



PUBLIC PROTECTOR
SOUTH AFRICA

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28 January 2015

“Whistle-blowing in South Africa”

'Empowering whistleblowers in South Africa-dealing with intimidation and strengthening people and institutions'.



**LAUNCH OF THE ANTI-INTIMIDATION AND ETHICAL PRACTICES FORUM
(AEPF)**

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1. Why the need for a forum of this nature

The forum is made up of professional bodies in fields of governance, accounting, auditing, business, risk management and related fields. The bodies have joined forces in a bid to fight corruption by encouraging responsible whistle-blowing (note the emphasis on responsible) and advocating for a more enabling environment for protected disclosures, among other things. We have seen in recent times the death of internal auditor in his hotel room in Durban and former councillor in Rustenburg. People were shocked for a day or two then everybody carried on with their lives. Never before have we seen a more pressing and urgent need on the need to empower whistle-blowers, deal with intimidation and strengthen people and institutions. Many international benchmarks including Transparency International's Corruption Perception Index directly link the conditions under which citizens live and are able to freely engage and report corrupt or irregular practices as a reliable barometer of how well run or free a country is.

There is a well-known symbiosis between extent to which corrupt and irregular practices were decisively dealt with and the level of economic prosperity of a country. The more repressive a nation is the greater the more profound the economic challenges it faces.

Let me turn to South Africa

We are hardly a despotic state. In fact, far from it. The lessons from the brutal apartheid project gave us a beautiful post-conflict constitutional dispensation and we are recognized the world over for a progressive dispensation. With that in mind why don't we all go home now since there is 'good story to tell'. Not so fast. Whistle-blowers face many types of intimidation that range from physical threats to dismissals and other occupational detriment which is against the law. Who should fix this challenge? The state? The private sector? Integrity bodies? Actually the answer is all of us. This can only work as a Public-Private Partnership.

The time is ripe for us to harness all possible resources in South Africa to ensure that financial, accounting and all other professionals receive maximum protection as they do their work, especially for the state."

Among the founders of the Forum are the Association of Certified Fraud Examiners of SA (ACFESA), Crime Line, Ethics Institute of SA (EthicsSA), Institute of Directors of Southern Africa (IoDSA), Institute of Internal Auditors of SA (IIA SA), Institute of Risk Management of SA (IRMSA), SA Institute of Chartered Accountants (SAICA) and SA Institute of Professional Accountants (SAIPA).

The Forum aims to work closely with the offices of the Auditor-General, National Treasury, the Public Protector and Corruption Watch, amongst others, in its quest to mobilise professionals against crime.

So what is the problem? Since the Eskom show last week analogies have become fashionable. Is it the manufacturer of the vehicle which is government? Is it the passenger who is the citizen? Is it the road? Those are the questions which we need to interrogate.

My simple premise ultimately is that we really have not made it worth people's while to be whistleblowers. It is something you do for the love of country, out of patriotic fervor. Other countries have added sweeteners to the equation. Let's take the example of whistleblower Keith Edwards who was paid \$64 million for providing information to the effect that JP Morgan was falsely certifying federal loans resulting in huge losses to the state. JP Morgan had to pay the state \$614 million resulting Edwards getting his cut as it were under the False Claims Act. Far from suggesting that people should get such huge amounts for doing their civil and national duty I definitely think we should consider the idea of a bounty or sweetener seriously. Trust me a R50 000 or R100 000 incentive to report corruption would get us very far in getting corruption rooted out of tenders, employment practices etc. Right now there are only risks, honesty and national pride associated with being a whistleblower.

With that in mind let's conduct a survey of whistleblowing in South Africa and assess the faultlines.

2. INTRODUCTION: WHAT IS WHISTLEBLOWING

Some writers explain whistle blowing as *the disclosure by current or former members of an organisation of immoral, illegitimate or illegal practices under the control of the employers, to organisations or persons that might be able to effect action.*¹

It has also been defined as the disclosure by an employee of “*confidential information relating to some danger, fraud or other illegal or unethical conduct connected with the workplace, be that of the employer or of his fellow employees*”.²

But does it does not mean that all internal or external reporting of organisational wrongdoing, is regarded as whistleblowing:

Some definitions of whistle blowing distinguish between authorised and unauthorised disclosure.

In my understanding **authorised disclosure** relates to the reporting of sensitive or confidential information about organisational wrongdoing through prescribed channels by a person(s) whose job description or level of seniority in the organisation is sufficient to make the disclosure.³ In other words, persons whose jobs or duties include the detection and reporting of wrongdoing in the organisation, including auditors, forensic investigators and managers.

Unauthorised disclosure is therefore essentially the reporting of sensitive or confidential information in the “wrong way”, ie, along the wrong channels. This could include persons not considered sufficiently senior in the organisation, to make the disclosure or such reporting does not specifically fall within his/ her job description.⁴ It could also include disclosure of sensitive or confidential information by persons authorised to report on wrongdoing, but outside the normal line of communication and reporting, ie, over someone’s head or to external third parties.

1 *Whistle blowing and whistle blower protection in the South African Public Sector* by Natasja Holtzhausen, Doctoral thesis, UNISA, June 2007, Johnson, R.A. 2003. *Whistleblowing: when it works and why*. London: Lynne Rienner Publishers. Miceli, M.P., Van Scotter, J.R., Near, J.P. and Rehg, M.T. 2001. *Individual differences and whistle-blowing*. Academy of Management Proceedings, 1:1-6.

