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Protecting whistle blowers in South Africa: The Protected Disclosures Act, no 26 of 2000

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Whistleblowing – [a] Bringing an activity to a sharp conclusion as if by the blast of a whistle (Oxford English Dictionary); [b] Raising a concern about malpractice within an organisation or through an independent structure associated with it (UK Committee on Standards in Public Life); [c] Giving information (usually to the authorities) about illegal or underhand practices (Chambers Dictionary); [d] Exposing to the press a malpractice or cover-up in a business or government office (US, Brewers Dictionary); [e] (origins) Police officer summoning public help to apprehend a criminal; referee stopping play after a foul in football.[1]

Background

This paper challenges public opinion about whistle blowers and whistleblowing. It places the South African legislation to protect whistle blowers in the context of recent anti-corruption initiatives. A brief summary is given of the *Protected Disclosures Act* and its application. Some of the potential practical implications of whistle blower protection legislation for employers and employees in both the public and private sector organisations are touched upon.

Introduction

Because of some confusion about the meaning of the term, whistle blowers have unfairly acquired a bad reputation as being trouble makers, busy bodies and disloyal employees. A major cause of this negative perception in South Africa is the unfair confusion of whistle blowers with '*impimpis*' — apartheid era informants who betrayed their comrades often with devastating consequences. This historical context — not dissimilar to former Soviet bloc countries, as well societies in some European countries such as France that were deeply scarred by World War II — has unfortunately allowed the stigmatisation of whistleblowing as an activity to be despised rather than to be encouraged.

If understood correctly, whistleblowing is not about informing in a negative, anonymous sense. Rather, as the United Kingdom's Committee on Standards in Public Life puts it, it is about "raising a concern about malpractice within an organisation" and in this way is a key tool in promoting individual responsibility and organisational accountability. The bravery of being prepared to blow the whistle is seemingly directly related to the cultural resistance in many organisations to promote transparency and accountability. The reality is that, in sticking their necks out to raise concerns within their place of employment, people more often than not risk victimisation, recrimination and sometimes dismissal as it is often the case that the messenger, rather than the important message that is conveyed, is attacked. Within this context, whistle blowers acting in good faith and in the public interest may be the bravest of citizens. In refusing to turn a blind eye to suspected impropriety in the workplace and as such preventing possible harm, they deserve society's support, if not praise.

International and local experience has shown that failure to address legitimate concerns raised by employees may have a number of harmful consequences, including loss of life or huge financial losses:

- The failure of officials in the European Commission to respond to the internal whistleblowing of an auditor caused him to disclose his concerns of financial misconduct to the European Parliament. This led to the resignation of the College of Commissioners, a crisis in confidence in the European Union and to the suspension of the whistle blower and — he maintains — lasting damage to his career.
- The Bingham Inquiry in the UK into corruption at the Bank of Credit and Commerce International found that there was an autocratic environment where neither employees nor firms were willing to voice concerns. This led to new rules in the UK on the duties of auditors and other firms to report suspected irregularities.
- The victims of HIV-contaminated blood products in France complained that the ministers and officials had known of the problem, but had said nothing and done nothing.[2]

In South Africa, the recent factory deaths in Lenasia acutely demonstrate the importance of reacting to the whistle when it is blown. The tragedy in the case of the 11 chemical factory workers who lost their lives in this instance is that it could have been prevented. Following their deaths, it has come to light that the Department of Labour had received written notice from concerned employees who had blown the whistle three months before about working conditions in the factory. These included being locked up with gas bottles for up to 16 hours, fire extinguishers that were not in working order, lack of ventilation and the absence of an emergency alarm system — conditions that were inexcusable if not illegal.

What is known about the management of this particular company that allegedly locked up its workers and paid them a pittance, does not suggest an environment conducive to raising concerns about working conditions. Unfortunately, when concerns about malpractice in the workplace are raised, they are often not addressed. In this case, the workers obviously felt desperate enough to turn to the Department of Labour, which will have to live with the fact that the failure of its systems to respond appropriately to these complaints resulted in a fiery death for the factory workers.

Failure to address legitimate concerns raised by employees, as the above example shows, may result in loss of life, damage to reputation, financial costs and, following the Department of Labour's investigation, possibly further regulation of small businesses. Recognising that events such as those illustrated above might have been avoided if a culture of openness and accountability encouraged honest employees to raise their concerns in an appropriate way to those in a position to address them, many countries have taken a legislative route and have put legislation in place that protects the whistle blower.

