

# THE PROTECTION OF WHISTLE-BLOWERS IN THE FIGHT AGAINST FRAUD AND CORRUPTION: A SOUTH AFRICAN PERSPECTIVE\*

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## SUMMARY

Criminal and irregular conduct can endanger the economic stability in South Africa. It also has the potential of causing social damage. Employees as whistle-blowers play an important role in the promotion of corporate governance in organizations and are protected from occupational detriments by the Protected Disclosures Act 26 of 2000. The Companies Act 71 of 2008 also contains provisions regarding whistle-blowing but extends the protection to other categories such as shareholders and directors. This article investigates the protection granted by both these pieces of legislation and if synergy exists between these two Acts. It also explores whether the Protected Disclosures Act really protects employees and the remedies they are entitled to.

## 1 INTRODUCTION

Employees play an important role in the fight against corrupt and fraudulent activities in the workplace, especially in the promotion and enforcement of corporate governance. Employee governance is a way to ensure that companies are partially governed by the employees in the employ of that company. Employees are the most likely ones to detect irregularities and report on illegal and unethical conduct. Traditionally, fairness in employment relations was measured by weighing the interests of the employer against that of employees and that public interest was not taken into consideration.<sup>1</sup> A potential whistle-blower faces a difficult choice in that he or she either reports the misconduct and takes the risk of potential retaliation from his or her employer or keeps quiet and thus retains his or her job.<sup>2</sup> The Protected

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\* This article is dedicated to my friend and colleague, the late Piet de Kock, who provided great guidance in the editing process. Without his valuable input this article would not have been in this final format.

<sup>1</sup> Kloppers "Behoort die Whistle Blower Beskerm te Word?" 1997 *Stell LR* 246.

<sup>2</sup> Mendelsohn "Calling the Boss or Calling the Press: A Comparison of British and American Responses to Internal and External Whistleblowing" 2009 *Washington University Global Studies Law Review* 723.

Disclosures Act 26 of 2000<sup>3</sup> was enacted to protect an employee from being subjected to “occupational detriment” because the employee blew the whistle by making a “protected disclosure”.<sup>4</sup> The purpose of the PDA is to create a culture which will facilitate the disclosure of information by employees relating to criminal and other irregular conduct they encounter in the workplace.<sup>5</sup> Although a number of cases have already dealt with whistle-blowing, two of them stand out. The first is *Tshishonga v Minister of Justice & Constitutional Development*<sup>6</sup> and the second one *Engineering Council of SA v City of Tshwane Metropolitan Municipality*.<sup>7</sup> Both cases are significant because of the fact that the employee in both instances made a disclosure externally and also because both cases subsequently went on appeal. In *Tshishonga* the court noted that employees often have insider information of wrongdoing and are usually first to detect such wrongdoing. The court also noted that employees are vulnerable because, by disclosing information about the employers and other employees, conflicts arise with their duty of loyalty and confidence which exposes them to retaliation.<sup>8</sup>

Although the PDA has been in place since 2000, the PDA’s track record when it comes to protection of whistle-blowers is quite poor.<sup>9</sup> The question is whether the PDA has succeeded in creating a culture of whistle-blowing and if any legislative instrument could on its own ever succeed in doing this.<sup>10</sup>

## 2 THE LEGISLATIVE PROVISIONS

### 2.1 Introduction

The objectives of the PDA are the following: to make provision for procedures in terms of which employees in both the private and public sector may disclose information regarding unlawful or irregular conduct by their employers and/or other employees in the employ of their employers; to provide for the protection of those employees who make disclosures which are protected in terms of the Act and to provide for matters connected therewith. The PDA also gives due recognition to the Bill of Rights in the Constitution of 1996 and affirms the democratic values of human dignity, equality and freedom, and provides that criminal and other irregular conduct of state and private bodies are detrimental to good, effective, accountable and transparent governance in corporate bodies and organs of state. These

<sup>3</sup> Hereinafter “the PDA”.

<sup>4</sup> *Rand Water Staff Association obo Snyman/Rand Water* 2001 6 BALR 543 (P) 547c; and s 3 of the PDA.

<sup>5</sup> Preamble to the Act; and *Grieve v Denel (Pty) Ltd* 2003 4 BLLR 366 (LC) 368g.

<sup>6</sup> 2007 4 BLLR 327 (LC). This case subsequently went on appeal. Both the appeal case and court *a quo* case will be discussed. See discussion later.

<sup>7</sup> 2008 29 ILJ 899 (T). This case subsequently went on appeal. Both the appeal case and court *a quo* case will be discussed. See discussion later.

<sup>8</sup> *Tshishonga v Minister of Justice & Constitutional Development supra* 356d.

<sup>9</sup> Lewis and Uys “Protecting Whistleblowers at Work: A Comparison of the Impact of British and South African Legislation” 2007 49(3) *Managerial Law* 85.

<sup>10</sup> Mischke “Protected Disclosures and Compensation: Whistle-blowing, Occupational Detriments and Remedies” 2007 *Contemporary Labour Law* 91.

values are important especially when cognisance is taken of section 23(1) of the Constitution which provides that “everyone has the right to fair labour practices”. The Labour Relations Act 66 of 1995<sup>11</sup> gives effect to the right to fair labour practices in that employees have the right not to be unfairly dismissed or subjected to unfair labour practices. It must also be noted that section 16 of the Constitution states that “[e]veryone has the right to freedom of expression, which includes – (a) freedom of the press and other media; (b) freedom to receive or impart information or ideas; (c) freedom of artistic creativity ...”<sup>12</sup>

The PDA also places emphasis on open and good corporate governance while pointing to criminal and irregular conduct that can endanger the economic stability of the Republic and that has the potential of causing social damage. The Prevention and Combating of Corrupt Activities Act 12 of 2004, for example, which states that the purpose of the Act is to provide for the strengthening of measures to prevent and combat corruption and corrupt activities and to provide for the offence of corruption and offences relating to corrupt activities and also to place a duty on certain persons holding positions of authority to report certain corrupt transactions. One of the most publicized cases which dealt with corruption was *Shaik v The State*,<sup>13</sup> where the court investigated the meaning of the concept corruption and stated that it is closely associated with organized crime and that it is a serious crime which is “potentially harmful to our most important constitutional values”.<sup>14</sup>

In line with the new companies law dispensation it must be noted that in terms of King III “the board should ensure that the company’s ethical standards ... are integrated into the company’s strategies and operations. This requires, among others, ethical leadership, management practices, structures and offices, education and training, communication and advice, and the prevention and detection of misconduct for example through whistle-blowing.”<sup>15</sup> An important emphasis is therefore placed on whistle-blowing by King III and the Companies Act 71 of 2008.<sup>16</sup> Section 159 of the Companies Act, like the PDA, also provides protection to employees who blow the whistle. It provides additional protection and not substitute protection as provided for by the PDA. Any provision in a company’s Memorandum of Incorporation or rules, or an agreement, is void to the extent that it is inconsistent with, or purports to limit, set aside or negate the effect of section 159 of the Companies Act.

