THE PROTECTED DISCLOSURES ACT:

REFLECTING ON THE JURISPRUDENCE OF THE LAST 10 YEARS AND THE CHALLENGES AHEAD

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SUMMARY

The purpose of this paper is to reflect on, analyse and evaluate the protection offered to whistleblowers since the enactment of the Protected Disclosure Act 26 of 2000. It focuses on the Act, which seeks to combat crime and corruption through protected disclosure. It considers the fate of whistleblowers, notwithstanding the provisions provided in the Act for their protection.

Globally, governments have been paying more attention to the valuable potential role of the whistleblower in preventing and disclosing fraud, corruption and other wrongdoings. This short comparative study explores the United States, selected countries within the European Union, and the three tier model of the United Kingdom, which has legislation similar to that of South Africa.

Both the Protected Disclosures Act and the South African government's proposed Protection of Information Bill, or "'Secrecy Bill'," are discussed with reference to the impact on the potential whistleblower.

With its 'state of the art' legislation, South Africa is at the forefront of whistleblower law worldwide. If it is understood and applied effectively, this legislation will help to deter and detect wrongdoing in the workplace, acting as an early-warning mechanism to prevent impropriety and corruption within all work sectors.

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CHAPTER 1

INTRODUCTION

1.1 Introduction

'The world is a dangerous place, not because of those who do evil, but because of those who look on and do nothing.'

-Albert Einstein

A little over a decade ago South Africa introduced legislation designed to protect the whistleblower, which was in the form of the Protected Disclosures Act (hereafter referred to as the PDA or the Act).[1] The Act came into force in February 2001 with the purpose of encouraging employees to raise concerns regarding wrongdoing in the workplace, in order to ensure that organisations respond by addressing the impropriety rather than confronting the person reporting the wrongdoing. By protecting the whistleblower from occupational detriment in these circumstances, the Act promotes public awareness and interest. The Act also promotes that organisations take action when faced with whistle-blowing, instead of covering up improprieties.

The Act covers all employees and applies to every employer in the public and private sectors. It promotes the raising of concerns regarding, malpractice, and maladministration, danger to public health, safety and the environment, and miscarriage of justice. The Act sets out a clear and simple framework to protect employees who disclosed criminal and other irregular conduct in the workplace from victimisation and dismissal. The legislation slots neatly into Chapter 8 of the Labour Relations Act (hereafter referred to as the LRA),[2] dealing with unfair labour practise and unfair dismissal.

A whistleblower that is subjected to any form of disciplinary action or any other adverse influence in his or her work may bring a claim according to the processes in the Act, including a claim to the Labour Court or to a court with jurisdiction over the matter. One of the key obstacles in the fight against all forms of corruption is the fact that without legal protection, individual

[1] The Protected Disclosures Act 26 of 2000
[2] The Labour Relations Act 66 of 1995

employees are often too intimidated to speak out or 'blow the whistle' on an employer or organisation. The PDA seeks to eliminate this fear and the provisions of the Act are now used more regularly in litigation. This study is not intended to analyse all the jurisprudence in recent cases decided under the PDA,[3] but rather to examine a few selected cases in which the whistleblower has had no other recourse than to apply to the courts for remedy. Whilst the Act promotes disclosure, it cannot guarantee protection of the whistleblower nor does it the take into account the future of the person having blown the whistle. In my view, as honourable as it is to blow the whistle, it is also onerous, often leaving the whistleblower without employment and financial means.

It is important to recognise that whistleblowing is an international phenomenon and although this study cannot assess the impact of legislation on protected disclosure internationally it does compare the legislation of selected jurisdictions. The PDA is compared with the UK model, the laws of the United States and the different approaches taken in selected countries within the European Union, with a view to exposing the best practise, criticizing the current laws, and suggesting alternatives. In the final chapter, I discuss the PDA in relation to the impact of the South African governments proposed 'Protection of Information Bill'.

The Alternative Information Development Centre commented that, 'this law, if passed, will limit access to government information, thus undermining transparency, accountability and media freedom. The bill allows every organ of state - from government departments and parastatals to the smallest

