a fact in issue that is proved directly by such evidence (Schwikkard & Van der Merwe, 2009:21). Circumstantial evidence furnishes indirect proof where the court is required to draw inferences as no direct assertions with regard to the fact in issue has been made (Schwikkard & Van der Merwe, 2009:21).

Schwikkard and Van der Merwe (2009:21) indicate that circumstantial evidence often forms an important component of the information that is furnished to the court. Schwikkard and Van der Merwe (2009:537) further indicate that circumstantial evidence is not necessarily weaker than direct evidence. This is reciprocated in *S v Shabalala* (1966) where it was stated that in some instances circumstantial evidence may even out value direct evidence and is also supported by Zeffertt *et al.* (2003:94) as it is stated that circumstantial evidence may be the more convincing form of evidence.

As some of the information that the forensic accountant will obtain during his forensic investigation will consist of circumstantial evidence, the rules applied by the courts in this regard must be understood and taken into account.

The rules that are applied in the event of circumstantial evidence were established in *R v Blom* (1939). Schwikkard and Van der Merwe (2005:538) explain the two cardinal rules of circumstantial evidence in criminal cases. The first rule that was stated is that the inferences sought to be drawn must be drawn consistent with all the proved facts of the case and if this cannot be done the inference cannot be drawn. The second rule stated that if the proved facts do not exclude all other reasonable inference, there must be a doubt whether the inference sought to be drawn is correct.

When evidence is gathered to prove the offence in question during a forensic investigation, the forensic accountant must ensure that the evidence is sought lawfully and that it is admissible (Mudaly, 2011:1). Mudaly (2011:82) further indicates that when information is obtained during a forensic investigation the information or evidence must be collected, handled and preserved in such a manner that its physical and legal integrity is maintained.

When the forensic investigation is done in conjunction with the police, the police can in terms of Section 20 of the Criminal Procedure Act (Act 51 of 1977) seize certain

articles and information that can assist the investigation. Section 21 of the Criminal Procedure Act (Act 51 of 1977) *inter alia* indicates that articles may *inter alia* be seized by virtue of a search warrant, this search warrant shall require a police official to seize the article in question.

Section 22 of the Criminal Procedure Act (Act 51 of 1977) further describes the circumstances in which articles may be seized without a search warrant. The section further describes that this may be done in circumstances where the person concerned consents to the search and seizure of the article in question or if the police official on reasonable grounds believes that the search warrant will be issued to him but that the delay in obtaining such warrant would defeat the object of the search.

Aslett (2012:5) indicates that the involvement of the forensic accountant in search and seizure operations may be vital, as documentary evidence makes up a large part of the evidence collected during the investigation but that that South African courts seem adamant that search warrants must be addressed to a police officer in order to comply with the decency and order requirements of the Act. Aslett (2012:5) further indicates that although only police officers may seize the documentation, the forensic accountant's inputs as to what the police should seize may be vitally important in the successful prosecution of crime.

There are a number of different direct and indirect techniques that the forensic accountant can make use of when doing a forensic investigation. The study will now focus on various techniques that are commonly used by forensic accountants.

3.2 Direct Method

The direct method is used by the forensic accountant to identify and obtain facts. Gottlieb (2010) indicates that this method includes the examination and analysis of the following:

- Interview management and staff;
- Public records and notices;
- Cancelled checks and invoices; and

- Contracts and agreements.

Although this method is similar to traditional audit techniques, it is not an audit method but a forensic accounting method. Forensic accountants frequently use the direct method of proof methodology to resolve an alleged crime. In order to obtain direct proof, the forensic accountant must identify specific financial transactions that involve the suspect.

The aim of the direct method is that the forensic accountant uncovers financial transactions that involve illegal activity. These illegal funds and the information obtained from the transaction are then analysed and investigated by the forensic accountant in order to identify the related parties. Direct links between the financial transaction, the illegal activity and the suspect are created by the forensic accountant. The direct proof is used to expose the suspect's personal association and awareness of the illegal funds used in the financial activity that is under investigation (McClung, 2012).

The ACFE (2011:1081) notes that the tracing of financial transactions under the direct method is very important. It is further stated by the ACFE (2011:1081) that information from financial institutions can be a valuable source for the forensic accountant as it can be used as evidence for fraud. In addition to this forensic accountants might be able to identify leads on source of funds, expenditures and personal affairs from bank statements. Dorrell and Gadawski (2005:5) state that the most basic financial statements can become significant indicators when skilled analysis is applied to the composition thereof. The challenges that forensic accountants might face is that in most instances bank records are not readily obtainable and there are important legal requirements that must be met in order to obtain and utilise them (ACFE, 2011:1081).

Cancelled checks, invoices, contracts and agreements (mentioned in the last two bullets above) are classified as documentary evidence (as discussed under paragraph 3.1 above). These documents are analysed by the forensic accountant as part of the forensic investigation to obtain evidence that is relevant to the case.. Obtaining evidence by means of interviews and public information requires more consideration:

3.2.1 Performing interviews

Interviewing is a critical part of a forensic investigation, as it can assist the forensic accountant in establishing the who, what, when, where, how and why. A successful interview is an integral part of facts gathering and steering the investigation in the right direction (AICPA, s.a.).

Silverstone and Sheetz (2007:135) state that there are various psychological barriers to efficient communication that have to be overcome in order for the forensic investigator to reach his goal and that the elimination or minimising of these barriers is the job of the forensic accountant.

The AICPA (s.a.) describes an interview as a professional conversation that is conducted with a specific goal and purpose in mind and that the primary purpose of most interviews is to gather evidence through facts and information that the interviewee provides during the interview. Silverstone and Sheetz (2007:135) also mention that the purpose of the interview is to elicit information.

The ACFE (2011:874) defines an interview as a question-and-answer session of which the objective is to elicit information. An interview differs from a conversation as a structural approach is taken, it is not free-form and it has a purpose. Interviews can be conducted by the forensic accountant throughout the investigation.

When conducting an interview the forensic accountant should adhere to section 12 of the Constitution that states that a person has freedom and security to be: (a) free from all forms of violence from either public or private persons and (b) not to be tortured in any way and not to be treated in a cruel, inhuman or degrading way.

3.2.1.1 Characteristics of an effective interview

Interviews should be of satisfactory length and intensity in order to uncover the relevant facts (ACFE, 2011:874). A good interview will exclude irrelevant information and therefore the forensic accountant should determine beforehand what information is deemed to be relevant and what information he wants to obtain (ACFE, 2011:874).

It is noted by the AICPA (s.a.) that for an interview to be successful it needs to be thorough and that proper planning, relevant questions and an objective interviewer will be beneficial to a successful interview.

It is further noted that the interviewer should be an active listener and an active observer. Active listening not only means that the investigator should listen more than talk, but also that the investigator should listen in the manner that what is said is being communicated (AICPA, s.a.). This statement is shared by the ACFE (2011:875) as they state that the interviewer should not interrupt the interviewee with unnecessary questions as more pertinent information will result from volunteered information as opposed to responses to specific questions.

The interviewer must ensure that he always demonstrates objectivity, equality and professionalism. The interviewing setting is an important part of the interview as it should create a comfortable and non-threatening circumstance for the interviewee (AICPA, s.a.). The AICPA (s.a.) indicates that the following should be considered by the interviewer to ensure a comfortable interview setting:

- The location of the interview should be private in order to minimize interruptions;
- Cell phones should not be used during the interview; and
- The interviewee should have clear access to an exit.

The interviewer must make it clear to the interviewee that the main objective of the interview is to obtain relevant facts. This can be done by phrasing questions in a manner that is non-accusatory. Formal and pretentious interviews will not assist the interviewer to perform a successful interview (ACFE, 2011:875). The interviewer should always seek to clarify and verify any information that was gained during the interview (AICPA, s.a.).

3.2.1.2 Planning and preparation for the interview

An interview must always be planned effectively beforehand by the forensic accountant. The session must be approached with various tools and tactics, a line of questioning must be followed and the effectiveness of the interview must constantly be evaluated (Golden *et al.*, 2006:349). Silverstone and Sheetz (2007:137) also indicate that the forensic accountant should always plan the interview in advance.

Firstly, the forensic accountant should identify who he is going to interview. Interviewees could *inter alia* include witnesses, victims, potential information holders,

suppliers and vendors, customers, accountants or competitors (Silverstone & Sheetz, 2007:137). Silverstone and Sheetz (2007:154) also advise that interviewees with general information should be interviewed first and interviewees with specific information last, as this will assist the forensic accountant in building his knowledge as he proceeds. The ACFE (2011:874) also states that the most valuable interviewees should be interviewed after more hesitant interviewees, as this will provide the forensic accountant with a wider base from which to formulate his questions later in the process.

After determination of who the forensic accountant wants to interview, the forensic accountant should consider what knowledge the interviewee is likely to have. This can provide assistance to the forensic accountant when he organises the interview. When you have an idea of what the interviewee might know, it is easier to identify what possible documents and information he might be able to supply (Silverstone & Sheetz, 2007:139). The ACFE (2011:874) reciprocates this as they state that the examiner should consider the type of information that can be obtained by each of the potential interviewees. Golden *et al.* (2006:351) state that a good starting point would be to determine what the interviewee would know.

Silverstone and Sheetz (2007:139) describe the next step of the planning phase of the interview that the forensic accountant should consider: the reason why he is interviewing the witness. Golden *et al.* (2006:353) state that the planning for the interview must reflect the type of interview that is anticipated. It should be considered whether the interviewee is more valuable for background information, during the intelligence gathering phase or for assistance in defining the detail of the case as this might indicate when in the process is the best time to interview this witness.

Although most interviews that are conducted by the forensic accountant are straightforward fact-finding interviews, where persons are asked basic questions in order to obtain information, there may be situations where interviews involve important legal considerations that could involve consultation and guidance from counsel (AICPA, s.a.).

The AICPA (s.a.) indicates that forensic accountants must always consider whether legal counsel should be involved in the interview. In circumstances where the

interview is conducted after a specific allegation has been made or there is a question of whether a law has been broken or if criminal behaviour is suspected, it would be advisable to involve counsel from the beginning.

Section 35 of the Constitution of South Africa states that everyone who is arrested for allegedly committing an offence has the right. Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice. Therefore, it is essential that the forensic accountant has a thorough knowledge of the relevant legislation and the forensic accountant should conduct the interviews in an open and fair manner in order to meet the “test of fairness”, thereby ensuring that any evidence that is obtained is not deemed inadmissible.

3.2.1.3 Conducting the interview

The ACFE (2011:875) identifies five general types of questioning that can be used by the interviewer:

- Introductory;
- Informational;
- Assessment;
- Closing; and
- Admission seeking.

It is stated by the ACFE (2011:875) that in regular interview situations where neutral or corroborative interviewees are being interviewed in order to gather information and facts from them, only three of the general types of questioning will be used, namely introductory, informational and closing questions.

During introductory questioning the interviewer provides an introduction for the interview and the interviewee verbally agrees to be co-operative during the interview (ACFE, 2011:876). The ACFE (2011:876) provides the following information with regards to questioning: Informational questioning can be performed by using three types of questioning: Open-ended, close-ended and leading. Open-ended questions

are questions where “yes” or “no” answers will not be sufficient. Open-ended questions typically do not have a specific answer but several different ways of answering. This type of questioning should be used during the information phase of the interview.

Assessment questioning is used when the interviewer believes that the respondent is being deceptive. This line of questioning is used to establish the respondent’s credibility. Closed questions are questions that require a definite answer. Closed questions can be used when asking questions about specifics, amounts, dates and times. This type of questioning should be avoided during the informational part of the interview. Leading questions are questions that contain the answer as part of the question and are used to confirm facts that are already known. These questions lead the witness to answer in a particular way and do not allow the witness much room to move.

Admission-seeking questioning is reserved for when an individual’s culpability is reasonably certain. These questions are posed in an exact order designated to clear an innocent person or encourage the culpable person to confess. The interviewer must however be careful of undue influence or harassment of the witness as section 35(5) protects the interviewee against unconstitutionally obtained evidence (which will include confessions).

The above questioning method that the ACFE (2011:894) describes is very similar to the method as that is described by Silverstone and Sheetz (2007:144). They indicate that the cognitive interview method can be used by forensic accountants during interviews. Phase one of this method is when the witness does most of the talking. The forensic accountant should make use of open-ended questions and he should make sure not to interrupt the witness. This can be done by timing his comments and necessary questions carefully.

Phase two of the method is that the forensic accountant can ask the interviewee basic questions based on the interviewee’s free-report recollection of the event. Phase three consists of directing the interviewee to make a second attempt at retrieving information that answers questions that phase one and two did not cover.

An important factor that the forensic accountant should consider is to ask the interviewee for any supporting documentation relating to his information (Golden *et al.*, 2006:359).

Upon conclusion of the interview, the forensic accountant should institute a trust relationship with the interviewee, as this will assist in assuring future cooperation (ACFE, 2011:953).

3.2.2 Research

The forensic investigator is burdened with the enormous task of obtaining all the information to put the case together (Manning, 2005:223). A vast amount of information about individuals and businesses can be sourced from public sources (ACFE, 2011:974). The ACFE (2011:991) states that a wide variety of information has been digitised in order to be available online. There are numerous commercial online services available that the forensic accountant can utilise to obtain public records, *inter alia* LexisNexis (ACFE, 2011:992).

When the forensic accountant uses research in order to obtain information, section 14 of the Constitution must be taken into account. This section states that every person has the right to privacy. The forensic accountant should take care to ensure that infringements are not made on a person's right to privacy.

The ACFE (2011:993) identifies the following searches that can be conducted by the forensic accountant:

- **Newspaper/Media databases**

Newspapers, publications and journals can be used as sources of information during the forensic investigation. There are a number of searchable databases that deal specifically with news and media resources.

- **Background searches**

Background searches can be done by the forensic accountant for various purposes. In some instances it can be used to seek evidence of fraud by digging deep into related party transactions. In other instances background searches can be used to identify investigative leads, to locate interviewees

and to perform asset searches (Golden *et al.*, 2006:331). The ACFE (2011:995) identifies more reasons for conducting background checks: discovering what public sources expose with regard to individuals and businesses that the subscriber may do business with and to discover information about potential employees.

Golden *et al.* (2006:355) emphasises that the enormous growth in information resources that are available on the Internet and through commercial online services has transformed the investigative process. “Virtually every business investigation now begins with some form of online research. In a matter of hours, a skilled forensic accounting investigator can develop critical leads and make connections that may never be found through traditional field investigation” (Golden *et al.*, 2006:331).

The ACFE (2011:996) states that newspapers and publications can be very useful during background searches. The forensic accountant should, however, always consider the source of the website when obtaining information from the Internet (Golden *et al.*, 2006:331).

- **Internet searches**

The Internet is the most basic way to source information. Search engines and web directories can be used.

- **Asset searches**

The ACFE (2011:994) indicates that the ownership of assets may be discoverable through the use of property searches. The ACFE (2011:1110) identified that the most common means of hiding assets is to transfer the asset to another party, such as a family member. State and local proprietary records can be used to determine whether assets exist, where they exist and whether they are recoverable (ACFE, 2011:993).

- **Company searches**

The forensic accountant can perform company searches in order to obtain information. This information will permit the forensic accountant to uncover information about the background and financial health of a company, uncover

information about key individuals in a company and to identify potential conflicts of interest that exist (Golden *et al.*, 2006: 336).

- **Deed search for property**

Deed searches can also be performed in order to determine property ownership. Golden *et al.* (2006:339) indicate that this information has many uses, such as *inter alia* detection of the ownership and value of a particular property and to research a person's financial interest.