2 Louw, M. 2002. *Ethics in the workplace: Moving to higher ground*. In Verwey, S. and Du Plooy-Cilliers, F. Strategic organizational communication: Paradigms and paradoxes. Sandown: Heinemann Publishers

³ Adapted from Uys, T. and Senekal, A. 2005. *Morality of principle versus morality of loyalty: The case of whistleblowing*. Paper read at the fifth annual conference of Ben- Africa, Botswana, 30 August – 01 September 2005.

⁴ *Whistle blowing and whistle blower protection in the South African Public Sector* by Natasja Holtzhausen, Doctoral thesis, UNISA, June 2007 Uys, T. and Senekal, A. 2005. *Morality of principle versus morality of loyalty: The case of whistleblowing*. Paper read at the fifth annual conference of Ben- Africa, Botswana, 30 August – 01 September 2005.

An employee could for instance, feel obliged to report things in ways that the organisation may see as inappropriate for a variety of reasons, including because-

- a) there are no channels for such reporting;
- b) the persons involved in the channel of reporting may be implicated in the perceived wrongdoing; or
- c) previous reports of such wrongdoing did not illicit any appropriate response from the organisation.

Whistleblowing, in essence, refers to the situation where an unauthorised disclosure is or *should be transformed into an authorised disclosure of wrongdoing following certain prescribed processes and procedures* in order to prompt action to address organisational wrongdoing and to protect the whistle-blower from harmful action for reporting wrongdoing in a controversial or unauthorised manner.

“Since the actions of whistle blowers can protect the health, safety, or security of the general public or those within an organisation, whistle blowing is an act that benefits others and can therefore be considered as altruistic behaviour for the public good”⁵

In essence, whistleblowing happens when employees recognise that there are certain wrongdoings in the organisation and decide to expose such wrongdoings to someone who is able to do something about it. Such behaviour may be borne out of a form of organisational citizenship, - *“in which people go beyond the call of duty to contribute to the well-being of their organisation and those in it”*,⁶ usually without intending to gain any rewards for themselves.

⁵ *Whistle blowing and whistle blower protection in the South African Public Sector* by Natasja Holtzhausen, Doctoral thesis, UNISA, June 2007, (quoting Greenberg, J. and Baron, R.A. 2003. *Behaviour in Organizations*. (Eight edition). New Jersey: Prentice Hall. Miceli, M.P. and Near, J.P. 1992. *Blowing the whistle: The Organizational and Legal Implications for Companies and Employees*. New York: LexingtonBooks.

⁶ Greenberg, J. and Baron, R.A. 2003. *Behaviour in Organizations*. (Eight edition). New Jersey: Prentice Hall

3. WHY IS WHISTLE-BLOWING RECOGNISED AND PROTECTED?

Whistleblowing is central to ... constitutional principles. It is key in the fight against corruption and mismanagement, especially of public funds, and to strengthening transparency and accountability within organisations and society more generally.⁷

The National Development Plan 2030 (South Africa) (NDP) stresses that Corruption is generally recognized as a serious threat to the rule of law, the stability and security of societies. It jeopardizes the fair distribution of resources since it undermines fundamental democratic values and institutions and impedes social, economic and political development and the enjoyment of human rights.

While enhanced regulation and stricter law enforcement have been the usual response to misconduct and corruption in the public sector, the very essence of corruption, which is invariably committed in secrecy, with few witnesses, if any, and between willing participants, means that the normal crime-busting agencies are ill-equipped to deal with it. South Africa, like other countries, has embarked on a significant reorientation to promote ethics and the principles of good governance, stressing openness, transparency, information, competition, sanctions, incentives, clear rules and regulations as adjuncts to the limitations of law.

Some of these measures focus on preventing and mitigating the risks of corruption by the strengthening organisational integrity and ensuring that an organisation has a positive, sound set of values that are in line with social expectations and that it works in accordance with these values. An integrity management system is the functional subsystem of the governance and management system of an organisation - that is, by defining and consistently communicating the organisation's set of values, and by creating and operating the integrity controls (rules, codes of conduct, ethical principles, mission statements, etc.) that promote or provide guidance for compliance, monitoring and, as required, enforcement of compliance.

⁷ *The Status of Whistleblowing in South Africa, Tacking stock, Patricia Martin, ODAC, June 2010*

While the successful implementation of an integrity management system means that the organisation could manage to mitigate, to a very large degree, the risks arising from incorrect employee behaviour, the real success lies in the extent to which employees also identify themselves with the organisation's values and act accordingly. A huge part of the human element that is critical for promoting good governance involves the values of the community within which we seek to fight poor governance, including corruption. In my view there are three dimensions to the human element. These are the values of each individual, community values and political will at all levels of leadership. The value underlying all of this is the human conception that it is desirable to try and set things right where and when they are perceived to be wrong.

Perhaps one of the most notorious obstacles in the way of developing an integrity management framework in any organisation is a sense amongst employees that they are not free to report suspicious behaviour within their organisations and, furthermore, a fear of retaliation. The risk of corruption is significantly heightened in environments where the reporting of wrongdoing is not supported or protected. Public and private sector employees and by default members of these organisations here today have access to up-to-date information concerning their workplaces' practices, and are usually the first to recognise serious problems within the management and operations of an organisation whether they are unintentional problems due to misjudgements, mistakes, delays, haste, or intentional integrity issues due to misconduct, corruption and/or illegality.⁸

Disclosure mechanisms are therefore regarded as one of the most essential tools for combating corruption and enhancing democratic principles such as accountability and transparency. Experts agree that financial disclosure, standards of conduct, and whistle-blowing protection are the most important components of a framework for tackling conflicts of interest.

