THE PLIGHT OF SOUTH AFRICAN WHISTLE-BLOWERS: SEARCHING FOR EFFECTIVE PROTECTION

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SUMMARY

Daily reports in the media about the extent of corruption in South Africa and the plight of whistle-blowers who dare to report it demonstrates the inadequacy of protective measures in South Africa. The murder of whistle-blower Babita Deokaran saw other whistle-blowers go into hiding, fearing for their own safety, and calls for urgent measures to be implemented to ensure the physical safety of whistle-blowers. The United Nations Convention Against Corruption (UNCAC) contains measures that could be implemented to protect the physical safety of whistle-blowers.

Currently, the only legislation specifically protecting whistle-blowers in South Africa is the Protected Disclosures Act (PDA),[1] which only protects against detriment in the workplace. A number of other statutes provide a measure of protection, but they are fragmented and by no means adequate. A legal comparison with the United Kingdom (UK), Ireland and the United States of America (US) may provide guidelines for reform in South Africa. The UK is currently debating the Protection for Whistleblowing Bill (Bill 27) in the House of Lords to improve protection for whistle-blowers. This Bill proposes to sever the required link to employment so that *any* person reporting wrongdoing will be protected if certain requirements are met. Bill 27 also establishes the Office of the Whistleblower, which has wide-ranging powers to protect whistle-blowers. The Irish Protected Disclosures (Amendment) Act 2022 was amended to broaden the definition of "worker" to include persons not previously protected and to establish an Office of the Commissioner similar to the Office of the Whistleblower in Bill 27, although with limited power. Neither the UK nor Ireland requires whistle-blowers to report in good faith; the focus is on the message instead of the messenger. Financial rewards for whistle-blowers in the US have proved to be highly successful and could be implemented in South Africa.

It is recommended that physical protection of whistleblowers be prioritised, that a Whistle-Blowers' Office with wide-ranging powers be established, that protection be extended to persons outside the employment relationship, that whistle-blowers be rewarded for reporting on wrongdoing in prescribed circumstances, that the burden of proof be reversed and that the good faith requirement for protection be dropped.

1 INTRODUCTION

Although there are many definitions of whistle-blowing,[2] the definition given below by Transparency International is preferred because persons who

[1] 26 of 2000.

[2] Chaoulat, Carrión-Crespo and Licata "Law and Practice on Protecting Whistle-Blowers in the

disclose information and entities to whom information is disclosed are not limited. Whistle-blowing is defined as:

> "[t]he disclosure of information about a perceived wrongdoing in an organisation, or the risk thereof, to individuals or entities believed to be able to elect action."[3]

Whistle-blowers play an important role in the public and private sectors to expose corruption, criminal activities, infringement of human rights, and conduct threatening the environment. It is especially important in South Africa to encourage whistle-blowers to report wrongdoings in light of evidence heard by the Judicial Commission of Inquiry Into State Capture (Zondo Commission), which indicated that corruption is systemic in both the private and public sectors in South Africa.[4] This is also reflected in a report of the non-governmental organisation, Corruption Watch, which, from 2012 to 2021, received 36 224 whistle-blowing reports.[5] Unsurprisingly, according to Transparency International's 2022 public-sector corruption-perceptions index, South Africa is ranked the 72nd most corrupt country in the world out of 180 countries. The index ranking is calculated on a scale of 0 (very clean) to 100 (highly corrupt), with South Africa scoring 43/100.[6] With reference to the ongoing implosion of Eskom caused by looting and corruption at the once-exemplary power giant,[7] the current energy crisis could probably have been avoided if whistle-blowers had been sufficiently protected to come forward to uncover what was happening. Power cuts are one of the best examples of the social injustice caused by corruption. While affluent persons can buy alternative power sources, the vulnerable and poor are wholly dependent on the delivery of services by a state-owned entity.

Whistle-blowers may be inhibited from reporting on wrongdoing because they feel torn between loyalty to their employer and their conscience, regarding the harm to the public should they keep quiet.[8] There is also the very real possibility of a negative impact on their employment and danger to their own and their families' safety.

Public and Financial Services Sectors" *International Labour Organization* (2019) https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/publication/wcms_718048.pdf (accessed 2023-01-23).

3 Transparency International "Recommended Draft Principles for Whistleblowing Legislation" (November 2009) https://www.transparency.org/files/content/activity/2009_PrinciplesForWhistleblowingLegislation_EN.pdf (accessed 2023-01-31).

4 Zondo *Judicial Commission of Inquiry Into State Capture Report: Part 1* (22 January 2022) https://www.gov.za/sites/default/files/gcis_document/202201/judicial-commission-inquiry-state-capture-reportpart-1.pdf (accessed 2023-01-23) par 458.

5 Corruption Watch *Annual Report (2021)* https://www.corruptionwatch.org.za/wp-content/uploads/2022/03/cw-2021-annual-report-10-years-20220330-spreads.pdf (accessed 2023-01-23).

6 Transparency International "Corruption Perceptions Index 2022" (2021) https://www.transparency.org/en/cpi/2021/index/zaf (accessed 2023-01-23).

7 Karrim, Cowan and Masondo "The Eskom Files. Here's What Eskom Officials Bought With Their Kusile Loot" (28 March 2022) https://www.news24.com/news24/southafrica/news/the-eskom-files-heres-what-eskom-officials-bought-with-their-kusile-loot-20220328 (accessed 2023-01-10).

8 Dungan, Waytz and Young ("The Psychology of Whistleblowing" 2015 6 *Current Opinion in Psychology* 129–133) describe this as the dichotomy between loyalty and fairness.

The discussion of case law below indicates that, in many instances, whistle-blowers, instead of being supported, have been harassed and victimised, called into disciplinary hearings,[9] dismissed,[10] and financially ruined.[11] Some had to leave South Africa for their safety,[12] and some even paid with their lives for making a disclosure.[13]

The Protected Disclosures Act (PDA)[14] is the only statute dedicated specifically to protecting whistle-blowers, but only against unfair treatment in the workplace. A number of other statutes also provide a measure of protection, but there is no integrated matrix of protection for whistle-blowers. Heading 2 of the article analyses this existing protection, pointing out the shortcomings of the current South African legal framework. Heading 3 discusses the United Nations Convention Against Corruption (UNCAC), while heading 4 discusses the European Directive on Whistleblowing (EDW),[15] which could provide guidance on improving protection for whistle-blowers in South Africa. Heading 5 considers legislation in Ireland and the United States of America (USA) and proposed legislation in the United Kingdom (UK). Heading 6 concludes the article with recommendations on improving protection of whistle-blowers in South Africa.

2 PROTECTION FOR WHISTLE-BLOWERS IN SOUTH AFRICA

Fundamental rights in the Constitution of the Republic of South Africa, 1996 (the Constitution), such as the right to be free from all forms of violence (section 12(1)(*c*)), the right to fair labour practices (section 23), and especially the right to freedom of speech (section 16) are relevant in the protection of whistle-blowers and should be given effect to in legislation. However, the court in *Tshishonga v Minster of Justice* (*Tshishonga LC*)[16] pointed out that the PDA takes its cue from the Constitution, and although whistle-blowers can rely on each of these rights, the focus should be on the "overarching objective of affirming values of democracy, accountability and equality of which the particular rights form a part".[17] In *Communication*

9 *Grieve v Denel (Pty) Ltd* (2003) 24 ILJ 551(LC).

10 *State Information Technology Agency (Pty) Ltd v Sekgobela* (*Sekgobela*) (2012) 33 *ILJ* 2374 (LAC).

11 *Mashilo v Commissioner of SA Revenue Service* Case No: 108/1822-08-2022 (*Mashilo*) par 69.

12 Daniels "Whistle-Blower Athol Williams Health Suffered After Exposing Pariah Bain & Co" (15 March 2023) https://www.iol.co.za/capetimes/news/whistle-blower-athol-williams-health-suffers-after-exposing-pariah-bain-and-co-75ada81f-bff5-4cd9-81d7-2c43a62ddc36 (accessed 2023-03-15); Daily Investor "Andre de Ruyter Leaving South Africa for Safety" (22 February 2023) https://dailyinvestor.com/south-africa/9456/andre-de-ruyter-leaving-south-africa-for-safety/ (accessed 2023-03-15).

13 Bhengu "Babita Deokaran's Murder Will Deter Whistle Blowers From Speaking Out, Says Goodson" (26 August 2021) https://www.news24.com/news24/southafrica/news/babita-deokarans-murder-will-deter-whistleblowers-from-speaking-out-says-goodson-20210826 (accessed 2023-01-15).

14 26 of 2000.

15 Directive 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the Protection of Persons Who Report Breaches of Union Law.

16 [2007] 4 BLLR 327 (LC).

17 *Tshishonga LC supra* par 106.

Workers Union v Mobile Telephone Networks (Pty) Ltd (*CWU*),[18] the Labour Court stated that "[t]he PDA seeks to balance an employee's right to free speech, on a principled basis, with the interests of the employer".[19] This is the ideal, but some provisions of the PDA seem biased toward the employer's interests (reputation). In balancing the rights of whistle-blowers and employers, it should also be kept in mind that reports by whistle-blowers are in the public interest and not self-serving.