The PDA entails a four-stage process, namely: (i) an analysis of the information to determine whether it is a disclosure; (ii) if it is, the next question is whether it is protected; (iii) to determine whether the employee

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<sup>11</sup> Hereinafter “the LRA”.

<sup>12</sup> See *Khumalo v Holomisa* 2002 8 BCLR 771 (CC) discussed later.

<sup>13</sup> 2007 12 BCLR 1360 (CC).

<sup>14</sup> *Shaik v The State supra* par [75].

<sup>15</sup> 57 par 36.

<sup>16</sup> Hereinafter “the Companies Act”.

was subjected to any occupational detriment; and (iv) lastly, what remedy should be awarded for such treatment.<sup>17</sup>

In terms of section 1 of the PDA “disclosure” means

“any disclosure of information regarding any conduct of an *employer*, or an *employee* of that *employer*, made by any *employee* who has reason to believe that the information concerned shows or tends to show one or more of the following:

- (a) that a criminal offence has been committed, is being committed or is likely to be committed;
- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;
- (c) that a miscarriage of justice has occurred, is occurring or is likely to occur;
- (d) that the health or safety of an individual has been, is being or is likely to be endangered;
- (e) that the environment has been, is being or is likely to be damaged;
- (f) unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000); or that any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed.”<sup>18</sup>

A “protected disclosure”<sup>19</sup> includes a disclosure made to a legal adviser,<sup>20</sup> an employer,<sup>21</sup> a member of Cabinet or of the Executive Council of a province,<sup>22</sup> or any other person or body.<sup>23</sup> Protected disclosures can also be made to the Public Protector or Auditor-General.<sup>24</sup> It appears that when an employee makes a disclosure to a person who has an interest in the matter it will meet the requirements set in terms of the PDA. In addition to these categories mentioned in the PDA, section 159(3)(a) of the Companies Act provides that a disclosure can also be made to the Commission, the Companies Tribunal, the Panel, a regulatory authority, an exchange, a legal adviser, a director, prescribed officer, company secretary, auditor, board or committee of the company concerned. This underlies the arbitrating commissioner’s line of thought in *H and M Ltd*,<sup>25</sup> where he added that although information was confidential it was disclosed to a shareholder who had an interest in the matter. An employee must therefore first make a disclosure that falls within the ambit of a disclosure as defined by the PDA

<sup>17</sup> *Tshishonga v Minister of Justice & Constitutional Development supra* 357b.

<sup>18</sup> In *CWU v Mobile Telephone Networks (Pty) Ltd* 2003 8 BLLR 741 (LC) 747a-b the labour court confirmed that the definition of “disclosure” clearly contemplates that it is only the disclosure of information that either discloses or tends to disclose forms of criminal or other misconduct that is the subject of protection under the PDA.

<sup>19</sup> This definition specifically excludes a disclosure in respect of which the employee commits an offence by making the disclosure, or disclosures made by a legal adviser to whom the information concerned was disclosed in the course of obtaining legal advice in terms of s 5.

<sup>20</sup> S 5 of the PDA.

<sup>21</sup> S 6 of the PDA.

<sup>22</sup> S 7 of the PDA.

<sup>23</sup> Ss 8 and 9 of the PDA. This definition specifically excludes a disclosure in respect of which the employee commits an offence by making the disclosure, or disclosures made by a legal adviser to whom the information concerned was disclosed in the course of obtaining legal advice in terms of s 5.

<sup>24</sup> S 8 of the PDA.

<sup>25</sup> 2005 *ILJ* 1737 (CCMA) 1791h.

and secondly make a disclosure to a set category of persons and thirdly make the disclosure in good faith<sup>26</sup> and in accordance with an authorised procedure. Section 6 of the PDA emphasizes that an employee must make a disclosure in line with an authorized procedure. An example of such a procedure will be a corruption and fraud hotline. If an employee makes a disclosure of corrupt activities to such a hotline it will render such disclosure a protected disclosure in terms of the PDA. "Crime-stop" hotlines that enable members of the public as well as police informers to report criminal activities provide similar protection to members of the public because without reports from individuals such as employees and the general public, many criminal activities would remain unresolved.<sup>27</sup> Although an employee is entitled to report perceived irregularities or corrupt activities, the use of untested, hearsay evidence is open to criticism. It is also important to note that a disclosure worthy of protection must on a *prima facie* basis at least be carefully documented and supported<sup>28</sup> to be regarded as a protected disclosure.<sup>29</sup> The court in *Roos v Commissioner Stone NO*<sup>30</sup> found that the applicant did not make a protected disclosure in terms of the PDA and would not be protected by the PDA. The applicant was found guilty of insolence at a disciplinary hearing for misconduct. The applicant alleged that she made a protected disclosure and was subsequently unfairly dismissed for making this disclosure. The court found that the disclosure that she had made was not *bona fide* because she turned down an opportunity to have the disclosure clarified. The court was also of the view that "it is not the purpose of the Act to give licence to employees to make unsubstantiated and disparaging remarks about their employers and later hide behind the Act".<sup>31</sup>

## 2 2 The Tshishonga case

The PDA does not make a distinction between the private and public sectors when it comes to disclosures. Distinction is, however, drawn between internal and external disclosures. It is important to note that the PDA

<sup>26</sup> S 6 of the PDA provides that "(1) Any disclosure made in good faith –  
 (a) and substantially in accordance with any procedure prescribed, or authorised by the employee's employer for reporting or otherwise remedying the impropriety concerned; or  
 (b) to the employer of the employee, where there is no procedure as contemplated in paragraph (a), is a protected disclosure.  
 (2) Any employee who, in accordance with a procedure authorised by his or her employer, makes a disclosure to a person other than his or her employer, is deemed, for purposes of this Act, to be making the disclosure to his or her employer."

<sup>27</sup> *Engineering Council of SA v City of Tshwane Metropolitan Municipality* 2008 29 ILJ 899 (T) 936c-d.

<sup>28</sup> In *Grieve v Denel (Pty) Ltd supra* 374a-b the court stated that: "*Prima facie* they appear to be based on information which is documented and supported and although there may be adequate explanations and reasons for providing the information may go beyond merely wishing to draw these matters to the attention of the management of the respondent, nonetheless in my assessment at a *prima facie* level the applicant has established that the disclosures were made *bona fide*."

<sup>29</sup> *CWU v Mobile Telephone Networks (Pty) Ltd supra* 747e-f.

<sup>30</sup> 2007 10 BLLR 972(LC).