⁸ United Nations Office on Drugs and Crime, UN Anti-Corruption Toolkit, 3rd Edition, Vienna, 2004, p. 67.

The most recent global fraud study as reflected in the ACFE Report to the Nations on Occupational Fraud and Abuse, 2014⁹ shows that almost 50% of organisational fraud is detected through tip-offs, and that almost half of all tip-offs are from employees:

Figure 11: Initial Detection of Occupational Frauds

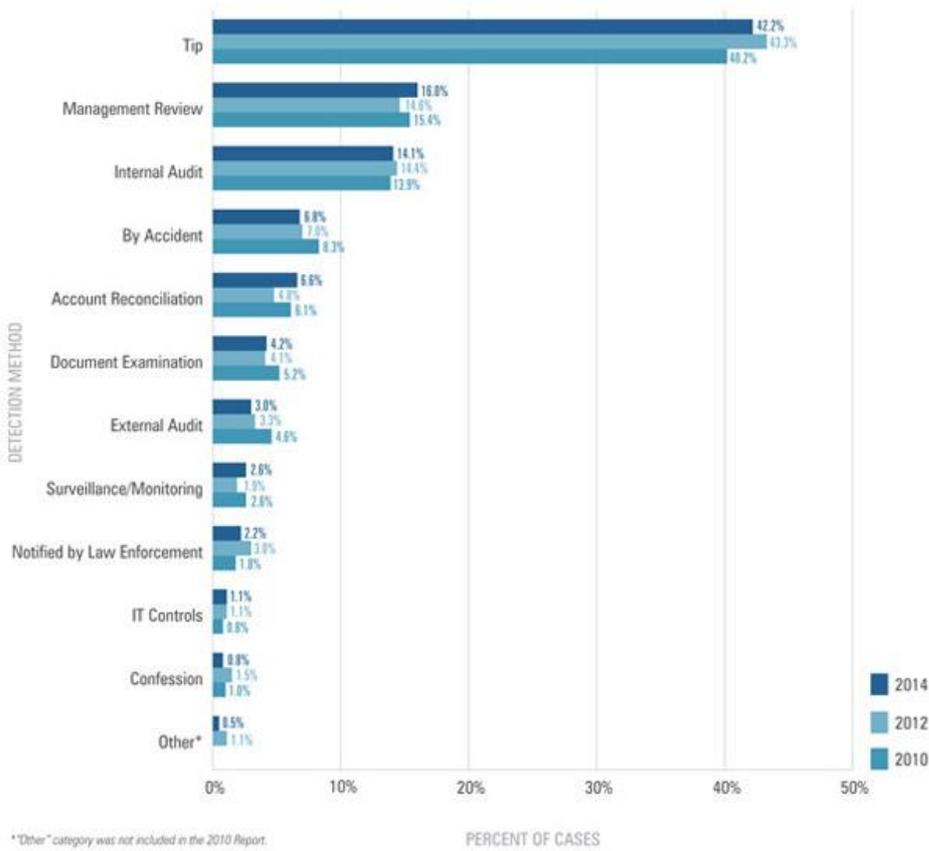
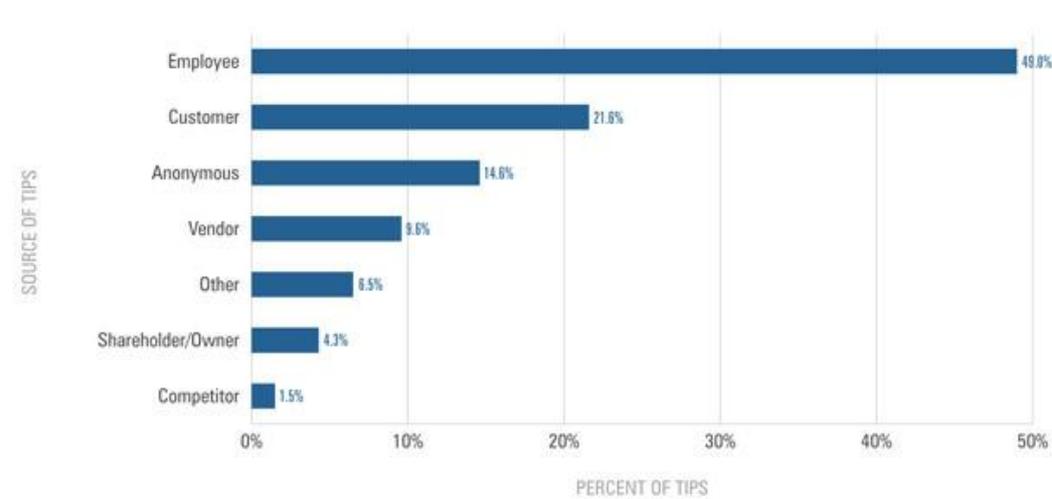


Figure 13: Source of Tips



⁹ <http://www.whistleblowing.co.za/mailers/Whistle-Blowers-Newsletter-August-2014.html>