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[3] *Tshishonga v Minister of Justice & Constitutional Development & another* (2006) 27 *ILJ* 1541 (LC); *Tshishonga v Minister of Justice & Constitutional Development & another* (2007) 28 *ILJ* 195 (LC); *Tshishonga v Minister of Justice & Constitutional Development & another* (2009) 30 *ILJ* 1799 (LAC); *Engineering Council of SA & another v City of Tshwane Metropolitan Municipality & another* (2008) 29 *ILJ* 899 (T); *Engineering Council of SA & another v City of Tshwane Metropolitan Municipality* (2010) 31 *ILJ* 322 (SCA); *Young v Coega Development Corporation (Pty) Ltd (1)* (2009) 30 *ILJ* 1776 (ECP); *Young v Coega Development Corporation (Pty) Ltd (2)* (2009) 30 *ILJ* 1786 (ECP); *Pedzinski v Andisa Securities (Pty) Ltd (formerly SCMB Securities (Pty) Ltd)* (2006) 27 *ILJ* 362 (LC); *Global Technology Business Intelligence (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2005) 26 *ILJ* 472 (LC); *Theron v Minister of Correctional Services & another* (2008) 29 *ILJ* 1275 (LC); *Charlton v Parliament of the Republic of SA* (2007) 28 *ILJ* 2263 (LC); *Charlton v Parliament of the Republic of SA* (2010) 31 *ILJ* 2353 (LAC); *Communication Workers Union v Mobile Telephone Networks (Pty) Ltd* (2003) 24 *ILJ* 1670 (LC); *Radebe & another v MEC, Free State Province Department of Education* [2007] JOL 19112 (O); *Radebe & another v Marshoff, Premier of Free State Province & others* (2009) 30 *ILJ* 1900 (LC); *Ramsammy v Wholesale & Retail Sector Education & Training Authority* (2009) 30 *ILJ* 1927 (LC); *Sekgobela v State Information Technology Agency (Pty) Ltd* (2008) 29 *ILJ* 1995 (LC); *Roos v Commissioner Stone NO & others* [2007] 10 BLLR 972 (LC); *Bagarette & others v Performing Arts Centre of the Free State & others* (2008) 29 *ILJ* 2907 (LC); *Rand Water Staff Association on behalf of Snyman and Rand Water* (2001) 22 *ILJ* 1461 (ARB); *Randles v Chemical Specialities Ltd* (2010) 31 *ILJ* 2150 (LC); *Randles v Chemical Specialities Ltd* (2011) 32 *ILJ* 1397 (LC)

municipality - to throw a blanket of secrecy over its documents'.[4] Disclosing these documents by any means would result in criminal charges and possible jail terms. These consequences are a serious deterrent to whistleblowers wanting to expose wrongdoing and malpractice, especially in the public sector.

It is important at this juncture to discuss the work done by the Open Democracy Advice Centre (ODAC),[5] which was launched in October 2000 as a niche, non profit partnership between the Institute for Democracy in South Africa (IDASA), the University Of Cape Town Department Of Public Law, and the Black Sash Trust. It is the only specialist centre of its kind in South Africa campaigning vigorously for and offering legal advice and assistance to the whistleblower.

ODAC recognises that, '[a]t its heart, the PDA contains a simple idea: that it is in the common interest of both the employer and the (responsible, potential whistleblower) employee to "blow the whistle" internally – within the company – rather than externally, to, for example, the media'. The Open Democracy Campaign Group has continually campaigned for the "right-to-know" and public access to the laws that can protect the whistleblower. ODAC promotes the fight against corruption by supporting actual and potential bona fide whistle blowers using the PDA by providing legal advice, support and case referral.

1.2 A note on the term 'whistleblowing' and the PDA

What is whistleblowing? Transparency International, the global coalition against corruption, defines it as '[t]he disclosure of information about a perceived wrongdoing in an organisation, or at the risk thereof, to individuals or entities believed to be able to effect action.'[6] However, while this statement is basically correct, it probably does not reflect the more nuanced aspects of whistleblowing.

In the South African context, whistleblowing is neither easy nor uncomplicated as it is often confused with 'impimpis' ie apartheid era

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[4] Amandla Alternative Media 'SA's Secrecy Bill- another threat to media freedom' available at- http://www.communitymedia.org.za/alt-media-resources/192-sa-secrecy-bill?tmp=co...[accessed on 22 June 2011.]

[5] Open Democracy Advice Centre- available at- http://www.opendemocracy.org.za/ [accessed on 21 July 2011.]

[6] Transparency International- 'The Need for Whistleblower Protection'-available at http://www.transparency.org/global_priorities/other_thematic_issues/towards_greater_protection_of_whistleblowers/the_need_for_whistleblower_protection [accessed on 22 August 2011.]

informants who betrayed their comrades, often with life-threatening consequences.

This history has unfortunately tainted whistleblowing as an activity to be despised rather than encouraged. Understood correctly, whistleblowing is not informing in a negative, anonymous sense, athwart with trepidation, but is raising a concern about wrongdoing and malpractice within an organisation.

The PDA provides the legislative framework within which whistleblowing can take place in South Africa. In short, it provides the terms on which, employees in both the private and public sectors can disclose information (regarding unlawful or irregular conduct by their employers or their employees) and claim the protection of the Act. In the Act the term 'whistleblowing' is generally used to refer to the conduct that is protected by the PDA.