<sup>31</sup> *Roos v Commissioner Stone NO supra* 976a-c.

attempts to provide protection to whistleblowers by having mechanisms in place to dissuade employers from victimizing employees who blow the whistle. This is done by encouraging employees to make use of integral procedures when they suspect wrongdoing within the organization.<sup>32</sup> It is apparent that an external disclosure is dependent on the internal one because it must be established if an employee blew the whistle internally before going externally. To comply with the requirements set in section 1 of the PDA an employee must also meet the conditions set in section 6. In *CWU* the court held that if an employee makes a disclosure to an employer in terms of section 6, a number of conditions must be met before the disclosure can be regarded as a protected disclosure. These conditions are:<sup>33</sup> (i) the person claiming the protection must be an employee;<sup>34</sup> (ii) the employee must have reason to believe that information in his or her possession shows, or tends to show, the range of conduct that forms the basis of the definition of disclosure; (iii) the employee must make the disclosure in good faith; (iv) if there is a prescribed procedure or a procedure authorized by the employer for reporting or remedying any impropriety, then there must be substantial compliance with that procedure; (v) if there is no procedure that is either prescribed or authorized, then the disclosure must be made to the employer; (vi) if any procedure authorized by the employer permits the making of a disclosure to a person who is not the employer, the employer is deemed to have made the disclosure; and (vii) there ought to be some nexus between the disclosure and the detriment.

If an employee made a disclosure internally and any of the parties to whom he made the disclosure, failed to take any action regarding the disclosure, such an employee can then repeat the disclosure to an external party. Section 9 of the PDA provides for general-protected disclosures that protect an employee for making a disclosure externally. Section 9 affords similar protection to South African whistle-blowers who make external disclosures under the general disclosure provision. However, this protection is subject to the employee meeting some conditions first. The *Tshishonga* case was the first highly publicized case that dealt with whistle-blowing because of the media's involvement in covering the events. In *Tshishonga* the applicant, a deputy director-general of the first respondent, had made serious allegations to the media about his former employer, a former minister of Justice. He was immediately suspended. The chairperson of the disciplinary tribunal found that the information divulged by the applicant to the media was a protected disclosure as defined in the PDA and that the applicant's suspension and disciplinary enquiry therefore qualified as occupational detriments as defined in section 1. *Tshishonga* posed an important question - whether disclosures to the media about impropriety in the workplace are protected under the PDA or not.

<sup>32</sup> Lewis and Uys 2007 *Managerial Law* 85.

<sup>33</sup> *CWU v Mobile Telephone Networks (Pty) Ltd supra* 746c-e.

<sup>34</sup> S 1 of the PDA and s 213 of the LRA contain the same definition of an employee.

The court in *Tshishonga* stated that several hurdles must be overcome before disclosures can qualify as general-protected disclosures. They include the following:<sup>35</sup>

- (i) *The disclosure must be made in good faith*: By setting good faith as a specific requirement, the legislature must have intended that it should include something more than reasonable belief and the absence of personal gain. An employee may reasonably believe in the truth of the disclosures and may gain nothing from making them, but his good faith or motive would be questionable if the information does not disclose an impropriety or if the disclosure is not aimed at remedying a wrong.<sup>36</sup> A whistle-blower, who is overwhelmed by an ulterior motive, that is, a motive other than to prevent or stop wrongdoing, may not claim the protection under the PDA. The requirement of good faith therefore invokes a proportionality test to determine the dominant motive. Good faith is required to test the quality of the information. A malicious motive cannot disqualify the information if the information is substantial. A malicious motive could affect the remedy awarded to the whistle-blower.
- (ii) *The employee must have a reasonable belief*: In the context of determining whether a disclosure is protected the test is more stringent. The reasonableness of the belief must relate to the information being substantially true.
- (iii) *The disclosure should not be for personal gain*: Lewis and Uys<sup>37</sup> point out that this issue is problematic because since the demonstration of good faith is a separate issue and thus good faith cannot be used as a test to illustrate the employee's motive. This requirement should be construed to include any commercial or material benefit or advantage received by or promised to the employee as *quid pro quo* for the disclosure and any expectation by the employee of a benefit or advantage that is not due in terms of any law. "Chequebook journalism" falls into this category. If the employee benefits incidentally from the disclosure it will be protected provided that was not the purpose of making the disclosure. The possibility exists that personal and public interests may coincide.<sup>38</sup> Although cheque-book journalism is not desirable, it would not be in the

<sup>35</sup> *Tshishonga v Minister of Justice & Constitutional Development supra* 362g-364f; and s 9 of the PDA.

<sup>36</sup> S 159(3)(b) of the Companies Act also provides that the person making the disclosure must reasonably have believed at the time of the disclosure that the information showed or tended to show that a company or external company, or a director or prescribed officer of a company acting in that capacity has contravened the Companies Act or a law mentioned in Schedule 4 of the Companies Act. This provision is also applicable when a company or external company, or a director or prescribed officer of a company acting in that capacity has failed or is failing to comply with any statutory obligation to which the company is subject, or engaged in conduct that has endangered or is likely to endanger the health or safety of any individual, or damage the environment; or unfairly discriminated, or condoned unfair discrimination, against any person, as contemplated in s 9 of the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 or contravened any other legislation in a manner that could expose the company to an actual or contingent risk of liability, or is inherently prejudicial to the interests of the company.

<sup>37</sup> 2007 *Managerial Law* 79.

<sup>38</sup> *Ibid.*

public interest if a financial incentive enables the avoidance of a disaster.<sup>39</sup>

It must be noted here that the media play a very important role especially as freedom of the press and media is protected in terms of section 16 of the Constitution. The media are not only promoting good governance but also insuring that the constitutional mandate is carried out.<sup>40</sup> In *Khumalo v Holomisa*<sup>41</sup> the court highlighted the importance of the media by stating that the media must be scrupulous and reliable when they perform their constitutional obligations because the constitutional goals will be imperilled if they fail to perform their duties.<sup>42</sup> The court in *Tshishonga* also emphasized the importance of the media in promoting good governance. Caution must be taken when the media are utilized as a means of blowing the whistle.<sup>43</sup> The court in *Tshishonga* noted that it was reasonable for Tshishonga to make the disclosure of the corruption to the media because the media are important pillars that promote and uphold democracy. The court added that corruption undermines democracy and that when the various elements of the

<sup>39</sup> *Ibid.* The court in *Tshishonga v Minister of Justice & Constitutional Development supra* 365a-c stated the following: "Good faith, reasonable belief and personal gain overlap and are mutually reinforcing. A weakness in one can be compensated for by the other(s). Thus a doubtful motive can be compensated for by a strong belief based on sound information. Each of the three requirements in s 9(1) should be construed narrowly so as not to defeat the objectives of eliminating crime, promoting accountable governance and protecting employees against reprisals. This view is fortified by the fact that a disclosure has to be filtered through two more tests. Firstly, the disclosure must meet one or more of the four conditions in s 9(2). Secondly, it must be reasonable to make the disclosure. Reasonableness must be assessed against the seven criteria in s 9(3). These two tests shift the focus away from an assessment of the employee's good faith and the reasonableness of his beliefs to more tangible and objectively determinable facts. A narrow approach to s 9(1) could therefore block the enquiry firstly into facts that are more easily ascertainable in ss 9(2) and (3) and secondly, into the alleged impropriety and the retaliation. The defence that any one of the requirements in s 9 is lacking must be specifically pleaded and proved. Deciding whether all the requirements are met is a question of fact. The more serious the allegation, the more cogent the proof. The threshold of proof required for each requirement must be assessed from all the facts, case by case ... To saddle the employee with a burden of proof would set too high a standard which, if not met, could disqualify the disclosure and bar an enquiry into whether the employer breached the PDA by subjecting the employee to an occupational detriment."