The next section discusses the protection provided by the common law, the PDA, the Labour Relations Act (LRA),[20] the Protection from Harassment Act (Harassment Act),[21] the Promotion of Equality and Prohibition of Discrimination Act (PEPUDA),[22] the Employment Equity Act (EEA),[23] and the Companies Act.[24]

2 1 PDA

2 1 1 Aim of the PDA

The PDA states in its Preamble that:

> "neither the South African common law, nor statutory law makes provision for mechanisms and procedures in terms of which employees or workers may without fear of reprisals, disclose information relating to suspected or alleged criminal or other irregular conduct by their employers whether in the public or private sector."

It states further that "every employer, employee and worker has a responsibility to disclose criminal and other irregular conduct in the workplace". Importantly every employer has the *responsibility* (not a *duty*, which would signify a legal obligation) to protect their employees and workers against reprisals as a result of having made a protected disclosure. The aim of the PDA is, therefore, to

> "create a culture which will facilitate the disclosure of information by employees and workers relating to criminal and other irregular conduct in the workplace in a responsible manner by providing comprehensive statutory guidelines and protection against any reprisals."[25]

The court in *Potgieter v Tubatse Ferrochrome* (*Tubatse*)[26] remarked as follows on the creation of a culture of disclosure:

> "The fostering of a culture of disclosure is a constitutional imperative as it is at the heart of the fundamental principles aimed at the achievement of a just society based on democratic values. This constitutional imperative is in compliance with South Africa's international obligations. Article 33 of […]

18 (2003) 24 ILJ 1670 (LC).
19 *CWU supra* par 24.
20 66 of 1995.
21 17 of 2011.
22 4 of 2000.
23 55 of 1998.
24 71 of 2008.
25 Preamble of the PDA.
26 (2014) 35 *ILJ* 2419 (LAC).

> UNCAC enjoins party states to put appropriate measures in place 'to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with that convention."[27]

But how will a culture of disclosure be fostered? It is often seen as disloyalty towards the employer or the group to report irregularities. For example, cultures in Asia place great emphasis on group cohesion and brotherhood, and less on individualism. In these countries, employees will often not be in favour of whistle-blowing.[28] In contrast, in the USA, there is a strong focus on individualism, and employees are more likely to blow the whistle. In South Africa, whistle-blowers may wrongly be viewed as "*impimpis*", informants used by the secret police during apartheid.[29] Research has indicated that employees with nonconformist, proactive personalities are more likely to blow the whistle.[30] Open discussions about the value to organisations of critical thinking and of employees pointing out weaknesses may encourage employees to report wrongdoing. They would then not feel that they are being disloyal but that they are, in fact, assisting in improving transparency and ethical behaviour that would be beneficial to the organisation and the country.[31]

2 1 2 Protection provided by the PDA

The PDA protects whistle-blowers in a labour-law context against specific forms of harm (termed "occupational detriments") for making a protected disclosure. The Act provides that no employee or worker may be subjected to any occupational detriment by their employer on account of, or partly on account of, making a protected disclosure.[32] Consequently, "[w]here an employer, under the express or implied authority or with the knowledge of a client, subjects an employee or worker to an occupational detriment, both the employer and the client are jointly and severally liable".[33] Unlike the position in some countries such as Canada, where very limited protection is offered to private sector employees,[34] the PDA does not distinguish between public and private sector employees who blow the whistle.

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27 *Tubatse supra* par 14.

28 Irawanto and Novianti "Exploring the Nature of Whistleblowing in Organizations in Asia: An Integrative Perspective" 2020 7(11) *The Journal of Asian Finance, Economics and Business* 519; Landy "Corporate Whistleblowing Meets Culture Clash in Asia" (11 January 2018) https://asia.nikkei.com/Business/Corporate-whistleblowing-meets-culture-clash-in-Asia (accessed 2023-02-28).

29 Pather "Impimpi Accusations Are 'Reckless'" (22 February 2019) https://mg.co.za/article/2019-02-22-00-impimpi-accusations-are-reckless/ (accessed 2023-02-10).

30 Dungan *et al* 2015 *Current Opinion in Psychology* 131.

31 *Ibid*.

32 S 3 of the PDA.

33 S 3A of the PDA. This section makes provision for the protection of workers engaged through an agency.

34 Vatanshi "Whistleblowing in Canada: A Call for Enhanced Private Sector Protection" 2019 9(1) *Western Journal Legal Studies* 4.

The rest of this section discusses the meaning of the terms "employee" and "worker", "disclosure", "occupational detriment", and "protected disclosure".

2 1 3 The meaning of "employee" and "worker"

"Employee" is defined in the same way as in other labour statutes, except that former employees are also included:

> "(*a*) any person, excluding an independent contractor, who works *or worked* [emphasis added] for another person or the State, and who receives or received, or who is entitled to receive, any remuneration; and
> (*b*) any other person who in any manner assists or assisted in carrying on or conducting or conducted the business of an employer."[35]

The definition of "worker" was added to the PDA by the Protected Disclosures Amendment Act (PDAA)[36] and is defined widely to include persons who in any manner assist an employer or client in conducting the business of such an employer or client. It includes independent contractors, consultants, agents and persons who render services through a temporary employment service.[37] The lack of an employment contract will thus not have the effect that these persons connected to the workplace are not protected. However, other persons who could have important information about wrongdoing, such as shareholders, non-executive directors, suppliers, applicants, and volunteers, are not included. Labour law protection cannot apply to these persons, but legislation could protect them against detriment such as harm to their reputation, criminal and civil liability, and disclosure of their identity.[38] There is no definition of whistle-blowing or of a whistle-blower in the PDA.

2 1 4 The meaning of "disclosure"

The PDA defines a disclosure as "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 criminal offence; a miscarriage of justice; endangerment of the health or safety of persons; damage to the environment; unfair discrimination and a failure to comply with a legal obligation or deliberate concealment of any of these matters. Such types of conduct are termed "improprieties".

Regarding the interpretation of the listed improprieties, the Labour Court in *Van Alphen v Denel Metall Denel Munition* (*Van Alphen*)[39] held that accusations by an employee that managers in a certain department did not deal with customer complaints, and that the department was in chaos, did

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35 S 1 of the PDA.

36 5 of 2017.

37 See the definition section of the PDA.

38 See Transparency International "Best Practice Guide for Whistleblowing Protection" (1 March 2018) https://www.transparency.org/en/publications/best-practice-guide-for-whistleblowing-legislation (accessed 2023-02-03) 11.

39 (2013) 34 *ILJ* 2484 (LC).

not amount to a disclosure in terms of the PDA. The reason is that the relevant conduct did not point to criminal conduct or failure to comply with a legal obligation.[40] In addition, the court in *Nxumalo v Minister of Correctional Services* (*Nxumalo*)[41] did not regard an employee's allegations that he was transferred because of the pressure on officials by an influential prisoner as falling within the types of misconduct or criminal act that would constitute a disclosure.[42]

Could information previously known to the employer still qualify as a disclosure? In *City of Tshwane Metropolitan Municipality v Engineering Council of South Africa* (*Tshwane*),[43] the employer alleged that because it had previous knowledge of improprieties, a report by an employee about these matters did not amount to a disclosure. The Supreme Court of Appeal held that it would undermine the whole purpose of the PDA if a culpable employer could argue that information is not disclosure if it had previous knowledge of its own improprieties.[44] In *Tanda v Member of Executive Council, Department of Health* (*Tanda*),[45] the court held that there is no general rule that an employee's disclosure in fulfilling their duties could not constitute a protected disclosure.[46]

2 1 5 Requirements for protection depending on the identity of the recipient of the disclosure

The Labour Court in *Tshishonga LC* described the different requirements for protection, depending on the identity of the recipient, as follows:

> "The tests are graduated proportionately to the risks of making disclosure. Thus the lowest threshold is set for disclosures to a legal adviser. Higher standards have to be met once the disclosure goes beyond the employer. The most stringent requirements have to be met if the disclosure is made public or to bodies that are not prescribed, for example the media."[47]

In all disclosures, the employee must have reason to believe that the information shows or tends to show that an impropriety took place. An employee may make a disclosure to a legal adviser[48] in the course of seeking legal advice with no further requirements for protection.[49] A disclosure to the whistle-blower's employer will be protected, but only if it was made in good faith and according to any procedure required, by the employer or someone appointed by the employer, for such disclosure.[50] The

40 *Van Alphen supra* par 39.
41 (2016) 37 *ILJ* 177 (LC).
42 *Nxumalo supra* par 20.
43 2010 (2) SA 333 (SCA).
44 *Tshwane supra* par 47.
45 (2022) 43 *ILJ* 2601 (LC).
46 *Tanda supra* par 18.
47 *Tshishonga LC supra* par 198.
48 S 5 of the PDA. This could include a trade union representative.
49 In *Randles v Chemical Specialities* (2011) 32 *ILJ* 1397 (LC) par 22(ii), the court held that s 5 provides protection to a person making a disclosure to a legal adviser, but not to the legal adviser making a disclosure.
50 S 6 of the PDA.

employer must authorise rules for such a disclosure and communicate them to employees.[51] However, there is no penalty for employers who do not adopt rules for reporting.