It is clear that the direct method will be the first method that the forensic accountant will make use of, but when it seems unlikely that this method is going to be a success, the forensic accountant can also make use of the indirect method.

3.3 Indirect Methods

These methods are not as commonly used as the direct method but are still just as relevant to the forensic investigation. McClung (2012) states that the indirect method is used when the flow of money is not reflected in the businesses' books and records.

In this method, economic reality and financial status techniques are used to reconstruct the suspect's finances through circumstantial evidence.

McClung (2012) states that when the forensic accountant uses the indirect method, he will not be able to directly trace transactions to the suspect but that the forensic accountant rather prepare an overview of the suspect's financial condition (a financial profile) by uncovering what the suspect owes, owns, earns and spends. For this reason, this method is also often referred to as "financial profiling".

Dorrell and Gadawski (2005) support this method by indicating that transaction-generated evidence can provide a rich collection of data, which can be aggregated by forensic accounting analysis. The forensic accountant may perform an analysis of financial records in order to identify inconsistencies. This analysis can be done between the financial statements of the suspect company and the financial statements of companies that conduct similar business, or between the suspect company's current financial statements and those of previous years (Woodman, 2011).

These methods should be used when:

- 1) The individual or business maintains inadequate books and records;
- 2) The books do not clearly reflect income;
- 3) When books and records are being withheld;
- 4) When expenses exceed reported income; and
- 5) Where there is a significant increase in the year-to-year net worth.

3.3.1 Net worth method

The net worth method is a long-established indirect method of proof that is regularly used in establishing income. This is a very useful method of proof in reconstructing income when it is not possible to establish income through direct evidence and is based on the concept that if the accused has more wealth at the end of a given year than at the beginning of that year, and the increase is not a result of non-taxable sources such as gifts, loans, and inheritance, then the increase is a measure of income for that year (Alvin Brown and Associates, 2012).

A person's net worth at any given time is the difference between his total assets and his total liabilities on that date and that it is the difference between what he owns and what he owes (Lectric Law Library, 2012).

This method can be of value in a criminal investigation to demonstrate the accused's apparent income by determining the increase in his wealth, by deriving the year-to-year change in his overall net worth and accordingly show that the accused spent more than he had available from known, reported or legitimate sources (Dorrell and Gadawski, 2005:9).

As mentioned, the net worth method is a common method that uses the balance sheet approach to estimating income. This method is not an accounting method but a method that relies on proof of circumstantial or indirect evidence (Manning, 2005: 69).

To use this method the forensic accountant must:

- 1) calculate the suspect's net worth (assets less liabilities) at the beginning and ending of a period;
- 2) add non-deductible living expenses to the increase in net worth; and

- 3) account for any difference between reported income and the increase in net worth during the year as (a) non-taxable income and (b) unidentified differences.

Figure 1: Source: Manning (2005: 69) illustrates this theory:

Year one	Year Two
Assets	Assets
Less: Liabilities	Less: Liabilities
Equals: Net worth	Equals: Net worth
	Less: Net worth year one
	Equals: Net worth increase
	Add: Non-deductible Expenditures
	Less: Non-taxable income
	Equals: Corrected taxable income
	Less: Reported taxable income
	Equals: Unreported taxable income

Figure 1: Source: Manning (2005: 69)

The net worth method entails the calculation of unreported income. To obtain an accurate picture, the starting net worth of the suspect must be reasonably accurate as a comparison of the suspect's net worth at the beginning of the year and his net worth at the end of the year will be calculated. The exact value of the assets that were owned by the suspect at the starting point does not need to be revealed, the forensic accountant should, however, be able to provide evidence that the assets owned by the suspect at the starting point, is not sufficient to account for the subsequent increases in his net worth (Lectric Law Library, 2012).

In addition to the matter of the suspect's net worth the forensic accountant must establish whether the suspect spent money throughout the year on living expenses, taxes and other expenditure that does not add to his net worth at the end of the year. The forensic accountant must further establish whether the expenditure came from funds that the suspect received throughout the year and if it is established that the receipts cannot be accounted for by non-taxable sources, then those funds should also be deemed as the income of the suspect (Lectric Law Library, 2012).

3.3.2 Expenditure theory

The lifestyle of an individual may give clues as to the possibilities of unreported income. There are obvious lifestyle changes that may be an indication of fraud or unreported income. These changes include *inter alia* a lavish residence, expensive cars and boats, holiday residences, private schools, and exotic vacations.

The term that is commonly referred to by forensic accountants to describe this test that determines if the lifestyle of an individual is commensurate with that persons known income stream is “a lifestyle audit” (Powell, 2012:1).

A lifestyle audit is a study of a person’s living standard to determine if it is consistent with his reported income (Investorwords, 2012b). When someone is spending beyond his or her apparent means, there should be a concern and a lifestyle audit should be performed.

Fraud and corruption are typically committed by way of “off the book” transactions or manipulated financial and accounting records. Fraud and corruption are not easily detected and corrupted professionals are able to conceal fraud with ease, particularly in work environments that have weak controls and limited segregations of duty. A sudden unexplained change in a person’s lifestyle can sometimes be the first or only indication that illicit activities are taking place. Therefore, lifestyle audits are a critical management tool to identify whether any staff member/individual is living beyond his/her means and may potentially be engaging in illicit activity (Powell, 2012:1).

It is clear that a lifestyle audit is an amalgamation of reports which can provide forensic accountants with information relating to certain aspects of an individual’s life. Properties, motor vehicles, company registrar information and credit histories are the areas that are most commonly included in a basic lifestyle audit. Forensic firms normally subscribe to various public databases to gather business intelligence on individuals and companies; this can assist the forensic accountant to obtain the above information (Powell, 2012:1).

3.3.3 Cash-T Method

The Cash-T is a method that is used to reconstruct a person's income, and it is compared to all known expenditures during a particular year (Hicks, 2005).

In essence this method is used to determine understated income. All cash received is compared to all cash spent. If it appears that cash spent exceeds cash received then the excess may represent unreported income (Gottlieb, 2010).

Dorrell and Gadawski (2005: 9) state that this theory can be useful in criminal cases in instances where the suspect purchases big-ticket items such as real estate, stocks and bonds and general tangible assets. Dorrell and Gadawski (2005: 9) further state that when sources of cash attributed to the suspect based upon various records collected by search and seizure by police officers and the estimated living expenses are compared to his claimed earnings an inference can be drawn that the suspect has significant unknown and unreported sources of income.

Figure 2: Source: Manning (2005: 75) illustrates this theory:

Gross receipts:		Business expenses:	
Receipts	R 120 000.00	Expenses:	R95 000.00
		Personal living expenses:	R60 000.00
Preliminary Understatement	R35 000.00		R155 000.00

Figure 2: Source: Manning (2005: 75)

3.3.4 Bank Deposit Method

This method is of great use when the subject uses his bank account a great deal, makes payments in cash and when the forensic accountant has access to the bank statements. The forensic accountant analyses funds deposited into the bank account during the year by reconstructing gross taxable receipts.

One of the typical criminal offences for which this method can be used by the forensic accountant to investigate is tax evasion (Murphy, 1958). This method can also be used to reconstruct income to reveal the fruit of illicit activity (Studdard, 2012).

USLegal (2012) defines the Bank Deposit method of proving unreported income as a method that is used to investigate income. It is further stated by USLegal (2012) that with this method the forensic accountant is able to compute the deposits that are made into a person's bank account and to compare these deposits with the reported income of this person.

In the event where the deposits made are more than the reported income of a person, the difference is taken as unreported income. The method is based on the theory that if a taxpayer is engaged in a revenue-producing business or occupation and occasionally makes deposits of money into his bank account, the assumption that is made is that these bank deposits represent taxable income unless it appears that the deposits are re-deposits or transfer of funds between accounts, or that the deposits were a result of non-taxable sources such as gifts, inheritances or loans (USLegal, 2012).

Another contemplation of this method is that any expenditure of cash or currency from funds that were not deposited in the bank and not derivative from a non-taxable source also raises an assumption that the cash or currency is representative of taxable income (Manning, 2005:202).

Under the bank deposit method, the suspect's gross receipts are determined by adding total bank deposits, business expenses paid in cash, capital items purchased in cash, personal expenses paid in cash and cash accumulations not deposited in any bank account. This is then compared to the gross income reported and the difference is the amount of unreported taxable income or illegal income (Manning, 2005:202).

Figure 2: Source: (Manning, 2005:202) illustrates the Bank Deposit method

<p>1. Total Deposits:</p> <ul style="list-style-type: none"> a. Business checking b. Personal checking c. Savings account(s) <p>Total deposits</p>
<p>2. Plus: Cash expenditures:</p> <ul style="list-style-type: none"> a. Business expenditure b. Personal expenses c. Capital purchases <p>Total cash expenditures</p>
<p>3. Less: Total Checks written:</p> <ul style="list-style-type: none"> a. Bank balances 1/1/XX b. Total deposits for the year Less: Bank balances 12/31/XX <p>Total cash expenditures</p>
<p>TOTAL RECEIPTS</p>
<p>4. Less: Non-income items</p> <ul style="list-style-type: none"> a. Transfers b. Re-deposits c. Loans d. Gifts <p>Total non-income items</p>
<p>TOTAL INCOME RECEIPTS</p>
<p>5. Accrual adjustments:</p> <ul style="list-style-type: none"> a. Accounts receivable – add increase b. Accounts receivable – less decrease c. Accounts payable – less increase d. Accounts payable – add decrease <p>Total accrual adjustments</p>
<p>6. TOTAL INCOME</p>

Figure 2: Source: (Manning, 2005:202)

3.4 Forensic analytics

Another technique that can be used during a forensic investigation is the use of analytics. Forensic analytics describes the act of obtaining and analysing electronic data using formulas and statistical techniques to reconstruct, detect, or otherwise support a claim of financial fraud (Nigrini, 2011).

Dorrell and Gadawski (2005:13) state that the analysis of transactions is when a comparison or contrast of transactional and pattern-sensitive data is measured in order to provide a record for forensic analysis. It is further stated that full and false inclusion tests are used to establish the suitable “universe” of data that is under investigation and that this ensures that no irrelevant data is included and that no relevant data is excluded.

The ACFE (2011:1000) indicates that various computer programs have been developed that enable forensic accountants to sift through mounds of information. Nigrini (2011) states that the main steps in forensic analytics are (a) data collection (b) data preparation (c) the use of forensic analytics and (d) evaluation, investigation and reporting.

The use of computers and the Internet has made these steps easier. Various different types of tailor-made programs can be used to perform these analytics. However, only computer programs such as Microsoft Excel (Excel) and Microsoft Access (Access) will be discussed as they are widely available and discussing all the analytical programmes on the market falls beyond the scope of this study. Through the use of computer-based analytic methods, the goal is to detect fraud, error and biases where biases involve people gravitating to specific numbers or number ranges to circumvent actual or perceived internal control thresholds. These methods are directed at determining the likelihood or magnitude of fraud occurring (Nigrini, 2011).

3.4.1 Using Access in forensic investigations

Access can be used for data sets that are reasonably sized. Access is a Windows-based database program that keeps the tables, queries and reports neatly compartmentalised. Data must be imported to Access and stored in tables. These tables are made up of fields, with each field storing one type of data for all the

records. Queries are the workhorses used in forensic analytics. Queries are used to perform calculations or to select records with specific attributes. Another function of queries is that it can append tables to each other, to create tables, to delete data, and to update data in the tables. It can also be used to group data together and to run calculations on the group. Duplicates can also be detected by using the queries function.

3.4.2 Using Excel in forensic investigations

The importation of data is usually easy, as you can easily import data from Access and a host of other database programs. Excel has a variety of data-formatting options that assist with the interpreting and visualising of the data. Nigiri (2011) states that the following steps can be followed when using Excel in the forensic investigation:

- 1) Data collection – All the relevant data is obtained;
- 2) Data preparation – Data cleansing or data scrubbing must be performed. This involves the detection and correction (or removal) of corrupt or inaccurate records from the data tables;
- 3) Data analysis – Various tests are performed. These tests are designed to identify outlier records that stand out from the rest of the records. The tests also involve various types of summaries, calculations, groupings and comparisons. Various tests that can be performed here will be described later in this chapter; and
- 4) Reporting – The final phase is the reporting of the results. The results can include the use of charts, tables, graphs and selected records.

3.4.3 High-level data overview tests

There are various tests that can be used for data-driven investigations.

3.4.3.1 Data profile

The data profile is usually the first test to be run on the data because this test might find serious issues that show that it is not a good idea to continue with the analytics

(Nigrini, 2011). This test might indicate that the data set is incomplete. During this test, the data is divided into different strata. These can include:

- Large positive numbers;
- Small positive numbers;
- Amounts equal to zero;
- Small negative numbers; and
- Large negative numbers.

For some data sets it might be necessary to use more strata and strata should be changed according to various factors.

The objective of the data profile is to give a better understanding of the data that is being analysed.

3.4.3.2 Data histogram

The function of this test is that the data histogram shows patterns of the data with respect to size and counts by showing the shape of the distribution. This histogram is showed graphically. Another way of describing this test is descriptive statistics. Descriptive statistics are graphical and numerical measures that are used to summarise and interpret some of the properties of a data table.

3.4.3.3 Periodic graph

This test divides the data into time periods and shows the total per time period on a graph with time shown on the x-axis. The use of this test is to get a better understanding of the data, and to detect anomalies.

3.5 Conclusion

There are various investigation techniques that the forensic accountant can use when performing an investigation. These techniques can be used in conjunction with or separate from each other. The forensic accountant must be able to select the method(s) most suitable for the investigation and that will produce the selected outcome.

The direct method is typically used by a forensic accountant to resolve an alleged crime, while the indirect method is typically used to identify evidence that a person might be involved in illicit activities.

When applying the direct method, there are various techniques that the forensic accountant can use in order to obtain facts and evidence. A technique that is frequently used in forensic investigations is interviewing, where the forensic accountant can interview potential suspects, fact witnesses or any person that would be able to assist him with the investigation. In order to obtain the best result from the interview, the forensic accountant must do adequate planning for the interview. Logistical factors such as time and space must also be considered by the forensic accountant. During an interview there are various types of questions that can be used; open-ended questions, closed-ended questions and leading questions are most commonly used. The forensic accountant must determine which interviewing technique he should make use of in order to achieve the best results from the interview.

Research and information gathering is another technique that the forensic accountant can use during the investigation. Information gathering is an essential part of any forensic investigation. There are various sources that the forensic accountant can make use of to gather information. Information can *inter alia* be obtained from public sources, government departments and commercial online services. The forensic accountant can also obtain information by doing background searches, making use of asset statements and investigating family members of the suspect.

The Net Worth method as an indirect method can be used to identify whether a person has more wealth at the end of a period as opposed to the beginning of the period, and the increase in wealth is not aligned with the persons reported taxable income or a result of non-taxable income, while the expenditure theory can be used to perform a lifestyle audit on a person. When a person is living above his means and he is exercising a lavish lifestyle, which cannot be supported by his reported income, it could be an indication that he is involved in illicit activities.

The Cash-T method can be used by the forensic accountant to identify whether a person's cash spent exceeds his cash received. While the Bank Deposit method

can be used by the forensic accountant when he has access to a person's/company's bank account. An analysis of funds deposited into the bank account can be performed in order to identify whether a person has deposited more money than is reflected in his reported income.

Forensic analytics is another technique that can be used by the forensic accountant. The forensic accountant can analyse electronic data by using various programs and exercises. Microsoft Excel and Access can be used to analyse data and this data can be used to identify irregularities, quantify losses and support allegations.