<sup>40</sup> Govindjee, Vrancken, Holness, Holness, Horsten, Killander, Mpedi, Olivier, Stewart, Stone and Van der Walt *Introduction to Human Rights Law* (2009) 121.

<sup>41</sup> 2002 8 BCLR 771 (CC) par [24].

<sup>42</sup> In *Khumalo v Holomisa supra* par [24] the court emphasized the important role of the media in the promotion of good governance and held that "[i]n a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperilled. The Constitution thus asserts and protects the media in the performance of their obligations to the broader society, principally through the provision of section 16."

<sup>43</sup> *Tshishonga v Minister of Justice & Constitutional Development supra* 371e-372d.



media expose corruption it strengthens democracy.<sup>44</sup> The court also stressed that the public interest is of importance when a disclosure is made and that if a disclosure is not in the public interest then such a disclosure to the media will not be justified. Confidentiality must be maintained in order to better investigate the complaints or protect the employer until suspicions are confirmed. When the complaint has already been addressed internally or by a prescribed regulator, disclosures to the media will also not be justified.<sup>45</sup>

### 2 3 The Engineering Council case

In *Engineering Council* the second applicant, Mr Weyers, was employed by the first respondent, City of Tshwane Metropolitan Municipality. He held the position of Managing Director: Power System Control and was also registered as a professional engineer with the first applicant, the Engineering Council of South Africa, in terms of the Engineering Profession Act 46 of 2000. The second applicant was required to appoint systems operators who, however, in his judgment did not have the necessary skills nor experience for the power-system control section. The second applicant was quite vocal in making his concerns known about appointing people simply for the sake of employment equity as such persons, according to his judgment, did not have the necessary skills and/or expertise and would endanger the lives of the public and/or fellow employees. The second applicant raised his concerns by writing a letter to senior managers of the municipality and asked them to relieve him from his duties to ensure safety requirements under the Occupational Health and Safety Act 85 of 1993. He also sent copies of the letter to the Department of Labour and the Engineering Council. The municipality instituted disciplinary action against him for sending copies to external organs without first taking his concerns to the highest levels and without prior authorization for approval. Before the disciplinary committee could impose the sanction, the second applicant, together with the first applicant, applied for an interim order from the High Court interdicting the municipality from continuing with the disciplinary proceedings or imposing any disciplinary action against him. The court found that the second applicant made a general-protected disclosure and that he reasonably believed that the information and allegation that he disclosed were substantially true. The court added that he had previously made a disclosure of substantially the same information to his employer, but no action was taken within a reasonable time after the disclosure had been made. The court was also of the view that the impropriety was of an “exceptionally serious nature” and that when the reasonableness of the disclosure was tested against the provisions of section 9(3) of the PDA, it was manifest that it was in the public interest.<sup>46</sup>

The case subsequently went on appeal. The Supreme Court of Appeal in *City of Tshwane Metropolitan Municipality v Engineering Council of South*

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<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> *Engineering Council of SA v City of Tshwane Metropolitan Municipality supra* 935b-e.

*Africa*<sup>47</sup> also looked at whether the disclosures made by Mr Weyers, the second respondent, was protected under the PDA. The court was also faced with jurisdictional issues concerning the High and Labour Courts. The court made it clear that the case was not about disciplinary proceedings and whether Mr Weyers had misconducted himself or about the application of employment equity at the municipality.<sup>48</sup> The court stressed the importance of the PDA in the protection of employees who make disclosures of unlawful or irregular conduct in the private and public sectors and the fact that protection is provided to such employees.<sup>49</sup> Before the court dealt with whether Mr Weyer's letter contained a protected disclosure the court dealt with the contention on behalf of the appellant that the matter falls exclusively within the jurisdiction of labour tribunals under the LRA and is not a matter of jurisdiction of the High Court. The court looked at the provision in section 4(1) of the PDA that provides that "[a]ny employee who has been subjected, is subject or may be subjected, to an occupational detriment in breach of section 3, may – (a) approach any court having jurisdiction, including the Labour Court ..., for appropriate relief". The court held as to the matter whether the Labour Court is the primary jurisdiction in cases under the PDA as follows:

"The issue in this case, whilst arising in the context of employment, relate to questions of public safety and the professional obligations of persons in the position of Mr Weyers in the context of accountability of a municipality for proper service delivery of electricity within its municipal area. Those issues are by no means solely all labour-related matters. The questions that can arise in relation to a protected disclosure, such as whether the person concerned had reasonable grounds for believing that a criminal offence had been committed or that a miscarriage of justice had occurred or that the environment is likely to be damaged are not labour-related issues and are more appropriately dealt with in ordinary courts. The mere fact that it is an employee who is protected under the PDA from an occupational detriment in relation to that employee's working environment does not mean that every issue arising under the PDA is a 'quintessential labour-related issue' as contended by Mr Pauw. For those reasons I reject the challenge of the High Court's jurisdiction."<sup>50</sup>

The court then turned to the issue of whether a protected disclosure was made by Mr Weyers. The first argument that the court had to deal with was that the contents of the letter did not constitute information because it only contained the opinion of Mr Weyers. The court points out that "a person's opinion is itself a fact" and that "an opinion often relates to a fact the existence of which can only be determined by considering the views of a suitably qualified expert".<sup>51</sup> The court added that the question whether a person has the requisite skills to undertake a dangerous and skilled task is a

<sup>47</sup> 2010 3 BLLR 229 (SCA).

<sup>48</sup> *City of Tshwane Metropolitan Municipality v Engineering Council of South Africa supra* par [31].

<sup>49</sup> *City of Tshwane Metropolitan Municipality v Engineering Council of South Africa supra* par [33].

<sup>50</sup> *City of Tshwane Metropolitan Municipality v Engineering Council of South Africa supra* par [39].