Whistleblowing and Anti-Corruption Strategies

South Africa's transition to democratic rule has been characterised by high levels of crime, including widespread corruption. Several initiatives have been undertaken in recent years to promote accountability and fight corruption. These efforts include establishing specialised bodies such as the Special Investigating Unit, hosting anti-corruption conferences (November 1998, April 1999 and November 1999), as well as passing legislation such as the *Promotion of Access to Information Act* and the *Protected Disclosures Act*.

One of the key obstacles in the fight against corruption is the fact that, without legal protection, individuals are often too intimidated to speak out or 'blow the whistle' on corrupt activities which they observe in the workplace. Although they may have a duty to report misconduct in terms of their conditions of employment, those who do stick their necks out and raise concerns are mostly victimised, intimidated and, until recently, would have little recourse to legal remedies.

A recent survey conducted by the Institute for Security Studies among an expert panel of people who attended the above anti-corruption conferences confirms the importance attached to whistleblowing as an effective tool in the fight against corruption. When asked to rank the effectiveness of 30 different anti-corruption controls, "legal protection for whistle blowers" was placed in the fourth highest position, scoring 62.3% and regarded as "very effective". Barring public officials from holding public office led the way (68.8%), followed by greater transparency of government tender processes (66.2%), and greater internal financial controls and internal audits of government spending (64.9%).

In South Africa, the newly passed *Protected Disclosures Act* (no 26 of 2000) makes provision for procedures in terms of which employees in both the public and private sector who disclose information of unlawful or corrupt conduct by their employers or fellow employees, are protected from occupational detriment. This law is therefore a crucial weapon in the armoury of anti-corruption efforts to encourage honest employees to report wrongdoing. As such, this law should be welcomed as a crucial corporate governance tool to promote safe, accountable and responsive work environments in both the public and private sector.

The legislative process

Resolutions taken at the National Anti-Corruption Summit in April 1999 made specific reference to:

> "developing, encouraging and implementing whistle-blowing mechanisms, which include measures to protect persons from victimisation where they expose corruption and unethical practices."

Towards the end of 1999, the ad hoc committee in parliament dealing with the *Open Democracy Bill* decided that, in order to meet the 4 February 2000 constitutional deadline, they would take out the section on whistle blower protection and expand it into a separate Act. This was partly at the suggestion of the Institute for Security Studies. In studying comparative experience, particularly in Australia and Britain, the Institute believed that this action would result in whistle blower protection becoming more visible. In collaboration with Idasa and with the assistance of Guy Dehn, Executive Director of Public Concern at Work, a British charity organisation that has assisted hundreds of whistle blowers, a draft bill was prepared which drew extensively on the British *Public Interest Disclosure Act*.

With some refinement effected by legislative drafters of the Department of Justice, what came to be known as the *Protected Disclosures Bill* was unanimously approved by the parliamentary justice committee . It was passed on to the National Council of Provinces' Select Committee on Security and Constitutional Development where, apart from tightening up Section 4 relating to the jurisdiction of the courts in labour-related matters, the Bill was approved. On 20 June 2000, the Bill was passed by parliament in the form of the *Protected Disclosures Act,* no 26 of 2000. It was signed by the president on 1 August and published on 7 August in the *Government Gazette*.

The Act has not yet come into force, and there is apparently reluctance by the Office of the President to enact the legislation without having the necessary guidelines in place. Hopefully, this is the only reason for the delay. Developing state-of-the-art legislation (whether to protect whistle blowers, provide access to information or ensure administrative justice) without regard for the necessary infrastructure for its effective implementation, is unwise. Without creating undue delays, the necessary guidelines and regulations with regard to the specific procedures pointed to in the Act will therefore need to be developed and disseminated before the Act comes into force. The Department of Justice is currently in the process of compiling such procedures for the public sector. While the Act also extends to private sector employers, it is not prescriptive, rather appealing to the self-interest of organisations to develop practical procedures for their employees to blow the whistle which are in line with the law.