The evidence that the forensic accountant obtains through the use of these techniques can be communicated by means of a report. The following chapter will provide information with regard to the forensic accounting report.

CHAPTER 4

THE FORENSIC ACCOUNTANT'S EXPERT REPORT

4.1 Introduction

After the forensic accountant has done the forensic investigation, a report is usually compiled to communicate the findings of the investigation. The report may also be used to convey the expert's findings to a court of law. Therefore the main reason for the expert being involved in a case before a court of law is to state his opinion. It is stated in Common law of South Africa that in some cases, a witness must give evidence of facts, and when he is an expert he can express an opinion (Schwikkard & Van der Merwe, 2009:93). When a witness is only testifying to the facts and conclusions drawn in his report, he is not expressing an opinion and will therefore not be regarded as an expert witness (Schwikkard & Van der Merwe, 2009:85).

The objective of this report is to provide all parties with the information on which the expert based his opinion (Singleton *et al.*, 2006:287). Thus it is obvious that the forensic expert report must be of a high standard. However, in South Africa there are no standards set for what a forensic report should contain. This study will explore some of the standards that other regulating institutions across the world have for reports.

Evidence that was obtained during forensic investigations is usually presented to third parties, and these third parties could be a court of law or the mandate giver. The way in which this information is given over to third parties is by means of a report.

Unlike an audit report, where the auditor's objective in an audit is to render an opinion on whether the information appearing in a set of financial statements is presented fairly in conformity with accounting principles, the forensic accounting report's objective relates specifically to the issue defined by the party engaging the accountant; a specific goal is defined by the client (NAFA, 2007). It is clear that the objectives of an audit report and a forensic accounting report differ. This study will aim to determine what the difference between an audit report and a forensic accounting report is.

After determining the difference between these reports, this study will aim to determine what standards and guidelines should be applicable to forensic reports. Although there are currently no standards set in South Africa for forensic accounting reports, there are legal standards that should be adhered to and standards issued by other major international accrediting bodies that cover the required content in the drafting of an expert report (DiGabriele, 2012).

This study will evaluate the standards that other international accrediting bodies have set for forensic reports and determine if these standards can assist South Africa with the development of such standards. In addition to the standards that the forensic accountant can follow to ensure the report is of a high standard, it also has to be ensured that the report's content is well-written and well-supported.

DiGabriele (2012) states that the importance of a well-written, well-supported expert report is twofold: firstly, the expert report will become a crucial document in the legal matter it affects, and secondly, it will also become a permanent fixture of the expert's record. In order to ascertain which guidelines can assist the forensic accountant to ensure that a well-written and well-supported report is written, this study will aim to consider some guidelines for report writing that have been set by various institutions.

4.2 Difference between the audit report and a forensic accounting expert report

A forensic accounting report differs considerably from an audit report. The audit report contains audit opinions that are issued under International Financial Reporting Standards (IFRS), while the forensic accounting report is not constrained by the required language of a governing standard and forensic reports differ from one investigation to another, and one firm to another, depending on the client's needs.

Cantoria (2010) refers to a financial audit report in his discussion and not an audit report. Cantoria (2010) also illustrates that the most prominent difference between financial statement audit and forensic accounting is the objective of the task performed. He further illustrates that certain similarities may be present, but the difference creates a wide gap between the two professions. Cantoria (2010) further demonstrates that the users of a financial audit and of a forensic examination report

are the key differences between the objectives of a financial audit vs. forensic examination. He explains the differences as the following:

A financial audit report will aid management as a tool for:

- determining the efficiency of its marketing strategies;
- evaluating the soundness of its internal control policies to safeguard the company's assets; and
- reviewing compliance with company policies as well as governmental rules and regulations.

Forensic accounting on the other hand it more concerned with:

- establishing the existence of fraud;
- determining the extent of damage or losses involved as a result of the fraud or crime; and
- gathering of sufficient evidence for the use by the courts of law to come up with a fair and judicial ruling for indemnification and/or prosecution.

Although the goals stated by Cantoria (2010) for financial audit reports may differ from those listed by other authors, his viewpoint highlights the fact that a forensic accounting report has a specific focus, purpose and end-user, which differs significantly from other accounting reports.

Not only does the information in the two reports differ, but the uses of the reports also differ. Golden *et al.* (2006:455) state that the following can be done with a forensic report:

- The report can be distributed to a select group of individuals associated with the company in various capacities;
- The report can voluntarily be given to a prosecutor as a referral for prosecution;
- The report can be used as evidence in a criminal proceeding where the forensic accountant is providing expert testimony; and

- The report can be given to outside counsel for use in preparing for a legal matter.

In summary, the forensic accountant's services, and therefore report, may be needed by different types of individuals, institutions, industries or organisations for the purpose of collecting financial evidence and a forensic accounting report in a criminal investigation will typically provide details on an alleged crime or it will be fraud-related, and it will be used to communicate the results and to document the work performed, while the audit report is used by companies, investors and interested third parties and contains an opinion about the financial position of an entity.

It is essential to note that a forensic accounting report and an audit report do not fulfil the same objective and do not contain the same information. As it is clear that an audit report differs from a forensic accounting report, the same standards cannot be applied to a forensic report as to an audit report. In the next section this study will examine the standards and guidelines for forensic accounting reports.

4.3 Standards and guidelines regarding a forensic accounting report

4.3.1 Legal standards

When the forensic accountant writes a report for purposes of the criminal court, the report will be used as evidence when the forensic accountant acts as an expert witness. Therefore, the forensic accountant should identify that there is a legislative framework that needs to be taken into account. This study will examine the Criminal Procedure Act (Act 51 of 1977) and the Law of Evidence of South Africa, as well as various other literature sources.

- **Relevance as a requirement of admissibility**

The forensic accountant must always make sure that the content of the expert report must be admissible in the court of law. Relevance is a factor that should be taken into account when considering admissibility. It is established in section 210 of the Criminal Procedure Act (Act 51 of 1977) that irrelevant evidence is inadmissible. This section indicates that no evidence as to any fact, matter or thing shall be

admissible if it is deemed irrelevant or immaterial or if it cannot conduce to prove or disprove any point or fact at issue in criminal proceedings.

The Law of Evidence specifically provides that relevance is not a sole test for admissibility, there might be other rules in the law that make the relevant information inadmissible. In Schwikkard and Van der Merwe (2009:47) it is stated that relevance (and therefore admissibility) cannot be decided without taking various issues into consideration, namely the facts of the case and the nature and extent of the factual and legal dispute. In *S v Zuma* (2006) Van der Merwe J said that the question of relevancy can never be separated from the facts of a particular case before court.

- **The admissibility of opinion evidence**

The nature and extent of the factual and legal dispute must be considered in all cases. It is clear that the expert witness must provide testimony regarding his expert report as some issues that arise in court cannot be decided without expert guidance. A further legal aspect to take into account is the admissibility of opinion evidence. In *Gentiruco AG v Firestone SA (Pty) Ltd* (1972) it was stated that the true and practical test for admissibility of the opinion of an expert witness is whether or not the Court can receive 'appreciable help' from that witness on the particular issue.

Schwikkard and Van der Merwe (2009:83) state that if an issue is of such a nature that the opinion of an expert can assist the court in deciding the issue, the opinion evidence is relevant and admissible. It is further stated that if the witness is in a better position than the court to form an opinion about the issue, the opinion will be admissible on the basis of its relevance.

In *Coopers (SA) (Pty) Ltd v Deutsche Gesellschaft für Schadlingsbekämpfung Mbh* (1976) it is stated that expert witnesses provide testimony and an opinion in order to assist the court, therefore the test for admissibility of the expert testimony of the expert witness is whether the expert is in a better position than the court to draw an inference regarding the issue and in instances where the court can come to an unassisted opinion, the help of the expert witness is deemed helpful.

There are two approaches that can be followed with regard to opinion evidence. These approaches co-exist in our practice and they both have their vices and virtues

(Zeffertt *et al.*, 2003:289). Zeffertt *et al.* (2003:289) describe the two approaches that can be followed in accordance with the Law of Evidence:

1) Traditional approach

The general rule that was traditionally used was that evidence of opinion or belief of a witness is irrelevant because it is the function of the court to draw inferences and form its opinion from facts and that the witness merely gives evidence as to the facts whereafter the court can form its own opinion from those facts. This rule demonstrates that a witness may testify to the facts, which he has observed, but he may not ordinarily state any inferences, which were drawn from those facts or opinions founded upon facts of which he had no personal knowledge.

An exception to this rule could be when expert evidence is presented and inferences are drawn from the facts.

2) The *Vilbro* approach

The principal that governs the reception or rejection is that if opinion evidence is relevant, it is accepted and if it is irrelevant, it is rejected. An opinion will be deemed relevant if it can considerably assist the court and it is deemed irrelevant if it cannot assist the court considerably.

It is stated that it is recognised in South Africa that the reception or rejection of opinion evidence depends on its relevance and that this approach has been explicitly adopted by various courts. In *S v Nangutuuala en 'n ander* (1997) it is stated that an expert's qualifications are measured in relation to the evidence that is going to be presented in order to determine whether it is of significance in the case and therefore whether it will be relevant.

- **The admissibility of hearsay evidence**

If the report is admitted into evidence and no testimony is provided by the person himself, the evidence can be labelled as hearsay evidence. As stated by Schwikkard and Van der Merwe (2009:275) hearsay evidence is defined in Section 3(4) of the Law of Evidence Amendment Act (Act 45 of 1988) as when oral or written evidence is given where the probative value of the evidence depends upon the credibility of any person other than the person giving such evidence.

Section 3 of the Law of Evidence Amendment Act (Act 45 of 1988) further stipulates that hearsay evidence is not admissible at criminal or civil proceedings, unless the person upon whose credibility the probative value of such evidence depends testifies at such proceedings.

- **General rule**

Schwikkard and Van der Merwe (2009:101) indicate that there are a number of conflicting South African court cases about the procedure that is adopted when expert witnesses testify and also about the extent to which the written report is received as evidence (as opposed to *viva voce* evidence). Schwikkard and Van der Merwe (2009:102) indicate that that the Law of Evidence states the following principals that govern the situation:

- Expert witnesses sometimes make use of their reports and notes to refresh their memories, and these reports and notes are put in as exhibits. The reports and notes are, however, not the evidence. The oral statement that the expert witness is giving is the evidence. The expert report will have no independent probative value in this instance;
- Where expert witnesses have already consulted his notes and reports and he has no independent recollection of the case but he can simply give an undertaking for the accurateness of his recorded observations, then the report must be filed as evidence; and
- In both (a) and (b) above, the expert should be allowed to read out his report. This is an exception to the general rule that witnesses are generally not allowed to read their statements.

4.3.2 Professional standards

Due to the fact that the ICFP was only founded in May 2010, there are currently no professional standards set for forensic accountants in South Africa with regards to report writing. There are, however, other institutions around the world that have set reporting standards for their members.

One of the institutions that has standards for report writing is the ACFE (Association for Certified Fraud Examiners). The Fraud Examiners Manual issued by the ACFE

(2011) states that the documentation of results is a very important function in fraud examination. The written report is, in many instances, the only evidence that the work was performed. The strength of the expert report can help win or lose the case. The report conveys to the litigator all the evidence and it provides credence to the forensic investigation and to the investigator's work. The fact that a report must be written makes the investigator aware of his actions, as they need to be documented. The expert report omits irrelevant information, and thereby allows pertinent facts to stand out. A first-rate written report is based on first-rate examination.

The international standards that the study will examine are the standards that the ACFE provides for report writing in their Fraud Examiners Manual (2011) as well as the reporting standards for Certified Public Accountants as referred to by Golden *et al.* (2006:451). The study will then analyse these standards in line with South African legislation and standards set by other professional bodies in South Africa.

The following standards were identified:

- **Preparation and planning**

The ACFE (2011) indicates that preparation is a standard that fraud examiners must adhere to when writing an expert report. It states that adequate preparation must be done by the fraud examiner before any interview or information gathering. This includes analysing what is to be expected as an end product. Aligned with preparation, AICPA (2011) also states that adequate planning and supervision of the performance of professional services must take place.

This standard that is set by the ACFE and reciprocated by the AICPA is a relevant factor and it can be aligned to common law. In order to adhere to the law the forensic accountant must do proper planning and preparation. The forensic accountant should plan the investigation according to legal standards that have to be adhered to.

The Auditor General of South Africa (2008) has also noted this as a standard for investigations. It is noted that investigations should be adequately planned and that planning should consist of establishing detailed objectives, determination of the investigation steps that are going to be taken and the work has to be defined so that

the investigation can be properly executed. It is also stated that because of the nature of investigations, planning must be done on a continuous basis.

- **Accuracy of reports**

The ACFE (2011) states that all contact that the fraud examiner makes during the fraud examination must be documented. There is no need to recapitulate word for word testimony but all relevant facts should be included. All dates and supporting information should be reconfirmed with the respondent before the report is written. Attachments to the report, if any, should be described in detail. There is no place for inaccuracies and careless errors in a report as these can render a report useless. This standard is highlighted in Schwikkard and Van der Merwe (2009:100) where it is stated that completeness must be taken into account.

Babitsky and Mangraviti (2002) further state that it is very important that the expert report that is going to be used in the court of law is well written, as the report will become a crucial part of the legal proceedings. Therefore the expert report will become a permanent part of the experts "record". If a report is poorly written, it can also be used against the credibility of the expert in the future. A factor that should be taken into account by the forensic accountant is that when and if this report is going to be used as evidence when he is testifying as an expert witness in the court of law, only relevant information will be admissible (relevance is discussed below in more detail under the next heading).

The Auditor General of South Africa (2008) also indicates that an investigation report should be factually correct and the explanation of the facts must be cleared at the most suitable level.

- **Impartiality and Relevance**

The AICPA (2011) identifies that sufficient relevant data must be obtained to afford a reasonable basis for conclusions or recommendations in relation to any professional service performed. The ACFE (2011:3.902) further states that all facts should be reported without bias.

In Schwikkard and Van der Merwe (2009) it is also stated that an expert should remain objective despite the fact that he is employed by one of the parties, and for

the expert testimony to be helpful, the expert must be neutral. All information should be included in the report, even if it is information that will favour the other party. Because of this fact, the fraud examiner should carefully determine what will be needed to prove the case and attempt to include only this information. Only matters relevant to the investigation should be included in the report.

However, as noted in Schwikkard and Van der Merwe (2009:93) the principal of completeness must also be adhered to. It is stated that harmless information should not be excluded by the court when this information could assist the witness to tell a logical story and by doing this he will be providing the general background information to the court. The importance of this is highlighted in *Palmer v Minister of Safety and Security* (2002), where it was stated that there is a need for having a complete picture and this may require reception of facts neither in issue nor relevant because they are inextricably bound up by factors of time, place and circumstances with facts in issue or relevant facts.

- **Clarity**

The standards and policies set by the Auditor General of South Africa relating to investigations states that the report should be clear and concise (Auditor General, 2008). The importance of clarity of the report is emphasised by the ACFE (2011:3.902), where it is stated that the information that is conveyed through a report should be conveyed in the clearest possible language.

The ACFE (2011:3.902) further states that direct quotations can be used in the report. Only the facts should be conveyed in the report, no opinions or judgements should be given. Technical and complex terms should be used in their proper contexts, and if it is deemed necessary, their meanings should be explained. As the persons who will be reading the report might not be familiar with esoteric or technical terminology and because it can make the witness vulnerable in cross-examination, is it important to not use jargon.