The Act recognises that unlawful and other irregular conduct in organs of state and private bodies is detrimental to good, effective, accountable and transparent governance, can endanger the economic stability of the Republic of South Africa and has the potential to cause social damage.

The Act therefore aims to operate as an effective early warning system or as a risk-management tool, potentially saving money, jobs and even lives. It remains in the interests of every employees and organisations interests to stop wrongdoing and report the perpetrators of such acts. As this dissertation will show, a whistleblowing policy that encourages employees and employers to take steps to correct wrongdoings and that provides information on reporting channels, is probably the most effective means of giving effect to the broad aims of the PDA.

CHAPTER 2

ANALYSIS OF THE PROTECTED DISCLOSURES ACT 26 OF 2000

2.1 Background

The PDA is derived from Part 5 of the Open Democracy Bill [B67-98], which contained a chapter on whistleblowers. When the Portfolio Committee on Justice and Constitutional Development reported to Parliament on the Bill, it stated that it was not appropriate to include a mere chapter on the protection of whistleblowers in legislation dealing with the right of access to information. Parliament thus embarked on a process of redrafting the chapter into a separate legislation, the Protected Disclosures Bill [B30-2000]. This bill was later enacted as the Protected Disclosures Act.[7]

In the mid 1990's, South Africa was in transition to democracy. Its rapid transformation meant that South Africa was experiencing high levels of crime, including fraud and corruption. The apartheid government of the past was riddled with secrecy in the way it conducted itself in the public sector, making it difficult to obtain information about suspected corruption and maladministration, at the time. This 'secrecy mentality' that existed under the apartheid government needed to change with South Africa's newly democratically elected administration.

According to Landman,[8] 'the government sought to combat crime and corruption by encouraging whistle blowing by employees regarding any impropriety, ie unlawful and irregular conduct by employers and fellow employees. Employees who took such action were to be protected from victimisation by their employers.'

The intention was to create a culture that would facilitate the disclosure of information by employees relating to criminal and other irregular conduct in the workplace in a responsible manner by providing comprehensive statutory guidelines for the disclosure of such information and subsequent protection against any reprisals as a result of such disclosures. The desirability of a culture of whistle blowing might have been questionable at

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[7] Protected Disclosures Act (Act No 26 of 2000) was passed in June 2000 and came into operation in 2001.

[8] A Landman. "A Charter for Whistle Blowers – A note on the Protected Disclosures Act 26 of 2000" (2001) 22 *ILJ* 37 at 37.

the time as it was a great deal to expect in that situation, but the process had begun.

2.2 Structure of the Act

The PDA was enacted to protect employees (whistleblowers) from being subjected to occupational detriment as a result of having made a protected disclosure.[9] The purpose of the PDA is to create cultures that will facilitate the disclosure of information by employees regarding unlawful and irregular conduct in the workplace, by employers or other employees in the employ of the employers in both the public and private sectors.[10] The Act also recognises the Bill of Rights in the Constitution[11] and affirms the democratic values of human dignity, equality and freedom, and declares that criminal and other irregular conduct in organs of state and private bodies are harmful to the good, effective, accountable and transparent governance in corporate bodies and organs of state.[12] The act emphasises the need for open and good corporate governance which otherwise would endanger the economic stability of the Republic and have the potential to cause social damage.

The PDA is made up of four important stages, namely: (i) to analyse the information and determine whether it is a disclosure or not; (ii) if it is, then question whether it is a protected disclosure or not; (iii) to determine whether the employee was subjected to any form of occupational detriment; and lastly, (iv) what remedy is available and should be awarded.[13]

Importantly, the PDA regulates the protection of employees from victimisation by employers and is therefore confined to the relationship between employer and employee in both the public and private sectors.

2.3 Definitions within the Act: Evaluation and comment

Fundamental to the Act are the definitions of employee, employer, disclosure, impropriety, occupational detriment and protected disclosure,

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[9] PDA s 3; PDA s 6; *Charlton v Parliament of the Republic of SA* (2007) 28 *ILJ* 2263 (LC) para 9.
[10] Preamble of the PDA; *Randles v Chemical Specialities Ltd* (2011) 32 *ILJ* 1379 (LC) para 14.
[11] The Constitution of the Republic of South Africa 1996.
[12] Preamble of the PDA.
[13] *Tshishonga v Minister of Justice & Constitutional Development & Another* (2007) 28 *ILJ* 195 (LC) para 176.

which are discussed in this section. Importantly, except for 'employer', the definitions in the Act are essentially the same as in other employment legislation,[14] but there is no presumption as in other employment legislation.

2.3.1 The Act defines an employee as 'any person, excluding an independent contractor, who works for another person or for the state and who receives, or is entitled to receive, any remuneration; and any person who in any manner assists in carrying on or conducting the business of an employer.' Although the Act mirrors the definition of employee in other employment legislation,[15] the PDA is aimed at eradicating wrongdoing and malpractices in the workplace and not regulating the employment relationship and should therefore not be restricted to the reach of the BCEA[16] or the LRA[17].