South African legislation goes further than both the Australian and American laws to cover both public and private sector employees. However, in drafting the legislation, the justice committee was not persuaded to expand the ambit of the law beyond the employer-employee relationship. As such, a pensioner (who is not an employee) who blows the whistle on a corrupt pension officer or fellow pensioner, would not be protected once the law comes into force. A resolution was taken by the justice committee, however, to ask the South African Law Commission to investigate the matter further. Also important to note is that the Act is not retrospective with regard to the disclosure, meaning that whistle blowers suffering occupational detriment as a consequence of their disclosure would not currently be protected.

How will the Act work?

In its current form, the Act makes provision for procedures to allow and assist employees in both the private and public sector to raise concerns about the unlawful or irregular conduct of their employers or co-workers. Various types of information disclosures are highlighted in the Act, including suspicion of criminal offences, failure to comply with legal obligations and,

particularly relevant in the Lenasia case, "a reasonable belief that the health or safety of an individual has been, is being or is likely to be endangered."

Employees making a protected disclosure in terms of the specified procedures are protected from occupational detriment. This might include being subjected to disciplinary action, dismissed, suspended, demoted, harassed, intimidated, transferred against his or her will, refused transfer or promotion, or otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security. The Act thus prohibits an employer from subjecting an employee to an occupational detriment on account of having made a protected disclosure. Should occupational detriment occur and is found to have been linked to the making of a protected disclosure, the bona fide whistle blower would be protected and the employer would not be allowed to dismiss or prejudice the employee for having raised legitimate concerns. This, in effect, is how the law protects whistle blowers.

It is important to note that disclosures of information relating to the above will only be "protected" if made according to specific procedures. In order to be protected, a disclosure must be made in one of five methods:

- to a legal representative (clause 5);
- to an employer (clause 6);
- to a minister or provincial member of the Executive Council (clause 7);
- to a specified person or body (clause 8) — only the Public Protector and the Auditor-General are currently mentioned with other persons or bodies (for example, the Special Investigating Unit) required to be prescribed by the minister of Justice in regulations; or
- as a general protected disclosure (clause 9).

Each of the above procedures to ensure that a disclosure is protected, has certain requirements that must be complied with. Only a few requirements are applicable in respect of a disclosure given to a legal representative, with the requirements becoming more comprehensive as one moves up the ladder. The most comprehensive requirements are set in respect of making a "general disclosure".

Richard Calland, Executive Chair of the new Open Democracy Advice Centre, puts it as follows:

> "at the heart of the Act is the notion that prevention is better than cure. It strongly encourages whistle-blowers to disclose first of all to their employer, in order that the employer should have the opportunity to remedy the wrongdoing. Potential whistleblowers need to know that they must first go through this door where the test is that of good faith, rather than making a wider disclosure which would require higher tests."

Any concerns that the Act favours employees are unfounded. The Act is specifically structured in a way that best serves the interests of accountable organisations. Only when internal channels have been exhausted or fail are wider disclosures to external bodies protected if they pass the significantly higher tests. The fact that the Act allows the response of the Department of Labour in the Lenasia case to be scrutinised before deaths occur means that it can and will make a difference in the way organisations and the state receive concerns about wrongdoing and the diligence with which these are addressed.

If employers respond appropriately to the good faith concerns raised by their employees the Act should be invoked rarely rather than regularly. Ultimately, the law provides protection for both employers and employees. Through informing employees that it is acceptable to blow the whistle and putting procedures in place to do so, employers receive early warnings of potential problems in their organisations and can address them before they spill over into the public realm. Employees, by raising legitimate concerns in an environment of trust to those in a position to address the problem cannot be subjected to occupational detriment for sticking their necks out.

In discussing the Act in more detail, the most relevant procedures to unpack in order to understand how the Act works, are those relating to disclosures to employers (clause 6) and clause 9 regarding the making of a general protected disclosure.

Clause 6: Protected disclosure to employer

In order to qualify as a protected disclosure, the disclosure must be made in good faith and be:

a. substantially in accordance with any procedure prescribed, or authorised by the employee's employer for reporting or otherwise remedying the impropriety concerned;

b. or to the employer of the employee, where there is no procedure as contemplated in paragraph (a)."

In section 6:2, the Act also makes provision for confidential hotlines, with some companies encouraging their employees to make use of them:

> "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 the purposes of this Act, to be making the disclosure to his or her employer."

