



## **The Mandate of Forensic Investigations Unit in the Fight Against Fraud, Corruption, Financial Misconduct, Irregularities and Maladministration in the Public Sector of South Africa**

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### **Abstract**

This article examines the mandate of Forensic Investigations Unit in the fight against fraud, corruption, financial misconduct, irregularities, and maladministration in the public sector of South Africa. Fraud, corruption, financial misconduct, irregularities and maladministration in public service have dire consequences to the lives of ordinary South Africans as these offences derail government efforts of improving the delivery of services such as construction of roads, access to clean water, electricity and housing. Thus, section 85(b) of the Public Finance Management Act, 1 of 1999 (PFMA) requires the Minister of Finance to craft regulations stipulating matter relating to the investigations of allegations of financial misconduct. The study employed a qualitative research approach including thoroughly revised several legislations such as Acts, regulations, policies and frameworks. Eight (8) participants from Forensic Investigations Units ranging from state departments/ institutions were interviewed using open-ended interview questions. The study followed purposive sampling as participant were selected purposively. The study found that it is the responsibility of Minister of Finance to craft regulations stipulating matter relating to the investigations of allegations of financial misconduct in the public sector. The study recommends the amended of Public Service Act of 1994 (PSA) interchangeable with Part three of Public Service Regulations of 2016 (PSR), PFMA and Treasury Regulations of 2001 to provide a Forensic Investigations Unit with clear mandate as these Acts and regulations remain silent on investigations performed by internal Forensic Investigations Units of the government departments/ institutions including State-Owned Entities (SOEs).

**Keywords:** Fraud, Corruption, Financial Misconduct, Irregularities, Maladministration, Public Sector

### **Introduction**

In South Africa, every legislation requires to be developed and aligned to the Constitution of the Republic of South Africa Act, 108 of 1996 as the supreme law of the land. As a results, legislations such as PFMA; Treasury Regulations; Prevention and Combating of Corrupt Activities Act, 12 of 2004 (PRECCA); Prevention of Organised Crime Act, 121 of 1998 (POCA); PSA; Public Administration Management Act, 11 of 2014 (PAMA); Public Protector Act, 23 of 1994 (PPA); Labour Relations Act, 66 of 1995 (LRA) and but not limited to National Anti-Corruption Strategy were crafted in line with the 1996 Constitution of the Republic of South Africa to fight fraud, corruption, financial misconduct, irregularities and maladministration in the public sector of South Africa. According to the National Anti-Corruption Strategy (2020-2030), to successfully address fraud and corruption requires the coordination and collaboration of multi anti-corruption agencies across all the spheres of government, civil society organisations, business people, private sector and communities. Most of the Special Investigating Unit (SIU) reports indicate that fraud, corruption, financial misconduct, irregularities and

maladministration are taking place as a result of supply chain procurement process being influenced by the executives as well as manipulated and flawed by public servants which resulted in State incurring massive annual losses of billions of Rands aimed to render government services to the public. Furthermore media reports and outcry by the public confirm that allegations of fraud, corruption, financial misconduct, irregularities and maladministration emanate from the abuse of procurement processes by public servants and executive through collusions with suppliers or service providers. It is often reported and alleges that officials from Supply Chain Management Unit manipulate supply chain processes to favour their suppliers in return for gratuity (Ambe & Badenhorst-Weiss, 2012:11011; Legodi, 2017:2). According to the 2011 Public Service Commission Report, Naidoo (2012:669) indicates that fraud, mismanagement and abuse of government resources, bribery, identity document fraud and procurement irregularities were reported as the most common display of corruption in the public sector of South Africa.

Thus, this article seek to explores the mandate of Forensic Investigations Unit in the fight against fraud, corruption, financial misconduct, irregularities and maladministration in the public sector of South Africa. This is because the mandate of Forensic Investigations Units in the public sector of South Africa is not adequately legislated and prescribed in the Public Service Act, of 1994; Public Service Regulations of 2016; PAMA and PFMA. Section 95A of the Correctional Service Act, 111 of 1998 (CSA) gives mandate to the establishments of Departmental Investigation Unit. The mandate of Departmental Investigation Unit is to investigate allegations of theft, fraud, corruption and maladministration reported to be committed by officials of Department of Correctional Services (DCS). The mandate of Directorate for Priority Crime Investigations (DPCI) is to prevent, combat and investigate national priority crimes such as fraud, corruption and other serious organised and commercial crimes. The mandate of SIU is to investigate allegations ranging from serious maladministration in connection with the affairs of any State institution, unlawful and improper conduct by employees of any State institution, unlawful appropriation or expenditure of public money or property, irregular and offences referred to in Part 1 to 4, or section 17, 20, or 21 of Chapter 2 of the PRECCA, and which offences were committed in connection with the affairs of any State institution, or unlawful or improper conduct by any person which has caused or may cause serious harm to the interests of the public or any category thereof. Naidoo (2012:675) emphasise that the level of independence of the Forensic Investigations Unit in the public sector of South Africa should vary in terms of specific needs and conditions. The organisational and operational independence as well as clear legal foundation and mandate of the Forensic Investigations Unit is important in the public sector of South Africa. The study was informed by lack of adequate legislative mandate for Forensic Investigations Unit in the public sector similarly to that of multi anti-corruption agencies such as SIU, DPCI, Public Protector, Investigative Directorate (ID) and Public Service Commission (PSC).