It has been suggested by the SA Law Reform Commission (SALRC)[18] that the Act be extended to include the protection of pensioners and former employees. Furthermore, the Act applies only to employees as defined, a shortcoming that excludes agents, independent contractors and consultants all of whom could operate in the same workplace but would be denied the protection of the PDA. Amending the Act to include the term 'workers'[19] has also been recommended, in my opinion, these enhancements would definitely strengthen the reach of the Act.

Although service providers and independent contractors are not covered as employees in the PDA, the definition is far broader under the new Companies Act.[20] Section 159 of the Companies Act, like the PDA, also provides protection for employees who disclose information. Any provision of a company's Memorandum of Incorporation or rules, or agreement, is void to the extent that it is inconsistent with, or purports to limit, set aside or negate the effect of section 159 of the Companies Act. Disclosure provided by a shareholder, director, company secretary, prescribed officer, employee, registered Trade Union that represents employees, another representative

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[14] The Employment Equity Act 55 of 1998 s1; The Skills Development Act 97 of 1998, Chapter III ss1; Occupational Health and Safety Act 85 of 1993 s1; Basic Conditions of Employment Act 75 of 1997 s1; The unemployment insurance Act 30 of 1996 s1; The Compensation for Occupational Injuries and Diseases Act 130 of 1993 s1; The Labour Relations Act 66 of 1995 s 213.
[15] The Basic Conditions of Employment Act 75 of 1997 s1 (BCEA); The Labour Relations Act 66 of 1995 s213 (LRA).
[16] Ibid.
[17] Ibid.
[18] South African law Reform Commission: Project 123.
[19] South African law Reform Commission: Project 123 para 1.19.
[20] The Companies Act 71 of 2008 s159 (4).

of employees, suppliers, and employees of suppliers all have qualified privilege in respect of the disclosure, and are immune from any civil, criminal or administrative liability for that disclosure.

2.3.2 The Act defines an employer as 'any person who employs or provides work for any other person and who remunerates or expressly or tacitly undertakes to remunerate that other person; or who permits any other person in any manner to assist in the carrying on or conducting of his, her or its business, including any person acting on behalf of or on the authority of such employer.' The PDA defines an employer as any person, but the BCEA and the LRA do not contain a definition of employer. The Act does not extend to a Temporary Employment Service (TES),[21] which is an oversight. It is not implied in the Act that an employer is both the employer of first instance, in the case of a TES, and that the client is a joint employer. The PDA classifies employer as any person, not taking into account that there could be more than one employer.

The employer in the traditional sense and the employer in the expanded sense should be held jointly and severally liable where the first employer on the instructions of the second employer subjects an employee to occupational detriment for having made a protected disclosure as defined in the Act.

2.3.3 The Act defines 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 regarding such conduct indicates that:

(a) a criminal offence has been committed is being committed or is likely to be committed;

(b) a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;

(c) a miscarriage of justice has occurred, is occurring or is likely to occur;

(d) the health or safety of an individual has been, is being or is likely to be endangered;

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[21] LRA s 98 (1)*(a)(b)* 'temporary employment service' means any person who, for reward, procures for or provides to a client other persons who render services to, or perform work for, the client and who are remunerated by the temporary employment service.

(e) the environment has been, is being or is likely to be damaged;

(f) unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 has occurred; or

(g) that any matter referred to above, is being or is likely to be deliberately concealed.

The Law Reform Commission[22] recommends additionally that reference to the Employment Equity Act[23] be included in the definition of disclosure as it contains a range of grounds considered to be unfair discrimination within the context of employment policy and practice. Importantly this definition implies that every employer should promote equal opportunity and eliminate any unfair employment policy or practice that could be classified as discriminatory.

2.3.4 The Act defines an impropriety as any conduct that falls within any of the categories referred in the definition of disclosure, irrespective of whether or not the impropriety occurs or occurred in the Republic of South Africa or elsewhere or the law applying to the impropriety is that of the Republic of South Africa or of another country.

This definition is clear and concise. The categories of impropriety are listed in the Act and any disclosure must be of improprieties.[24] Disclosures about disagreements with the employer's policy are not disclosure of impropriety. Information may be in the public interest; an example is whether an employer contributes to the coffers of a particular political party, but that would not by itself be an impropriety.[25]

2.3.5 The Act provides that no employee may be subjected to any occupational detriment by an employer for having made a disclosure as regulated by the Act. The Act lists, although not exhaustively, various forms of occupational detriment in relation to the working environment of an employee with the proviso that any form of victimisation suffered by an employee will have to be shown as causally linked to whistleblowing resulting in occupational detriment.