A disclosure by a whistle-blower will be further protected if made in good faith to a member of the Cabinet (the relevant minister) or a Member of the Executive Council (MEC) of a province, if these bodies have appointed the whistle-blower's employer (whether an individual or body), or if the employer is an organ of state within the area of responsibility of the minister or MEC.[52]

A fourth category of disclosure includes those made to certain public bodies such as the Public Protector, the South African Human Rights Commission, the Commission for Gender Equality, the Auditor-General of South Africa (AGSA), or any other body dealing with the relevant conduct. Reports to these so-called section 8 bodies must also be made in good faith, but there are two additional requirements – namely, that the whistle-blower must reasonably believe that the impropriety falls within the matters that are ordinarily dealt with by these bodies (financial irregularities should, for instance, be reported to AGSA) and that the information be substantially true.[53] It could be difficult for a whistle-blower to establish which body would be the appropriate authority and what the standard is for information to be substantially true. In this regard, Transparency International criticises the extra requirements for disclosures to authorities, and recommends that no extra burden be set over and above those for disclosures to employers, since there may be many valid reasons for a worker to prefer to make the disclosure to authorities.[54]

The threshold for protection is set at the highest level for a so-called general disclosure in terms of section 9.[55] This is when the disclosure is made to the public, a journalist, or other bodies or individuals not mentioned in sections 6–8 of the PDA. Such a disclosure must be made in good faith, the employee or worker must reasonably believe that the disclosure is substantially true, and the employee must not make the disclosure for personal gain. Furthermore, at least one of the following must also apply:

- the employee must have reason to believe that they will suffer an occupational detriment if the disclosure is made to their employer;
- no person or body is prescribed in section 8 for the particular impropriety;
- the employee or worker has reason to believe that the disclosure will be destroyed or concealed if made to the employer;
- the disclosure has previously been made to the employer (and the prescribed procedure was followed) or to a section 8 body, and no action was taken within a reasonable time; and

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51 S 6(2) of the PDA.

52 S 7 of the PDA.

53 S 8 of the PDA.

54 Transparency International https://www.transparency.org/en/publications/best-practice-guide-for-whistleblowing-legislation 11.

55 S 9 of the PDA.

- the impropriety was of an exceptionally serious nature.[56]

Moreover, it must be reasonable to make the disclosure in all circumstances of the case. To establish reasonableness, consideration must be given *inter alia* to:

- the identity of the person to whom it has been made;
- the seriousness of the impropriety;
- the likelihood that the impropriety will continue;
- whether the disclosure is in breach of a duty of confidentiality of the employer towards another person;
- any action that the employer or body has taken or may reasonably be expected to take in respect of a previous disclosure;
- whether the employee complied with the procedure prescribed by the employer for such a disclosure; and
- whether it is made in the public interest.[57]

The high threshold with myriad requirements is such that whistle-blowers may have difficulty comprehending exactly what is needed before they can be protected. Regarding the prohibition on making a general disclosure for personal gain, Transparency International recommends that:

> "if appropriate within the national context, whistle-blowers may receive a portion of any funds recovered or fines levied as a result of their disclosure. Other rewards or acknowledgements may include public recognition or awards (if agreeable to the whistle-blower), employment promotion, or an official apology for retribution."[58]

2 1 6 Duty to inform the whistle-blower

The PDAA amended the PDA so as to require employers and other bodies to acknowledge receipt of the disclosure and take a decision about it within 21 days, or refer it to another body. In the case of the latter, the person who made the disclosure must be notified.[59] The employee or worker must further be informed if the matter will be investigated and, if not, the reasons for declining to investigate. The outcome of the investigation must also be communicated to the whistle-blower within certain time frames.[60] This amendment is an improvement; previously, an employer or body could merely ignore the disclosure, and did not have to give feedback to the employee who made the disclosure. However, if the disclosure is not properly investigated, there is hardly anything that a whistle-blower can do because there is no duty on the receiver of a disclosure to report to any authority on the outcome of the investigation.

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56 S 9(2) of the PDA.

57 S 9(3) of the PDA.

58 Transparency International, principle 23 https://www.transparency.org/en/publications/best-practice-guide-for-whistleblowing-legislation 56.

59 S 3B(1) of the PDA.

60 S 3B(3)–(4) of the PDA.

2 1 7 Meaning of good faith and reasonable belief

In order to be protected in terms of the PDA, the disclosure of information must be made in good faith and with the reasonable belief that the information shows or tends to show that an impropriety took place. The good faith requirement applies to all disclosures (except for disclosures to a legal adviser). The case law discussed below indicates that courts often differ on the meaning of "good faith".[61]

The Labour Appeal Court (LAC) overturned the decision of the Labour Court dealing with a general protected disclosure in *Tubatse*, and held that a disclosure can still be regarded as being made in good faith even if the employee previously had the information but only disclosed it after his dismissal.[62] The LAC likewise overturned the Labour Court decision in *Baxter v Minister of Justice and Correctional Services* (*Baxter*),[63] and held that even if a disclosure were made partly with an ulterior motive, it could still be made in good faith.[64] Furthermore, in *Radebe v Premier, Free State Province* (*Radebe*),[65] the decision of the Labour Court was overturned on the ground that,

> "the nature of the information and meaning of that term [good faith] as propounded by the Labour Court is rather too narrow and introduces an element of truth and verification. It presupposes factual accuracy of the allegations made in a disclosure. The PDA does not contain such an element. The phrase 'tends to show' in section 1 cannot be equated to 'show'."[66]

The LAC in *Radebe* explained the relationship between the meaning of the terms "information", "good faith", "reasonably believe", and "substantially true" as follows: if the employee believes that the information is true, it will fortify the reasonableness of their belief, from which, in turn, their *bona fides* could be inferred.[67] The court in *John v Afrox Oxygen Ltd* (*Afrox Oxygen*)[68] further emphasised that the inquiry is not about the reasonableness of the information but about the reasonableness of the belief. Therefore, the requirement of "reasonable belief" does not entail demonstrating the correctness of the information since a belief can still be reasonable even if the information turns out to be inaccurate.[69]

This was confirmed in *State Information Technology Agency (Pty) Ltd v Sekgobela* (*Sekgobela*),[70] where the court clarified that whether the belief held by a whistle-blower is reasonable is a question of fact and the facts need not be true.[71]

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61 See the *Sekgobela supra*.
62 *Tubatse supra* par 35–36.
63 (2020) 41 *ILJ* 2553 (LAC) par 33.
64 *Baxter supra* par 83.
65 (2012) 33 *ILJ* 2353 (LAC).
66 *Radebe supra* par 33.
67 *Radebe supra* par 35.
68 (2018) 39 *ILJ* 128 (LAC).
69 *Afrox Oxygen supra* par 26.
70 *Supra*.
71 *Sekgobela supra* par 32.

The Labour Court in *Tshishonga LC* remarked as follows:

> "The standard of quality that the information must meet is pitched no higher than requiring the impropriety to be 'likely'. It is enough if the information 'tends to show' an impropriety. That anticipates the possibility that no impropriety might ever be committed or proven eventually. If the suspects are cleared, the protection will not be lost. 'Likely' and 'tends to show' must therefore mean that the impropriety can be less than a probability but must be more than a mere possibility."[72]

This analysis was followed in *Chowan v Associated Motor Holdings (Pty) Ltd* (*Chowan*).[73] Here the court added that the test of whether a person making a disclosure has reason to believe that information disclosed tends to show unfair discrimination (the conduct in issue in this case) is whether the person subjectively holds the belief, and whether the belief is objectively reasonable.[74]

The Labour Court in *CWU* held that disclosures made deliberately to harass and embarrass an employer are unlikely to be regarded as being made in good faith.[75] However, the court in *Tshishonga LC* remarked that "[a] malicious motive cannot disqualify the disclosure if the information is solid. If it did, the unwelcome consequence would be that a disclosure would be unprotected even if it benefits society".[76] This comes close to saying that the motive for a disclosure should not be considered in deciding whether it is protected.

From the above discussion, it is clear that the Labour Court and the LAC have often been in disagreement about the meaning of good faith and "reason to believe that the information shows or tends to show that there was an impropriety" and that courts have often been at pains to explain these concepts. This demonstrates just how difficult it may be for potential whistle-blowers (especially those without legal advice) to establish whether the disclosure that they intend to make will be regarded as being made in good faith.

The Minister of Justice and Constitutional Development issued Practical Guidelines for Employees in terms of section 10(4)(*a*) of the PDA,[77] which explain that good faith means that "the employee must act in a responsible and honest manner without any motives to gain any personal advantages from making the disclosure". In light of the case law discussed above, this explanation is simplistic and not helpful to would-be whistle-blowers.

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72 *Tshishonga supra* par 180 [footnotes omitted].
73 (2018) 39 *ILJ* 1523 (GJ).
74 *Chowan supra* par 47.
75 *CWU supra* par 21.
76 *Tshishonga supra* par 197.
77 GN702 in *GG* 34572 of 2011-08-31.