### **Research Objectives**

The following research objectives were adopted to guide this study:

1. To establish the mandate of Forensic Investigations Unit and its personnel in the public sector of South Africa; and
2. To determine the legislations that are governing Forensic Investigations Units in the public sector of South Africa.

### **Literature Review**

Year on year, in-depth forensic investigations into the allegations of fraud, corruption, irregularities, financial misconduct and maladministration are conducted or carried out by various Forensic Investigations Units in the public sector of South Africa. These forensic investigations conducted are running into millions of Rands of taxpayers money. Begg (2022) indicates that an amount of R36 million was spent by the internal Forensic Investigations and Quality Assurance Audits (*hereinafter Begg (2022) refers to as Forensic/ Risk Audit Unit*) of Department of Water and Sanitation (DWS). The unit was tasked to investigated allegations of fraud, corruption, financial misconduct, irregularities and maladministration emanating from 'Watergate' projects whereby billions of Rands of South African taxpayers money were wasted without clean water been delivered in most of the areas.

The introduction of the National Anti-Corruption Strategy (2020-2030) was to encourage ethical leadership, competence, professional and accountable public servants. Furthermore, the strategy seeks to discourage corruption within the public and private sector through the formation of oversight bodies such as PSC. However, Begg (2022) reported that 65 of senior management “top brass” of the DWS were investigated by Forensic/ Risk Audit Unit and charged by Disciplinary Committee set-up by Minister Lindiwe Sisulu for wrongful expenditure, negligent and possibly criminal acts.

Similarly, some of the charges were issued by the Risk Audit Unit which carried out these in-depth investigations of “wrongful expenditure of more than R31-billion”. Notwithstanding these charges by Disciplinary Committee and Risk Audit Unit, these 65 officials were left of the hook as “some department heads went to cover up a litany of wrongful, negligent and possibly criminal acts against South Africa’s citizens”. Notwithstanding that section 15(5)(b) of the PAMA stipulates that matters of misconduct originating from criminal investigations must be reported to the departmental internal Labour/ Employee Relations and the relevant Head or Director-General (DG) of department for initiation and institution of disciplinary proceedings. Thus, Begg (2022) concludes that the transgression of the PFMA and other laws by 65 senior management of the DWS were viewed in a serious light by the responsible Minister and DG of the DWS, however, no decisive action has been taken despite the forensic investigations reports been presented and charges been issued.

Begg (2022) revelations were shared by Mothibi (2022) who indicated that most of SIU proclaimed investigations into the affairs of DWS were completed, pending the execution of “consequence management and recoveries through civil litigation, and the referrals for actions, including criminal actions to the NPA”.

Similarly, the SIU is concerned about the resistance of the DWS in dealing with disciplinary matters. This is because the SIU was worried about the continuous “widespread maladministration, wanton disregard of the procurement process, unauthorised procurement processes and non-compliance with the PFMA, abuse of emergency provisions and poor project management” by officials of DWS (Mothibi, 2022). Furthermore, Hlengwa (2022) indicates that lack of urgency by DWS to implement consequence management creates more opportunities for corruption, financial misconduct, maladministration and irregularities to exacerbated.

Section 15(5)(a) of the PAMA states that when an institution (government department or SOE) discovers an act of corruption, such corruption must be immediately reported to the police (SAPS) for investigations by DPCI [*commonly known as the Hawks*] in terms of PRECCA and any applicable laws. Such appeared not been the case in relations to the case of 65 senior management in the DWS.

In support of the National Anti-Corruption Strategy (2020-2030), the Department of Public Service and Administrations (DPSA) is mandated to set “norms and standards on ethics, integrity and anti-corruption for the public servants”. The DPSA is required to be a leading department in “coordinating South Africa’s commitment on international treaties” intended on curbing corruption in the public sector.

As part of the multi anti-corruption agencies to fight and discourage fraud, corruption, financial misconduct, irregularities and maladministration in the public sector, the Departmental Investigations Unit is mandated to perform their investigations under section 95A of the CSA. The Investigating Directorate from National Prosecuting Authority (NPA) is mandated to conduct and/or perform their investigations in terms of Chapter 5 of the National Prosecuting Authority Act, 32 of 1998 in relations to offences or criminal or unlawful activities set out in the proclamation as stated in section 7(1) of Chapter 2 of the Act.

The Public Protector (PP) is mandated to perform their investigations in terms of paragraph 7 of the PPA. The PSC conducts their investigations under section 11 of the Public Service Commission Act, 46 of 1997. In support of the powers and functions of the PSC is section 196(4)(b) of the Constitution of South Africa (*hereinafter refer to as the 1996 Constitution of the Republic of South Africa*) which requires the Commission to investigate, monitor and evaluate the organisation and administration, and the personnel practices, of the public service.