However, those who report wrongdoings may be subject to retaliation, such as intimidation, harassment, dismissal or violence by their fellow colleagues or superiors. In many countries, whistleblowing is even associated with treachery or spying.¹⁰ Whistleblower protection is therefore essential to encourage the reporting of misconduct, fraud and corruption. Providing effective protection for whistleblowers supports an open organisational culture where employees are not only aware of how to report but also have confidence in the reporting procedures. It also helps businesses prevent and detect bribery in commercial transactions. The protection of both public and private sector whistle-blowers from retaliation for reporting in good faith suspected acts of corruption and other wrongdoing is therefore integral to efforts to combat corruption, safeguard integrity, enhance accountability, and support a clean business environment

*Whistleblowing ... is key in the fight against corruption and mismanagement, especially of public funds, and to strengthening transparency and accountability within organisations and society more generally.*¹¹

Whistleblower protection has been recognised by all major international instruments concerning corruption. The 1998 OECD Recommendation on Improving Ethical Conduct in the Public Service including the Principles for Managing Ethics in the Public Service and the 2003 OECD Recommendation on Guidelines for Managing Conflict of Interest in the Public Service were among the first.

In addition, whistleblower protection requirements have been introduced in the United Nations Convention against Corruption,¹² the Council of Europe Civil and Criminal Law Conventions on Corruption,¹³ the Inter-American Convention against

¹⁰ See David Banisar, "Whistleblowing: International Standards and Developments" in Sandoval, I. (editor), *Corruption and Transparency: Debating the Frontiers between State, Market and Society*, World Bank-Institute for Social Research, UNAM, Washington, D.C. 2011, p.7 (hereinafter Banisar) and Transparency International, *Alternative to Silence: Whistleblower Protection in 10 European Countries* (2009).

¹¹ *The Status of Whistleblowing in South Africa, Tacking stock, Patricia Martin, ODAC, June 2010*

¹² UNCAC Articles 8, 13 and 33.

¹³ 4 Council of Europe Civil Law Convention on Corruption, Article 9; Council of Europe Criminal Law

Corruption,¹⁴ and the African Union Convention on Preventing and Combating Corruption.¹⁵

In 2010, the importance of whistleblower protection was reaffirmed at global level when the G20 Anti-Corruption Working Group recommended that G20 leaders support the *Guiding Principles for Whistleblower Protection Legislation*, prepared by the Organisation for Economic Co-operation and Development (OECD), as a “reference for enacting and reviewing, as necessary, whistleblower protection rules by the end of 2012”¹⁶

4. CONSEQUENCES OF WHISTLEBLOWING: RETALIATION AND THE INTIMIDATION FACED BY WHISTLE-BLOWERS

The dilemma and misfortune of the whistle blower are often highlighted in the popular press. Not too long ago there has been the case of senior official Jimmy Mohlala who was shot after he had blown the whistle on perceived corrupt practices in a 2010 Soccer World cup construction project. Some other whistle blowers, who provided information on corrupt housing practices, were also threatened and murdered. King Winner Maluleka, an inmate of C-Max in 2004 who blew the whistle on the former prison warder and fellow inmates on an attempted escape, has been victimised in jail. In 2013 Roberta Nation was fighting dismissal from the State Security Agency (SSA) after she reported on alleged fraud in the SSA’s medical scheme more than a year ago. Solly Tshitangano, was dismissed from the Limpopo Department of Education, continues to suffer the consequences of highlighting the malfeasances leading to the 2012 textbook scandal. In 2013 it was reported that Icasa official Joseph Leboo was abducted and beaten by individuals who demanded that he halt his investigation into Wireless Business Solutions, a private company allegedly owing license fees to Icasa.¹⁷

In 2013 the Public Protector released a report called “They Called it Justice” dealing with an investigation into maladministration in the handling of a whistle-blower matter

¹⁴ Inter-American Convention against Corruption, Article III(8).

¹⁵ African Union Convention on Combating Corruption, Article 5(6).

¹⁶ OECD *Whistleblower protection: encouraging reporting*, July 2012

¹⁷ <http://www.r2k.org.za/2013/02/07/r2k-statement-on-sas-whistleblower-crisis/>

resulting in immense prejudice suffered by the whistle-blower in the form of an occupational detriment as envisaged in the Protected Disclosures Act.