2 1 8 The meaning of an occupational detriment

The PDA provides that no employee or worker may be subjected to any occupational detriment on account of, or partly on account of, making a protected disclosure.[78] An occupational detriment includes:

- disciplinary action;
- a suspension, demotion, or denied promotion;
- harassment or intimidation;
- transfer against the will of the employee;
- refusal of transfer or refusal of promotion;
- a condition of employment or retirement altered to the employee's disadvantage;
- refusal of a reference or supplying an adverse reference;
- threats pertaining to the above; and
- being subjected to a civil claim for the alleged breach of a duty of confidentiality or being otherwise adversely affected in employment, profession or office, employment opportunities or work security.[79]

The final phrase is sufficiently wide to include other detrimental actions, but the protection would be enhanced if physical and psychological injuries were explicitly included. The listed types of detriment are all employment-based and do not cover detriment that could be suffered by "new" categories of persons now included in the term "worker" in the PDA, such as independent contractors, consultants and agents. One would expect that blacklisting and early termination of a contract, *inter alia*, should be included to protect these groups.

2 1 9 General protected disclosures and the public interest

The case of *Tshishonga LC*[80] is typical of what whistle-blowers who report to bodies other than their employer must often endure. Tshishonga was suspended and subjected to a disciplinary hearing on charges of misconduct after having made a disclosure of corruption by the Minister of Justice, Penuell Maduna, regarding nepotism in the appointment of liquidators. The employee reported to the Director-General of Justice and to section 8 bodies – *inter alia*, the Public Protector and AGSA (as required by section 9) – but none of these bodies took the matter further. The Minister of Justice, who was implicated in Tshishonga's disclosure, called him a "dunderhead" and hopelessly incompetent on national television.[81] He was humiliated as a result of the remarks on television, had to pay for trauma counselling, and although he was paid during his suspension, he was, in the words of the court, "denied the dignity of employment".[82] The disclosure Tshishonga

78 S 3 of the PDA.
79 S 1(vi) of the PDA.
80 2007 (4) SA 135 (LC).
81 *Tshishonga LC supra* par 109.
82 *Tshishonga LC supra* par 197.

made to an investigative journalist was regarded as reasonable and thus protected because it was in the public interest, on the ground that the public service and public officials were involved.[83]

In the *Tshwane* judgment, an electrical engineer responsible for safe electrical supply systems reported that municipal officers were appointing electrical system operators without the necessary skills, which could lead to a serious safety hazard.[84] He sent a letter relating to the impropriety to high-ranking officials in the electricity department and copied the letter to the Department of Labour and the Engineering Council. He was suspended and disciplinary proceedings were commenced against him. Because the impropriety was exceptionally serious and in the public interest, the court found that this was a protected disclosure.[85]

In *Theron v Minister of Correctional Services* (*Theron*),[86] Dr Theron raised the issue of inadequate health care for prisoners at Pollsmoor Prison many times with the Department of Correctional Services and the Department of Health. When there was no response, he eventually raised his concern with the Office of the Inspecting Judge of Prisons, as well as the Portfolio Committee on Correctional Services of Parliament. Dr Theron was then charged with misconduct for contacting the judge and portfolio committee without informing his superiors. The court regarded his transfer (without his consent) to a clinic as a demotion on account of having made a protected disclosure. The court further considered a lack of medical care for prisoners as being exceptionally serious and as a disclosure in the public interest.[87]

In *Sekgobela*, the employee reported irregularities in the procurement process to the CEO, and when nothing was done, he reported them to the Public Protector. The employer took away some of his responsibilities, suspended him, called him into a hearing based on alleged incompatibility with colleagues, and he was eventually dismissed. The court found that the disclosure was in the public interest[88] and his dismissal was, therefore, automatically unfair.[89]

The above discussion highlights only a few of many cases of the detriment that whistle-blowers suffer. It indicates that despite the enactment of the PDA, and despite the fact that their disclosures were found to be protected, whistle-blowers often suffer abuse, psychological injury, dismissal, and other forms of unfair treatment in the workplace. They should be provided with protection during the whistle-blowing process, starting with legal advice on whether a disclosure would be protected, and including support during disciplinary hearings and in court.

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83 Tshishonga LC *supra* par 263.
84 *Tshwane supra* par 50.
85 *Ibid*.
86 (2008) 29 *ILJ* 1275 (LC).
87 *Theron supra* par 10 and 13.
88 *Sekgobela supra* par 34.
89 *Sekgobela supra* par 25.

2 1 10 A duty to blow the whistle?

In terms of the Preamble to the PDA, employees have a responsibility to report on criminal and other irregular conduct.[90] This responsibility may, however, conflict with employees' common-law duty of good faith, which includes a duty of confidentiality and not bringing the name of their employer into disrepute.[91] Nevertheless, this duty is not absolute in the case of wrongdoing by the employer.[92]

Public servants are obligated to report corruption, fraud, nepotism and other offences that are prejudicial to the public interest.[93] The duty of a company director to act in good faith, and in the best interests of the company, in terms of section 76(3) of the Companies Act,[94] implies that a director is duty bound to report fraud, corruption and so forth, as such activities would be detrimental to the company.

The Prevention and Combating of Corrupt Activities Act (PCCAA)[95] imposes a duty on a wide range of persons in positions of authority (especially in the public service) to report corrupt transactions involving R100 000 or more to a police official.[96] Persons with such a duty include directors of companies, partners in a partnership and a person responsible for the overall management of a business.[97] Any person who fails to comply with such a duty is guilty of a criminal offence.[98]

2 1 11 Dispute resolution and remedies

An employee subjected to an occupational detriment may approach the Labour Court or the High Court for a remedy,[99] instead of a council or the Commission for Conciliation, Mediation and Arbitration, as in most other instances of unfair treatment in the workplace.[100] The Labour Court may make an order that is just and equitable, which may include an order for reinstatement or re-employment or payment of compensation and payment of actual damages.[101] An employee may also apply for urgent interim relief[102] to restrain the employer from subjecting them to a disciplinary enquiry.[103] An employee alleging that an inquiry (regarding misconduct or incapacity)

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90 *Tshishonga LC supra* par 169.

91 Garbers, Le Roux and Strydom (eds) *The New Essential Labour Law Handbook* 7ed (2019) 39.

92 *Tshishonga LC supra* par 172.

93 Cl 4.10 of the Public Service Regulations GNR 825 in *GG* 5947 of 1997-06-22.

94 71 of 2008.

95 12 of 2004.

96 S 34(1)(*b*) of the PCCAA.

97 S 34 (4) of the PCCAA.

98 S 34(2) of the PCCAA.

99 S 4(1) of the PDA. See *Young v Coega Development Corporation (Pty) Ltd (1)* 2009 (6) SA 118 (ECP).

100 S 191 of the LRA.

101 S 4(1B) of the PDA read with ss 158(1)(*a*)(vi) and 193 of the LRA.

102 S 158(1)(*a*)(i) of the LRA.

103 See *The Independent Municipal and Allied Trade Union obo Gloria Ngxila-Radebe v and Ekhurleni Metropolitan Municipality* [2010] ZALC 289.

contravenes the PDA may require an arbitrator to conduct the inquiry.[104] This provides important protection to employees. If the charges are without merit, brought by way of retaliation against an employee who has made a protected disclosure, an objective arbitrator would ensure a fair outcome.

A dismissal on account of having made a protected disclosure will be deemed to be an automatically unfair dismissal in terms of section 187(1)(*h*) of the LRA, and other occupational detriments could constitute unfair labour practices in terms of section 186(2)(*d*).[105] Although section 191(13)(*a*) of the LRA provides that such cases may be referred to the Labour Court, the court in *Van Alphen* remarked that "it seems to me that a referral to conciliation is still envisaged as a first step".[106]

The employer must further, on request, if it is reasonably possible or practicable, transfer the employee if after having made a protected disclosure they reasonably believe that they will be adversely affected;[107] the terms and conditions of the transfer may not be less favourable than the applicable terms and conditions before the transfer unless the employee consents in writing.[108]

The PDA does not exclude civil remedies, as illustrated in the *Chowan* judgment. Utterances amounting to racial and gender discrimination about Ms Chowan provided the basis for a delictual remedy being awarded to her; she had been dismissed for alleged incapacity in the form of incompatibility after a disclosure of these insults. Regarding a remedy, the court ordered payment of patrimonial damages for unlawful termination of her employment (Aquilian damages) as well as damages for impairment of her dignity, based on the *actio iniuriarum*.[109]

In *Tshishonga*, the LAC likewise distinguished between patrimonial and non-patrimonial loss.[110]

As is evident in the cases discussed above, the PDA only grants relief after the fact and does not protect the whistle-blower during the disciplinary process, unless the employee applies for an interim order to restrain the employer from subjecting them to a disciplinary hearing, or the employee applies for an arbitrator to preside at the disciplinary hearing. In many cases, whistle-blowers may feel that the remedy ordered is a Pyrrhic victory.[111] Tshishonga had to pay his own legal costs at the disciplinary hearing, at the Labour Court and the LAC. Some whistle-blowers may not be in a position to pay for legal advice and representation. The court in *Tshishonga LAC*, in

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104 S 188(A)(11) of the LRA. See *Nxele v National Commissioner: Department of Correctional Services* [2018] 39 *ILJ* 1799 (LC) and *Tsibani v Estate Agency Affairs Board* [2021] JOL 51625 (LC).

105 S 4(2) of the PDA.

106 *Van Alphen supra* par 48.