The DPCI is mandated to perform their investigations duties in terms of the South African Police Service Amendment Act, 57 of 2008. The establishment of DPCI was to improve the capacity of the SAPS to prevent, combat and investigate national priority crimes such as fraud, corruption as well as other serious organised and commercial crime such as vehicle theft, drug and mineral smuggling including trade, money laundering and racketeering (Dramat, 2014). While the SIU conducts their

investigations through section 4 of the Special Investigating Units and Special Tribunals Act, 74 of 1996.

The SIU is mandated and proclaimed to investigate allegations of amongst others serious maladministration in connection with the affairs of public institutions; improper or unlawful conduct by public institutions employees, officials or agents; unlawful appropriation or public money or property; unlawful, irregular or unapproved acquisitive act, transaction, measure or practice having a bearing upon state property; intentional or negligent loss of public money or damage to public property; offences referred to in the PRECCA and unlawful or improper conduct by any person, which has caused or may cause serious harm to the interests of the public or any category thereof (South African Government News Agency, 2022).

### **Legal Framework**

Section 197(1) and (2) of the 1996 Constitution of the Republic of South Africa states that public service in the public administration must be structured and function in terms of national legislations such as PSA, PAMA, Treasury Regulations and PFMA; and that the terms and conditions of employment must also be regulated by national legislation such as PSR.

Paragraph 22(c) of Part 3 of the PSR emphasise that the Head of Department (HOD) shall determine a systems that encourages and allows employees and citizens to report allegations and other unethical conduct, and such systems shall provide (i) confidentiality of reporting; and (ii) the recording of all allegations of corruption and unethical conduct received through the system or systems.

Regulations 4.1 and 33.1 of the Treasury Regulations is aligned/ derive from section 85 of the PFMA. Regulations 4.1 speaks about the officials and Accounting Officers in government departments while Regulations 33.1 is directed to employees and Accounting Authority (CEOs) of the public entity (SOEs).

Section 6(2)(e) of the PFMA stipulates that the National Treasury may investigates any system of financial management and internal control in any department, public entity and constitutional institutions. Section 85(b) of the PFMA requires the Minister of Finance to craft regulations stipulating matter relating to the investigations of allegations of financial misconduct. Regulations 4.1 of the Treasury Regulations refers to the investigations alleged financial misconduct by an official in terms of Section 85(1)(b), (c) and (d) of the PFMA.

Regulations 4.1.1 stipulates that if an official is alleged to have committed financial misconduct, the Accounting Officer (the HOD and/ DG of the government department and CEO of SOEs) of institution must ensure that disciplinary proceedings are carried out in accordance with the relevant prescripts. Regulations 4.1.2 of the Treasury Regulations further states that the Accounting Officer must ensure that disciplinary proceedings are carried out within 30 days.

While regulations 4.1.3 emphasise that if an Accounting Officer is alleged to have committed financial misconduct, the relevant Treasury, as soon as it becomes aware of the alleged misconduct, must ensure that the relevant Executive Authority and/ or the Department of Public Service and Administration initiate appropriate disciplinary proceedings against the Accounting Officer. Regulations 4.1.4 of the Treasury Regulations states that a relevant Treasury may - (a) direct that an official other than an employee of the institution conducts the investigations; and or (b) issue any reasonable requirements regarding the way in which investigations should be performed.

Regulations 33.1.4 of the Treasury Regulations also states that the relevant Treasury may, after consultation with the executive authority, (a) direct that a person other than an employee of the public entity conducts the investigations; and (b) issue any reasonable requirements regarding the way in which investigations must be conducted.

Chapter 14 of the NDP pronounces on promoting accountability and fighting corruption in the public sector. Despite that countries like China have a successful fight against corruption through [a] single anti-corruption agency called Hong Kong's Independent Commission Against Crime (ICAC). Thus, Commissioners who pen down the NDP argued that South Africa requires a diversity of anti-corruption agencies to fight corruption contrary to a single anti-corruption agency of China (National Planning Commission, 2011:403-404).

One of the arguments provided by the Commissioners was that single anti-corruption agency in South Africa is likely to be compromise and captured by politicians and powerful businesspeople. So, to fight corruption in the South African context require multi anti-corruption agencies since the model

is regarded as feasible to adopt. The Commissioners further believe that a multi anti-corruption agencies will develop independent systems against political and businesspeople interference as well as offering check and balances in terms of the performance of these agencies towards fighting corruption (National Planning Commission, 2011:404).

Section 15 of the PAMA makes reference to the establishment of the Public Administration Ethics and Integrity and Disciplinary Technical Assistance Unit (PAEIDTAU) to address issues of corruption within the public service. PAEIDTAU is positioned within the DPSA to oversees all government departments.

However, Section 34 of PRECCA requires senior management in position of authority namely Director-Generals/ Heads of National and Provincial government departments, Municipal Managers of municipalities, Directors of companies, Chief Executive Officers (CEO) of SOEs, Vice-Chancellor and Principal/ Head of tertiary institutions and but not limited to the Executive Directors/ Managers of the Banks to report corruption within their institutions to the police (SAPS).

Section 205 of the Criminal Procedure Act, 51 of 1977 (CPA) gives the investigators right to or allows the investigators to access information which is not in the public domain including being classified as confidential such as banking records/ bank statements, phones records, etc. It should be noted that the investigators refers to in section 205 are limited to detectives members of the SAPS, investigators from DPCI, PPSA and SIU; and not investigators within the Forensic Investigations Units in the public sector of South Africa.