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[22] SA Law Reform Commission: Project 123-available at http://www.justice.gov.za/salrc/reports.htm [accessed on 17 August 2011.]

[23] The Employment Equity Act 55 of 1998 ss 5-11.

[24] PDA s 1.

[25] *Tshishonga v Minister of Justice & Constitutional Development & Another* (2007) 28 *ILJ* 195 (LC) para 184.

It is important to note that caution should be exercised when relying on the provisions of the PDA to protect against occupational detriment as some difficulties could be encountered. The major problem with the PDA is that it assumes that the employers or persons other than employers, to whom protected disclosure is made, will in fact investigate the complaint, and it imposes no such obligation for an investigation to take place. By not providing a provision for such an obligation, the PDA leaves the way open for the whistleblower to suffer potential occupational detriment as a result of the disclosure, the effects of which could be prolonged before remedy is sought and possibly awarded by the courts. The disclosure might, questionably be made to the media if the internal processes fail or if the whistleblower is afraid of any of the various forms of occupational detriment as listed in the Act. Making an external disclosure may result in damaging publicity and consummate penalties for both the employee and the employer in terms of The Prevention of Corrupt Activities Act,[26] which focuses on strengthening measures to prevent and combat corruption and corrupt activities. The Prevention of Corrupt Activities Act, Chapter 2, section 3 (b) *(i)*,[27] makes provision for the reporting of improprieties committed by, for example, persons in public office. Improper conduct, including the abuse of power, misuse of information or illegal acts is committed when a person intends to gratify themselves or others, or when a person agrees or offers to give another person gratification.

The LRA in section186 (2) *(d)* and section187 (1) *(h)* states that an employee who makes a protected disclosure in terms of the PDA is protected against any occupational detriment.[28] The employee is also permitted in section 191 (13) of the LRA to approach the Labour Court directly for adjudication where the employee alleges that he or she has been subjected to occupational detriment by the employer for having made a

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[26] The Prevention and Combating of Corrupt Activities Act 12 of 2004.

[27] 'Any person who directly or indirectly gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person, in order to act, personally or by influencing another person so to act. In a manner that amounts to the misuse or selling of information or material acquired in the course exercising, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or other legal obligation is guilty of the offence of corruption'.

[28] LRA s186 (2)*(d)*: Unfair labour practice means any unfair act or omission that arises between an employer and an employee involving an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act 26 of 2000, on account of the employee having made a protected disclosure defined in the Act. LRA s187 (1)*(h)*: A dismissal is automatically unfair if the employer, in dismissing the employee and the reason for the dismissal is a contravention of the Protected Disclosures Act 26 of 2000, by the employer, on account of the employee having made a protected disclosure defined in that Act.

protected disclosure.[29] It is important to note that although the PDA makes provision for the protection of disclosures and for remedies, the LRA is still important in determining the dispute resolution process and the appropriate remedies. In the case of an unfair labour practice, the employee would be entitled to a maximum of 12 months compensation and in the case of automatically unfair dismissal, to a maximum of 24 months compensation.

It seems that threats of occupational detriment are adequately addressed in the Act under the listing of 'otherwise being adversely affected in his or her employment' but the Act could be extended to include reprisals such as defamation suits, loss of contracts, or the unexplained failure to obtain a contract for work.

2.3.6 The Act provides for a protected disclosure to include a disclosure of information made to a legal adviser, an employer, a member of Cabinet or of the Executive Council of a province, or any other person or body. Protected disclosures can also be made to the Public Protector or Auditor-General. [30]

The South African Law Reform Commission suggests that the list of persons and bodies to whom a protected disclosure can be made be extended to widen the scope of protection. The Commission is of the opinion that it would be preferable to issue regulations in terms of section 8 of the Act as opposed to amending the Act.[31] The commission proposed to include the Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; the Commission for Gender Equality; the Electoral Commission; the Independent Authority to Regulate Broadcasting; the Speaker of Parliament; the Commissioner of Police; an ombudsman; an organ of state or a Labour Inspectorate.[32]

It is important to note that a general protected disclosure in section 8 of the PDA, or the widened list as proposed, is always subject to the terms of section 9 (1) of the PDA where disclosure must be made in good faith by an

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[29] LRA s 191 (13)*(a)*: An employee may refer a dispute concerning an alleged unfair labour practise to the Labour Court for adjudication if the employee has alleged that the employee has been subjected to an occupational detriment by the employer in contravention of section 3 of the Protected Disclosures Act 26 of 2000 for having made a protected disclosure defined in that Act.

[30] The definition of protected disclosure specifically excludes a disclosure in respect of which the employee concerned commits an offence by making that disclosure; or made by a legal advisor to whom the information concerned was disclosed in the course of obtaining legal advice in accordance with section 5 of the Act.

[31] SA Law Reform Commission: Project 123 para 1.83.