This standard should be considered by the forensic accountant, as the report will assist the forensic accountant when he provides expert testimony in court. In the case *Gentiruco AG v Firestone SA (Pty) Ltd* (1972) it is stated that the proper and sensible test of the admissibility of the opinion of an expert witness is to determine

whether the court can receive substantial assistance from the expert witness on a certain issue. In order for the forensic accountant to provide substantial assistance to the court, he must be able to understand and interpret his findings and opinion. When the forensic accountant conveys the information in the clearest possible way, the court will more likely comprehend and his opinion will be admissible.

- **Timeliness**

The ACFE (2011:3.902) states that timeliness of reports is extremely important as it can enhance the accuracy of witness testimony. The examiner's memory of the interviews will also be better preserved if the report is presented in a timely manner. All interviews should be transcribed upon completion of the examination and a report should be drafted as soon as possible.

Although timeliness is a very important factor that can influence the testimony of the expert witness, it is stated in the case *R v Molefe* (1975) that it is a common law approach that witnesses should, as a rule, be able to provide testimony from memory. Thus, if because of circumstances, the forensic accountant is not able to defend his expert report in a timely manner, he will be able to consult his report before doing so. This also gives rise to the factor that the forensic report must be of such a standard that when some time has lapsed between the writing of the report and the testimony, that the forensic accountant will be able to recollect exactly what he has written.

- **Professional competence**

The AICPA (2011) states that professional services must only be undertaken that the member or the member's firm can reasonably expect to complete with professional competence.

This is highlighted in the policy, standards and guidelines that the Auditor General of South Africa has set for investigations (Auditor General, 2008). A standard of conduct that has been set out is that the investigation team should have the relevant skills, knowledge and experience that are needed to conduct the investigation in a professional manner. This is further explained by Meintjes-Van der Walt (2001b) who indicates that experts can be attacked in court by showing that they do not

possess the expertise to give an opinion on a particular point or that the expert is going beyond the boundaries of this expertise.

- **Due professional care**

The AICPA (2011) has stated that professional care must be exercised in the performance of professional services. In addition the Auditor General of South Africa (2008) has also identified this as a standard that should be adhered to during investigations. It is stated that due care requires diligence, critical analysis and scepticism in executing their duties.

4.3.3 Guidelines

Further to standards that are set by professional bodies, various common reporting mistakes and other guidelines have been identified by the ACFE, the Auditor General of South Africa, as well as guidelines retrieved from literature sources.

- **Conclusions vs. Opinions**

The main reason for the expert being involved in a criminal case is to state his opinion. The expert report is used to communicate this opinion. The opinion should be communicated effectively and expressed in a defensible manner. The ACFE (2011:3.903) states that although conclusions and opinions are similar in report writing context, they are not identical. A conclusion is based on observations of the evidence whilst an opinion is an interpretation of the facts. Conclusions in the report should be self-evident from the information provided and should not be pointed out by the examiner.

The fraud examiner should always avoid stating opinions regarding the guilt or innocence of any person or party. The ACFE's Code of Professional Ethics specifically prohibits statements of opinion regarding guilt or innocence, as this is the job of the judge or jury (ACFE, 2011:3.903). The only reason for a forensic accountant to state an opinion is where he is considered as an expert on certain technical matters. The standards and policies set by the Auditor General of South Africa (2008) for investigations also state that a report should not express an opinion of the legal effect of the facts that are set out in the report.

Babitsky and Mangraviti (2002:7) recommend the following with regard to the expert's opinion:

- All opinions should be stated clearly, explicitly and with confidence;
 - The following words can be used: “based upon a reasonable degree of certainty” or “based on a reasonable degree of probability” when expressing an opinion in the report;
 - The following words should be avoided: “it seems”, “I think” and “I believe”, when expressing an opinion in the expert report;
 - The reasons that justify the opinions should be stated in bullet point;
 - Experts should avoid expressing net opinions, that is, bare conclusions without supporting justifications;
 - It is best to state all the opinions in the report that the expert expects to express at trial; and
 - The expert report should document the methodology that was used.
- **Evidence**

The ACFE (2011:3.904) states that there are various legal standards that provide guidelines for the handling of evidence and preserving of the chain of custody. A manual documenting system can be used to document the receipt or release of all evidence.

Where the chain of custody is broken or flawed, doubt can arise regarding to the accuracy of the evidence. A skilled cross-examiner can expose the potential from contamination of the exhibit and unreliability of the evidence (Meintjes-Van der Walt, 2001a).

- **The importance of staying within the expert's true area of expertise**

Experts should not give opinions in areas that are beyond their true areas of expertise. Experts who give opinions in these areas lay themselves open to cross-examination. The following is recommended by Babitsky and Mangraviti (2002:6):

- Expert reports should only express opinions that are within the true area of expertise of the expert;
- The only terms that should be used, are the ones that the expert knows the definition of;
- Experts that do not have legal expertise should avoid using legal terms in the report; and
- Experts that do not have legal expertise should avoid expressing legal opinions in their reports.

The credibility of a witness is an important factor that the court will base its decisions on. In Schwikkard and Van der Merwe (2009:95) it is emphasised that in accordance with the Law of Evidence the credibility of a witness can determine the outcome of a case and that credibility must be taken into account in all matters. They further state that some of the issues that can be considered when looking at the credibility of an expert witness are:

- What is the appearance of the witness upon credibility?
- Will the evidence given by the witness result in a verdict against a party?

- **The importance of research**

The credibility of the report can be increased by making proper citations to authority that supports the expert's opinions. Babitsky and Mangraviti (2002:7) recommend the following:

- Detailed and precise citations should be included in the report. They should include title, author, edition, publisher, and year published;
- A pinpoint cite should be used if specific pages are referenced;
- The expert should be prepared to be cross-examined on any authority that has been cited in the report;
- When literature and authority are not cited in the report, the testimony might be excluded;

- The expert report will be less credible and more vulnerable to cross-examination if the supporting literature is not cited;
- General statements that the expert's conclusion is supported by the "weight of the literature" or "studies" should be avoided;
- The most recent authority should be used where possible;
- Quoting authority may strengthen the report's credibility, but the expert must be prepared to be questioned closely about the quoted passage; and
- Experts should be cautious in describing any authority as being authoritative.

- **Report structure**

A report can be written in a variety of formats and fraud examination reports are not all the same. The ACFE (2011:3.912) recommends that the following be included in most reports:

- *Background*

This section should generally be no longer than two paragraphs and should contain details of why the fraud examination was conducted. This section can also include details of who called for the examination.

- *Executive summary*

This section should be a summary of the actions that were performed during the fraud examination, such as a review of the documents, witnesses interviewed and analyses performed on information. At the end of this section the outcome of the investigation can be summarized.

- *Scope*

A paragraph explaining what the scope of the fraud examination was should be included in this section.

- *Approach*

A brief description should be given about the fraud examination team members, the procedures that were followed and the individuals that were interviewed. By doing this, a handy reference guide is made of who was involved in the fraud examination, what was reviewed, what procedures were followed and which individuals were interviewed.

- *Findings*

Details of the fraud examination should be given though in this section. This section should be used to describe what tasks were performed and what was found. Enough detail should be presented so that the reader understands what occurred.

- *Summary*

A section should succinctly summarise the results of the fraud examination.

- *Impact*

This section should detail the impact of the fraud on the victim organisation. In this section an estimate of the losses or any other type of tangible or intangible damage already suffered or that may occur in future may be provided (ACFE, 2011:1129).

- *Exhibits*

The general rule is that copies of exhibits should be included in the report and not attached separately. However, bulky files might be attached separately and referred to in the body of the report. The chain of custody should be maintained over original documents (ACFE, 2011:1130).

The Auditor General of South Africa (2008) also indicated that all reports should include the following:

- Description of the mandate;
- Description of the restrictions on the use of the report;

- Specification of the limitation of the findings;
- Provision of all the information that is needed to understand the subject and environment relating to the investigation;
- Specification of the nature of the scope of the investigation and what evidence has been gathered;
- Description of the methods used and approaches that were taken;
- Description of any facts that relate to the reason for the investigation;
- Communication of the factual findings obtained during the investigation;
- Description of the conclusions that were drawn on the facts that were obtained during the investigation;
- Inclusion of recommendations; and
- List of the documentation and information sources that were relied upon in the forming of the findings.

Although legislation must always be considered, the forensic accountant should take note of these recommendations when writing a forensic report.

- **The well-written expert report**

Babitsky and Mangraviti (2002:8) list various techniques that can be used to make an expert report well written. The following techniques are mentioned:

- State things clearly and directly;
- Do not speculate or guess;
- To be careful about speculating as to the future costs or monetary value;
- Do not use boilerplate language;
- Avoid the use of absolute words such as “always” and “never”;
- The report should not be vague, equivocal or uncertain;

- Avoid the use of emphatic language, exclamation marks, boldface, italics, and capital letters to emphasise findings or conclusions;
- The active voice should be used;
- Precise language should be used;
- Confident language should be used. Words like “it seems”, “could”, “apparently” and “I believe” should be avoided;
- Define all technical terms and technical jargon;
- Objective language should be used and subjective characterisations to describe the investigation, findings and conclusions should be avoided;
- All abbreviations should be explained explicitly;
- Avoid argumentative language;
- No comments should be made about the credibility of a witness;
- Make sure of the consistency of the report; and
- Avoid any evidence of bias in the report.

The Auditor General of South Africa (2008) also provides the following standards for an investigation report:

- The report should be clear, concise, complete, objective, timely, logically sequenced and structured, readable and accurate;
- The report should contain clear and precise language and terminology, this is so that misunderstandings can be avoided and to avoid that false perceptions are created;
- All reports should be language edited;
- Consistency must be adhered to regarding to terms and phrases; and
- Avoid general abbreviations.

- **What not to include in an expert report**

Babitsky and Mangraviti (2002:9) state that the only information that should be used in the expert report is the information that objectively states or objectively supports an expert's findings and conclusions. All other information is unessential and should not be included in the report. The inclusion of unessential language in a report is one of the most common mistakes that can be made by the expert. Unessential language can provide fertile grounds for cross-examination and put the credibility of the expert in danger.

The following recommendations are indicated:

- Avoid all "friendly" language to counsel that thanks them for the assignment, invites comments or questions, or includes personal salutations;
- Do not include speeches in the expert report that expose the beliefs of the expert;
- Do not make any reference to being an expert witness in the letterhead of documents;
- Cover letters should be short and formal;
- Do not document discussions with retaining counsel in the expert report unless they are relevant; and
- Experts should self-edit their reports aggressively to remove all unessential language.

The expert report that is going to be used as evidence in the court of law when the forensic accountant is acting as an expert witness will be a direct measurement of the credibility of the forensic accountant. As previously stated, the report conveys to the litigator all the evidence and it provides credence to the forensic investigation and to the investigator's work. Therefore, it is important that the forensic accountant keeps his report factual, relevant and to the point.

Babitsky and Mangraviti (2002:9) further state that certain words can raise red flags with an attorney, and their job is to undermine an expert's credibility and opinions. Some of the most common words that should be avoided include:

- “Authoritative” to describe text. This is a term that has special legal significance and the attorney that is doing the cross-examination may question the expert about everything in the text;
- “Legal” or “legally.” Most experts do not have expertise in what is legal and what is not;
- “Draft.” This term may alert counsel to the existence of prior or subsequent reports. This could be very lush ground for cross-examination;
- “Work product”, “confidential” or “privileged.” These terms may suggest that the expert is trying to hide facts;
- “Probable” and “possible.” These words are ambiguous words and should be avoided;
- “Substantially.” This word is ambiguous words and should be avoided;
- “Obviously” and “clearly.” The use of these words can make the expert appear demeaning and presumptive;
- “Appears,” “presumably,” “supposedly,” “is said,” and “evidently” can imply uncertainty;
- “He,” “she,” “it,” “they” and other pronouns seem uncertain. The expert should use proper nouns;
- Words like “it seems,” “could,” “apparently,” “I believe” and other hedge words should be avoided. Confident language should be used; and
- The words “complete,” “thorough,” “meticulous,” “exhaustive,” and other such words are self-serving words and will hold the expert report to an extremely high standard.

4.4 Legal obligation of the forensic accountant when he obtains evidence that is in favour of the opposition

The forensic accountant has to be objective when writing a forensic report. This means that all information, positive and negative has to be included in the report. As stated above, the ACFE (2011:3.901) also has a requirement to include all information in the report and that all facts should be reported without bias. The ACFE (2011:3.901) also states that all information should be included in the report, even if it is information that will favour the other party.

The objective of a forensic investigation is to get to the truth. In Silverstone and Sheetz (2007:264) it is recommended that as the forensic accountant contemplates how detailed he wishes to make the report, there are things that need to be considered. Most importantly the forensic investigator must consider the purpose of his job in the big picture. The task of the forensic investigator is to discover the truth, and sometimes this duty becomes obscured by the rhetorical pursuit of the opposition. The discovery of the truth should always stay the main objective. Regardless of where the facts point in the investigation, accuracy should always be the goal of any investigation report. Whether the investigation points in the anticipated direction (i.e. the suspect is guilty) or in a different direction, the report should reflect exactly what the investigation revealed. And by doing this, ultimately, the truth regarding the matter will be known.

4.5 Conclusion

In review the above chapter provides an overview of forensic accounting report writing. It suggests that a forensic accountant may, in some instances, have to write a forensic accounting report about the findings during a forensic investigation. The objective of this report is to give the findings through to third parties. Included in the term "third party" is the court of law, as it may also be used before the court of law as evidence.

This chapter also highlighted some facts about forensic accounting reports and audit reports, and from these facts it is clear that a conclusion can be made that a forensic report and an audit report are significantly different. They have different objectives and a different audience.

As the forensic report is used by third parties, it is essential that it is of a high standard. As mentioned before, the ICFP, the regulatory authority for forensic accountants in South Africa was only established in May 2010. Therefore there are currently no standards set for forensic accounting reports in South Africa. As the forensic practice in South Africa can learn from other regulatory bodies, this study aimed at presenting *inter alia* the standards that the ACFE, the AICPA and the Auditor General of South Africa have set for report writing, standards that are set in literature and legislation that impact the forensic accounting report.

The chapter discussed various legal aspects that the forensic accountant should adhere to when writing a forensic report for the purpose of assisting the expert witness in court. Some factors that are highlighted by common law as well as the Criminal Procedure Act (Act 55 of 1971) that should be considered are the admissibility of hearsay evidence, the admissibility of opinion evidence and the admissibility of irrelevant information. The forensic accountant should always make sure that the report fulfils all the legal standards and that no negligent mistakes are made in the report.

Various standards that have been set by other regulatory bodies have been identified. The forensic accountant should endeavour to execute some of the tasks mentioned by these standards. When the forensic accountant identifies which standards he will attend to, legislation should always be taken into account.

Further to standards that are set by professional bodies, the study has also identified some basic guidelines that can assist the forensic accountant in the report writing process. These guidelines can further assist the forensic accountant in maintaining a high standard report that would carry more weight in a court of law.

When writing a forensic accounting report, there are some common mistakes that can occur. These mistakes can put the whole report into disrepute. This chapter discussed some of the common mistakes that the forensic accountant should avoid making.

The main objective of this chapter was to inform the forensic accountant that when the report is going to be used as evidence in a court of law, there are various standards that need to be taken into account. If relevant legislation and standards

are followed by the forensic accountant, the court will most likely place more credibility on him as an expert witness. The following chapter will go into the detail of when a forensic accountant appears as an expert witness in a court of law.