107 S 4(3) of the PDA.

108 S 4(4) of the PDA.

109 *Chowan supra* par 71.

110 See a discussion of the remedy awarded in this case by Botha and Sieger "*Minister for Justice and Constitutional Development v Tshishonga* 2009 9 BLLR 862 (LAC): Just and Equitable Compensation for Non-Patrimonial Loss" 2011 44(2) *De Jure* 30; see also *Tshishonga supra* par 109.

111 *Tshishonga supra* par 175.

deciding about the award of legal costs to the whistle-blower, remarked as follows:

> "Legal representation is a necessity in cases under the PDA not least because employees need to test their beliefs and the information they intend to disclose against the objective, independent and trained mind of a lawyer."[112]

In *Tubatse*, the argument was made that reinstatement would be inappropriate in light of the sensitive information that was divulged. Here the court remarked that if it is accepted that the disclosure rendered the employment relationship intolerable, it would "seriously erode the very protection that the abovementioned legal framework seeks to grant to whistle-blowers".[113]

2 1 12 A causal link and the onus of proof

The PDA requires that the occupational detriment should be "on account of or *partly* on account of a protected disclosure being made".[114] A causal link must thus be established between the protected disclosure and the occupational detriment. In terms of sections 186(2)(*d*) and 187(1)(*h*) of the LRA, an occupational detriment must be "on account of having made a protected disclosure". The word "partly" is excluded in the LRA. In *TSB Sugar RSA Ltd v Dorey* (*TSB Sugar*),[115] the LAC applied the formulation in the PDA in terms of which it is sufficient if the protected disclosure was but one of the reasons for the dismissal,[116] which would be to the advantage of whistle-blowers.

When considering the onus of proof, there are no special provisions for whistle-blowers in the PDA or the LRA. The LRA provides that dismissal of an employee on account of the employee having made a protected disclosure is an automatically unfair dismissal.[117] According to the LAC in *Kroukam v SA Airlink (Pty) Limited* (*Kroukam*),[118] the employee will have to raise sufficient evidence that there is a credible possibility that an automatically unfair dismissal took place.[119] The employer will then have to prove that the reason for the dismissal was not one of those grounds for an automatically unfair dismissal in section 187.[120] In deciding whether there was a causal link, the court in *Kroukam* also held that if there is more than one possible reason, it must be established which was the dominant or most likely reason for the dismissal.[121]

If the whistle-blower had not been dismissed, but was subjected to an unfair labour practice in terms of section 186(2)(*d*), the onus to prove that

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112 *Tshishonga supra* par 187
113 *Tubatse supra* par 31.
114 S 3 of the PDA.
115 (2019) 40 *ILJ* 1224 (LAC).
116 *TSB Sugar supra* par 95.
117 S 187(1)(*h*) of the LRA.
118 [2005] ZALAC 5.
119 *Kroukam supra* par 28.
120 *Kroukam supra* par 91.
121 *Ibid*.

there was a causal link rests on the employee, since there is no indication in the LRA on whom the onus should rest regarding unfair labour practices. Consequently, the rule that "he who alleges has to prove" will be followed.[122] Bearing the burden of proof could be extremely onerous because employees will often not have access to relevant information. Transparency International recommends that the onus should rather rest on the employer so that the whistle-blower only has to prove that they made a disclosure and afterwards suffered an occupational detriment.[123]

2 1 13 Non-disclosure clauses and offences

To protect employers against false reports, section 9B of the PDA provides that whistle-blowers who intentionally disclose false information, knowing that the information is false, or who ought reasonably to have known that it is false, intending to cause harm and did cause harm, are guilty of an offence. If convicted, such a whistle-blower may be sentenced to pay a fine or imprisonment for two years or both.[124] The court will have to apply the phrase "ought reasonably to have known" to the facts of each case. Potential whistle-blowers could be afraid that a court may find that they should have known that the information was false. There are no concomitant provisions regarding sanctions to be imposed on employers or co-employees who make false allegations against a whistle-blower,[125] although the discussion of the case law above illustrates that employers often retaliate by subjecting whistle-blowers to proceedings regarding alleged disciplinary offences and poor work performance. Nortje remarks that "the criminalisation of false disclosures might nullify the effect that whistleblowing has on the prevention and combating of corruption in South Africa".[126]

A court may find that an employee making a protected disclosure concerning a criminal act, or a substantial contravention of the law or failure to comply with the law, is not liable to any civil, criminal or disciplinary proceedings if the disclosure is prohibited by another law or contract requiring the employee or worker to maintain confidentiality.[127] This provision refers *inter alia* to non-disclosure (anti-gagging) clauses in contracts. It is notable that a whistle-blower will not have immunity in all cases of having made a protected disclosure – only regarding reports on criminal activities in cases of a "substantial" contravention of the law. What constitutes a substantial contravention of the law is by no means clear and could have the effect that employees making a disclosure are in the dark about whether they will be protected until a court in each case decides about the meaning of this phrase.

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122 See *Shoba v Commission for Conciliation, Mediation and Arbitration* [2021] ZALCJHB 161 par 12.

123 Transparency International (March 2018) https://transparency.eu/wp-content/uploads/2018/03/2018_GuideForWhistleblowingLegislation_EN.pdf 55.

124 S 9B of the PDA.

125 Transparency International 28 principle 29.

126 Nortje "Section 9B of the Protected Disclosures Amendment Act 2017" 2018 *Journal of Anti-Corruption Law* 212.

127 S 9A of the PDA.

2 2 Protection for whistle-blowers outside the PDA

2 2 1 Companies Act[128]

In addition to the protection provided by the PDA, section 159 of the Companies Act provides protection for persons making reports on contraventions of the Companies Act and related legislation, *inter alia*, to the Companies and Intellectual Property Commission, the Companies Tribunal, the Takeover Regulation Panel, a regulatory authority, legal advisor, director, board of the company, company secretary and an auditor.[129] As with the PDA, the person must make the disclosure in good faith and must reasonably believe that the information shows or tends to show that a company, external company, director or official of a company contravened a law, failed to comply with a statutory obligation, unfairly discriminated against someone, endangered the health and safety of persons or the environment, or contravened legislation that would harm the company.[130] A director, shareholder and trade union representing an employee who makes a protected disclosure will be immune from civil and criminal liability and administrative liability.[131]

The person making the disclosure will be entitled to damages if another person intentionally causes detriment to them or threatens to cause such detriment. In contrast to the PDA, there is a presumption in the Companies Act that this conduct occurred as a result of the disclosure being made.[132]

A public or state-owned company must maintain a system to receive disclosures confidentially and to act on them. The availability of such a system must be made known to the category of persons who would be protected in the case of whistle-blowing.[133]

The categories of persons in the definition of "worker" not found in the PDA, the reversal of the burden of proof and the requirement for establishing a confidential system for receiving internal reports should inform amendments to the PDA.

2 2 2 Protection from Harassment Act

The Harassment Act provides protection to a person, or a related person, against different forms of harassment, among other things: following, watching, stalking, and unwanted communication through different means.[134] A complainant can obtain a protection order against the harasser, and if they breach the order, the harasser could be arrested.[135] A protection order may provide a measure of physical protection to whistle-blowers.

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128 71 of 2008.
129 S 159(3)(*a*) of the Companies Act.
130 S 159(3(*b*) of the Companies Act.
131 S 159(4) of the Companies Act.
132 S 159(6) of the Companies Act.
133 S 159(7)(*a*) and (7)(*b*) of the Companies Act.
134 S 1 of the Harassment Act.
135 S 9 of the Harassment Act.

2 2 3 Statutes that protect against discrimination

Whistle-blowers may rely on PEPUDA or the EEA for protection if they are subjected to discrimination on prohibited grounds. The definition of "occupational detriment" in the PDA includes being subject to harassment,[136] which is prohibited in both statutes on certain grounds.

2 2 4 Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace 2022

In accordance with the International Labour Organization's Violence and Harassment Convention 190 of 2019, which was ratified by South Africa in December 2021, governments and employers have a duty to protect workers in the world of work. The Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace 2022 (Harassment Code 2022),[137] which gives effect to the Convention, enjoins employers to ensure a safe psychosocial climate to prevent harassment.[138] It follows that employers should ensure that there are safe reporting channels to protect the identity of the whistle-blower, and a culture that encourages whistle-blowing and disciplining of harassers. The Harassment Code 2022 briefly mentions the PDA as one of the statutes protecting employees against harassment.[139]

Although the different types of protection available in South African law for whistle-blowers discussed above seem to be extensive, such protection is not integrated, and as case law indicates, whistle-blowers often face severe consequences after having made a disclosure. The discussion has pointed to several shortcomings, which are addressed in the conclusion and recommendations after discussing UNCAC, the EDW, legislation in Ireland and the US, and proposed legislation in the UK.

3 UNCAC

Although several international instruments deal with corruption, UNCAC is the only legally binding universal anti-corruption instrument.[140] The purpose of this Convention is to "call for the penalization and criminalization of the most prevalent forms of corruption in both the public and the private sectors".[141] Each state party is obliged to establish anti-corruption bodies that can receive reports on corruption and which should also make provision for anonymous reporting.[142]

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136 Part (*f*) of the definition of "occupational detriment" in the PDA.