### **Challenges to Forensic Investigations Units in the Public Sector of South Africa**

Chapter 14 of the NDP expresses the need for state to have a multi anti-corruption agencies. In terms of the NDP, these agencies refers to Asset Forfeiture Unit (AFU), Auditor-General South Africa (AGSA), Independent Police Investigative Directorate (IPID), the PP, the PSC, SIU and DPCI (National Planning Commission, 2011:403).

The researcher noted that in the absence of these multi anti-corruption agencies is the Forensic Investigations Unit, notwithstanding that this unit exist within some of the government departments such as Department of Agriculture, Land Reform and Rural Development (DALRRD), Department of Justice and Constitutional Development (DoJ&CD), Department of Human Settlement (DHS), Department of Water and Sanitation (DWS), Department of Transport (DoT), National Treasury, naming the few.

The formation of Forensic Investigations Unit in the public sector was to investigate fraud, corruption, financial misconduct, irregularities and maladministration committed by officials within their respective government departments. In the event that Forensic Investigations Unit detects fraud and corruption during the investigations, the unit through the HOD/ DG makes referral to the South African Police Service (SAPS), which then refers the matter to DPCI as a Divisional Branch of SAPS, specialise on priority crimes for further investigations, secure evidences and prosecution by NPA thereafter.

The findings of maladministration, financial misconduct, mismanagement of public funds, fruitless, irregular and wasteful expenditure and other irregularities from investigations conducted by Forensic Investigations Unit are refer to internal Employee/ Labour Relations Units for disciplinary and Legal Services for civil recovery. As a result, Forensic Investigations Unit have no control on the outcomes of disciplinary hearing, civil recovery and investigations by DPCI, except to follow up on the implementation of their recommendations.

Another challenge is the protection of Forensic Investigations Unit from the interference of the executive and politicians. Naidoo (2012:675) emphasise that Forensic Investigations Unit as anti-corruption body require to be protected from undue political interference. This is because offences such corruption, fraud, malpractices, nepotism, maladministration, financial misconduct, and mismanagement of public funds thrives in the public sector of South Africa due to lack of capacity (human capital and investigative tools) within Forensic Investigations Units and law enforcement agencies such as DPCI as well as gaps in most of South African laws.

### **The Impact of Anti-Corruption Agencies on Investigation of Offences in South Africa**

In the South Africa context, the SIU seemed to be effective and successful in their investigations of various crimes/ offences in the public sector. Most of their investigations are referred to the Special

Tribunal Court for plea bargaining and civil recovery thereafter. Their findings in relations to fraud and corruptions, the SIU refer them to DPCI for further investigations and prosecutorial purpose.

Hlengwa (2019) reveal that 881 cases were referred to NPA for possible prosecution since 2013. Of the 881 cases, Hlengwa reported that “293 resulted in enrolled cases and of these 293 enrolled cases, 144 were still under investigation, 11 were brought before the courts, and only nine (9) cases finalised with eight (8) of them been successful”.

As of 06 July 2021, the NPA report based on SIU referrals cases indicates that “377 were under investigation or pending decision whether to prosecute or not, 23 were in court, 20 had resulted in a conviction, and 51 had been withdrawn” (Hlengwa, 2021). The DPCI report further indicates that they were pursuing 131 active cases coming from SIU referrals. Of the 131 referrals cases by SIU, the DPCI reported that “88 were still under investigation, 20 were on the court rolls, and 23 were awaiting a prosecutorial decision” (Hlengwa, 2021).

Dramat (2014) states that in 2010, the DPCI arrested 50 most wanted suspects involved in a Cash-In Transit (CIT) heist, ATM bombing, armed robbery, murder, and other crimes. Ngcobo (2014) indicates that in 2013/14 financial year, the DPCI arrested 1 218 suspects for serious organised crime. Off the 1 218 suspects, the DPCI managed to achieve 828 convictions.

At the end of 2014, Dramat (2014) reported that 52 suspects were convicted for serious corruption involving an amount of R5,000,000.00. In the meantime, the AFU managed to get preservation and restraint orders amounted for R1,381,000,000.00 by the end of March 2014.

### Research Methodology

This article adopted qualitative research approach. Qualitative researcher technique was considered suitable to this study in order to establish the mandate of Forensic Investigations Unit in the public sector of South Africa (Jamshed, 2014:87). Data was collected through inclusive review of articles, laws and policies as well as interviews using open-ended interviews questions. The secondary data was also collected from various legislations, reports, articles, media reports and other government documentations such as NDP. An open-ended research interview was formulated as a guide to the study topic (Draper & Swift, 2011:8).

Open-ended interview is often considered appropriate in qualitative study, as it allows the researcher to gather the views of participants based on their experience in forensic investigations in the public sector of South Africa. Open-ended interview also provides thorough, detailed and independent data to this study (Wolf, 2021).

For data collection purposes, the researcher ensured that the data is/was kept sternly confidential to protect the identity of participants. This is because most often participants do not want to reveal their identity when participating into the study. They usually opt to remain anonymous (Surmiak, 2018). Thus, the researcher use letter “P” and a “Number” as a reference to participants responses which were recorded verbatim.