[32] SA Law Reform Commission: Project 123 para 1.71.

employee: The employee should believe the information to be substantially true; the disclosure is not made for purposes of personal gain; is made in respect of which one or more conditions referred to in section 9 sub section (2) of the Act have been met and all the circumstances of the case are reasonable.

In addition to these categories stated in the PDA and proposed by the SA Law Reform Commission, the Companies Act [33] provides that a disclosure can also be made in good faith to the Commission, the Companies Tribunal, the Panel, a regulatory authority, an exchange, a legal adviser, a director, prescribed officer, company secretary, auditor, board or committee of the company concerned.[34] An employee must therefore first make a disclosure that falls within the ambit of a disclosure as defined by the PDA; second make a disclosure to a set category of persons and thirdly make the disclosure in good faith.[35] Although the onus is on an applicant to satisfy a tribunal that a protected disclosure was made in good faith, most claims rely on one broadly drawn category of disclosure that the employer has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.

The definitions of disclosure, protected disclosure, general protected disclosure and impropriety were examined when the court made a detailed analysis of their meanings as contained in the PDA with reference to international and local authorities. In *Tshishonga v Minister of Justice and Constitutional Development,*[36] a case involving disclosure to the media, the court noted,

> [R]egarding general protected disclosures provided for in section 9, several requirements have to be met for a disclosure to qualify as a general protected disclosure. It has to be in good faith; the employee must have a reasonable belief that the information is substantially true, and the disclosure should not be for personal gain. These three requirements of good faith, reasonable belief and personal gain overlap and mutually reinforce one another. A weakness in one can be compensated for by the others. These requirements must be

[33] The Companies Act 71 of 2008 s 159(3) *(a)*.
[34] As defined in The Companies Act Chapter I Part A (1).
[35] PDA s 6.
[36] *Tshishonga v Minister of Justice & Constitutional Development & Another* (2007) 28 *ILJ* 195 (LC) para 197-198.

> construed in a manner that does not defeat the objectives of eliminating crime, promoting corporate governance and protecting employees against reprisals. The disclosure must in addition be filtered through two more tests: The disclosure must meet one or more of the four conditions in section 9(1) and it must be reasonable to make the disclosure. Reasonableness must be assessed against the seven criteria in section 9(3). These two tests shift the focus away from an assessment of the employee's good faith and the reasonableness of his beliefs to more tangible and objectively determinable facts. The defence that any one of the requirements in section 9 is lacking must be specifically pleaded and proved. Deciding whether all the requirements have been met is a question of fact.

The Tshishonga case confirmed that disclosure to the media can be treated as a protected disclosure if all the requirements of the Act have been met.

Although the Act does not make a distinction between public and private sectors, it does distinguish between internal and external disclosures in that it must be proven that internal processes have been exhausted before making an external disclosure as defined in the Act.[37]

Grogan[38] confirms 'that the PDA protects only certain disclosures made in particular circumstances. The disclosure must be made by an employee who has reason to believe that a wrongful act is being committed.' The wrongful act must either be a criminal offence that has been, is being, or is likely to be committed, or a failure to comply with any legal obligation, or a miscarriage of justice, the endangering of health and safety of any individual, damage to the environment, or unfair discrimination or the deliberate concealment of such matters.[39] Grogan[40] adds that 'disclosures the making of which constitute criminal offences are not protected. An employee making a disclosure must also use the procedure prescribed or authorised by the employer for reporting or remedying the impropriety concerned.' Occupational detriment includes being subjected to disciplinary action, dismissed, suspended, demoted, harassed, transferred or refused

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[37] PDA s 6.
[38] John Grogan *Dismissal* (2010) 132.
[39] Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.
[40] John Grogan *Dismissal* (2010) 133.

promotion or otherwise being adversely affected in respect of employment, including employment opportunities and work security. The final conditions are that the employee must reasonably believe the information disclosed, and the disclosure must not be made for personal gain or reward.

2.3.7 Remedies are dealt with in section 4 of the Act where an employee can approach any court having jurisdiction, including the Labour Court,[41] for the appropriate relief; or pursue any other process allowed or prescribed by any law.

However, the employee is subject to the provisions of section 4 of the Act.[42] The ceilings of 12 and 24 months dictate the amount of compensation that an employee is entitled to when having suffered occupational detriment. NEDLAC[43] is of the opinion that the 24 month ceiling currently applicable to automatically unfair dismissals in terms of the PDA be removed. The impact of an unfair labour practice on an employee's life needs to taken into account and consequently its potential to discourage disclosure. It argues that loss in income is not limited to dismissals alone as demotion and transfer could impact the lower paid employee substantially. The whistleblowing employee should be able to claim for the actual loss of earnings and other costs incurred in obtaining redress under the provisions of the PDA.