CHAPTER 5

THE FORENSIC ACCOUNTANT'S ROLE IN TESTIMONY

5.1 Introduction

As discussed in the previous chapter, the forensic accountant compiles a report about the investigation he conducted. As the report contains facts, the forensic investigator may, in some instances, be called before a court of law to testify as a witness of fact. There are, however, some circumstances where the forensic accountant may be asked to testify as to the findings and to offer an opinion (Golden *et al.*, 2006:1). By providing testimony the forensic accountant can assist the court of law to interpret and easily understand the facts in order to make a determination from that report.

Matson (1999:9) states that there are two kinds of experts, consulting and testifying. The consulting expert provides background information and facts while the testifying expert provides an opinion based on the facts. When a forensic accountant is asked to testify as to findings and to offer an opinion, it is referred to as expert witnessing.

An expert witness is a person who is skilled in some art, science, profession, or business or who has experience or knowledge in relation to matters that are not commonly known to the ordinary person. While the ordinary person testifies to facts that he/she has witnessed, the expert witness expresses opinions or answers questions based on facts (ACFE, 2011:204).

Pagano and Buckhoff (2005:11) state that expert witnesses are becoming more important and that the reason for this is that some of the most complicated cases do not settle before the expert witnesses have issued comprehensive reports. They further state that this could be because education has not kept up with the continuing increase in knowledge and that this causes an ever widening gap between the lay person and a specialist.

As the forensic accountant will be appearing as an expert for certain facts, Wecht (2006:523) indicates that the forensic accountant should not act as an advocate for the client's position but that the forensic accountant should assist the court by helping them to understand complex issues. This is also highlighted by

Pagano and Buckhoff (2005:1) where number one of the top ten tips for an expert witness is to tell the truth and to be an expert and not to be an advocate.

Wecht (2006:523) further acknowledges the fact that the forensic accountant in the role of an expert witness would typically have to show more objectivity than one in the role of a consultant. There are various characteristics that can be taken into account when a person is acting as an expert witness, and these will be discussed in this chapter.

The case of *S v Shaik and others* (2008) can have an influence on the perception of forensic accountants as expert witnesses in the court. Professor Johan van der Walt of KPMG acted as the expert witness in the case and the judge made the following statement:

“Van der Walt was plainly an impartial witness who simply described chapter and verse, in extraordinary detail, the evidence that he culled from the mass of documents given to him to investigate. In one or two respects that he expressed an opinion, there was nothing amiss about doing so, but we have not relied on any of those.”

Van der Walt acted in the capacity of a forensic accountant and as the judge mentioned, he received all the documents, conducted his investigation and he presented the evidence to the court. By doing this he gave his evidence as well as opinion through to the court.

The distinct difference between an ordinary witness and an expert witness is that the ordinary witness is not allowed to give opinions before the court, whilst the expert witness is allowed to provide opinions before the court. In Schmidt and Rademeyer (2000:468) it is stated that the expert witness can provide his opinion but that eventually the court has to decide if it is a just opinion. Aarora (2010) states that although the expert's interpretation of the facts is often necessary in order to explain and justify his conclusion, an expert is called for his opinion evidence and not for his view regarding the facts or circumstances that are in dispute. Schwikkard and Van der Merwe (2000:98) indicate that the opinion of an expert must be ignored and considered inadmissible if the opinion is based on some hypothetical situation, which has no relation to the issue at hand or which is entirely inconsistent with the facts.

The court is tasked with the function of examining the weight of the opinion of an expert. Therefore, the inference can be drawn that in the case *S v Shaik and others* (2008) the forensic accountant was still deemed to be an expert witness, as his opinion was not deemed inadmissible but no reliance was placed on this opinion. The facts upon which he based his opinion were not deemed inadmissible by the court and his credibility as an expert was not in dispute.

5.2 General principles with regard to expert witnessing

5.2.1 What is an expert witness?

The Oxford University Press (2012) describes an expert as a person who is very knowledgeable about or skilful in a particular area. Matson (1999:17) defines an expert witness as a person who, by reason of education or special training, possesses knowledge of some particular subject area in greater depth than the public at large. It is further stated that the job of the expert witness is to assist the court to understand complicated subjects not within the knowledge of the average person.

To determine whether the witness is presenting evidence as a general witness or an expert witness, Smith and Bace (2002:10) state that the following questions can be asked:

- Is the expert qualified by knowledge, experience, and training?
- Is the expertise that this expert claims one that is generally recognised to exist by society and a socially recognised community of experts?

As stated in Schwikkard and Van der Merwe (2009:95), the party seeking the testimony of the expert witness as an expert opinion has to satisfy the court that the opinion of the expert is relevant to the issue at hand. This can be done by satisfying the court:

- that the witness obtains specialist knowledge, training, skills and experience and that by the use of these attributes assists the court with complex issues;

- that the expert is indeed an expert in relation to the matters it will assist the court with; and
- that the expert will not express any opinions regarding facts that have no bearing on the case.

Bronstein (2007:70) states that many courts believe that experts may have undue influence on the court and therefore they are only permitted to testify on matters that are not within the common knowledge of the court. In the case of *Mohamed v Shaik* (1987) it is expressed that it is the function of the court to decide whether an expert possesses the necessary skills, qualifications and experience to facilitate him in expressing opinions about the issue at hand.

To qualify as an expert witness, the forensic accountant must demonstrate that he is a master of the specific subject. Matson (1999:20) identifies that the expert must be able to defend his qualifications in court. While Pagano and Buckhoff (2005:2) in turn also state that the expert witness should not overstate his credentials and although academic credentials are important, it is more important to show the court than the expert witness is knowledgeable by means of showing logic and common sense when coming to conclusions. It is further stated by Pagano and Buckhoff (2005:2) that practical knowledge is an integral part of knowledge that the expert witness should possess.

5.2.2 Relevance and admissibility of expert evidence

The general rule as stated in section 210 the Criminal Procedure Act (Act 51 of 1977) is that irrelevant evidence is inadmissible. In the UK case of *R v Randall* (2004) Lord Steyn stated that when a judge is making a ruling on a point of admissibility involving an issue of relevance, he has to come to a decision on whether the evidence given is capable of increasing or diminishing the probability of the existence of a fact in issue. He further stated that the question of relevance is a typical matter of degree that has to be determined and that for the most part common sense and experience are used.

When analysing expert evidence for relevance, all facts of the particular case in front of the court must be considered (*S v Zuma*, 2006). The issues of the case must be

determined before analysing whether the expert evidence is relevant (*Lloyd v Powell Duffryn Steam Coal Co Ltd*, 1914).

Meintjes-Van der Walt (2003:8) highlights the fact that with the rapid development of new scientific, technical and social scientific techniques and procedures, South African judges will be faced with the development of certain criteria and standards to test the admissibility and reliability of such evidence. It is further stated that in most cases, the practice will continue to admit such evidence and it will be left to the court to determine the value and weight of such evidence and emphasises that South African judges could make use of the guidelines that were set out in the American case of *Daubert v. Merrel Dow Pharmaceuticals, Inc.* (1993). The guidelines that were set out in this case are discussed later in this chapter.

The dominant standard in the USA that was initially used in the beginning to determine the admissibility of an expert witness' testimony was the Frye standard. This standard was set in the case law *Frye v U.S.* (1923). Pagano and Buckhoff (2005:49) stated that this standard used the following test to determine whether expert testimony was admissible:

- whether the witness' expert testimony will assist the court to understand the testimony or to determine a fact;
- whether the theory or techniques that are relied upon by the witness are supported by the relevant professional community; and
- if the relevant expert is qualified to provide expert testimony regarding a specific topic.

This standard was subsequently substituted as the dominant standard by the Daubert standard. This standard was formed based on the outcome of the case law *Daubert v Merrell Dow Pharmaceuticals Inc.* (1993) and ever since this outcome by the Federal Court of Appeals, the regulation of expert witnesses became an integral part of proper litigation. The basis of this standard is that the presiding officer fulfils the role of gatekeeper in the presentation of expert testimony (Pagano and Buckhoff, 2005:51). Pagano and Buckhoff (2005:51) further explain that the Daubert standard institutes the following standards, which can be used by the court to determine the reliability of the expert witness:

- whether the theory and techniques that were used could be tested, or if they had been tested;
- whether the theory and techniques had been used by other people or whether they had been published;
- the possibility that the theory and techniques that were used could be wrong; and
- whether the community generally accepted this theory and these techniques.

As the Daubert standard only applies to scientific experts, the standard was further extended by the case law *Kumho Tire Co., Ltd. v. Carmichael* (1999). In this case it was determined that the Daubert standard does not only apply to scientific experts but also to non-scientists like forensic accountants.

The Federal Rules of the USA can also be implemented in conjunction with the abovementioned standards, as it specifically applies to testimony provided by expert witnesses. Pagno and Buckhoff (2005:26) explain that this rule can assist to determine when expert testimony will be admissible. It states that if scientific, technical or other specialised knowledge can assist the court to understand the evidence or to determine a fact that is in issue, a witness that is qualified as an expert by means of knowledge, skill, experience, training or education may testify to the fact and offer an opinion or otherwise, if:

- the testimony is based on sufficient facts or data;
- the testimony is the product of reliable principles and methods; and
- the witness has applied the principles and methods reliably to the facts in the case.

This approach is shared by South African law, as in Chapter 4 it was stated that if an opinion of an expert can assist the court with an issue and when the witness is in a better position than the court to form an opinion about the issue, the opinion will be admissible on the basis of its relevance. Schmidt and Rademeyer (2000:465) state that the competence of the witness must be taken into account, the grounds for the

opinion must be stated and the court must not be subjected to the opinion of the expert evidence.

As discussed in Chapter 4, the two approaches that can be followed with regard to opinion evidence are the Traditional approach and the *Vilbro* approach. The basis of the traditional approach is that opinion evidence is irrelevant as the witness may not draw inferences but that the presentation of expert evidence is an exception to this approach as evidence is presented and inferences are drawn from the facts while the basis of the *Vilbro* approach is that opinion evidence is accepted if it is relevant and rejected if it is irrelevant (Zeffertt *et al.*, 2003:289).

The omission of irrelevant evidence is important, as it impacts various factors, such as time, cost, inconvenience, the limitations of the human mind, the undesirability of the court being called to adjudicate matters that are not relevant to the issue at hand and the right of the accused to a fair trial. It is the duty of the presiding officer and the parties involved to ensure that this is adhered to (Schwikkard & Van der Merwe, 2009:46).

5.2.3 The admissibility of opinion evidence

Any opinion expressed over an issue, which the court can decide without receiving such opinion, whether it is given by an expert or non-expert, will be inadmissible because of its irrelevance (*S v H*, 1981).

In Schmidt and Rademeyer (2000:456) it is stated that the common rule is that a witness may not give an opinion to the court and he may only testify regarding the facts that he witnessed. It is further stated that there are two exemptions to the common rule, namely: (1) an expert witness may give his opinion regarding an issue that is within his area of expertise; and (2) a lay person can give his opinion regarding a fact that will be difficult to describe by any other means than his opinion.

An expert witness is a person who specialised in a subject; this subject can often be technical, and who is able to present his expert opinion without being a witness to any occurrence relating to the court case. As mentioned above, this is the exception to the rule against giving an opinion in trial, provided that the expert is qualified by evidence of his/her expertise, training and special knowledge (Hill & Hill, 2009). Schwikkard and Van der Merwe (2003:93) state that the opinion of an expert will be

admissible if the court can receive appreciable help from the witness on a particular issue. This is reciprocated in Schmidt and Rademeyer (2000:462) where it is stated that one of the considerations that should be taken into account when the opinion of an expert is examined is whether the experience and knowledge of the expert makes him more competent than the court to give an opinion in his field of study.

If the expert witness's expertise is challenged in court, the attorney for the party calling the expert must make a showing of the necessary background through questions in court. The trial judge ultimately has the discretion to qualify the witness and rule whether he/she is an expert or only an expert on limited subjects (Hill & Hill, 2009). The rules with regard to expert witnessing are only applicable when the witness makes use of his expert knowledge in order to form his opinion (Schmidt and Rademeyer (2000:463).

Therefore, the testimony of an expert witness will be admissible in court if the expert is an expert because of special knowledge or skills and when he/she is better qualified than the court to make a derivation about a certain point.

There are numerous court cases in the South African law that influence testimony by expert witnesses. In *Menday v Protea Assurance Co Ltd* (1976), the judge stated that in essence, the function of the expert was to assist the court in drawing a conclusion about matters that the court did not have sufficient knowledge about to reach a conclusion by itself. It is not only the opinion of the expert that is decisive but also the ability to convince the court about his specialist skills, knowledge and expertise, and the reason for the acceptability of the opinion that he expressed.

If an expert states an opinion without stating the reasons for the opinion, it can have a negative outcome on the evidence (Meintjes-Van der Walt, 2001b). The fact that experts are supposed to advance proper reasons for their opinions is highlighted in *Coopers (South Africa) (Pty) Ltd. v. Deutsche Gesellschaft für Schadlingsbekämpfung Mbh* (1976) where it is stated that an expert's opinion represents his logical conclusion that is based on certain facts or data. These facts or data can be common cause, they can be established by the witness' own evidence or they can be based on the evidence of another competent witness. A bald statement given by an expert will not be of any real assistance to the court and therefore proper evaluation of the opinion provided can only be undertaken by the court if the process

of reasoning, which led the expert to his conclusion and the grounds on which the opinion is based, can be disclosed by the expert.

5.3 Characteristics of a forensic accountant acting as an expert witness

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

But before the forensic accountant can provide such technical evidence, he must convince the court of his skills, knowledge and experience to be able to provide an opinion on the issue at hand. Matson (1999:20) states that this can be done by gathering the expert's credentials into a well-documented resume or curriculum vitae. He recommends that the following can be included in this document:

- Academic credentials – advanced degrees, special areas of study, patents, inventions;
- Experience – this can be measured in years as well as involvements in notable projects, patents, innovations;
- Associations – committee participation, chairmanship; and
- Publications – any papers that the expert has written in his area of expertise.

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

Smith and Bace (2002:195) state that the forensic accountant should have experience in the relevant subject areas as well as competence in the field. He must be able to communicate his special knowledge to lay persons and it will be beneficial

if the forensic accountant is “court wise”. Wecht (2006:524) further identifies that analytical, interviewing, investigatory and forecasting skills could be useful to the forensic accountant when he is providing expert testimony. It is also stated by Wecht (2006:524) that the major asset that the forensic accountant can bring to legal proceedings is the ability to analyse financial statements and financial-related data.

Matson (1999:20) indicates that an expert witness will be perceived in a bad light if he shows that he is inexperienced, nervous or tense around lawyers and when he is unable to express himself clearly. Another factor that can impact the expert witness’ testimony is if he gives too much information in his responses by being too talkative, not filtering what he says and answers questions that the opposing attorney did not ask. The expert witness should not be portraying that he wants to get even with the opposing expert, lawyer or litigant. The credentials of the expert witness should not be deemed as weak and they should come in direct alignment with the technical issues.

Matson (1999:20) further states that the expert witness should truly be an expert in the relevant field. The expert witness should reflect street smartness, as this is a good characteristic that could assist the expert witness. In addition the expert witness should possess a good theoretical background and his credentials should at least match those of the opposing expert. The expert witness should act and look professional by dressing in good taste and appearing confident. Meintjes-Van der Walt (2003) reciprocates this fact as she states that the expert witness should dress appropriately for court and that the physical appearance of the expert witness can affect the impressions of the observers of the testimony.