Qualitative research technique depends on small sample size of participants. The data was collected through interviews with public servants who have experience in the field of forensic investigations in relations to investigations of allegations of fraud, corruption, financial misconduct, irregularities and maladministration in the public sector (Campbell, Greenwood, Prior, Shearer, Walkem, Young, Bywaters, & Walker, 2020:653). Eight (8) participants from few government departments and SOEs were interviewed in this study. Cleary, Horsfall and Hayter (2014:473) highlights that the sample size in qualitative research is justifiable based on the quality of data. To achieve data saturation, the number of participants to be interviewed can range as little as from six (6) participants depended on the sample size of the government departments/ institutions and SOEs which had Forensic Investigations as a Unit (Fusch & Ness, 2015:1409). Thus, the researcher believes that the eight (8) sampled participants (forensic investigators) provided appropriate data into this study.

Purposive sampling using semi-structured interviews was adopted as a guide to provide valuable and complete data to this study. Purposive sampling was deemed appropriate as participants were selected based on their knowledge and experience on the forensic investigations field in the public sector (Oppong, 2013:203). This is because reliable and quality results are achieved through purposive sampling when the researcher focuses on the study subject including following all research ethical principles (Saunders, Lewis & Thornhill, 2015). Purposive sampling was followed to find out the mandate of Forensic Investigations Unit in the fight against fraud, corruption, financial misconduct,

irregularities and maladministration in the public sector of South Africa (Ames, Glenton & Lewin, 2019:6).

The term validity was applied by the researcher to measure and evaluate the reliability of the study's findings in order to make a complete and conclusive finding (Middleton, 2019). The results of this study were considered reliable and dependable because the same results can be produced in the event that this study is carried out by another scholar (McDonald, Schoenebeck, & Forte, 2019:4). In this article, credibility was measured from study results generated from literature review and participants responses based on their forensic investigations experience (Yilmaz, 2013:320).

The study was carried in the Tshwane area, Gauteng Province of South Africa where government administration are located. Data was gathered from participants from DALRRD, DoJ&CD, DHS, DWS, NPA, SAPS, Eskom and Road Accident Funds (RAF) in the field forensic investigations using open-ended interviews. Participants were selected purposively from various government departments/institutions with the believe that they will provide different views based on their experience regarding the mandate of Forensic Investigations Unit in the public sector of South Africa (Campbell et al., 2020:653).

The advantage of open-ended interviews is that participants expressed their thoughts based on their forensic investigations experience in the public sector of South Africa without restrictions (Wolf, 2021). Moreover, open-ended interview grants the researcher an opportunity to familiarise himself with the collected data when recording it down into the study as it makes it easier for the researcher to effectively analyse it (Fade, & Swift, 2011:107). The disadvantage open-ended interviews is that is time consuming and resource exhaustive to collect, analyse and interpret data (Neha, 2021:542).

### Finding and Discussions

The selected participants of the study provided data on the mandate of Forensic Investigations Unit in the fight against fraud, corruption, financial misconduct, irregularities and maladministration in the public sector of South Africa. The results of the study are presented verbatim and shortly thereafter discuss in an italic manner.

#### **Theme 1: The mandate of the Forensic Investigations Unit and its personnel in the public sector of South Africa**

When participants were asked whether “there are any mandate and/ or delegations provided to the Forensic Investigations Unit and personnel during investigations and thereafter completion of such investigations”. Most of the participants indicated that Forensic investigations Unit receive the mandate from their respective Director's-General and CEOs in the case of SOEs to investigate allegations of fraud, corruption, financial misconduct, irregularities and maladministration in the public sector of South Africa. Participants response were expressed and recorded verbatim as follows:

- *Experience has shown that some forensic investigations are conducted on the basis of given mandates. Although this is not an easy statement to qualify, this can be observed through continuous practices of management giving instructions to withdraw investigators from continuing with a particular investigation or selective implementation of recommendations made by investigators.*

*Participation of Audit Committee Members in as far as the approval or disapproval of recommendations are concerned, leaves more to be desired concerning their objectivity, particularly that the Accounting Officer, who happens to be the approver/disapprover of such recommendations, sits in the same meetings. The number of Senior Management Service (SMS) members who are subjected to disciplinary hearings or faces criminal prosecutions, suggests that mandates are somehow conveyed to investigators. This is because in cases where SMS members are found to have contravened legislations, which in some cases criminalises such acts, no criminal cases are opened against them because someone somewhere must approve the opening of such a criminal case. (P1)*

- *Most Forensic Investigations Units are expected to uphold high level of integrity, be independent, objective and be trusted. The mandate or delegations given to Forensic Investigations Unit is that they should be objective when performing their investigations being truthful in their assessments is also crucial because they are expected to uphold the law, have*

*a natural desire to seek and report the whole truth and nothing but the truth. This entails making sure that all tests and written reports are done accurately and thoroughly, and that their testimonies include all necessary information. (P2)*