In South Africa, as elsewhere, there has been a competitive market for such services. Research has found, however, that where the only real alternative to silence is for individuals to make an anonymous report, practical problems result. Anonymous disclosures are hard to corroborate, difficult to investigate and often impossible to remedy.[3] As such, setting up and publicising a hotline through which the public and employees can anonymously report suspected corruption is not felt to be the right answer when attempting to promote and encourage a culture of openness, transparency and accountability.

How would making a protected disclosure in terms of clause 6 work in practice? Consider the hypothetical case of the options faced by an honest official (Mr X) working in a traffic licensing department. He notices that a fellow employee is allowing visibly unroadworthy vehicles to be issued with clearance papers. The honest employee, motivated out of good faith and public interest concerns, and knowing how many deaths result from such vehicles being on the road, decides to blow the whistle on his co-worker. Being a public servant, the traffic official might already have signed the Code of Conduct where the duty to report impropriety is stipulated.[4] If there is a procedure in place for making protected disclosures, the official would be wise to do so, or for example, may report the suspected wrongdoing to his immediate supervisor. For clause 6 disclosures to be protected, good faith is the only test. Important to remember is that it is not the duty of the whistle blower to investigate the matter under these circumstances, only to disclose information according to procedures specified in the Act to those in a position to investigate it.

If the traffic official's immediate supervisor is a responsible and honest manager, he would welcome the information supplied by the honest employee acting in good faith and ensure that the allegations are followed up. However, if the line manager to whom the disclosure is made, is an accomplice of the corrupt co-worker, a situation may arise where the traffic official is dismissed, demoted or labelled as a trouble maker in the department. It is under such circumstances that the Act, when it comes into force, will be able to protect employees, for the dismissed or victimised traffic official would have some recourse in terms of the remedies laid out in the Act for the first time.

Legal remedies

The remedies stipulated in the Act are dealt with in section 4. Where an employee is subjected to an occupational detriment in contravention of the Act, such an employee may approach any court or tribunal having jurisdiction for protection, including the Labour Court (section 151 of the *Labour Relations Act,* no 66 of 1995), for appropriate relief, or may pursue any other process allowed for or prescribed by any law. The Act states that any employee who has made a protected disclosure and who reasonably believes that he or she may be adversely affected on account of having made the disclosure, at his or her request and if reasonably possible or practicable, must be transferred from the post or position occupied by him or her at the time of the disclosure to another post or position in the same division or another division of his or her employer or, where the person making the disclosure is employed by an organ of the state, to another organ of the state. The terms and conditions of employment of a person transferred in terms of this subsection may not be less favourable, without his or her written consent, than the terms and conditions applicable to him or her immediately before his or her transfer. That such remedies exist under the Act should provide an incentive for employees to blow the whistle without fear, as well as for employers to ensure that they are able to account for any action which might occur once a disclosure has

been made.

Because cases may arise where it is impossible for an employee who is a bona fide whistle blower to make a disclosure to his or her direct employer, the Act does provide for other channels for making disclosures, such as a general protected disclosure. Here the tests are far higher than 'good faith', since the Act is structured in a way to encourage employees to raise their concerns internally where organisations can take responsibility for responding to the concern, rather than externally (such as to the media).

Making a general protected disclosure

A general protected disclosures is any disclosure, other than a disclosure made in accordance with section 5, 6, 7 or 8, made in good faith by an employee who:

a. reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and
b. does not make the disclosure for purposes of personal gain, excluding any reward payable in terms of any law;

is a protected disclosure if–

i. "one or more of the conditions referred to in subsection (2) apply; and
ii. in all the circumstances of the case, it is reasonable to make the disclosure."

The conditions referred to in subsection (1)(i) in terms of circumstances are:

"2(a) that at the time the employee who makes the disclosure has reason to believe that he or she will be subjected to an occupational detriment if he or she makes a disclosure to his or her employer in accordance with section 6;
(b) that, in a case where no person or body is prescribed for the purposes of section 8 in relation to the relevant impropriety, the employee making the disclosure has reason to believe that it is likely that evidence relating to the impropriety will be concealed or destroyed if he or she makes the disclosure to his or her employer;
(c) that the employee making the disclosure has previously made a disclosure of substantially the same information to–

i. his or her employer; or
ii. to a person or body referred to in section 8,

in respect of which no action was taken within a reasonable period after the disclosure; or
(d) that the impropriety is of an exceptionally serious nature."