5.4 Trial proceedings

5.4.1 Preparation for trial

Meintjes-Van der Walt (2001b) states that good preparation by the expert witness is essential, as this is the best guarantee against unintentional exclusion of any material of circumstance during the examination. Meintjes-Van der Walt (2001b) further indicates that when an expert witness prepares for the trial, a sound and comfortable working environment should be developed between the expert and the

lawyer. The lawyer and the expert should know where the expert evidence fits into the overall case strategy (the expert witness must remain objective).

If the expert witness is to give evidence for the first time, he should visit the court and familiarise himself with its atmosphere and procedures. The expert witness should have knowledge of *inter alia* the court proceedings, how objections are made and how he must deal with them (Meintjes-Van der Walt, 2001b).

Matson (1999) states that before offering expert testimony to the court, the expert witness performs four separate functions:

1) Establish the facts

The documentation of a case must firstly be studied. The expert must decide what data and information relate directly to the matter at hand. This process usually involves immense amounts of paperwork. The expert must filter through these documents and make an initial classification of relevance.

2) Interpret the facts

The data and facts must be encapsulated in order to form the technical basis for the case. The expert should not be fooled by correlations that ostensibly link cause and effect but have no theoretical justification.

3) Comment on the opposing expert's facts and opinions

A good understanding of the opposing expert must be formulated. Details of his educational background and experience must be obtained. All the details about his facts and opinions must be known.

4) Define the professional standards in the particular area of expertise

One of the most important ways in which an expert is used in the trial is by defining the standard of care that the professionals in that field exercise. The professional must be aware of all current practices and reliance cannot be placed on obsolete practices. The expert must exercise reasonable, informed judgement in the course of his duties. The expert will be called upon to define the professional standard and to measure

that against the standard of care exercised by the professional on the other side.

Meintjes-Van der Walt (2001b) states that the forensic accountant must determine the clearest way in which to provide testimony and that it is important to explain evidence clearly. The expert witness should endeavour not to ramble and provide inappropriate answers, as these are likely to be interrupted by the lawyer. The expert witness should always tell the truth, but only the questions that are being asked should be answered. Long answers should be avoided as the more topics that are raised in the answers, the more questions the examining lawyer is likely to ask and the expert witness should always wait until a question has been completed before answering.

She further states that when answering questions, the expert witness must face the presiding officer. The magistrate must be addressed as 'Your Worship' and a judge as 'My Lord' or 'My Lady'. The expert may use 'As it pleases your Lordship' or 'As it pleases your Ladyship'. The expert witness should speak directly to the bench and proceed at a measured pace, especially if the evidence the expert witness is giving needs to be interpreted and the expert witness should stand at ease in the witness stand and should not engage in any habits that could distract the attention from the testimony.

The expert witness should convey his views using aids, diagrams, exhibits etc. as this can enhance the presentation of the expert witness's evidence (Meintjes-Van der Walt, 2001b). Matson (1999:85) also states that the following modes of information transmission can be used:

➤ Flip Charts

This is a powerful method of illustration as the information is produced in front of the court in real time. As the expert explains his opinion the drawings, words, numbers etc. illustrate what he is saying.

➤ Photography

A photo that has a sufficient resolution and looks professional can always assist the expert to show the court what he is talking about. These photos can be displayed on a computer or overhead projector.

➤ Drawings/Computer graphics

A strong visualisation of reality can be used. This will help to break down complex processes into simple, understandable elements that the court can see.

➤ Highlighted critical documents

Important phrases or portions of a document can be highlighted.

The forensic accountant must always ensure that he is adequately prepared to give his testimony during the trial. The study will now look at the direct examination and cross-examination of the expert witness.

5.4.2 Testimony

Every witness is exposed to direct examination and cross-examination (Schmidt & Rademeyer, 2000:291).

5.4.2.1 Direct Examination

The purpose of the direct examination is for the party calling the witness to be able to present evidence that is favourable to them (Schwikkard & Van der Merwe, 2009:364). The method that is most commonly followed during direct examination is the method of question-and-answer. The reason for this would normally be so that the expert witness does not speak about matters that are irrelevant or inadmissible (Schwikkard & Van der Merwe, 2009:364).

Direct examination of the expert witness by his engaging attorney is important, as it is where it is established that the forensic accountant has the relevant education, experience and certification to testify about the issue at hand (Telpner & Mostek, 2003:273). Matson (1999:94) also states that a good attorney will tie the credentials of the expert witness in with the case. It is further stated that by asking the right

questions the attorney intends to show the credentials of the expert, why he is there and how the expertise of the expert witness bears directly on the issue. Meintjes-Van der Walt (2001b) also emphasises that the witness should be qualified and that the lawyer should constructively elicit the expert's credentials and relevant experience.

It is clear that the credibility of the expert witness must be concisely maintained throughout the examination. Matson (1999:94) states that although the expert witness is hired by the one side, he must demonstrate objectivity during the direct examination.

Matson (1999:95) states that the facts of the case are built by the attorney through the fact witnesses, and the expert witness is there to discuss the facts and to offer opinions. Pagano and Buckhoff (2005:1) emphasise that the most effective expert testimony is based on facts and not on emotion. Meintjes-Van der Walt (2001b) further advises that the opinions from the expert witness should be carefully drawn, and explanation of the data upon which the expert witness relied for the expression of his opinion should be encouraged. Pagano and Buckhoff (2005:13) provide the advice that the expert witness should be ready to answer questions about what factual basis he used to reach his conclusion.

Pagano and Buckhoff (2005:6) state that when the expert witness is aware of any weaknesses then he should bring them out in direct examination. This will show the court that he was aware of these weaknesses and that he took them into account in the forming of his opinion.

Meintjes-Van der Walt (2003) advises that the notion on consensus should be used and that the lawyer should show evidence to be credible by showing that the expert represents the main stream view and not untested theories. Pagano and Buckhoff (2005:12) also state that the expert should always adhere to the analytical rigors of his profession.

Pagano and Buckhoff (2005:13) state that the expert witness should always be prepared to answer predictable but difficult questions and that the questions that could be asked could include the following:

- What assumptions were made?

- What information that was given by your client or counsel was relied on?
- What concerns do you have with regards to the conclusion that you have made?
- Would you have used a different methodology under different circumstances?
- Could you explain any alternative hypotheses that you may have observed?

As expert witnesses can in some instances be asked difficult questions, Pagano and Buckhoff (2005:109) provide general advice that expert witnesses can take into account when they are providing testimony:

- The expert should know his role in the case and he should always read the documents before he testifies about them;
- The expert witness should always tell the truth and act naturally. Further the expert witness should not be arrogant, he should avoid using slang and he should be careful of what he highlights and writes down;
- The expert witness should not argue with counsel, he should not lose his temper and he should not interrupt the question but listen carefully to the questions posed and then pause before answering. The expert witness should indicate if he does not know the answer to a question or if he does not remember and the expert should take breaks when needed; and
- The expert witness should not elaborate, estimate, exaggerate, joke, speculate, or guess but he should stay within the area of his expertise

After the direct examination has taken place, cross-examination will take place.

5.4.2.2 Cross-Examination

5.4.2.2.1 What is cross-examination?

Cross-examination is regarded as a fundamental procedural right that is established in section 35(3)(i) of the Constitution (1996). Pretorius (1997:83) states that cross examination can be defined as the questioning of a witness by a party representing

opposing interests. Schwikkard and Van der Merwe (2009:367) indicate that the right to cross-examine arises as soon as any witness of the opponent has been sworn in as a witness.

5.4.2.2.2 Objectives and value of cross-examination

The main purpose of cross-examination is to highlight facts that are favourable to the cross-examiner and challenging of the precision of the version that the expert witness presented (Schwikkard & Van der Merwe, 2009:366). It is further stated by Schwikkard and Van der Merwe (2009:366) that the scope of the cross-examination is much wider than that of the direct examination and that the cross-examiner's questions are not limited to statements made by the expert witness during the direct examination.

Meintjes-Van der Walt (2003) states that in common law jurisdictions cross-examination is seen as the most effective device for testing the reliability of witnesses. Confidence is placed on the cross-examiner to expose any dishonest, mistaken or unreliable witnesses and to expose any inconsistencies and inaccuracies in oral testimony. Meintjes-Van der Walt (2001a) further states that the objectives of cross-examination are to bring forth information that is complimentary to the cross-examiner and to cast doubt on the accuracy of the evidence given by the witness being cross-examined.

This is reciprocated by Dumani (2005:34) as he states that the objective of cross-examination is threefold:

1. to strengthen or weaken the opposing party's evidence by reducing adverse information relating to his case;
2. to elude matters that will strengthen one's own case; and
3. to evidence that the witness is not credible and therefore weakening his case.

Pretorius (1997:77) further states that the fine art of cross-examination is in making a case out of an opponent's witness, and that this is mostly done by means of a gentle and leading process. This process is also linked to a concealed kindness that

fascinates and encourages and it creates the reasonable doubt or supplies the broken thread of a story that the cross-examiner is seeking to establish.

Pretorius (1997:78) has stated that the objective of questioning witnesses is that it is defined to expose weak points in the testimony that the witness has given, and it might bring light to facts that can enlighten the interrogator's facts. Pretorius (1997:79) further states that where a lack of cross-examination exists, it becomes impossible for the court to weigh the evidence that was given by the witness. This, therefore, highlights the importance of cross-examination and that it is the primary and essential means of testing evidence for correctness, comprehensiveness and consistency.

Pretorius (1997:335) states that in general, cross-examination of expert witnesses is handled in the same manner as stated above. It is further stated that even if the expert opinion is unchallengeable, cross-examination should still take place, as it does not only have a destructive function and that the opposing side's expert can provide useful information to highlight unspecified aspects beneficial to the other side, and by doing this positive evidence can be elicited.

It is further stated by Pretorius (1997:336) that when the cross-examiner challenges the expert's opinion, a reasonable time must be given to the expert witness to respond to the opposing evidence.

5.4.2.2.3 Strategies for cross-examination

There are various key areas where the expert can expect questioning. Pagano and Buckhoff (2005:113) identified that the expert could be questioned about the reliability of the methods that the expert used to form his opinion and the factual assumptions that were made and relied upon to form his opinion. Meintjes-Van der Walt (2001a) reciprocates this when she states this as a strategy that the cross-examining expert can use during cross-examination. She states that the bases of the expert witness's opinions should be challenged. She further explains that the opinion that the expert witness forms can be based on data, facts, tests, observations or truths generally accepted to be within the expert's milieu. The cross-examiner could probe the validity of these bases.

The expert witness can further be asked to explain the significance of the steps that he followed. The cross-examiner can also ask the expert witness about documents that he did not use in the formation of his opinion. Pretorius (1997:337) states that one of the most important aspects, which should be considered during cross-examination, is the fundamental factual information on which the expert based his opinion. The expert may have based his information on insufficient facts; therefore the cross-examiner must closely examine what facts were given to the expert.

Another area where the expert can be cross-examined is whether any conflict exists between the expert's opinion and the opinion of another expert; whether any underlining or notations were made by the expert in the documentation that the expert used to formulate his opinion, whether any documentation or records were not available when the expert formed his opinion and whether this information could change the outcome, and whether any documents that were provided to the expert had not been reviewed.

The expert can also be cross-examined about any numbers, formulas or figures that were used by the expert in order to draw his conclusion, any lapse of time between the incident that occurred and the expert's examination of the incident, conditions or circumstances that changed, hours spent on the case and the degree of certainty maintained by the expert when he was expressing his opinion (Pagano & Buckhoff, 2005:113).

Meintjes-Van der Walt (2001a) also identified strategies that the cross-examiner can use during cross-examination. She states that the cross-examiner should secure beneficial concessions. She further describes that the cross-examiner might not use destructive cross-examination techniques in order to achieve his goal. He might use the expert witness to strengthen his case. This can be accomplished by getting the expert witness to agree with his interpretation of the facts as 'possible' and 'feasible'.

A further area that Meintjes-Van der Walt (2001a) identified as a key area for cross-examination is the exposure of bias. Bias or the tendency to favour the party by whom the expert witness is employed, is the most common criticism that is levelled against expert witnesses. It is stated that the following factors can be indicia of bias:

- Over-enthusiastic participation in the trial;

- The expert refuses to acknowledge alternatives;
- Overstatement and exaggeration by the expert witness;
- Evasive and aggressive demeanour as a witness; and
- Prior or current financial interests.

The highlighting of imperfect procedures is another key area that was identified by Meintjes-Van der Walt (2001a). When scientific practices, tests or experiments are firmly established as reliable, the cross-examiner can place more emphasis on the experimenter and possible procedural anomalies than on the technique. When the practice or technique is not firmly established among the profession, the scientific nature and the relevance may be challenged. The cross-examiner may use his own expert to launch questions aimed at exposing errors or omissions in the expert witness's working procedures.

Meintjes-Van der Walt (2001a) further also mentions a few survival strategies for expert witnesses under cross-examination:

- The expert witness should question his assumptions and explore alternative positions before cross-examination;
- The expert witness should not become angry or hostile towards the examining attorney as this communicates a lack of confidence and may be exploited during the trial and can alert the examining attorney to weaknesses in the expert witness's testimony;
- When a questions asks for a 'yes' or 'no' answer, the expert witness can ask to explain his response when he feels that a qualification or explanation is required to answer the question completely;
- The expert witness should watch out for questions that involve absolutes. The examining lawyer may ask "Have you identified *all* the documents?" The expert witness should always try to qualify his answer in case he has overlooked an important document or fact;
- The examining lawyer may compound a series of facts or premises into a question or a series of questions, and then ask for a simple 'yes' or 'no'

answer. If the expert witness is confronted with this type of question and he is of the impression that the answer is one of degree rather than a 'yes' or 'no' answer, the expert witness should state this and ask leave from the presiding officer to explain;

- When the expert witness is answering a question involving a matter of degree, the expert witness must point this out and state that although the concept involves a matter of degree that there may be significant differences along the range;
- The expert witness should only answer the questions that he is being asked. When he offers additional information, the cross-examiner could have an opportunity to use this information against the expert witness;
- The expert witness should always be himself, but he should be sensitive to negative habits that can distract the court from his testimony;
- The appearance of bias and untrustworthiness should be avoided at all costs. The expert evidence that is presented should be seen to be independent;
- The expert witness should not hesitate to admit an error. He should, however, not accept an opposing lawyer's unfavourable characterisation of his testimony;
- The expert should not overstate his opinion, as the cross-examiner could use this to discredit the testimony of the expert witness;
- The expert witness should always think before answering a question, as he will then have time to formulate an appropriate answer;
- The expert witness should never answer a question that he does not understand. He can always ask the examining lawyer to repeat the question; and
- The expert witness should under no circumstances guess or speculate. If he does not know the answer to a question, then he must state this.

5.4.2.2.4 Cross-examination with regards to credibility

Another factor that can be raised during the cross-examination is the qualifications of the expert witness. Pretorius (1997:337) states that although challenging the expert's qualifications may not have any purpose in some cases, it is still advisable that the qualifications and experience of the expert are closely examined during cross-examination, as this could, in many cases, be the ultimate deciding factor between opposing opinions. Meintjes-Van der Walt (2001a) also states that a strategy that the cross-examining expert can use during cross-examination is to challenge the expert witness' qualifications. She states that the cross-examiner should ensure that the expert witness possesses the expertise to give an opinion on the particular issue and that the issue is not beyond the boundaries of the expert's expertise. The expert witness must ensure that he does not go outside the borders of his expertise.

5.5 Conclusion

It is clear that the forensic accountant has a role in testimony, either as a consultant or as an expert witness. The main reason for a forensic accountant being involved in the trial proceedings is to assist the court by providing his expert opinion about the facts that are at issue.