<sup>51</sup> *City of Tshwane Metropolitan Municipality v Engineering Council of South Africa supra* par [41].

question of fact. The court also pointed out that the fact can only be ascertained by way of tests and assessment by persons who know what the task entails. The latter is done prior to their appointment and because of this, the question as to whether these persons had the requisite skills was relevant when they were raised by Mr Weyers.<sup>52</sup> The court also rejected the dictum in *CWU*, where it was held that a subjective opinion cannot be information and found that with regard to this issue that the judgment was wrong.<sup>53</sup> The court further found that the approach followed in the argument by the appellant was narrow and inconsistent with the broad purposes of the PDA, which “seeks to encourage whistle-blowers in the interests of accountable and transparent governance in both the public and the private sector[s]”.<sup>54</sup> The court also stressed that “[o]n the construction contended by Mr Pauw [for the appellant] the threat of disciplinary action can be held as a sword of Damocles over the heads of employees to prevent them from expressing honestly held opinions to those entitled to know of those opinions. *A culture of silence rather than one of openness would prevail. The purpose of the PDA is precisely the opposite*”.<sup>55</sup> The court confirmed that the letter did in fact constitute a disclosure as defined in section 1 of the PDA.<sup>56</sup>

The court was then faced with the issue as to whether the disclosure made to the Department of Labour and the Engineering Council was a protected disclosure in accordance with section 9 of the PDA. The court was satisfied with the fact that the disclosure of Mr Weyers was made in good faith, that he reasonably believed that the information disclosed and the allegations made by him were substantially true and was not for personal gain.<sup>57</sup> The court also pointed out that Mr Weyers acted because of his professional responsibilities in that he was concerned about the dangers arising from appointing people whom he regarded as being insufficiently skilled. It was clearly apparent that he was *bona fide* and he believed that is was true. The court added that his disclosure came at a “considerable cost” and was not for personal gain.<sup>58</sup> The court also looked at the counter-argument that the letter between Mr Weyers and City of Tshwane Metropolitan Municipality merely reflected a disagreement and did not amount to a disclosure because there was no previous disclosure made by Mr Weyers and that it did not relate to any impropriety as required by section 9(2)(d). The court rejected this argument as follows:

“In regard to the first it was put to him that the effect of his submission was that if the employer knew of the problem before the employee went and reported it there could be no prior disclosure to the employer and accordingly

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

<sup>54</sup> *City of Tshwane Metropolitan Municipality v Engineering Council of South Africa supra par [42].*

<sup>55</sup> *Ibid* (author’s own emphasis).

<sup>56</sup> *City of Tshwane Metropolitan Municipality v Engineering Council of South Africa supra par [43].*

<sup>57</sup> *City of Tshwane Metropolitan Municipality v Engineering Council of South Africa supra par [45]; Tshishonga v Minister of Justice & Constitutional Development supra 362g-364f; and s 9 of the PDA.*

<sup>58</sup> *City of Tshwane Metropolitan Municipality v Engineering Council of South Africa supra par [45].*

no protected disclosure could be made to anyone else. There was no answer to this point and the postulate cannot be correct. Its effect is that if an employee goes to the managing director and reports that bribes are being paid in order to secure contracts flowing from successful tenders that is not a disclosure if the managing director authorised the payments, and that knowledge would bar a protected disclosure to anyone else, such as the party issuing the tenders. Such a construction would undermine the whole purpose of the PDA because it has the result that the more culpable the employer in the conduct giving rise to the report and the greater its knowledge of the wrongdoing, the less would be the protection enjoyed by the employee.”<sup>59</sup>

The court found that the disclosure made by Mr Weyers, was a protected disclosure and dismissed the appeal with costs.<sup>60</sup>

### 3 GENERAL REMARKS AND CONCLUSION

#### 3.1 General

What is interesting about the PDA is that it affords protection to employees who blow the whistle and make protected disclosures. This protection is afforded by not subjecting them to occupational detriments. The PDA contains the same definition as the LRA and the Basic Conditions of Employment Act 75 of 1997.<sup>61</sup>

An employee is defined as:<sup>62</sup>

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

Interestingly enough neither the LRA nor the BCEA contains a definition of an employer. The PDA on the other hand does contain a definition of an employer; it is defined as any person:<sup>63</sup>

- “(a) who employs or provides work for any other person and who remunerates or expressly or tacitly undertakes to remunerate that other person; or
- (b) who permits any other person in any manner to assist in the carrying on or conducting of his, her or its business, including any person acting on behalf of or on the authority of such employer.”

<sup>59</sup> *City of Tshwane Metropolitan Municipality v Engineering Council of South Africa supra par [47].*

<sup>60</sup> *City of Tshwane Metropolitan Municipality v Engineering Council of South Africa supra par [50]-[52].*

<sup>61</sup> Hereinafter “the BCEA”.

<sup>62</sup> See ss 1 of the PDA, BCEA and EEA; and s 213 of the LRA. In *Wyeth SA (Pty) Ltd v Manqele* 2005 28 ILJ 749 (LAC) the Court confirmed that where a person's contract of employment is repudiated before he commences with employment, he is regarded as an employee for purposes of the LRA and is thus covered by the dismissal protection in the Act.

<sup>63</sup> S 1 of the PDA.

Both definitions were applied and confirmed in *Charlton v Parliament of the Republic of South Africa*.<sup>64</sup> In *Charlton* the applicant was employed by the respondent. He was dismissed after being accused of misconduct for making disclosures relating to improper travel benefits claimed by members of parliament. The applicant alleged that the disclosures were protected in terms of the PDA and that his dismissal was automatically unfair. The respondent submitted that the disclosures were not protected disclosures because members of parliament were neither employers of the parliamentary staff nor employees of parliament. The court confirmed that members of parliament fit into the definition of "employee" in that they perform duties for parliament being an organ of state because they are entitled to and do receive remuneration. Their remuneration is not paid in terms of the BCEA, but they do in fact receive salaries, allowances and benefits from the national revenue fund. The members of parliament are thus rewarded for services rendered to parliament.<sup>65</sup> The court also confirmed that members of parliament occupy positions which are *sui generis*. The court added that parliamentary staff of which the applicant was a member, supports the operation of parliament as carried out by members of parliament because without the members of parliament there would be no staff to carry out the work. The members of parliament thus permit the staff to assist them in the carrying out of their business. The court also added that because members of parliament were to be regarded as employers for purposes of the PDA, they do not have to employ or remunerate the support staff because what satisfies the definition is the fact that they provide work and permit other persons to assist in the carrying on of their business.<sup>66</sup> The court further added that parliament was the employer of the applicant and in terms of the PDA "the employer has a responsibility to take all necessary steps to ensure that employees who disclose information are protected from any [reprisals] as a result of such disclosure". The court went on to state that in this case parliament denied the protection of the applicant and that it "does not make sense that the members made a law that does not or was not intended to apply to them". This would make a mockery of the purpose of the PDA as a whole.<sup>67</sup>

### 3 2 Protection against victimization: Occupational detriments and remedies

Section 3 of the PDA provides that no employee may be subjected to any occupational detriment by his or her employer on account of having made a protected disclosure.<sup>68</sup> Obviously there must be "some demonstrable *nexus* between making of the disclosure and the occupational detriment threatened

<sup>64</sup> 2007 28 ILJ 2263 (LC).