- *The mandate arises as a result of the delegations flowing from the Director-General (DG) of the department/ Chief Executive Officer (CEO) of the entity. They investigate on behalf of the DG/ CEO. An appointment letters are issued to the investigators at the commencement of the investigation. After the investigation, the role of investigators gets relegated to that of support function when the recommendations from the investigation reports are implemented. (P3)*
- *From the government departments that I worked for, there was a mandate that was signed by the Director-General (DG) which gave permission to investigate any allegation that could be received. (P4)*
- *Yes, within the departmental level there is a mandate provided to the forensic investigations units through the Public Service Regulations and Public Financial Management Act and other departments derived their mandates through their Internal Audit Charter that stipulates that forensic investigations is mandated to investigate any other issues of alleged financial irregularities within their departments.*

*Chapter nine and ten institutions are mandated through the Constitution to perform forensic investigations in a public sector. (P5)*

- *Yes, the Forensic Investigations is mandated by the Head of the Department and/ Director-General to conduct investigations and allowing them to access any information that can assist in the investigation and also interview officials to obtain more information that relates to the matter that is being investigated. The investigators sign the Authorisation letter for every assignment/case which allows them to have unlimited access to departmental information. Forensic Investigators are allowed to use the evidence acquired during the investigation to support their testimony in cases where criminal/civil or disciplinary proceedings were recommended.*

*Yes, it is mandated by the Minister of the National Treasury according to the PFMA. (P6)*

- *As and when request are received, the allocated official must draft his/her mandate which outlines what is expected from the Investigations, the objectives aimed at archiving upon finalisation of the project, then the mandate is forwarded to the complainant/requester for his/her acknowledgment and to better engage with the appointed team thereof. If the complainant is happy with the drafted mandate he/she will sign it off then the team may proceed with the investigation. The mandate drafted by the team must first get the approval of Chief Audit Executive (CAE) then forwarded to the requester then will be discussed at the opening meeting where it will then be signed off.*

*There are also guidelines in place to assist the members during the process of investigation through which they can make reference to namely: Forensic Investigations methodology /manual, Forensic Investigations/ Audit Charter. (P7)*

- *Yes, an investigation should have a mandate and it will also assist for court enrolment as the evidence has to be admissible. An investigator can also make recommendations on the report based on the findings as to what other allegations can be further investigated and mandate can be granted for those allegations. Forensic investigations mandate is to develop objective findings that can assist in the investigation and prosecution of perpetrators of crime. (P8)*

From the participants responses, the study found that the mandate of Forensic Investigations Unit arises from the HOD and/ DG and the Chief Executive Officer (CEO) of SOEs. Section 6(2)(e) of the PFMA stipulates that the National Treasury may investigate any system of financial management and internal control in any department, public entity and constitutional institutions. Section 85(b) of the PFMA requires the Minister of Finance to craft regulations stipulating matter relating to the investigations of allegations of financial misconduct.

Regulations 12.5 of the Treasury Regulations stipulate that when it appears that the state has suffered a loss or damages through criminal acts or possible acts, the matter must be reported, in writing, to the Accounting Officer and the SAPS. In the cases of omissions, the matter must be reported,



in writing and the Accounting Officer of the institution must recover the value of loss or damage from the person responsible. Regulations 33.1.4 of the Treasury Regulations states that the relevant Treasury may, after consultation with the executive authority, (a) direct that a person other than an employee of the public entity conducts the investigations; and (b) issue any reasonable requirements regarding the way in which investigations must be conducted.

The study found that Section 95A of CSA requires the National Commissioner to establish Departmental Investigations Unit and which is mandated to investigate theft, fraud, corruption and maladministration committed by correctional service officials. The CSA is very clear in terms of the mandate and the Act governing their investigations. The PSA, PSR and PAMA remain silent in terms of Sections and Regulations governing the establishment of Forensic Investigations Unit by various government departments contrary to that of CSA.

Subsequently, the PSA, PSR and PAMA and PFMA does not provide Forensic Investigations Unit with the same designation provided to the Departmental Investigations Unit of the DCS. Section 95A of the CSA mandate the National Commissioner of DCS to establish Departmental Investigation Unit while the PSA, PSR and PAMA and PFMA remain silent on the mandate of the Director's-General or Heads of Departments in relations to the establishment of Forensic Investigations Unit including that such units must perform the same duties with that of multi anti-corruption agencies in the fight against fraud, corruption, financial misconduct, irregularities and maladministration in the public sector of South Africa.

Subsequently, Section 34 of PRECCA require people in position of authority to report corruption within their institutions to the police (SAPS). The act further stipulates that failure by these people to report corruption of more than R100,000.00 to the police constitute an offence.

Despite that Chapter 14 of the NDP provides a lime light to the multiplicity of anti-corruption agencies such as the SIU, DPCI, the PP, the AFU, the AG, the PSC, and IPID to investigate allegations of fraud and corruption as part of fight against corruption in the public and private sector, however, Section 199(1) of the 1996 Constitution of the Republic of South Africa speaks about the establishment of single police service (SAPS), tasked with preventing, combating, and investigating crime, as well as to maintain public order, to protect and secure the inhabitants of the Republic and their property, to uphold and enforce laws.