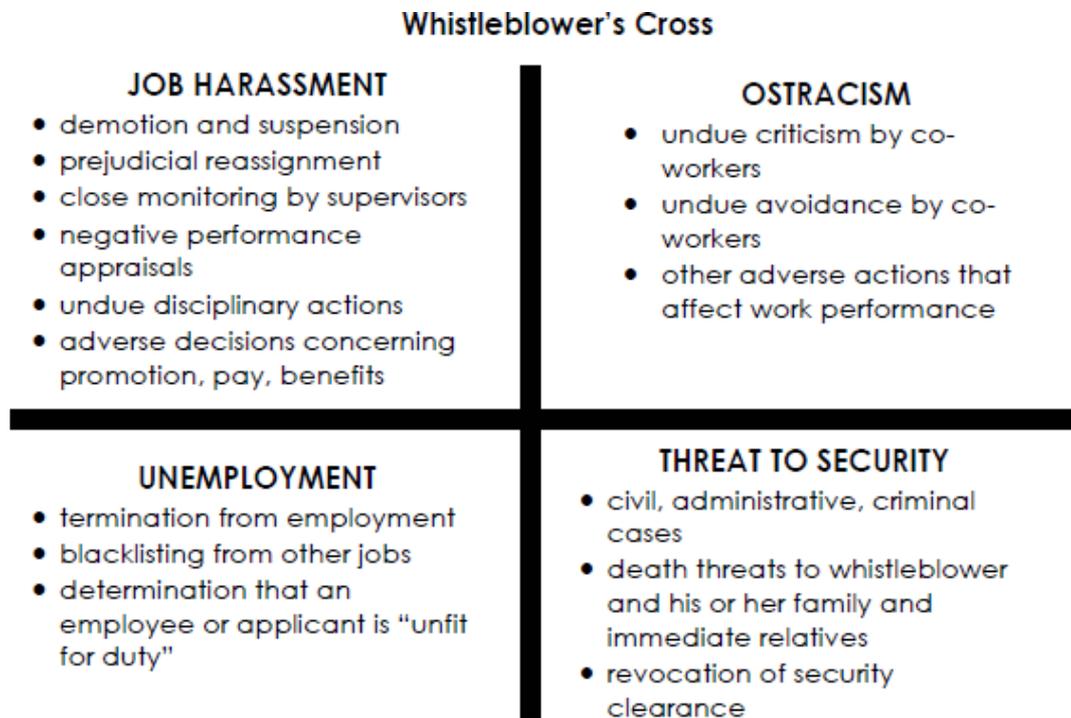
These reports confirm that Whistle-blowers often face harassment, discrimination, disadvantage or adverse treatment in relation to employment, dismissal from, or prejudice in employment and disciplinary proceeding. Whistle-blowers can therefore risk their livelihoods, their reputations, their lives and even the lives of their families to expose information of significant public importance, yet they do so at grave risk to themselves.

Retaliation or detrimental action against whistler-blowers may also include disciplinary hearings for insubordination, claims of disloyalty, accusations of whistle-blowing for personal gain, loss of friendships and *loss of respect for the ethnicity in whose interest the whistle-blower acted.*¹⁸

The following figure depicts these risks and costs of whistle blowing in what is called in the Philippines “*a whistle-blower’s cross*”¹⁹

¹⁸ Naude, P.J. (2005). Organisation ethics: an orientation. Unpublished organisation ethics study guide. Port Elizabeth: Nelson Mandela Metropolitan University.

¹⁹ Whistleblowing in the Philippines: Asian Institute of Management June 2006, RVR Center-Hills Program on Governance.



As a result of the heavy personal costs associated with whistleblowing, it is not a very common occurrence. And, as some writers pointed out, "**society shoulders the costs of people's unwillingness to blow the whistle against corrupt practices. The absence of sufficient supply of whistle-blowers worsens the state of corruption; it emboldens corrupt people to go on with their evil practices without fear of being punished.**"²⁰

Experts agree that retaliation against whistle-blowers typically occurs *when organisations have something to hide, when allegations are serious, and/or when dire consequences exist for the organisation as a whole, or for many within the organisation.*²¹

The protection of whistle-blowers is therefore fundamental to the operation of open and accountable government and is a standard provision in freedom of information legislation in a wide range of countries.

South Africa has followed suit and legislature promulgated the Protected Disclosures Act, 2000 (the PDA), which recognises the value of and need for whistle blowing in South Africa by aiming to:

²⁰ **Whistleblowing in the Philippines:** Asian Institute of Management June 2006, RVR Center-Hills Program on Governance

²¹ ELLI BINIKOS, **Sounds of silence: Organisational trust and decisions to blow the whistle**, SA Journal of Industrial Psychology; Vol 34, No 3 (2008)

Create a culture which will facilitate the disclosure of information by employees relating to criminal and other irregular conduct in the workplace in a responsible manner by providing comprehensive statutory guidelines for the disclosure of such information and protection against any reprisals as a result of such disclosures.

4. THE PROTECTED DISCLOSURES ACT: OVERVIEW AND GAPS

4.1 Contextualising the legislative measures to protect whistle-blowers in South Africa

Early in its democracy South Africa recognized the need to build a National Integrity framework as key cornerstone in its fight against corruption. Such an approach has its origins in October 1997 when Cabinet mandated a Ministerial Committee to consider proposals for the implementation of a National Campaign Against Corruption. Consequently, a National Anti-Corruption Summit was convened in April of 1999

Since then, South Africa has responded by implementing an array of legislation and the creation of democratic institutions as essential armour in its endeavours to build national integrity and fight corruption. It is acknowledged by most stakeholders that a comprehensive policy and regulatory framework is in place that provides for a **Generic Integrity Framework** through international and national instruments such as

- United Nations Convention against Corruption (UNCAC)
- Global Programme against Corruption designed by the Centre for International Crime Prevention (CICP), in collaboration with the United Nations Interregional Crime and Justice Research Institute (UNICRI),
- Transversally applicable (national level) constitutional provisions of the Constitution such as fundamental rights (Bill of Rights, etc) founding values in section 1, principles of public administration in

section 195, procurement regulation under section 217 and fiscal prudence guidelines.

- Transversal legislation and directives including the following legislation

4.1.1 The Companies Act

The Companies Act provides for the protection of whistle-blowers acting with companies but does not cover companies incorporated outside of South Africa.