<sup>65</sup> *Charlton v Parliament of the Republic of South Africa supra* 2270e-h.

<sup>66</sup> *Charlton v Parliament of the Republic of South Africa supra* 2271a-2272g.

<sup>67</sup> *Charlton v Parliament of the Republic of South Africa supra* 2274a-c.

<sup>68</sup> *Tshishonga v Minister of Justice & Constitutional Development supra* 365f, where the court emphasized that unfair labour practices and unfair dismissals are occupational detriments and that the employer ultimately bears the burden of proving that it did not commit an unfair labour practice or dismissed the employee unfairly.

or applied by the employer” for the protection of the PDA to apply.<sup>69</sup> In *Theron v Minister of Correctional Services*<sup>70</sup> the applicant was a medical doctor responsible for providing health care at a prison. The applicant informed the Inspecting Judge of Prisons and the Parliamentary Select Committee on Correctional Services about his concern of the health care standards at the prison whereupon the judge and the committee subsequently compiled additional reports which were highly critical of health care at the prison. The applicant was charged for misconduct for contacting the inspecting judge and making the disclosures without informing the area commissioner first. The applicant launched urgent proceedings against the disciplinary proceedings. The charges were subsequently withdrawn against him which led to a settlement of the unfair labour practice dispute. When the applicant attempted to return to work he was informed that his services were no longer required at the prison and that he was to be placed at a community health centre. The court had to investigate whether the disclosure was a protected disclosure because it was not made to the employer, a member of cabinet or Executive Council or a body envisaged by section 8 of the PDA. The court was left with the task of assessing if it was protected by section 9 of the PDA. The court was satisfied that the conditions in section 9 were met and that the applicant suffered an occupational detriment by being transferred against his will.<sup>71</sup> The court noted with regard to the “balance of convenience” that the applicant had been a “sessional” doctor at the prison for over 20 years and that the only inconvenience that the Department of Correctional Services would suffer if the applicant returned to the prison was the fact that some officials who had taken exception to the applicant’s protected disclosures would have to work with him. The court found that the balance of convenience favours the applicant because he suffered an occupational detriment and granted interim relief in his favour.<sup>72</sup> In terms of section 186(2) and section 187(1) of the LRA an employee who makes a protected disclosure in terms of the PDA is protected against any occupational detriment.<sup>73</sup> An occupational detriment

<sup>69</sup> *CWU v Mobile Telephone Networks (Pty) Ltd supra* 746g.

<sup>70</sup> 2008 5 BLLR 458 (LC).

<sup>71</sup> *Theron v Minister of Correctional Services supra* 466a-467h.

<sup>72</sup> *Theron v Minister of Correctional Services supra* 470b-f.

<sup>73</sup> S 186(2)(d) of the LRA specifically makes provision for the protection of an employee against the wrongful suffering of an occupational detriment, short of dismissal, for making a protected disclosure. The LRA has been amended since the promulgation of the PDA to make provision for the right of an employee not to be subjected to an unfair labour practice. This provision implies that the provision in s 23(1) of the Constitution that everyone has the right to fair labour practices is guaranteed to an employee who makes a protected disclosure. S 187(1)(h) of the LRA provides that the dismissal of an employee is automatically unfair if the reason for his or her dismissal is a contravention by the employer of the PDA because an employee has made a protected disclosure in terms of the latter Act. In *Pedzinski v Andisa Securities (Pty) Ltd (formerly SCMB Securities (Pty) Ltd)* 2006 27 ILJ 362 (LC) the applicant notified her superior and other senior people at the company of irregular trading in shares by certain staff members. Her supervisor was dissatisfied that the applicant had reported the irregularities to other persons within the company’s hierarchy. The relationship between the applicant and her supervisor deteriorated. The supervisor motivated for an increase in the staff complement of the department, insisting that the applicant had to revert to work on a full-time basis. He notified the applicant that she would be required to work full-time and also that if no suitable alternative placement could be

includes an employee being subjected to any disciplinary action,<sup>74</sup> dismissal, suspension, demotion, harassment, intimidation, transfer, threats, *et cetera*. The court in *Tshishonga* held that the applicant was subjected to occupational detriment regardless of being paid during his suspension and being assured of remuneration until he reached the retirement age of 65. In terms of the settlement, he had been denied the dignity of employment.<sup>75</sup> When looking at the remedies for suffering an “occupational detriment”, the purpose of compensation is to provide redress for patrimonial and non-patrimonial losses. When determining the amount of compensation that is reasonable, fair and equitable, particular criteria must be taken into account. To reach the remedy stage means that the applicant must successfully prove that he had made a protected disclosure and that he was subjected to an “occupational detriment”.<sup>76</sup>

It is important to note that an employee who is subjected to an “occupational detriment” is in a position similar to one who is victimized or discriminated against and that compensation awards for discrimination are guidelines for these claims.<sup>77</sup> Where an employee suffered an “occupational detriment” because the employer had failed to protect the employee, the employer cannot be allowed to limit compensation on the basis of its own

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found for her within the company that she would be retrenched. At a subsequent meeting the applicant made counter-proposals in an effort to retain her employment. Her supervisor rejected these, and the applicant was subsequently dismissed. She contended that she had been dismissed in terms of s 187(1)(h) of the LRA, alternatively in terms of s 187(1)(c) and alternatively in terms of s 187(1)(f) of the LRA. The court held that the applicant had made the disclosures with the reasonable belief that she was acting in accordance with the regulatory procedures in place and that her conduct fell squarely within the ambit of s 6 of the PDA and that she made a protected disclosure (370d). The Court further held that the only reasonable inference to be drawn is that the applicant was dismissed because of the protected disclosure made and that the decision to retrench was not genuine but a sham and that the applicant’s dismissal was therefore automatically unfair, as contemplated by s 187(1)(h) of the LRA (*Pedzinski v Andisa Securities (Pty) Ltd (formerly SCMB Securities (Pty) Ltd supra 378a*).

<sup>74</sup> Although the term “disciplinary action” in the definition of an occupational detriment is not defined it is wide enough to include a disciplinary enquiry as there is considerable prejudice in being faced with such an enquiry. See also *Grieve v Denel (Pty) Ltd supra*, where the Court held that the applicant established a link between the charges which had been brought against him and the fact that he made the disclosures. This revealed a breach of legal obligations and possible criminal conduct (377i). Thus the disciplinary enquiry that the applicant had faced was a disciplinary action as contemplated by the PDA (377c-d).