Though, the SIU also investigates matters referred in Section 34 of PRECCA, thus, at the end of their investigations, they make referral to DPCI for further investigations and prosecution by NPA. Section 34 makes obligations to anyone to report corrupt transactions and states that:

- (i) Any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any other person has committed-
  - (a) an offence under Part 1, 2, 3 or 4, or section 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2; or
  - (b) the offence of theft, fraud, extortion, forgery or uttering a forged document, involving an amount of R100 000 or more, must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to any police official.

Van Tromp (2019) indicates that the AGSA as the Supreme Audit Institution (SAI) of South Africa has a constitutional mandate to strengthen democracy by enabling oversight, accountability and governance in the public sector through auditing, and thereby building public confidence. According to the AGSA delegations, the Auditor-General approved the request for investigation and engagement letter with the respective DGs, CEOs and HODs concerning matters identified during regularity audit in respect of the forensic investigations to be performed.

Apau and Koranteng (2020:300) emphasise that the National Cyber Security Centre (NCSC) from United Kingdom (UK) Government Communication Head-Quarters (GCHQ), the Computer Emergency Response Team (CERT) operated by the United State (US) Department of Homeland Security, Computer Analysis and Response Team (CART) from the Federal Bureau of Investigations (FBI) and the National Computer Forensic Institute (NCFE) are well established, equipped and mandated institutions with applicable legislation to deal with computer crimes.

In Ghana, there are four national agencies which are mandated to investigate cybercrimes as well as the lead to the prosecution of these offenses. These agencies are the Economic and Organised Crime

Office (EOCO), the Criminal Investigation Department (CID) of the Ghana Police Service, National Security Council Secretariat (NSCS) and Bureau of National Investigation (BNI). These agencies are tasked with the required legal mandate to investigate offenses relating to digital and computer fraud (Apau & Koranteng, 2020:303-304).

The mandate of AFU is to seize criminal assets reasonably suspected to have purchased with the proceeds of corruption, fraud and irregularities in the public sector of South Africa. For investigations purposes, the AFU adopts a multidisciplinary approach by grouping expertise such as forensic investigators, forensic accountants, forensic lawyers, data analysts and cyber forensic specialists supported by powers created for SIU as outlined in the SIU and Special Tribunals Act (Munzhedzi, 2016:5).

Despite the provisions of Chapter 14 of the NDP, the researcher believes that it is the responsibility of Department of Public Service and Administration, which is responsible for the public service laws and regulations to amend legislations such as PSA, PSR, PAMA, Treasury Regulations and PFMA to regularise Forensic Investigations Unit in the public sector. This is because it is not thoroughly articulated in the PSA, PSR, PFMA, PAMA, NDP and Treasury Regulations that Forensic Investigations Unit is part of multi anti-corruption agencies to fight corruption in the public sector. However, the undisputed fact is that employees within Forensic Investigations Units of various government departments and SOEs are well trained, skilled and experienced to carry out investigations of fraud, corruption, financial misconduct, irregularities and maladministration in the public sector. Thus, the researcher can certainly argue that in the absence of supportive legislations and resources to Forensic Investigations Unit, the fight against corruption in the public sector will remain a barrier to achieve.

## **Theme 2: Legislations governing Forensic Investigations Units in the public sector of South Africa**

Participants were asked “to name and/ list legislations that are governing Forensic Investigations Units in the public sector of South Africa?”. Most of the participants listed the Constitution of the Republic of South Africa Act, 108 of 1996; Public Finance Management Act, 1 of 1999; Treasury Regulations of 2001; Public Service Act of 1994; Public Service Regulations of 2016; Prevention and Combating of Corrupt Activities Act, 12 of 2004; Prevention of Organised Crime Act, 121 of 1998; Criminal Procedure Act, 51 of 1977; Labour Relations Act, 66 of 1995; Promotion of Administrative Justice Act, 3 of 2000 (PAJA); Protected Disclosures Act, 26 of 2000 (PDA), Regulation of Interception of Communication Act, 70 of 2002 (RICA), Financial Intelligence Centre Act, 38 of 2001 (FICA); and Anti-Corruption Minimum Strategy as legislations governing Forensic Investigations Units in the public sector.

The study found that the Forensic Investigations Units in the public sector of South Africa are governed by common legislations as most of the forensic investigators are appointed in terms of PSA. Forensic Investigations Units often apply or review legislations and imperatives such as the provisions of the 1996 Constitution of the Republic of South Africa, PFMA; Local Government Municipal Finance Management Act, 56 of 2003, Local Government Municipal Systems Act, 32 of 2000, Treasury Regulations, PSA, PSR, PRECCA, POCA, CPA, LRA PAJA, PDA; FICA; RICA, Anti-Corruption Minimum Strategy and currently Protection of Personal Information Act (the POPI Act) [*hereinafter people refers to as POPIA Act*] during their investigations of fraud, corruption, financial misconduct, irregularities and maladministration in the public sector of South Africa. The only difference between Forensic Investigations Units and multi anti-corruption agencies is that the mandate of Forensic Investigations Unit is limited to investigations of fraud, corruption, malpractice, financial misconduct, irregularities and maladministration contrary to that of DPCI, PPSA, and SIU which have powers to subpoena the witnesses, victims and suspects including retrieving information which is not in the public domain such as bank statements using Section 205 of the Criminal Procedure Act.