Section 159 seeks to expand on the protections contained in the PDA, including the types of information that warrant protection. In addition, it expands on the lists of persons to whom a whistleblower can make a disclosure (including, for instance, a Board Member of the company concerned or the Companies and Intellectual Property Commission). It also extends the means for protection far beyond those labour protections in the PDA through section 159(4), and provides that whistleblowers who make a protected disclosure are “*immune from any civil, criminal or administrative liability for that disclosure*”

4.1.2 The Prevention and Combatting of Corrupt Activities Act

According to section 34(1) of the Act, any person who holds a position of authority (defined in section 34(4) of the Act), who knows or ought reasonably to have known or suspected that any other person has committed an offence (of corruption) in terms of sections 3 to 16 or 20 to 21 of the Act or theft, fraud, extortion, forgery or uttering of a forged document involving an amount of R100 000,00 or more, must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to any police official.

Section 34(2) of the Act provides that any person who fails to report such corrupt activities is guilty of an offence.

4.1.3 The National Environmental Management Act

Section 31 of the National Environmental Management Act provides that no person can be civilly or criminally liable (or dismissed, disciplined, prejudiced or harassed) if

that person in good faith reasonably believed at the time of making a disclosure that it revealed evidence of an environmental risk.

The section prescribes that, for these protections to be available, the discloser must disclose the information either to:

- a) A committee of Parliament or of a provincial legislature;
- b) An organ of state responsible for protecting any aspect of the environment or emergency services;
- c) The Public Protector;
- d) The Human Rights Commission;
- e) Any attorney-general or his or her successor (Director of Public Prosecutions); or
- f) More than one of these bodies.

4.1.4 Protection from Harassment Act

This Act, which came into effect on 27 April 2013, presents an interesting new avenue for offering a form of protection to potential whistleblowers. The law provides a civil remedy for people who can apply for a protection order from harassment, which is described as:

“directly or indirectly engaging in conduct that the respondent [i.e. the person harassing] knows or ought to know:

- a) *causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably-*
 - a. *following, watching, pursuing or accosting of the complainant or related person resides, works, carries on business, studies, or happens to be;*
 - b. *engaging in verbal, electronic, or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues;*
 - c. *sending delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the*

complainant or a related person or leaving them where they will be found by, given to, or brought to the attention of the complainant or a related person

4.1.5 Witness Protection Act

The Witness Protection Act provides for protection of persons who have been witness to corrupt activities. It is only available for witnesses or potential witnesses in judicial proceedings (either appearing in court or making an affidavit). A witnesses can apply for such protection, and for the protection of those related to them if they are afraid for their safety.

4.1.6 The Promotion of Access to Information Act

The Promotion of Access to Information Act (PAIA) regulates how people can access the information of both public and private bodies. All people can utilize the provisions of the Act, and according to the Open Democracy Advice Centre -

it thus provides a useful bureaucratic mechanism for accessing more information about activities that may be of use to the whistleblower. The provisions in PAIA in many ways create a proactive mechanism for an open environment that prevents corruption – but also, if corruption exists, provides tools for trying to engage with this act.²²

4.2 **The Protected Disclosures Act (no 26 of 2000): Who is protected?**

In South Africa the Protected Disclosures Act (no 26 of 2000) makes provision for procedures in terms of which employees in both the public and private sector who disclose information of unlawful or corrupt conduct by their employers or fellow employees, are protected from occupational detriment.

(ii) "employee" means-

²² *Empowering our Whistleblowers* Commissioned by the Right2Know Campaign, in 2013

- (a) *any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration;*
and
- (b) *any other person who in any manner assists in carrying on or conducting the business of an employer.*

The definition of “employee” excludes independent contractors, who currently do not enjoy protection under the PDA. A similar narrow definition was originally found in the Labour Relations Act, 1995 (LRA) ²³. However, the LRA was amended in 2002 to provide that a person will be presumed to be an employee if one or more factors are present. These factors include the manner and hours of work being subject to the control of another person, where a person only works for one person and is provided with tools or work equipment by that other person.

There has been calls by Cosatu and other stakeholders that the definition of “employee” be amended to incorporate the LRA presumption in order to address the above inconsistency between the PDA and LRA.²⁴

4.3 Disclosure of information

The Act defines a “Disclosure” as reporting related to past, present or future:

- *Criminal offence*
- *Failure to comply with a legal obligation*
- *Miscarriage of justice*
- *Endangering health or safety*
- *Damage to the environment*
- *Unfair discrimination*
- *And the deliberate cover up of any of these.*

²³ See more at: <http://www.cosatu.org.za/show.php?ID=2222#sthash.YipKiOH9.dpuf>

²⁴ <http://www.cosatu.org.za/show.php?ID=2222#sthash.YipKiOH9.dpuf>

A disclosure as defined above will only be protected if it follows the proper procedure. In other words it is made to one of the following agencies or entities:

- *legal adviser (section 5);*
- *the employer (section 6);*
- *a member of the Cabinet or Executive Council (section 7);*
- *the **Public Protector** or Auditor-General (section 8); or*
- *general protected disclosure (section 9)*

in the case of *Radebe and another v Mashoff Premier of the Free State Province and Others*²⁵ the Labour Court, indicated that a disclosure had to be in the form of facts and that speculation, opinions and questioning the decisions and processes of the employer do not amount to facts for that purpose. The Court held that for a disclosure to be protected by the PDA, the employee/applicant must show that the disclosure exhibits **all** of the following elements. If one is absent, it is not a protected disclosure in terms of the PDA:

- a) .There must be a disclosure of information.
- b) .It must be information regarding any conduct of an employer or an employee of the employer.
- c) It must be made by an employee (or shop steward).
- d) The employee must have reason to believe that the information concerned shows, or tends to show one or more of the improprieties listed under the definition for 'disclosure' (a-g) above.