Rochelle Le Roux comments 'that the link between the amount of compensation awarded and the actual loss or damage suffered by the worker concerned is sufficient.' She adds that 'damages will differ from case to case and that the ordinary principles governing the recovery of damages should govern each case.'[44]

However, section 4 of the PDA does allow for compensation beyond the two-year salary ceiling as, in theory, a whistleblower can exercise common law rights and claim damages in excess of the amount of compensation available in terms of the LRA depending on the circumstances of each case. However, the cost of such action is prohibitive and deters whistleblowers from launching claims for the actual damages they have suffered.

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[41] LRA s 151.
[42] PDA s 4 (2) *(a) (b)*.
[43] The National Economic and Development Labour Council.
[44] South African Law Reform Commission: Project 123 Report (2007). Comment by Professor Rochelle Le Roux of The Institute of Development and Labour Law University of Cape Town at para 4.11.

Whistleblowing is both a risk and a duty, both of which carry possible financial and personal detriment. Judging the comments of NEDLAC, the Law Reform Commission and the Institute of Development and Labour Law University of Cape Town, I agree that there is a need to provide for claims for damages with no ceiling.

Significantly the Law Commission has also suggested that the Act provide for the protection of the identity of the whistleblower and that there is a need to expressly provide that the actual damage suffered by the whistleblower may be claimed.

There has also been robust debate on the immunity from criminal and civil liability where employees are bound by agreement or by law not to disclose any information relating to their work. In many cases, confidentiality agreements exist, and the employee could be tied to certain obligations, such as the protection of intellectual property rights, marketing and trade secrets. The prospect of being charged criminally or civilly by reason of making a disclosure of an impropriety is clearly a deterrent to making a disclosure outside of the framework in which disclosures, as prescribed by the employer, may be made. Moreover the PDA does not offer protection in this case by way of the definition of a protected disclosure where the employee concerned commits an offence by making a disclosure.[45]

Notably the LRA created specialist Labour Courts with exclusive jurisdiction for matters within the LRA.[46] The PDA section 4(1) deals with the approach to any court having jurisdiction, including the Labour Court established by section 151 of the LRA for appropriate relief.[47] Initially, all employment disputes were referred to the specialist Labour Courts, but employment matters have been referred to high courts; the decisions that were handed down indicate the court's willingness to interfere with the jurisdiction of the Labour Courts.[48]

> '[A] few years ago, the Labour Court was called upon to pronounce on the provisions of the PDA in the case of *Grieve v Denel*.[49] In this

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[45] PDA s 9.
[46] LRA s157 (1).
[47] *Pedzinski v Andisa Securities (Pty) Ltd (formerly SCMB Securities (Pty) Ltd)* (2006) 27 *ILJ* 362 (LC); *Sekgobela v State Information Technology Agency (Pty) Ltd* (2008) 29 *ILJ* 1995 (LC).
[48] *Old Mutual Life Assurance Co SA Ltd v Gumbi* (2007) 28 *ILJ* 1499 (SCA); *Boxer Superstores Mthatha & another v Mbenya* (2007) 28 *ILJ* 2209 (SCA).
[49] *Grieve v Denel (Pty) Ltd* (2003) 24 *ILJ* 551 (LC).

> case the employee, who was employed at a division of Denel, was suspended with a view to conducting a disciplinary hearing against him. This action was taken after he had forwarded a report of alleged misconduct by a senior director at that division. The employee had been spokesperson for a group within the division that had compiled information relating to improper management and misconduct by their general manager. This information had then been handed to the employee's immediate superior who forwarded it to the board of directors. The idea behind the information gathering had been to try and have the general manager removed from his position. Disciplinary proceedings were then instituted against the employee.'[50]

The employee sought an interdict from the Labour Court to prevent Denel from proceeding with its intended action. The Labour Court considered the PDA, and concluded that the disciplinary hearing was disciplinary action as contemplated by the Act and therefore constituted occupational detriment as defined in the Act. The Labour Court ruled in favour of the employee, granting the interdict and signalling that the provisions of remedy within the PDA were successful.

The Grieve case was referred to in *Communications Workers Union v Mobile Telephone Networks*,[51] where once again the Labour Court found in favour of the employee. This result serves confirm that the PDA was designed to protect whistleblowers, provided all the requirements of the Act are met. The Act is bolstered by the LRA in section 191(13) where provision is made that, in the event that an employee is subjected to occupational detriment, the employee can refer the matter to the Labour Court for adjudication. It is important to note that this recourse should not be considered the norm, but rather the exception. In the first instance an attempt should be made to resolve the matter internally, and failing that, it should be referred to the CCMA for conciliation or arbitration and as a last resort to the Labour Court or a court of equivalent jurisdiction.