<sup>75</sup> *Tshishonga v Minister of Justice & Constitutional Development supra 375d*.

<sup>76</sup> *Tshishonga v Minister of Justice & Constitutional Development supra 375e-f*.

<sup>77</sup> S 50(2) of the EEA provides that if the labour court decides that an employee has been unfairly discriminated against, the court may make an appropriate order that is just and equitable in the circumstances including the payment of compensation, damages, an order directing the employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future, *et cetera*. This could, however, fall within the unspecified grounds of discrimination taking into consideration that s 6(1) of the EEA provides that “No person may unfairly discriminate, directly or indirectly against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.” See also *Stojce v University of KZN (Natal) 2007 3 BLLR 246 (LC)*, where the unspecified grounds of qualifications and tertiary teaching and research experience, were considered.

conduct. It should count against an employer who fails to protect or subjects an employee to an “occupational detriment” when determining the amount of compensation.<sup>78</sup> Section 191(13) of the LRA permits an employee to approach the labour court directly for adjudication where the employee alleges that he has been subjected to an “occupational detriment” by the employer for having made a protected disclosure.<sup>79</sup> Although the PDA makes provision for the protection of disclosures and for remedies, the LRA is still important in determining the dispute resolution process and the appropriate remedies.<sup>80</sup> One of these remedies available to an employee would be to approach the court for a final interdict. The court confirmed in *Engineering Council* that in order to grant an applicant a final interdict a “clear right” is required and that a final interdict would be an “appropriate remedy” as intended by section 38 of the Constitution.<sup>81</sup>

Although the court in *Tshishonga* held that an employee who suffers an “occupational detriment” is in a position similar to one who is victimized or discriminated against and that compensation awards for discrimination are therefore guidelines for these claims, it must be stressed that in the case of an unfair labour practice the employee would be entitled to a maximum of 12 months compensation and in the case of automatically unfair dismissal to a maximum of 24-months compensation. The compensation of 24 months is different from cases where the employer did not prove that the reason for dismissal was a fair reason related to the employee’s conduct, capacity or the employer’s operational requirements or because the employer did not follow a fair procedure or both. In these instances the compensation must be “just and equitable” but not more than the equivalent of 12-months remuneration. On appeal in *Minister for Justice & Constitutional Development v Tshishonga*<sup>82</sup> the Labour Appeal Court was faced with the question what is just and equitable in circumstances where the compensation is for non-patrimonial loss. The court stated that assistance can be gained from the *actio injuriarum* which is granted for a *solatium*.<sup>83</sup> The court added that in cases of *solatium* “the award is, subject to one of exception of a non-patrimonial nature, and is in satisfaction of the person who has suffered an attack on their dignity and reputation or an onslaught on their humanity”.<sup>84</sup> The court added that the exception is for the amount relating to the costs of R177 000 which were incurred by the respondent when he had to defend himself, and which are patrimonial in nature. The court also stated that the respondent must be compensated for the

<sup>78</sup> *Tshishonga v Minister of Justice & Constitutional Development supra* 375g-376b; and *Global Technology Business Intelligence (Pty) Ltd v CCMA* 2005 5 BLLR 487 (LC) 489f-h.

<sup>79</sup> S 4 of the PDA which provides that an “occupational detriment” short of dismissal is “deemed to be an unfair labour practice and that any disputes in relation thereto must follow the procedure set out in the LRA and may be referred to the Labour Court for adjudication.”

<sup>80</sup> S 4 of PDA; and ss 191(5)(b) and (13), 193(4) and 194 of the LRA. In *Engineering Council of SA v City of Tshwane Metropolitan Municipality supra* 936i-j the court confirmed that if an employee wants to rely on the PDA that the employee must follow the procedure set out in the LRA.

<sup>81</sup> *Engineering Council of SA v City of Tshwane Metropolitan Municipality supra* 936e-g.

<sup>82</sup> 2009 9 BLLR 862 (LAC).

<sup>83</sup> *Minister for Justice & Constitutional Development v Tshishonga supra* par [18].

<sup>84</sup> *Ibid.*



R177 000 because he had to defend himself “against the wholly unwarranted onslaught launched against him”.<sup>85</sup> The court held that the following factors could be taken into account when quantifying compensation: (i) the embarrassment and humiliation the respondent had suffered by being summarily removed from his post without any reason given and thereafter being subjected to a suspension and subsequent disciplinary hearing, (ii) his being called a “dunderhead” by the Minister of Justice on national television and that the respondent was rapped over the knuckles for poor work performance [which was not true], (iii) gross humiliation by being moved to a position which was non-existent at the time and being thereafter for long periods without any work or without work instructions, (iv) the undisputed evidence of the respondent was that, because of all the humiliation, victimization and harassment by the appellant, he had to receive trauma counselling as a result of the way in which he was treated after the disclosures had been made to the media, (v) the respondent had to employ an attorney to defend him at the disciplinary hearing (where he was found not guilty) which cost him R77 000 and R100 000 to protect his interests and rights at the inquiry, to mention only a few.<sup>86</sup> The court then held that “a far more significant sum, should be awarded as compensation for the indignity suffered, the extent of the publication of attack on the respondent (publication being on national television) and the persistent, egregious nature of the attacks upon respondent which have been triggered because he had acted in the national interest”.<sup>87</sup> The court awarded *Tshishonga* R277 000 in compensation (R100 000 for suffering the indignity and R177 000 in respect of costs incurred in his defence) as well as all his legal costs.<sup>88</sup> Section 159(5) of the Companies Act also contains a provision as to compensation of the whistle-blower. It holds that if a person contemplated in subsection (4) makes a protected disclosure and suffers any damages he or she will be entitled to claim compensation from the person who engages in conduct with the intent to cause detriment to the whistle-blower, and the conduct causes such detriment; or directly or indirectly makes an express or implied threat, whether conditional or unconditional, to cause any detriment to the whistle-blower or to another person, and intends the whistle-blower to fear that the threat will be carried out; or is reckless as to causing the whistle-blower to fear that the threat will be carried out, irrespective of whether the whistle-blower actually feared that the threat would be carried out. This protection afforded by the Companies Act is obviously much wider because the category of protected persons is extended as well as the protection offered. It will also be within the court’s power to grant an order of reinstatement if the employee was dismissed. In terms of section 193(2) of the LRA an order for reinstatement would also be available to dismissed employees unless the dismissed employee does not wish to be reinstated or the continuation of the employment relationship would be intolerable or it is not reasonably

<sup>85</sup> *Minister for Justice & Constitutional Development v Tshishonga supra* par [19].

<sup>86</sup> *Minister for Justice & Constitutional Development v Tshishonga supra* par [16] and [19].