4.4 Perceived organisational wrongdoing

The whistle blower must witness an incident or practice, or set of incidents or practices, perceived to be incorrect and improper behaviour.²⁶

The whistle blower may only disclose the perceived wrongdoing once such a perception exists.²⁷

²⁵ 2528/2006) [2006] ZALC, paras 53 and 60 (Saflii).

²⁶ *Whistle blowing and whistle blower protection in the South African Public Sector* by Natasja Holtzhausen, Doctoral thesis, UNISA, June 2007

The wrongdoing must also be perceived as important for the individual to disclose it.²⁸

4.5 Internal vs external disclosure

internal whistleblowing refers to reporting to people or managers internal to the organisation that are in higher positions in the organisational structure Management is perceived to be the wrongdoers and the protectors of their own interests

Internal whistleblowing may take place using both existing communication channels such as hotlines (Johnson & Wright, 2004) or unexpected communication channels, if this is the only option remaining (Dehn, 2001)

Internal whistleblowing is emphasised in the literature as the most desirable option for whistleblowers because it offers an earlier opportunity to correct the matter, as it may avoid the more damaging consequences of external whistleblowing (Barnett, 1992; Davis, 1989; King III, 1999; Trevino & Bart, 1992) or non-reporting.

External whistleblowing refers to the disclosure of information to bodies outside the organisation, such as the media, politicians, ombudsmen, government bodies, regulatory bodies, public interest groups and enforcement agencies (Miceli & Near, 1992)..

“[e]xternal disclosures bring unwanted public attention to organisations, and since such disclosures concern alleged wrongdoing, they usually put organisations in the worst possible light”²⁹. Furthermore, by challenging the organisation’s authority structure, external whistleblowing may be seen to raise more questions about the capabilities and character of management, and, as a result, whistleblowers are more likely to experience harsher retaliation because of their choice of external reporting (Barnett, 1992, p. 2; Morehead Dworkin & Baucus, 1998, p. 1286). Other disadvantages of external reporting include litigation and the costs thereof and unfavourable media attention.

²⁷ Miceli, M.P. and Near, J.P. 1992. *Blowing the whistle: The Organizational and Legal Implications for Companies and Employees*. New York: Lexington Books.

²⁸ *Whistle blowing and whistle blower protection in the South African Public Sector* by Natasja Holtzhausen, Doctoral thesis, UNISA, June 2007; Gundlach, M.J., Douglas, S.C. and Martinko, M.J. 2003. *The Decision to Blow the Whistle: A Social Information Processing Framework*. *Academy of Management Review*, 28(1):107-123

²⁹ Barnett, T. (1992). A preliminary investigation of the relationship between selected organisational characteristics and external whistleblowing by employees. *Journal of Business Ethics*, 11(12), 949–959.

4.6 Protection

People who are victimised in breach of the Act, whether they are dismissed or not, can refer a dispute to the Commission for Conciliation, Mediation and Arbitration for conciliation and thereafter to the Labour Court. People who are dismissed for making a protected disclosure can claim either compensation, up to a maximum amount of two years salary, or reinstatement. People who are not dismissed but who are disadvantaged in some other way as a result of making a protected disclosure can claim compensation or ask the court for any other appropriate order³⁰

Section 1 of the Act defines Occupational Detriment as:-

- Any disciplinary action;
- Dismissal, suspension, demotion, harassment or intimidation;
- Transfer against your will or refusal for such transfer or promotion;
- Changes in terms or conditions of employment or retirement which is altered, or kept altered, to your disadvantage;
- Refusal for a reference, or being provided with an adverse reference, from your employer;
- Being denied appointment to any employment, profession or office;
- Being threatened with any of the actions mentioned above; or
- Being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security.

Section 3 of the Protected Disclosure Act States that

“No employee may be subjected to any occupational detriment by his or her employer on account, or partly on account, of having made a protected disclosure.”

Section 4 of the Protected Disclosures Act provides the following remedies should an employee suspect in any way that he/ she is being victimised in their workplace:-

- 1) Section 4 deems any dismissal in breach of Section 3 to be an automatically unfair dismissal as contemplated in terms of section 187 of the Labour Relations Act, and any other occupational detriment is deemed to be

30 Acknowledgement to the PSC: A Guide for Public Sector Managers Promoting Public Sector Accountability
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an unfair labour practise as contemplated in Part B of Schedule 7 of the Labour Relations Act, 1995.

- 2) In terms Section 4(3) the terms and conditions of employment of the whistleblower transferred at his or her request, cannot be altered to be less favourable than the terms and conditions applicable to him or her before the transfer

If any Occupational detriment still takes place despite this protection, the Act advises the employee to:-

- Approach any Court having jurisdiction including Labour Court for appropriate relief; and or
- Pursue any other process allowed by any law to enforce his/ her legal rights.