137 GN in *GG* 46056 of 2022-03-18.

138 Cl 1, 8 and 9 of the Harassment Code 2022.

139 Cl 7.6 of the Harassment Code 2022.

140 United Nations Convention Against Corruption 2349 UNTS 41 (2003). Adopted: 31/10/2003; EIF: 14/12/2005.

141 Foreword to UNCAC by the Secretary-General of the United Nations.

142 Art 13(2) of UNCAC.

Furthermore, witnesses and experts who give evidence regarding offences in terms of UNCAC (such as bribery of public officials and embezzlement by public officials,[143] as well as such wrongdoing in the private sector)[144] and their family members are to be provided with protection against retaliation and intimidation.[145] Countries must establish procedures for physically protecting and relocating these persons "to the extent to which it is necessary and feasible".[146] Information about their identity or whereabouts should not be disclosed, or if disclosed, the information should be limited.[147] Countries are further enjoined to make provision for evidentiary rules protecting the safety of witnesses, such as permitting them to give testimony by means of communication technology.[148] South Africa ratified the instrument on 22 November 2022,[149] but no specific measures have been taken to ensure the safety of whistle-blowers regarding confidentiality and the physical protection of whistle-blowers and their families.

The Zondo Commission recommended that legislation be adopted to afford UNCAC protection to persons making disclosures about corruption in public procurement.[150] The Zondo Commission also recommended that protection for these persons should be provided even without request for protection, if, on the assessment of a designated authority, the informant or their family might be in danger.[151]

4 THE EUROPEAN DIRECTIVE ON WHISTLE-BLOWING

Owing to limited space, this section only briefly refers to the most salient provisions in the EDW, which could inform improved protection for whistle-blowers in South Africa.

A wide group of persons entitled to protection are included in the definition of "worker," including family members and colleagues of the whistle-blower.[152] The EDW requires member states to ensure that whistle-blowers have support to access legal aid, assistance and counselling.[153] Member states are encouraged to provide financial assistance and psychological assistance to whistle-blowers.[154] Medical and psychiatric referrals are included in forms of retaliation that are prohibited.[155] Employers in both the public and private sectors with more than 50 employees are obliged to

143 Art 15–17 of UNCAC.
144 Art 21–22 of UNCAC.
145 Art 32(1) of UNCAC.
146 Art 32(2)(*a*) of UNCAC.
147 Art 32(2)(*a*) of UNCAC.
148 Art 32(2)(*b*) of UNCAC.
149 United Nations Office on Drugs and Crime "Signature and Ratification Status" (21 November 2021) https://www.unodc.org/unodc/en/corruption/ratification-status.html (accessed 2023-01-20).
150 Zondo *Judicial Commission of Inquiry Into State Capture Report: Part 1* par 690.
151 Zondo *Judicial Commission of Inquiry Into State Capture Report: Part 1* par 563.
152 Art 38–42 of the EDW.
153 Art 20(1)(*a*)–(*c*) of the EDW.
154 Art 20(2)–(3) of the EDW.
155 Art 19 of the EDW.

establish confidential internal reporting channels,[156] and authorities are obliged to establish safe external reporting channels that safeguard the identity of the reporting person.[157] Penalties must be imposed on persons retaliating against whistle-blowers or hindering them from making a report.[158]

5 PROTECTION FOR WHISTLE-BLOWERS IN THE UK, IRELAND AND THE US

This section discusses protection for whistle-blowers in the UK and Ireland, focusing on the UK Protection for Whistleblowing Bill 27 HL (Bill 27) and the Irish Protected Disclosures (Amendment) Act 2022 (2022 PDAA). These two jurisdictions were chosen for comparison because Ireland's Protected Disclosures 14 of 2014, like South Africa's PDA, was based on the UK's Public Interest Disclosures Act 1998 (PIDA). These three countries thus share a common basis of legislation for the protection of whistle-blowers. In Ireland, the realisation that whistle-blower protection is inadequate led to extensive amendments to their PDA in 2022, while the UK, for the same reason, is in the process of debating a Bill in the House of Lords, which, if adopted, will differ radically from PIDA in its current form. South Africa could opt either to amend the PDA or adopt a new Act. Analysing the changes and proposed changes in these two jurisdictions could provide valuable guidance on the best way to protect whistle-blowers adequately in South Africa. Protection for whistle-blowers in the US is also discussed, focusing on the financial reward system for whistle-blowers.

5 1 Protection for whistle-blowers in the UK

Whistle-blowing scandals entailing cover-ups of reports of wrongdoing, and victimisation of whistle-blowers, in the UK (many of them regarding the National Health Service)[159] were clear indicators that the protection provided by PIDA was ineffective and needed to be amended or replaced. Since the South African PDA is based on PIDA, which was inserted as Part IVA in the Employment Relations Act 2004, most of the provisions will be similar and are not discussed except where there is significant divergence.

5 1 1 Good faith

The Enterprise and Regulatory Reform Act 2013 (ERRA) made important amendments to PIDA, which *inter alia* removed the requirement that a report must be made in good faith,[160] in order to focus more on the report than on the motive of the whistle-blower.[161] ERRA added another requirement –

156 Art 9 of the EDW.
157 Art 11 and 12 of the EDW.
158 Art 23 of the EDW.
159 All-Party Parliamentary Group: Whistleblowing "The Whistleblowing Bill" (April 2022) https://www.appgwhistleblowing.co.uk/ (accessed 2023-01-30).
160 S 18 of ERRA.
161 Ashton "15 Years of Whistleblowing Under the Public Interest Disclosures Act 1998: Are We Still Shooting the Messenger? 2015 44(1) *Industrial Law Journal* 51.

namely, only disclosures in the public interest would be protected[162] – to ensure that employees did not seek protection for personal grievances.[163]

Even though the good faith requirement was removed, the motivation for a whistle-blower making a report still plays a role, in that compensation for the detriment suffered can be limited to 25 per cent of what the amount would have been had the report been made in good faith.[164]

5 1 2 Shortcomings of PIDA

Some of the important findings of the report on whistle-blowing by the All-Party Parliamentary Group on the shortcomings of PIDA included that:[165]

- PIDA only provides compensation to whistle-blowers after they have suffered detriment – there is no immediate protection against retaliation;
- whistle-blowers who are not "workers"[166] are not protected;
- there is no mechanism to ensure that the issue raised by the whistle-blower will be addressed;
- claiming compensation for detriment at the Employment Tribunal (ET) is complex, costly and slow;
- whistle-blowers can often not afford legal representation; and
- there is no duty on public and private organisations to set up internal reporting mechanisms.[167]

5 1 3 The Whistleblowing Bill

The above shortcomings and others are addressed in Bill 27, which was introduced on 13 June 2022 in the House of Lords by Baroness Kramer as a private members' bill. The second reading took place on 2 December 2022. If adopted, Bill 27 will replace PIDA.

The Bill signals a fundamental change in the approach to the protection of whistle-blowers. The two most significant changes are that the Bill is not employment-related and that an Office of the Whistleblower (the Office) will be established. The principal duty of the Office is to protect whistle-blowers who have made protected disclosures and to have oversight of the process of whistle-blowing.[168]

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162 S 43B of PIDA.

163 To close the loophole created by *Parkins v Sodexho Ltd* [2002] IRLR 109, in which it was held that employees could be protected by PIDA when making a disclosure in a purely private dispute.

164 S 49(6A) of PIDA.

165 All Party Parliamentary Group: Whistleblowing "Whistleblowing: The Personal Cost of Doing the Right Thing and the Cost to Society of Ignoring It" (July 2019) https://www.pslhub.org/learn/culture/whistle-blowing/all-party-parliamentary-group-whistleblowing-the-personal-cost-of-doing-the-right-thing-and-the-cost-to-society-of-ignoring-it-july-2019-r711/ par 4.1 (accessed 2023-03-18).

166 S 43K of PIDA.

167 Protection for Whistleblowing Bill [HL] (HL Bill 27) (13 June 2022) https://bills.parliament.uk/publications/46929/documents/2009 (accessed 2023-03-15).

168 Cl 4(2) of Bill 27.

A protected disclosure is defined as a disclosure of information made in the public interest to specified persons on specific matters. The disclosure can be made to the Office of the Whistleblower (although the Office will encourage whistle-blowers to refer concerns to appropriate authorities),[169] a relevant person, a person whom the reporting person reasonably believes is a relevant person, or a person to whom it is reasonable for the reporting person to make the report.[170]

A relevant person includes an employer, an employer's organisation, a regulator or public authority, an organisation with statutory obligations, or a person prescribed by the Secretary of State.[171] However, there is no longer any hierarchy of persons or bodies to whom whistle-blowers have to report to receive protection in terms of PIDA. Detriment is broadly defined as that which causes disadvantage, loss or harm to a person[172] – thus, not only detriment that workers could suffer.