<sup>87</sup> *Minister for Justice & Constitutional Development v Tshishonga supra* par [22].

<sup>88</sup> *Minister for Justice & Constitutional Development v Tshishonga supra* par [22]-[23].

practicable for the employer to reinstate an employee or the dismissal was procedurally unfair.

In *National Union of Textile Workers v Stag Packings (Pty) Ltd*<sup>89</sup> the court stated that the appellants' allegations that they had been dismissed for being members of the trade union have been established, the respondents could then be proved to have acted illegally. If reinstatement of the appellants was not granted it would frustrate the objects that victimization of employees should be prevented where they are victimized for merely being members of a trade union.<sup>90</sup> The same sentiment was followed in *Young v Coega Development Corporation (Pty) Ltd (2)*,<sup>91</sup> where the court held that the objects of the PDA would also be frustrated if the applicant was not reinstated because once an employee has on a *prima facie* basis established that he or she suffered an occupational detriment, then he or she is entitled to the full protection of the court. This protection includes reinstatement.<sup>92</sup> In *Sekgobela v State Information Technology Agency (Pty) Ltd*<sup>93</sup> the court found that the applicant was dismissed for an impermissible reason, namely for making a protected disclosure and that it was the primary reason for his dismissal. The dismissal of the applicant was found to be automatically unfair. *Sekgobela* is a good illustration of a case where the applicant did not seek reinstatement and the court was left granting the only other remedy, that of being "just and equitable", in the event remuneration not more than the equivalent of 24-months remuneration.<sup>94</sup>

What is interesting is the fact that the Companies Act<sup>95</sup> protection is much wider than that of the PDA. Section 159 of the Companies Act not only protects employees who blew the whistle but also protects other stakeholders such as shareholders, directors, company secretaries, prescribed officers, registered trade union representatives of the employees, suppliers of goods and services to the company or even employees of a supplier. This clearly underwrites the "stakeholder-inclusive" approach in King III which recognizes not only employees as important stakeholders, but also other stakeholders such as customers, suppliers, creditors and the government. Section 159(4) of the Companies Act does not only protect an employee, but extends the protection to shareholders, directors, company secretaries, prescribed officers, registered trade union representatives of the employees, suppliers of goods and services to the company or even employees of a supplier when they make a protected disclosure. Such persons have a qualified privilege in respect of the disclosure and are immune from any civil, criminal and/or administrative liability for that disclosure. It is clear that the Companies Act is extending the protection but how is the PDA going to give effect to this. It must be noted that the PDA gives protection to employees who are subjected to occupational detriments

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<sup>89</sup> 1982 4 SA 151 (T).

<sup>90</sup> *National Union of Textile Workers v Stag Packings (Pty) Ltd supra* 158g.

<sup>91</sup> 2009 30 ILJ 1786 (ECP).

<sup>92</sup> *Young v Coega Development Corporation (Pty) Ltd (2) supra* 1798a-c.

<sup>93</sup> 2008 29 ILJ 1995 (LC).

<sup>94</sup> *Sekgobela v State Information Technology Agency (Pty) Ltd supra* 2009f-j.

<sup>95</sup> Ss 159(4)-(7) of the Companies Act.

and not to other parties as per the Companies Act. The Companies Act, however, is silent on how the protection it provides will provide this additional protection. It is evident from these provisions that the protection in the Companies Act was not properly aligned with the protection and provisions of the PDA. It is therefore clear that a need to amend the PDA exists in order to provide proper protection to the additional parties mentioned in the Companies Act. The PDA currently provides extensive protection to employees, but not to these additional persons mentioned in the Companies Act. The Companies Act also mentions that the whistle-blower is entitled to compensation<sup>96</sup> from the person who causes a detriment, but it does not specify the amount of compensation as in the case where an employee blows the whistle. This will obviously create problems with regard to whether it is fair to limit the amount of compensation in the case of an employee towards that of other whistle-blowers. Another possible problem that might arise is the fact that detriments suffered by other stakeholders will not be heard in the Labour Court but in the High Court. It is thus suggested that these issues must be re-investigated before the re-enactment of a new Companies Act in order to address possible problems and provide clarity and to amend the PDA in order to address these and similar issues.

#### 4 CONCLUSION

What must be remembered is that whistle-blowing goes against what is generally expected of employees, namely not questioning a superior's decisions or acts, more so in public.<sup>97</sup> Sometimes employees are forced to go outside the organization to disclose the irregularity. A whistle-blower takes a risk by disclosing the irregularities or wrongdoing – it often comes at the price of retaliation from the organization. The PDA and now the Companies Act provide protection to not only employees but also other stakeholders who dare blow the whistle against irregularities or wrongdoing. It is again evident from international cases that whistle-blowing and its role in organizations is topical. Good examples of these are Lehman Brothers in the United States where a senior vice-president blew the whistle on accounting

<sup>96</sup> S 159(5). This section provides that a shareholder, director, company secretary, prescribed officer or employee of a company, a registered trade union that represents employees of the company or another representative of the employees of that company, a supplier of goods or services to a company, or an employee of such a supplier blows the whistle that such a person is entitled to compensation from another person for any damages suffered if the first person is entitled to make, or has made, a disclosure contemplated in this section and, because of that possible or actual disclosure, the second person –

“(a) engages in conduct with the intent to cause detriment to the first person, and the conduct causes such detriment; or

(b) directly or indirectly makes an express or implied threat, whether conditional or unconditional, to cause any detriment to the first person or to another person, and

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(i) intends the first person to fear that the threat will be carried out; or

(ii) is reckless as to causing the first person to fear that the threat will be carried out, irrespective of whether the first person actually feared that the threat would be carried out.”

<sup>97</sup> Perks and Smith “Employee Perceptions Regarding Whistle-blowing in the Workplace: A South African Perspective” 2008 *SA Journal of Human Resource Management* 15.

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improprieties and was then laid off and in Australia in the case of Allan Kessing where blowing the whistle in a public sector context is being considered.<sup>98</sup>

In line with whistle-blowing as a corporate governance mechanism, the following universal truth must be emphasised:

“[W]histle-blowing is healthy for organisations – managers no longer have a monopoly on information and that they need to know that their actions can and will be monitored and reported to shareholders and to the public at large. There is a loyalty to the organisation at large. Whistle-blowing should be a safe alternative to silence; it deters abuse. Many catastrophes would be averted if employees did not turn a blind eye and if employers did not turn a deaf ear or blame the messenger instead of heeding the message.”<sup>99</sup>

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<sup>98</sup> For more details see <http://www.reuters.com/article/idUSSGE62F07I20100316> and <http://www.theaustralian.com.au/business/news/allan-kessings-conviction-tainted>.

<sup>99</sup> Mischke 2007 *Contemporary Labour Law* 98.