Furthermore, the study found that the PFMA requires the DG to investigate fruitless and wasteful, unauthorised and irregular expenditure, but does not explicitly prescribe for the establishment of the Forensic Investigations Unit. The Department of Justice and Correctional Services is one of the few exceptions, where section 95A of CSA clearly refers to the establishment of the Departmental Investigation Unit, with its mandate clearly stated in the Act.

The researcher found that legislations such as PFMA, Treasury Regulations, PAMA, PSA, PRECCA, PSR, Preferential Procurement Policy Framework Act, 5 of 2000, and SMS Handbook are used by forensic investigators to highlight certain imperatives and laws or certain sections and regulations of the laws to the HODs/ DGs and CEOs of SOEs, which were violated by official(s) when committing misconducts or an offence.

Duma (2022) states that section 106 of the Municipal Systems Act, 32 of 2000 require the Member of the Executive Council (MEC) of Cooperative Governance and Traditional Affairs (COGTA) to institute investigations and/ or appoint an investigating team to investigate the allegations of corruption, fraud, malpractice, maladministration, or nepotism when they arise or reported within the municipalities.

The Act indicates that when the MEC is of the view that there is malpractice, maladministration, or corruption in any of the municipalities then he/she can appoint one individual or a team to investigate such allegations of malpractice, maladministration, fraud and corruption (Duma, 2022).

Apau and Koranteng (2020:300) argue that in most countries, there is a separate jurisdiction which regulates the forensic investigation, different from the prosecutorial body responsible for prosecution using forensic evidence for the purpose of ensuring autonomy and independence of evidence obtained. For instance, police officers and private sector investigators who work closely with law enforcement agencies in UK follow the Association of Chief Police Officers (ACPO) guidelines as framework for digital forensic investigations.

The ACPO guidelines is also applicable for techniques and procedures to be followed when acquiring evidence, analysing and processing such evidence. The ACPO guidelines serves to ensure that the produced digital forensic investigation report in the UK meet the set international standard (Apau & Koranteng, 2020:300). While in Scotland, the Scottish Police Authority is regarded as an autonomous state which oversees the forensics, which is different from Scottish Police Service (Apau & Koranteng, 2020:302).

### **Conclusion**

Based on data analysed and presented as well as the study results, the Forensic Investigations Unit does not have a mandate in terms of the PSA, PSR, PFMA, Treasury Regulations, NDP and PAMA. Section 6(2)(e) of the PFMA only mandated the National Treasury to investigate any system of financial management and internal control in any department, public entity and constitutional institutions.

As part of swiftly and effectively to resolve the allegations of fraud, corruption, financial misconduct, irregularities and maladministration in the public sector of South Africa, the Forensic Investigations Unit was established by various government departments and SOEs to assist DGs and CEOs in resolving these offenses rather than waiting for the SIU proclamation to be signed by President and gazetted by Minister of Justice and Correctional Service; which takes some years for investigations to be conducted and concluded. The PSA, PSR, PAMA, PFMA and Treasury Regulations remain silent on the establishment of Forensic Investigations Unit as a part of multi anti-corruption agencies. Despite the silent of these laws, the following Forensic Investigations Units were established in various government departments and SOEs in support of CEOs and DGs namely Forensic Audit (DoJ&CD), Forensic Investigations and Quality Assurance Audits (DWS), Departmental Investigations Unit (DCS), Specialised Audit Services (National Treasury), Forensic Investigations (DALRRD and DoT), Special Investigations Directorate (National Department of Human Settlement) and Forensic Investigation Department (Road Accident Fund (RAF)) and Assurance and Forensic Department/Unit (Eskom). To speedily detect and minimise corruption including avoiding investigations to take months and years to be completed, these investigations units were discovered to be in existence and operational in support of the CEO's and DGs in the public sector of South Africa. This is an indication that a multi anti-corruption agencies must not only be limited to those that listed/ mentioned in the NDP version 2030.

### **Recommendations**

Based on the finding of the study presented, the article recommends that the PSA, PSR and PAMA, PFMA and Treasury Regulations must be amended and provide Forensic Investigations Unit of all government departments with clear investigative mandated similar to that Departmental Investigation

Unit of DCS, as part of multi anti-corruption agencies to fight fraud, corruption, financial misconduct, irregularities and maladministration in the public sector of South Africa.

Section 6(2)(e) of the PFMA must be amended to empower other government departments, public entities and constitutional institutions rather than the National Treasury alone (which some politicians, executives and senior government officials refer to as ‘Super Ministry’) to investigate any system of financial management and internal control in any department, public entity and constitutional institution.

The study further recommends that the NDP be amended to include Forensic Investigations Unit as part of multiplicity of anti-corruption agencies as the unit perform some of the function similarly to that of SIU, AG, AFU, IPID, the PP, the PSC, and DPCI. This is because to curb corruption in the public sector and avoid delays or investigations to take for months and years to be completed, a multi anti-corruption agencies must not only be limited to the SIU, AG, AFU, IPID, the PP, the PSC, and DPCI as stated in the 2030 NDP.

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