There is, moreover, no longer a need to define "worker" as a category of persons who can make disclosures and be protected since the Bill is not employment-related. Whistle-blowers are defined as persons who have made, are making or intend to make a protected disclosure, or are perceived by a relevant person to have made, be making or intend to make a protected disclosure.[173] This means that anyone making a protected disclosure, including members of the public, could be protected, and even though someone has not yet made a report or is just perceived by a relevant person to be a whistle-blower, that person will also be protected against being subjected to detriment by a relevant person.[174]

Matters on which a whistle-blower may report within the confines of a protected disclosure are similar to matters in the South African PDA, but Bill 27 adds abuse of authority and mismanagement of public funds. Further matters may be prescribed in terms of the Bill in regulations made by the Secretary of State.[175]

The Office will refer reports by whistle-blowers to the relevant authority but may investigate the report if: the reporting person has no access to an accredited whistle-blowing scheme, or has a reasonable belief that they are being subjected to detriment; or there is a risk that the report will be destroyed or concealed; or there is a serious risk to the public.[176] The Office will establish rules for the administration of arrangements regarding whistle-blowing as well as minimum standards (including confidentiality and anonymity) for whistle-blowing policies adopted by relevant persons (including employers) and accreditation of such policies.[177]

169 Cl 4(4)(*a*) of Bill 27.
170 Cl 1(3) of Bill 27.
171 Cl 3(1) of Bill 27.
172 Cl 3(4) of Bill 27.
173 Cl 2 of Bill 27.
174 *Ibid*.
175 Cl 1(2) of Bill 27.
176 Cl 7(2) of Bill 27.
177 Cl 4(6) of Bill 27.

The Office will have oversight to ensure that reports by whistle-blowers are followed up and oversight regarding referrals of reports by relevant persons to other relevant regulatory bodies.[178] It will further monitor and enforce compliance with established standards,[179] prosecute offenders[180] and will be a point of contact for whistle-blowers where information, advice and support will be provided.[181] In an earlier version of Bill 27, the Office was empowered to:

- form and maintain a panel of accredited legal firms and advisory bodies to advise and support whistle-blowers; and
- maintain a fund to support whistle-blowers.[182]

Compared to the current Bill, this earlier version is more comprehensive and would be more effective in protecting whistle-blowers.

The Office has the following powers of investigation.[183] It may issue information notices to persons having information about a specific issue, and providing the information will be compulsory.[184] The Office may further issue "action notices" to relevant persons not complying with their duties, such as failing to keep reports of whistle-blowers confidential[185] and failing to provide information to the Office.[186] Interim relief orders may be issued to protect whistle-blowers pending an investigation of a complaint.[187]

If a whistle-blower is subjected to detriment, the Office may issue a redress order against the relevant person to take certain measures[188] – for example, an order to reinstate an employee or to refrain from taking certain steps, such as subjecting an employee to a disciplinary hearing. A redress order must include financial redress (which is not capped) where loss or damage has been incurred.[189] To establish whether a redress order should be issued,[190] the Office must assume that the person was subjected to detriment for being a whistle-blower until the contrary is proved.[191] The burden of proof is thus reversed. The implication of the authority of the Office to issue redress orders is that the whistle-blower does not have to turn to the ET for a remedy, which will solve issues of costs, legal representation and other difficulties experienced by whistle-blowers as pointed out by the All-Party Parliamentary Group.

The issue of relevant persons not following up on reports will be something of the past as they are enjoined to establish whistle-blowing

178 Cl 6(2)(c) of Bill 27.
179 Cl 4(6)(b)–(c) of Bill 27.
180 Part 3 of Bill 27.
181 Cl 4(6) of Bill 27.
182 Cl 3 of Bill 27.
183 Cl 7 of Bill 27.
184 Cl 8 of Bill 27.
185 Cl 6 of Bill 27.
186 Cl 9(7) read with cl 6(2)(e) of Bill 27.
187 Cl 11 of Bill 27.
188 Cl 10 of Bill 27.
189 Cl 10(2) of Bill 27.
190 Cl 10(4) of Bill 27.
191 *Ibid*.

procedures accredited by the Office and have to report on their progress to the Office.[192] A civil penalty may be imposed if there is no compliance by relevant persons regarding information notices, action notices, redress orders and interim relief orders.[193] An appeal by a relevant person may be brought to the First Tier Tribunal against any decision or order of the Office. A further appeal on any matter of law may be brought in the Upper Tribunal.[194] No specific provision is made for protection in the case of a disclosure to the public. This seems to be unnecessary as the whistle-blower can make it to the Office, which would protect the whistle-blower.

Relevant persons may not subject, cause or permit other persons (including co-employees) to subject a whistle-blower to detriment. This could be regarded as a criminal offence, which was not the case under PIDA.[195] A person who is guilty of such an offence could be liable for a fine and, in certain circumstances, imprisonment.[196] Destroying information will likewise be regarded as an offence.[197]

The Bill provides that agreements containing confidentiality and similar clauses (non-disclosure agreements) between a relevant person and another person that would prohibit a person from making a protected disclosure are void.[198]

Should the British parliament adopt Bill 27, protection and support for a wide group of whistle-blowers will be established.*

5 2 Protection for whistle-blowers in Ireland

Like South Africa, Ireland based its Protected Disclosures Act 2014 on the UK's PIDA. The Irish 2022 PDAA[199] was adopted with extensive amendments to provide more effective protection to whistle-blowers and to transpose the EDW into Irish law, as Ireland as a member of the European Union, is obliged to do.

The 2022 PDAA extends protection to more categories of reporting persons. "Workers" (who are protected against retaliation after having made a protected disclosure) are widely defined to include *inter alia* employees, shareholders, non-executive directors, trainees, applicants, volunteers, persons who are being recruited and workers supplied by a third person (agency).[200] The term "whistle-blower" is not used.

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192 Cl 3(6) of Bill 27.

193 Cl 6 of Bill 27.

194 Cl 18 of Bill 27. These tribunals were established by the Tribunals, Courts and Enforcement Act 2007.

195 Cl 20 of Bill 27.

196 Cl 20 of Bill 27.

197 Cl 21(2) of Bill 27.

198 Cl 22 of Bill 27.

* [Editorial note: The UK Government has embarked on a review of all whistleblowing legislation in 2023: see https://www.gov.uk/government/news/government-reviews-whistleblowing-laws.]

199 27 of 2022.

200 S 3 of the 2022 PDAA.

A protected disclosure is defined as a disclosure of relevant information if, in the reasonable belief of the worker, it tends to show relevant wrongdoing that came to the attention of the worker in a work-related context.[201] Relevant information includes the same matters as improprieties in the South African PDA, but oppressive and grossly negligent acts of a public body as well as mismanagement by a public body, are part of the list of relevant information.[202]

In the 2022 PDAA (as in the 2014 PDA), the motivation for making a disclosure is not relevant for protection;[203] there is, thus, no good faith requirement. However, if investigating the wrongdoing was not the sole or main motivation for the disclosure, it may lead to diminished compensation, as in the UK.[204]

Workers are protected against "penalisation", which, in addition to the "usual" adverse acts by employers, includes acts such as early termination of a contract for goods and services; cancellation of a licence or permit; harm to a worker's reputation (especially on social media); psychiatric or medical referrals; and acts of employers after the employment relationship has been terminated, such as blacklisting the worker.[205] The extended list of examples of penalisation is in line with the wider definition of worker.

Like the South African PDA, the 2022 PDAA requires a reporting person to report to a hierarchy of persons or bodies with different requirements for protection. The categories to which a person may report are employers, prescribed persons and the Commissioner of the newly created Office of the Protected Disclosures Commissioner.[206]

For a disclosure to an employer, there are no extra requirements for protection.[207] For disclosure of relevant wrongdoing by someone other than the worker's employer, the worker will be protected if they reasonably believe that the information that the disclosure tends to show relates solely or mainly to the conduct of that other person.[208]

A requirement for disclosure to a prescribed person or the Commissioner is that the whistle-blower must reasonably believe that the information is substantially true.[209]

For a disclosure to someone other than an employer, prescribed person, the Commissioner or the Minister (for instance, a journalist), the requirements are similar to those for a general protected disclosure in terms of the South African PDA. However, the provision that the worker would not be protected if the disclosure were made for personal gain was not retained.

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201 S 5(2) of the 2022 PDAA.
202 S 5(3)(*g*) of the 2022 PDAA.
203 S 5(7) of the 2022 PDAA.
204 S 13 of the 2022 PDAA.
205 S 3(ii) of the 2022 PDAA.
206 S 7(2)(*a*) of the 2022 PDAA.The Protected Disclosures Commissioner is established in terms of s 10(A) of the 2022 PDAA.
207 S 6(1)(*a*) of the 2022 PDAA.
208 S 6(1)(*b*) of the 2022 PDAA.
209 S 7(1)(*b*) of the 2022 PDAA.