In determining whether it is reasonable for the employee to make the disclosure, consideration must be given to the following:

a. "the identity of the person to whom the disclosure is made;
b. the seriousness of the impropriety;
c. whether the impropriety is continuing or is likely to occur in the future;
d. whether the disclosure is made in breach of a duty of confidentiality of the employer towards any other person;
e. in a case falling within subsection (2)(c), any action which the employer or the person or body to whom the disclosure was made has taken, or might reasonably be expected to have taken, as a result of the previous disclosure;
f. in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the employee complied with any procedure which was authorised by the employer; and
g. the public interest."

Returning to the traffic official discussed above: if he had reason to suspect that his employer would react negatively to the disclosure and find reasons to dismiss him — a common reaction — or that evidence might possibly be destroyed, he may be tempted to go the route of making a general protected disclosure, although the tests are much higher. Such a disclosure would only be protected in terms of clause 9 of the Act if it could be shown to be motivated by good faith, reasonable belief, substantial truth and was not made for personal gain. It also has to be shown that the circumstances referred to above were relevant and that it could be deemed reasonable for the traffic official to make such a disclosure.

Journalists or politicians who receive brown envelopes from so-called whistle blowers should take note of the tough requirements that have to be met in order to invoke the protection of

the Act. How many journalists or politicians are aware of the provisions of the Act? Would they, if they truly cared about the fate of the whistle blower, encourage the concerned individual first to raise their concerns internally to their employer and thus retain the protection of the law, rather than to miss an exclusive scoop?

Bearing in mind the high tests required for protected disclosures to bodies other than employer channels in order to invoke the protection of the law, the alleged whistle blowers in the highly publicised arms procurement deal would be wise to familiarise themselves with the provisions of the Act before it comes into force.

Conclusion

Disclosures outside the protection of the law clearly defeat the policy objectives of the Act which, according to the preamble, are to:

- "Create a culture that will facilitate the disclosure of information by employees relating to the criminal and other irregular conduct in the workplace in a responsible manner by providing comprehensive statutory guidelines for the disclosure of such information and protection against any reprisals as a result of such disclosures.
- Promote the eradication of criminal and other irregular conduct in organs of state and private bodies."

There is thus an urgent need to promote awareness of the Act and the way in which it is intended to work. The Open Democracy Advice Centre,[5] a new project of Idasa in partnership with the Black Sash Trust and the University of Cape Town's Public Law Department, will offer free legal advice on how to utilise the *Protected Disclosures Act* to ensure that employees blowing the whistle will be protected by the Act.

Even before the Act comes into force, employers in the public or private sector should use the opportunity to put the necessary procedures in place that will encourage honest employees to speak out and to prevent them from falling foul of the law. So too can potential whistle blowers equip themselves with the necessary information to ensure that, in disclosing information, they will be protected.

Clearly, putting effective legal protection in place for bona fide whistle blowers is but one of a number of measures to fight corruption effectively in South Africa. More importantly, the *Protected Disclosures Act* has the potential to stimulate the appropriate context for raising and addressing concerns in the workplace and, in this way, ensuring that problems are raised and addressed before they have harmful consequences.

Notes

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1. G Dehn, *Discussion paper: Whistleblowing to combat corruption*, OECD Labour/Management Programme, PLACE??, 2000.
2. Ibid.
3. Ibid.
4. Clause 4.10: "in the course of her or his official duties, shall report to the appropriate authorities, fraud, corruption, nepotism, maladministration and any other act which constitutes an offence, or which is prejudicial to the public interest ..."
5. See <www.opendemocracy.org.za>.

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About this paper

This paper challenges public opinion about whistle blowers and whistleblowing. It places the South African legislation to protect whistle blowers in the context of recent anti-corruption initiatives. A brief summary is given of the Protected Disclosures Act and its application. Some of the potential practical implications of whistle blower protection legislation for employers and employees in both the public and private sector organisations are touched upon. Putting effective legal protection in place for bona fide whistle blowers is one measure to fight corruption effectively in South Africa. More importantly, the Protected Disclosures Act has the potential to create the appropriate context for raising and addressing concerns in the workplace.

About the author

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