Management is perceived to be the wrongdoers and the protectors of their own interests

4.7 Quick overview of the potential gaps in the effectiveness and implementation of the PDA³¹

- *The Act only applies to employees and protects them from "occupational detriment".³²*
- *There is no express obligation in terms of the PDA on organisations, both public and private, to take proactive steps to encourage and facilitate whistleblowing in the organisation, or to investigate claims that are made by whistle-blowers.*
- *The protection and remedies provided by the PDA are not strong enough to engender confidence in the ability of the law to protect whistle-blowers.*

31 With acknowledgment to *The Status of Whistleblowing in South Africa, Tacking stock, Patricia Martin, ODAC, June 2010*

32 With acknowledgement to Lorraine Martin (ODAC) **A quick overview of the Protected Disclosures Act**, Whistleblowers Implementers' Forum, 2010

- *The fora for the resolution of disputes related to whistleblowing are court-based. This is expensive and allows for delaying tactics by employers which amount to an abuse of process.*
- *The protection that is provided by the PDA is limited to protection against occupational detriment only.*
- *The PDA provides no immunity against civil and criminal liability arising out of the disclosure.*
- *There is no express obligation on organisations in terms of the PDA to protect a whistleblower's identity.*
- *The remedies that are available in the case of a transgression of a whistleblower's rights are insufficient. For example, damages are limited to the damages that may be awarded in terms of the LRA.*
- *There is no public body dedicated and able to provide regular advice to the public, to monitor and review whistleblowing laws and practices and to promote public awareness and acceptance of whistleblowing.*

5. THE ROLE OF THE PUBLIC PROTECTOR

5.1 Introduction

The Public Protector as a Constitutional institution mandated to receive complaints regarding improper conduct by the state, investigates these and takes measures to remedy the issue. It is guided by 16 pieces of legislation including the Executive Members Ethics Act, the Promotion of Access to Information Act, the Protected Disclosures Act. It is also guided by a number of international laws such as the UN conventions, OECD, AU and SADC instruments. Within this framework, the Public Protector seeks to protect Whistle-blowers and to actively promote a culture of disclosure.

As indicated earlier, and also mentioned by the Public Protector on occasion, there are two essential aspects in building integrity within a system and a society namely

- Anti-corruption initiatives, and
- Promotion of ethical behaviour

The Public Protector forms part of the national integrity framework, together with other oversight and accountability bodies that include the Legislature, Auditor-General, Public Service Commission, the Judiciary, Financial Intelligence Centre, , media and society. These bodies play an important role in enforcing Democratic values of good governance, the Rule of Law and quality of life.

In working towards these aims, the Public Protector strongly relies heavily on whistleblowing and protected disclosures. The Public Protector's approach is broader than just protected disclosures under the Act; it includes also anonymous reporting. Currently the number of reports received this way significantly exceeds the cases of protected disclosures reported to the Public Protector³³.

5.2 Constitutional mandate of the Public Protector

Established under chapter 9 of the Constitution, the Public Protector has the power under section 182 of the Constitution to strengthen and support constitutional democracy by:

- a) investigating any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
- b) to report on that conduct; and
- c) to take appropriate remedial action.

The Public Protector's mandate covers all organs of state at national, provincial and local levels, including local government and extends to state owned enterprises, statutory bodies and public institutions. Court decisions are excluded.

Section 182(4) enjoins the Public Protector to be accessible to all persons and communities

The Constitution anticipates mandate expansion through legislation, and legislation passed since establishment 15 years ago has resulted in the Public Protector being a multiple mandate agency with the following 6 key mandate areas:

³³ The PPSA is currently reviewing 16 cases.

- a) Maladministration and appropriate resolution of dispute the Public Protector Act 23 of 1994(PPA). The maladministration jurisdiction transcends the classical public complaints investigation and includes investigating without a complaint and redressing public wrongs(Core);
- b) Enforcement of Executive ethics under by the Executive Members' Ethics Act of 1998(EMEA) and the Executive Ethics Code (Exclusive):
- c) Anti-corruption as conferred by the Prevention and Combating of Corrupt Activities Act 12 of 2004 (PCCAA) read with the PPA(Shared);
- d) Whistle-blower protection under the Protected Disclosures Act 26 of 2000. (Shared with the Auditor General and to be named others;
- e) Regulation of information under the Promotion of Access to Information Act 2 of 2000;(PAIA) and
- f) Review of decisions of the Home Builders Registration Council under the Housing Protection Measures Act 95 of 1998.

Except under the EMEA, anyone may lodge a complaint with the Public Protector against any organ of state and the service is free. The complainant need not be a victim of the alleged improper conduct or maladministration. The Public Protector may institute an investigation on own initiative and does not need to receive a complaint.

The Constitutional mandate of the Public Protector to investigate and report on improper conduct or improprieties in state affairs translates to a multi-pronged approach to handling complaints to ensure

- a) correction of transgressions by organs of State,
- b) a proper diagnosis and correction of any administrative inadequacies, including systemic failures
- c) that proper redress is provided in cases requiring remedial action.

Way forward

With this background without a doubt the time is ripe for us to harness all possible resources in South Africa to ensure that financial, accounting and all other professionals receive maximum protection as they do their work, especially for the state. I'm extremely confident that this will not be just another talk shop. The structure is very operational and can bring all resources and brains to bear in this fight. What is

also critical is that it is a partnership of all affected parties including government. Today we are planting the seed. Let's let it germinate and grow and become this big shelter in the fight against corruption and all forms of malfeasance in governance.

I thank you