The Office of the Commissioner for Protected Disclosures (the equivalent of the Office of the Whistleblower in the UK Bill) will act as a facilitator, and disclosures by whistle-blowers can be referred to this Office, which will refer the report to the appropriate authority.[210] If there is no appropriate designated person or body to deal with the report, the Commissioner may investigate the report.[211] The Commissioner does not have the power to issue action or redress orders that the UK's Office of the Whistleblower does. However, the Commissioner may require any person in possession of information or documents to provide information to the Commissioner.[212] A person refusing to provide information, or who destroys information or obstructs the Commissioner in accessing information, will be guilty of an offence.[213]

In compliance with the EDW, a new section 6A requires the establishment of internal reporting channels and procedures for reporting to employers. Public bodies, as well as employers with more than 50 employees, have to establish these channels. Employers with fewer than 50 employees whose activities hold a risk to the health and safety of persons and the environment will also have to establish reporting channels.[214] It will constitute an offence to omit establishing reporting channels.[215] External reporting channels that will ensure integrity and confidentiality must be established by prescribed persons as well as the Commissioner.[216]

The amended Act includes a new provision that a disclosure shall be presumed to be protected until the contrary is proved.[217] Should the employee suffer penalisation after having made a disclosure, the penalisation will be deemed to be a result of the employee having made a protected disclosure.[218]

Regarding remedies for penalisation, the worker may approach the Circuit Court for interim relief,[219] and may claim damages in tort,[220] or refer an action in terms of the Unfair Dismissals Act 1977, but cannot do both.[221] A Workplace Relations Commissioner can order the employer to pay just and equitable compensation to the whistle-blower.[222]

Employees who knowingly make a false report could be liable for civil damages,[223] and such a report could also constitute an offence.[224]

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210 S 10C of the 2022 PDAA.
211 *Ibid*.
212 S 10F of the 2022 PDAA.
213 S 10F(14)(i) of the 2022 PDAA.
214 S 6(4) of the 2022 PDAA.
215 S 14A(*e*) of the 2022 PDAA.
216 S 14A(7) of the 2022 PDAA.
217 Ss 6(8) and 12(7C) of the 2022 PDAA.
218 Ss 12(7C) and 13(2B) of the 2022 PDAA.
219 S 7A of the 2022 PDAA.
220 S 13(1) of the 2022 PDAA.
221 *Ibid*.
222 Sch 2 par (1)(*c*) of the 2022 PDAA.
223 S 13A of the 2022 PDAA.
224 S 14A(2) of the 2022 PDAA.

Transparency International Ireland expressed concern that this new measure will deter whistle-blowers from making disclosures.[225]

In terms of section 14A(1) of the 2022 PDAA, it is an offence for any person to prevent a person from making a report, or to penalise or threaten them, or for a third person connected to the reporting person to bring vexatious procedures against a reporting person, breach the duty of confidentiality regarding the identity of the whistle-blower, or to fail to establish or maintain reporting channels.[226]

Although the Commissioner for Protected Disclosures does not possess the far-reaching powers of the Office of the Whistleblower in terms of Bill 27, the 2022 PDAA amendments will to a certain extent strengthen the protection of whistle-blowers in Ireland.

5 3 The reward system for whistle-blowers in the USA

In the wake of financial scandals such as the collapse of Enron and WorldCom, the Sarbanes-Oxley Act 2002 (SOX)[227] was adopted to strengthen internal control of companies and to encourage whistle-blowers to report transgressions. SOX did not succeed in its aim[228] and the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act),[229] was consequently adopted to motivate employees to report securities law violations to the Securities Exchange Commission (SEC) or other appropriate bodies.[230] The Dodd-Frank Act protects whistle-blowers against retaliation and rewards them for information.[231]

Employers are prohibited from discharging, demoting, suspending, threatening, harassing, or discriminating against a whistle-blower. Whistle-blowers who have suffered retaliation may institute action in the appropriate district court.[232] Remedies for retaliation include reinstatement, double back-pay and payment of legal costs.[233] Whistle-blowers may further be rewarded by the SEC if they voluntarily provide original information (not provided previously) and the information leads to the "successful enforcement of the covered judicial or administrative action".[234] A whistle-blower will only be eligible for a reward if at least $1 million is recovered. The amount of the award must be at least 10 per cent and not more than 30 per cent of the

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225 Transparency International Ireland "Protected Disclosures Amendment Act Signed into Law" (22 July 2022) https://translate.google.co.za/?sl=fr&tl=en&text=Studio%20a%20100m%20du%20vieux%20village&op=translate (accessed 2023-01-15).

226 S 14A of the 2022 PDAA.

227 18 USC §1514A.

228 Bertucci, Skufca and Boyer-Davis "Section 806 of the Sarbanes-Oxley Act: Can the Fraud Triangle Prevent Fraud in the Finance Sector?" 2021 *Journal of Corporate Accounting & Finance* 158–159.

229 Pub L No 111- 203, 124 Stat 1376 (2010).

230 15 USC 78u-6(*b*)–(*g*).

231 Bertucci *et al* 2021 *Journal of Corporate Accounting & Finance* 166.

232 15 USC §§ 78u-6(*h*)(1)(B)(i) and 78u-6(*h*)(1)(B)(iii)(I)(aa).

233 15 USC §§ 78u-6(*h*)(1)(C).

234 15 USC §§ 78u-6(6)-(*g*).

recovered amount.[235] Factors that will be taken into account to determine the amount paid to the whistle-blower are *inter alia* the significance of the information to the success of action taken and assistance provided by the whistle-blower to agencies in recovering the amounts.[236] The whistle-blower would not receive an award if they were an employee or officer *inter alia* in the Department of Justice, an appropriate regulatory authority or a law enforcement agency.[237] The reward system has proved to be highly successful. In March 2022, the SEC reported that since 2012, awards of approximately $1.2 billion were made to 249 whistle-blowers. The rewards are financed by fines paid to the SEC by corporations that have violated securities laws.[238]

Although countries in Europe do not favour rewards for whistle-blowers because it could be conducive to false reports, this is not a significant problem in the US.[239] Research by Buccirossi *et al* indicates that not only is the reward system highly effective in retrieving amounts "lost" through corruption, but it is conducive to a high reporting rate, which has a strong deterrent effect on would-be wrongdoers.[240] The authors point out that whistle-blowers will be deterred from making false reports if an effective legal system imposes penalties against defamation, perjury and information fabrication.[241]

6 CONCLUSION AND RECOMMENDATIONS

Some of the measures in UNCAC, the EDW, the Irish 2022 PDAA, Bill 27, and the US Dodd-Frank Act could be considered for implementation in legislation in South Africa to enhance the protection of whistle-blowers and encourage them to report on wrongdoing. The legislator could consider including the following recommendations in a new or amended PDA:

- adopt one comprehensive statute covering all aspects of protection for whistle-blowers, integrating the current fragmented protection in different statutes;
- provide for the physical protection of whistle-blowers;
- protect persons outside the employment relationship by not limiting protection to workers only;
- define "whistle-blower" so as to extend protection to members of the public;
- define "detriment" widely to include negative consequences for reporting persons outside an employment relationship;

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235 15 USC §§ 78u-6(*b*)(1)(A)-(B).

236 15 USC §§ 78u-(*c*)(1)(A).

237 15 USC §§ 78u-6h (1)(A).

238 US Securities and Exchange Commission "SEC Awards Approximately $14 Million to Whistleblower" (11 March 2022) https://www.sec.gov/news/press-release/2022-40 (accessed 2023-01-20).

239 Buccirossi, Immordino and Spagnola "Whistle-Blower Rewards, False Reports, and Corporate Fraud" 2021 51 *European Journal of Law and Economics* 412.

240 Buccirossi *et al* 2021 *European Journal of Law and Economics* 416.

241 Buccirossi *et al* 2021 *European Journal of Law and Economics* 412.

- establish a whistle-blowers' office with wide powers to advise and support whistle-blowers, to monitor the investigation of disclosures by whistle-blowers, to order redress for whistle-blowers, and to penalise persons who have subjected a whistle-blower to detriment;
- reverse the burden of proof; and
- scrap the good faith requirement and the requirement that whistle-blowers must reasonably believe that information is "substantially true".

If a new Act does not sever protection from the workplace and the definition of worker is retained, the Act should:

- be extended to include non-executive directors, job applicants, voluntary workers, unpaid trainees and suppliers;
- extend the definition of occupational detriment to include harm to a whistle-blower's reputation (especially on social media), medical and psychological referrals, blacklisting the whistle-blower, premature terminating of a supplier's contract, and suspending a licence;
- oblige employers and authorities to establish safe internal and external reporting channels, respectively, protecting the confidentiality of the identity of the whistle-blower and their family;
- criminalise retaliation against a whistle-blower, and preventing a whistle-blower from making a report.
- hold employers liable for harassment of whistle-blowers by co-employees on account of a protected disclosure if the employer knew about the harassment or reasonably ought to have known about the harassment and did not take reasonable steps to address the conduct;
- regard non-disclosure agreements prohibiting a person from making a protected disclosure as void;
- implement a reward system (including financial awards) for whistle-blowers;
- adopt a national Code of Good Practice on Whistle-Blowing as a model for a code for each workplace; and
- make mandatory the provision of training on the importance of whistle-blowing for a specific business for employers, employees, trade unions and managers.

Furthermore, the government should raise awareness in the community on the importance of whistle-blowing to eliminate corruption and other types of wrongdoing.

Some of these recommendations are far-reaching, but anything less is unlikely to make a difference to the plight of whistle-blowers in South Africa. In the interests of a just society, it is expedient that protection for whistle-blowers should be extended.

As the court in *Mashilo* remarked, the complainant in this case

> "performed one of the most underrated and thankless constitutional duties: whistleblowing. I employ the words 'underrated and thankless' advisedly owing to the fact that the legislature seems to be moving at a snail's pace in promulgating tangible legislation to protect whistle-blowers."[242]

[242] *Mashilo supra* par 96.