In order for the expert's testimony to be admissible in the court, the court must be satisfied as to the relevance thereof to the case. The expert must possess relevant knowledge, training and experience in the field so that he will be able to assist the court. All the facts of the case must be considered when testing the relevance of the expert witness. The chapter highlighted standards that are used in the USA with regard to the admissibility of expert testimony.

Opinion evidence is regarded as inadmissible because of its irrelevance. However, an expert witness is allowed to give an opinion about certain facts when he is in a better position than the court to form an opinion. This is the exception to the rule.

The chapter also discussed the trial proceedings in which the forensic accountant will be involved when acting as an expert witness. Firstly, the forensic accountant

must ensure that he does proper pre-trial planning and preparation. When the testimony of the expert witness commences at the trial, direct examination will take place. The purpose of direct examination is that the party that called the expert witness can present evidence that is favourable to him. The attorney will use the expert witness to highlight the facts of the case. The credentials of the expert witness will also be tied into the case by the attorney.

Cross-examination follows direct examination. The purpose of cross-examination is so that the cross-examiner can challenge the exactitude of the testimony of the expert witness and the cross-examiner will aim to highlight facts that are favourable to him. Various authors prescribe strategies for cross-examination. The expert witness must be ready to defend all aspects of his testimony. It is essential that the expert does not overstate his expertise and credentials as it is likely that he will be cross-examined about his credibility as the aim of the cross-examiner could be to prove the bad character of the expert witness. In the following chapter, the study will examine the case *S v Prinsloo* (2010) and take an in-depth look at the expert testimony that was given by the forensic accountant.

CHAPTER 6

CASE STUDY

6.1 Introduction

In the preceding chapters the study explored various issues underpinning the role of the forensic accountant in criminal legal proceedings. In order to demonstrate that many of these issues have a practical basis in criminal cases, this chapter analyses the role that the forensic accountant played in the case law *S v Prinsloo* (2010). The focus of this study is to highlight the role of the forensic accountant in criminal legal proceedings.

6.2 Background - *S v Prinsloo* (2010)

The Krion scheme was a pyramid scheme operated by Ms Marietjie Prinsloo almost entirely on a cash basis and dependent entirely upon procuring sufficient investments from gullible members of the public to pay the fantastic rate of return promised to everyone (*S v Prinsloo*, 2010). The scheme was operated under various names, ending with Krion Investment Services (Anon, 2009).

After complaints were received by the Registrar of Banks, the SARB initiated an investigation into the scheme and PwC was appointed to assist in the investigation of the matter (*S v Prinsloo*, 2010). The State prosecuted Ms Marietjie Prinsloo and several others with charges ranging from racketeering to money laundering, theft, and contravening legislation relating to banks, companies, close corporations and income tax (*S v Prinsloo*, 2010). The criminal trial was held in the Pretoria High Court before Justice Cynthia Pretorius and two assessors in the course of 2010. The court convicted the accused persons on cumulatively 394 155 counts. Ms Marietjie Prinsloo was convicted on 118 409 counts and sentenced to 29 010 years in prison, which is effectively 25 years, as the court ruled that the sentences should be served concurrently (*S v Prinsloo*, 2010).

6.3 The forensic accounting engagement

In order to assist with the criminal case, The Serious Economic Offences Office appointed PwC to perform forensic accounting services with regards to the activities

of Ms Marietjie Prinsloo and the entities under her management (Transcript, date: 26 August 2009). PwC was requested to use available documentation to investigate the flow of funds between Ms Marietjie Prinsloo, entities under her management and related parties (Transcript, date: 26 August 2009).

The mandate stipulated the objectives of the investigation and the firm was requested to submit a written report of its findings (Transcript, date: 26 August 2009).

6.4 The forensic accounting investigation

During the forensic investigation over 400 000 documents were provided by the South African Police Service (SAPS) (Transcript, date: 26 August 2009). The witness stated that in terms of documents reviewed, the forensic accountants analysed and researched these 400 000 documents by performing the following procedures (Transcript, date: 26 August 2009):

- The investor files were filed in alphabetical order whereafter the documentary content was arranged chronologically;
- The documents were marked with a unique ten digit number;
- The information contained in the documentation was captured into an electronic database;
- Schedules were set up with different permutations and financial modelling that included different periods. These schedules are based on electronic information that is supported by documentation; and
- Analysis of relevant financial schedules, writings and supporting documents that were presented by the SAPS was performed.

As mentioned in Chapter 3 above, there are various investigation techniques that forensic accountants can use when forensic investigations are performed. In this case the forensic accountants used forensic analytics as an investigation technique during the forensic investigation. The information contained in investor files was used to compile a database by populating the database with the information extracted from the files (Transcript, date: 26 August 2009). During the data capturing process, various tests were performed to ensure the accuracy of the information (Transcript, date: 31 August 2009). When the database was complete, further electronic tests were performed to identify any anomalies (Transcript, date:

31 August 2009). An analysis of the dates, entity names and certificate numbers was undertaken in order to report on the order of events that occurred regarding the establishment of new entities and the transfer of investors to these new entities (Transcript, date: 26 August 2009).

The forensic accountants further produced a cash flow analysis from the information obtained which was used to *inter alia* identify investors/agents/directors linked to the scheme, identify transactions that occurred in the scheme and determine the value of the scheme (Transcript, date: 26 August 2009). The value of this procedure was that direct links were identified between transactions, illegal activity and the suspect.

6.5 The forensic accounting report

As discussed in Chapter 4 above, after a forensic investigation has been carried out, a forensic report is usually compiled. In *S v Prinsloo* a report was compiled that indicated all the facts that were identified during the investigation. The forensic accounting report was used to communicate the findings to The Serious Economic Offences Office. This section will aim to illustrate various aspects that occurred in the forensic accounting report.

6.5.1 Report structure and content

The report is structured in such a way that every section discusses another topic. The report contained *inter alia* the following sections (Transcript, date: 26 August 2009 to 2 September 2009):

- An indication of the description of the mandate; the objective of the investigation, who appointed them, what they were appointed for and the form of the deliverable. It was stated that the South African Police Service (SAPS) requested PwC to investigate, from available documentation, the flow of funds between Ms Marietjie Pelsler, entities under her management and related persons. The SAPS further requested PwC to report their findings in report format;
- A description of the limitations of the report; this included the limitation relating to the documentation that was made available and the fact that all possible steps were taken to ensure completeness, accuracy and validity

could not completely guarantee that they had knowledge of all relevant information and the validity and accuracy thereof. It was stated in the report that the nature of PwC's investigation was limited to the documentation made available by the SAPS. And it was further stated that although all reasonable steps were taken to ensure the completeness, accuracy and validity of the information received, it was impossible to ensure that PwC was aware of all the relevant information and the validity and accuracy thereof.

- A description of the restrictions on the use of the report; it was highlighted that the report may only be used for the objectives that were outlined in the tender document and may only be used by the tender givers and for subsequent prosecution processes;
- An explanation that the content of the report was not subject to an audit in terms of the international audit standards and that no audit opinion is provided in respect of the findings in this report. It is further explained that the findings in the report are of a factual nature and do not form part of any audit;
- A description of the limited number of copies that were distributed and that it is not the responsibility of the forensic accounting firm if the content of the report is given to any other party;
- A qualification that indicated that derivations and/or findings made regarding signatures were only done on face value of the specific document and that in these cases, the signatures were not verified by a handwriting expert but reliance was placed on the data capturers and managers that checked the work of the data capturers as far as practically possible;
- Description of methods used, approaches taken and procedures performed;
- Various sections relating to the description of the facts gathered during the investigation; and

- Description of the conclusions of the investigation.

6.5.2 Report

As discussed in Chapter 4, a standard that is *inter alia* put in place by the ACFE is that proper planning and preparation must be done by the forensic accountants (ACFE, 2011:3.901). From the report it was noted that the forensic accountants did proper preparation and planning of the investigation by having established detailed objectives, having determined investigation steps and defining the work.

As mentioned in Chapter 4, the accuracy of the report is a very important factor that must be taken into account throughout the report (Babitsky & Mangraviti, 2002). It is clear that in this case the forensic accountants aimed to produce a report that was accurate by ensuring all the relevant facts were included, and that the report was factually correct and clearly explained. The forensic accountants also described the attachments and schedules in detail (Transcript, date: 26 August 2009 to 2 September 2009).

The forensic accountants aimed to show impartiality and relevance by reporting all the facts that were identified and not excluding information that would favour other parties AICPA (2011). It appears that the report also displayed clarity by conveying the facts in a clear and concise language and explaining technical terms. This is a standard set by the AICPA and the ACFE as discussed in Chapter 4 (ACFE, 2011:3.902). The report was written in such a way that the court would be likely to comprehend the content.

6.6 The forensic accountant as an expert witness during trial proceedings

Louis Strydom within PWC was tasked with providing expert evidence testimony during the trial proceedings.

6.6.1 Evaluation of the direct examination of the expert witness

The prosecution facilitated the facts of the case by appointing a forensic accounting firm to do a proper forensic investigation of the issue at hand. From the transcripts of the court case (Transcript, date: 26 August 2009), it was noted that the objective of the direct examination was to lay the groundwork for the reception of the evidence to be adduced by the expert (Schwikkard & Van der Merwe, 2009:364).

The prosecution used strategies that demonstrated the competency, knowledge and qualifications of the expert. In order to present the expert testimony the credibility of the expert witness was established by the prosecution (Transcript, date: 26 August 2009). This was done by outlining the academic qualifications, postgraduate work, professional affiliations and working experience of the forensic accountant (Telpner & Mostek, 2003:273). Through the examination it was stated that the forensic accountant is a Chartered Accountant, employed by PWC as a director in the forensic investigations division. It was further stated that he obtained a Bcom Accounting degree from the University of Pretoria in 1985, where after in 1986 he obtained his Honours and STR from the University of South Africa. In 1989 he qualified as a Chartered Accountant. It was further stated that he did his compulsory military service in 1990 where he was seconded from the South African Military to the South African Police to the Economic Crime Unit. After this he returned to PWC as an audit manager. In 1995 he accepted a forensic accountant position in the Office of Serious Economic Crime and in 1995 he was approached by PWC to start their forensic accounting unit (Transcript, date: 26 August 2009).

Further, in order to satisfy the court that the expert was indeed an expert in relation to the matter he would assist the court with, the prosecution led the expert to discuss if he had acted as a forensic accountant expert witness before (Telpner & Mostek, 2003:273). It was stated that the forensic accountant had acted in various cases relating to deposit taking schemes (Transcript, date: 26 August 2009). The prosecution aimed to give facts about the court cases in which the forensic accountant gave expert testimony but the judge instructed the prosecution that the court was aware of the facts of the case and indicated that they were permitted to state the fact that the case also related to pyramid schemes (Transcript, date: 26 August 2009).

The method that was used during the direct examination was one of question-and-answer: open-ended and close-ended questions. By using various questioning techniques the prosecution lead the expert witness to reveal all facts relevant to his qualifications, knowledge and expertise. And so it was revealed that the forensic accountant had obtained specialist qualifications, knowledge and experience in the relevant field. The line of questioning that was used was successful in establishing the credibility of the expert witness with regard to the issue at hand.

The prosecution also aimed to demonstrate the objectivity of the expert witness as he mentioned that the work done by the forensic accountant would assist the court as well as the accused (Matson, 1999:94). He emphasised that the accused would be in a position where she would have knowledge of all the documents that had been handed in by the prosecution and he would know what the state aimed to prove with the documents.

In preceding chapters it was discussed that when a forensic accountant testifies as an expert witness in court he will be providing opinions that are based on facts and deductions made by the forensic accountant based on his expertise (Pagano and Buckhoff, 2005:1). The expertise of the forensic accountant was based on reports, schedules, annexure and legal cases.

The expert was tasked to provide the opinions made in the forensic accounting report and the facts of the investigation. The prosecution proceeded with the questioning of the expert witness. As discussed in preceding chapters, the opinion of the expert witness must be based on facts (Meintjes-Van der Walt, 2003). The prosecution made reference to the background of the appointment of the forensic accountant and then proceeded to present the information contained in the forensic report (Transcript, date: 26 August 2009). The expert witness gave a brief summary of the expert report and then proceeded to read the expert report (Transcript, date: 26 August 2009). He informed the judge that he was going to read the whole report and the judge confirmed that there was no other way and the report had to be read into the record for evidence. (Transcript, date: 26 August 2009).

The expert proceeded to read the various sections of the forensic accounting report (Transcript, date: 26 August 2009 to 2 September 2009). Mention was made of the resources and documents used in the report. Evidence was presented as to the fact that the report was not an audit report and when the expert was questioned about sample testing he described that although sample testing was an acceptable process in the audit profession, forensic accountants do not regard it as an acceptable process as forensic accountants work with all the facts that are presented (Transcript, date: 26 August 2009).

The forensic accountant informed the court about the schedules used in the forensic accounting report. He described that each line item had a reference to a document

that had its own unique number reference (Transcript, date: 26 August 2009). He further stated that the exposition of these numbers was complex and difficult. The court then stated that the exposition of the numbers was irrelevant as long as every document could be traced. (Transcript, date: 26 August 2009).

The expert presented evidence as to the fact that care was taken while scrutinising the documents during the investigation. The forensic accountant explained that during the data capturing various tests were performed to ensure the accuracy thereof and when the database was complete, various electronic tests were also performed to determine whether there were any mistakes (Transcript, date: 31 August 2009).

It was further explained by the forensic accountant that over 400 000 documents were worked with during the investigation and that he could not confirm that all the schedules were 100% correct but what he could confirm was that as far as humanly possible they gave their best effort to ensure that where mistakes were identified, they were corrected or taken out (Transcript, date: 31 August 2009). Where they were not sure about the correctness of a line item, it was removed and did not form part of the schedule (Transcript, date: 31 August 2009).

He further explained that where duplicate items were identified, the duplications were taken out of the schedule and where it appeared that if items were identified that at face value did not look as if they were captured correctly, the information was verified from the document again (Transcript, date: 31 August 2009). The forensic accountant stated to the court that he was convinced that an accuracy percentage of between 98% and 99% could be allocated to the schedules as they did everything possible within their capability to ensure the accuracy of the documents before the court (Transcript, date: 31 August 2009).

The forensic accountant proceeded to read the report that contained all the facts he relied upon in his testimony.

6.6.2 Evaluation of the cross-examination of the expert witness

The defence approached the cross-examination by posing leading questions to the expert witness. He also aimed to introduce one new fact or issue per point in order to build the case or theory he wanted to demonstrate.

The defence aimed to highlight the positive facts that related to the accused and to emphasise certain facts that were mentioned during direct examination by posing various questions to the expert witness regarding the facts of the case. The defence further posed various questions to demonstrate the facts that the expert witness did not have knowledge of.

A cross-examination technique that was identified by Meintjes-Van Der Walt (2001b) was that of the contesting of the basis of the expert's opinions. By questioning the statement made in the expert report that related to the accuracy and completeness of documentation used and by presenting evidence/facts that the accused had knowledge of that was not taken into account, the defence aimed to emphasise that the expert witness was not provided with all the relevant information. They further aimed to prove that because of this omission the forensic accountant would not be able to reach a reliable opinion (Transcript, date: 14 September 2009 to 26 October 2009).

In an attempt to prove that the expert report was not the independent product of the expert the defence posed various questions relating to the formulation of the report, the parties involved in the formulation of the report, as well as the schedules to the report (Transcript, date: 14 September 2009 to 26 October 2009).

In order to ensure the objectivity of the expert's opinion, the facts that the opinion is based on should also be unbiased and objective (Meintjes-Van Der Walt, 2001b). The defence posed questions regarding the involvement of the state prosecutor, as well as the investigating officers during the forensic investigation.

Another cross-examination technique that was identified by Meintjes-Van Der Walt (2001a) was that the cross-examiner could challenge the expert's qualifications. As expert witnesses should not provide testimony regarding facts that fall outside their expertise, the defence attempted to demonstrate that the expert provided details of signatures that appeared on certain documents although he was not a handwriting

expert but the expert witness made it clear during direct examination that these statements were made on face value and that he was not a handwriting expert.

As the expert witness's opinions were based on factual assumptions, the defence aimed to bring various facts into disrepute (Transcript, date: 14 September 2009 to 26 October 2009). The defence posed various questions relating to the analysis and background of the documentation used by the expert witness. The reason for this was that the defence might identify factual or documentary omissions that were made by the expert witness (Transcript, date: 14 September 2009 to 26 October 2009). This was also a cross-examination technique that was identified by Meintjes-Van Der Walt (2001a).

Various questions were posted regarding the application by the expert witness of the principals used to make calculations in the schedules of the report (Transcript, date: 14 September 2009 to 26 October 2009).

It was noted from the transcripts that the defence stated that the expert report was very well written but not easy to read at all times but that after the expert testimony it was much clearer. The expert witness responded to indicate that according to him, the reason for the testimony of the forensic accountant before the court was so that he could present and explain the findings and assist the court to understand.

6.7 Judgement

During the delivery of the verdict the Judge placed considerable emphasis on the testimony of the forensic accountant. The Judge emphasised the fact that the expert witness handed his report in and that he testified with reference to the report (Verdict, date: 8 June 2010). The report of the forensic accountant was accepted as evidence by the court (Verdict, date: 8 June 2010). She indicated the instances where the testimony of the forensic accountant was uncontested and therefore accepted by the court. She stated that the forensic accountant report was accepted as a forensic investigation report and not as an audit report and therefore no audit opinions were given and no sampling was used (Verdict, date: 8 June 2010). The Judge further indicated that the work method followed by the forensic accountant and his firm was to the advantage of the accused (Verdict, date: 8 June 2010).

During cross-examination certain allegations were made regarding the testimony of the forensic accountant but as the accused could not substantiate these allegations, the accusations were rejected by the court (Verdict, date: 8 June 2010).

It is clear that the forensic accountant was able to put the court in a better position regarding the matter at hand as he provided appreciable help to the court. The court took into account the methods that the forensic accountant followed and what the facts were on which he based his testimony. The court also took into account that the forensic report was based on all the information that was made available to them and that although human errors could be made, the accuracy of the schedules and annexure was between 98% and 99%.

As the testimony of the forensic accountant was admissible, it was relevant to the court.

6.8 Conclusion

It is evident that the role of the forensic accountant in *S v Prinsloo* (2010) was that the forensic accounting firm was tasked with performing a forensic investigation. During the forensic investigation the forensic accountants utilised various investigation techniques to analyse the information that they obtained.

After performing the investigation the forensic accountant compiled a forensic accounting report. It was emphasised by the forensic accountant that the report was not an audit report and therefore auditing principals were not used. It is evident that the forensic accountant did adequate planning and preparation in the compilation of the forensic report.

The forensic accountant took due care in order to make sure that the report was 100% accurate by performing various tests to ensure the accuracy of the data. The forensic accountant showed impartiality by also including evidence in the report that was to the advantage of the accused.

The forensic accounting report was then used as the basis upon which he provided expert testimony in court. The forensic accountant gave his testimony in a clear manner and assisted the court with the matter at hand. The testimony and evidence that the forensic accountant provided was accepted by the court and significant

reliance was placed on his testimony when the court delivered the verdict against the accused.

CHAPTER 7

CONCLUSION

7.1 Introduction

Forensic accounting is a new and growing profession in South Africa and as technology advances and criminals get smarter, there is an increased need for forensic accountants to provide expert testimony during criminal law proceedings.

This study described and outlined what the role of the forensic accountant is in criminal law proceedings. In the study the difference between a forensic accountant and an auditor was described and the forensic accountant was defined. The study further described the techniques used during forensic accounting investigations and the standards of a forensic accounting report. The chapters further emphasised the need for standards and regulation of the forensic accountant and concluded what the role of the forensic accountant was in criminal law proceedings.

The problem statement and main objectives of this study referred to the determination of the role of the forensic accountant in criminal law proceedings. In order to make recommendations and conclusions pertaining to the latter, the study elaborated and clarified the remaining main objectives of the study, being to determine the difference between a forensic accountant and an auditor, to determine the techniques that are available to the forensic accountant when conducting a criminal forensic investigation and to determine what the standards are with which a forensic accountant's report should comply.

This research showed that forensic accountants play an integral part during criminal law proceedings. In order for the forensic accounting profession in South Africa to become more credible the ICFP should institute various standards set throughout the study. The standards set by other regulatory bodies regarding report writing can be a solid guideline for the ICFP when they consider which standards to institute.

7.2 Findings

Forensic accountants are increasingly being called upon to provide expert testimony in criminal law proceedings. The main reason for the forensic accountant to be

involved in the trial proceedings is to provide assistance to the court about a relevant issue that the forensic accountant has more knowledge of.

As the regulation of the forensic accounting profession is still in its infancy, there are currently no rules and regulations as to who may perform forensic investigations or call themselves forensic accountants. This gave rise to the following question:

What is the difference between a forensic accountant and an auditor?

From the literature review and discussion in Chapter 3 it is evident that the term “forensic accountant” is the most common and appropriate term that is currently used in the profession and the study defines a forensic accountant as:

“An individual whose primary skills include a knowledge of accounting, auditing and investigative procedures, an understanding of the legal process, possesses the ability to conduct financial analysis and other accounting procedures and who is able to integrate these skills in order to interpret, summarise and present complex financial and business-related issues in a manner that is both understandable and properly supported before a court of law.”

It was further identified that although there is a misconception that auditors perform forensic accounting investigations, the two professions are vastly different. Through the literature review and discussion in Chapter 2 it is clear that although these two professions overlap in certain areas the basis of the profession as well as the audience differs. The other key differences that are identified are the methods, report-writing objectives, purpose, sources of evidence and sufficiency of evidence of the two professions.

The ICFP should aim to implement regulation regarding the terms used by people performing forensic investigations and who is allowed to call themselves forensic accountants.

When a forensic accountant is due to act as an expert witness during criminal law proceedings, he will typically perform four separate functions:

- 1) establish the facts;
- 2) interpret the facts;

- 3) comment on the opposing expert's facts and opinions; and
- 4) define the professional standards in the particular area of expertise.

In order to establish the facts of the case the forensic accountant performs a forensic investigation. During this investigation the forensic accountant will also interpret the facts that were identified. This gives rise to the following question:

What are the techniques available to a forensic accountant when conducting a criminal forensic investigation?

Through the literature study and discussion in Chapter 3 it is evident that there are various techniques available to a forensic accountant when he is conducting a criminal forensic investigation.

There are various types of evidence that can be used during a criminal trial. This includes Viva Voce evidence, documentary evidence, real evidence and electronic evidence. The forensic accountant must ensure that the evidence that he obtains during the investigation is admissible in court.

It is important that the forensic accountant must be able to identify which technique is best suited for the specific investigation he is undertaking.

When a forensic accountant is investigating an alleged crime, the direct method is the most common method that is typically used. In order to obtain facts and evidence the forensic accountant can conduct interviews, do research and gather information.

The indirect method can also be used during the forensic investigation. This method is used when information is not as readily available and various analyses and reconstructions are done.

Although the techniques used in every investigation will differ, the ICFP should aim to provide guidelines regarding the forensic accounting techniques in South Africa. This will provide assistance to tertiary institutions in determining the curriculum of forensic accounting courses and forensic accountants in South Africa could be more adequately trained.

After performing the forensic investigation, the forensic accountant must compile a forensic accounting report. This then gives rise to the next question:

What are the standards with which a forensic accountant's report should comply?

As the forensic accountant report will become an integral part of the expert testimony provided to the court it is essential that the report is of a high standard. The objective of the report is to give the findings obtained during a forensic investigation through to third parties.

The fact that the regulation of the forensic accountant profession in South Africa is still in its infancy directly affects the report writing of forensic accountants, as there are no standards set for writing the report.

It is evident from the literature that forensic accounting reports and audit reports differ immensely as the basis and the audience of these reports differ. As these reports differ, the standards that are set by SAICA for audit reports are not applicable to forensic accounting reports.

From a review of the legal requirements that the forensic accountant must be aware of when writing the forensic accountant report that will be used as evidence in a criminal proceeding:

- in order for the information contained in the report not to be hearsay, the report cannot merely be submitted as evidence; the forensic accountant must testify about the facts contained in such report;
- the content of the report must always be admissible in a court of law. Although relevance is not the sole test for admissibility it was established in section 210 of the Criminal Procedure Act (Act 51 of 1977) that evidence should be relevant to the issue at hand in order for it to be admissible; and
- if the forensic accountant will be providing opinions as part of his expert testimony, the opinion will be relevant and admissible if it will provide guidance to the court about a particular issue and the expert is in a better position than the court to give such opinions.

From a study of literature of other regulatory bodies it was identified that the following standards could be established in South Africa in order to assist the forensic accounting profession to become more credible. It is recommended that if the relevant standards are addressed effectively, the credibility of the forensic accountant will be enhanced and the role of the forensic accountant in criminal legal proceedings will be addressed effectively:

- **Preparation and planning:** Adequate preparation must be done by the forensic accountant before gathering the information or conducting interviews. This includes adequate planning and the supervision of the performance and professional services;
- **Accuracy of the report:** Completeness must constantly be taken into account by the forensic accountant. All information must be clearly documented and careless errors must be avoided. As the report is going to be used as evidence in a court of law, it will be a direct reflection on the expert witness' credibility;
- **Impartiality and relevance:** All relevant facts to the issue at hand should be reported. The forensic accountant should not omit relevant facts that are negative for the party that employed him;
- **Clarity:** Information should be conveyed in the clearest possible language. The report must be written well so that it can provide substantial assistance to the court;
- **Timeliness:** Timeliness of a report is extremely important as it is used to enhance the accuracy of witness' testimony;
- **Professional competence:** Forensic accountants should only take on investigations for which they have the relevant skills, knowledge and experience that is needed to conduct an investigation in a professional manner. This factor is also very important for the credibility of an expert witness; and

- **Due professional care:** Forensic accountants should execute their investigations with due care, this includes diligence, critical analysis and scepticism.

The ICFP should aim to provide standards with regard to forensic accounting report writing in South Africa. These standards will also assist in the training of forensic accountants and more credibility will be added to reports by forensic accountants.

The forensic accounting report could be used as evidence when the forensic accountant gives expert testimony in court. The final question is the following:

What is the forensic accountant's role in testimony?

The final step is that the forensic accountant will provide his testimony in court. Forensic accountants can be tasked with providing testimony as fact witnesses or as expert witnesses. When the forensic accountant gives opinions during the trial, he will be acting as an expert witness and therefore he has to satisfy the court that he is an expert in the particular field. The credentials of an expert witness will typically be given through to the court during direct examination. The forensic accountant will be asked a series of questions whereby his credentials will be brought to light. It is the prerogative of the court to judge whether the forensic accountant is deemed an expert witness.

The facts of the case will typically also be brought to light during direct examination and the forensic accountant will provide the facts of the case through his forensic accounting report. The forensic accountant must demonstrate his objectivity and impartiality throughout his testimony. The forensic accountant must further demonstrate the methods he used to identify and analyse the information. During the testimony the forensic accountant must endeavour to present the testimony in a clear and concise manner, as he will be presenting the testimony to persons that do not have forensic accounting knowledge and the aim of the testimony is to provide assistance to the court with regard to a certain issue for which he is in a better position than the court to form an opinion on.

Forensic accountants must be adequately prepared for the trial, as this is the best guarantee against unintentional exclusion of any material of circumstance during the examination.

After all the facts have been given through by the forensic accountant under direct examination, the defence will have an opportunity to cross-examine the forensic accountant. During cross-examination the defence will aim to highlight the facts presented by the forensic accountant that are favourable to him. The cross-examiner could also aim to demonstrate flaws in the forensic accountant's testimony or evidence. The cross-examiner could also aim to evidence that the forensic accountant is not credible in order to weaken his testimony.

The forensic accountant should always answer questions honestly and state if he does not know the answer to a question. The forensic accountant should also listen carefully to the questions he is being asked to identify when *inter alia* absolute questions are being asked. When an error is identified, the forensic accountant should accept these errors.

Throughout the testimony of the forensic accountant as an expert witness, it is the prerogative of the court to determine the relevance and admissibility of the expert evidence and the expert witness is only there to provide facts and opinions on those facts in order to place the court in a better position regarding an issue.

The ICFP should therefore also provide guidelines to the South African forensic accounting profession regarding expert testimony.

7.3 Final conclusion and recommendations

The main research objective of the study was to determine the role of the forensic accountant in criminal law proceedings. This objective has been fulfilled by the study and from the study it is clear what the role of the forensic accountant is in criminal law proceedings.

Forensic accountants play an integral role in criminal law proceedings. Their involvement begins when they perform a forensic investigation using various investigation techniques. After the investigation forensic accountants compile a report about their findings. This report is then used as evidence when the forensic accountant provides expert testimony in court.

The study, however, also evidenced that there is a need for standards and regulation in the forensic accounting profession in South Africa. The ICFP will play an integral role in the regulation of the profession.

Forensic accountants should ensure that they have sufficient knowledge of legislation, forensic investigation techniques, report writing standards and guidelines and expert testimony procedures. In order to make sure that forensic accountants have the required knowledge, the ICFP should ensure that proper training is given to individuals in the profession.

ABSTRACT

Forensic accountants are occasionally called upon to assist in criminal law proceedings. The role of the forensic accountant in such proceedings is usually determined during the engagement of the forensic investigation to assist in the matter under investigation. During such investigations, various investigation techniques may be utilised by the forensic accountant in order to convey the facts and findings of the forensic investigation in a written report, drafted by the forensic accountant. When criminal prosecutions are instituted and the forensic accountant is called upon to act as an expert witness, such evidence is mostly based on the findings of the written report. Thus, in giving evidence, the forensic accountant must ensure that the testimony and evidence will be admissible in court and that the forensic accountant is found to be a credible witness.

Although there are various legal standards that the forensic accountant must adhere to, the ICFP, which is the South African regulatory body for commercial forensic practitioners, is still in its infancy and has as yet not set any standards with which forensic accountants must comply with when assisting in criminal investigations or drafting written reports.

The objective of this study is to highlight the role of the forensic accountant in criminal law proceedings. This objective is reached by clarification of the following:

- the difference between a forensic accountant and an auditor;
- the techniques available to the forensic accountant when conducting a forensic investigation;
- the standards with which a forensic accountant's report should comply; and
- the forensic accountant's role in testimony.

The study illustrates the difference between a forensic accountant and an auditor and suggests a definition for a forensic accountant. The study furthermore explores various techniques that the forensic accountant may utilise during the investigation. The study also analyses the legal standards with which a forensic accountant must comply in order to ensure the admissibility of the written report and its findings. In

order to achieve this, international regulatory standards applicable to forensic accountants are analysed and discussed. Finally, the role of the forensic accountant in court proceedings is examined.

The illustrations in this study will be helpful in determining standards that could be implemented in South Africa to guide forensic accountants in their role in criminal law proceedings.

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