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[50] The South African Labour Guide 'The Protection of Whistle Blowers'- Article provided by Nalane Manaka Attorneys - available at http://www.labourguide.co.za/workplace-discipline/the-protection-of-whistle-blowers-667 [accessed on 26 July 2011.]

[51] *Communication Workers Union v Mobile Telephone Networks (Pty) Ltd* (2003) 24 *ILJ* 1670 (LC).

2.4 Protected disclosure to a legal advisor[52]

Section 5 of the Act allows for disclosure to a legal practitioner or to a person whose occupation involves the giving of legal advice, and with the object of and in the same course of obtaining legal advice to be considered a protected disclosure.

This definition implies that a person whose occupation involves the 'giving of legal advice', is most probably linked to a paralegal, which is a person without a law degree who has legal skills, knowledge and experience or to legal advice centres whose mission it is to promote democracy and foster a culture of corporate and government accountability as with the ODAC.

The NACF[53] states 'that a disclosure made by a whistleblower to someone for the purposes of getting legal advice concerning the disclosure is a protected disclosure and this would include the employee's attorney or shop steward.' The whistleblower is entitled to seek advice about a concern and how to raise it; good faith is not a requirement and all advice is confidential.

2.5 Protected disclosure to a employer

Section 6 of the Act provides for disclosure to an employer provided it is made in good faith and in accordance with any procedures as laid down by the employer. Most employers have a code of conduct that dictates the procedures. However, where there is no procedure as contemplated, the employee duly authorised by his or her employer can make a disclosure to a person other than his or her employer, which is, for the purpose of the Act, deemed to be disclosure to his or her employer.

The PDA promotes that it is safe to raise concerns internally. A disclosure to the employer will be protected if the whistleblower acts in good faith, and follows the process set out for such disclosures by the employer. They should have a reason to believe that there is a problem of some sort, including the law being broken, the health or safety of people being endangered, or discrimination taking place. This is the spirit in which the Act was promulgated, and it is in everyone's interest.

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[52] See *Randles v Chemical Specialities Ltd* (2011) 32 *ILJ* 1397 (LC), a case that is later discussed in more detail.
[53] National Anti Corruption Forum 'Guide to the Whistleblowers Act' -available at http://www.nacf.org.za/ [accessed on 28 July 2011.]

However, it assumes that the employer will take the disclosure seriously and respond appropriately. The PDA encourages employers to have a whistleblower policy in place. A good policy will operate like a shelter, signalling that this is the first, and best, route for the whistleblower to take.

2.6 Protected disclosure to a member of Cabinet or Executive Council

Section 7 of the Act allows for disclosure to a member of cabinet or of the executive council of a province or a body, the members of which are appointed in terms of legislation by a member of cabinet or of the executive council of a province or an organ of state falling within the area of responsibility of the member concerned. Disclosures in these instances are protected with the proviso that they are made in good faith.

2.7 Protected disclosure to certain persons or bodies

Section 8 of the Act specifies that disclosures to the public protector and the auditor general or a statutory body as defined made in good faith are considered protected disclosures.[54]

However, the whistle blower who makes the disclosure should reasonably believe that the Public Prosecutor, Auditor General or Statutory Body deals with that kind of problem.

2.8 General protected disclosure[55]

Section 9 of the Act allows for a general protected disclosure made in good faith by an employee. A general disclosure is made when 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 or has reason to believe that it is likely that the evidence relating

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[54] PDA s 8 (2).

[55] In *Tshishonga v Minister of Justice & Constitutional Development & Another* (2007) 28 *ILJ* 195 (LC) para 202-209 the court found that disclosures to the media are considered protected disclosures if all the requirements of the PDA in terms of a general protected disclosure are met and all internal processes exhausted before making the disclosure to the media.

to the impropriety will be concealed or destroyed if he or she makes the disclosure to his or her employer.[56]

It is unlikely that an employee disclosing an impropriety would do so other than in good faith. According to Lewis,[57] 'there exists reason for debate as to whether good faith is required or should whistleblowers be protected if they have reasonable grounds to believe or reasonable suspicion that the information they disclose is true or likely to be true. In his opinion it would be most unfortunate if the possibility of motive being examined deterred some important disclosures, for example, in relation to health and safety or serious crimes.'

Transparency International suggests people should be protected if they have 'an honestly held belief that the information offered at the time of the disclosure is true.'[58]

2.9 Regulations

Section 10 deals with regulations that the Minister may make by notice in the Government Gazette[59], after consultation with the Minister of Public Service and Administration. Any addition to legislative provisions in the Act must be approved by Parliament before publication in the Government Gazette. In their 2007 report the SA Law Commission confirmed that no further regulations had been issued in terms of the PDA.[60] Protected disclosure guidelines have subsequently been issued and will be published in the Government Gazette in September 2011.[61]

2.10 Other important legislation to consider

The PDA is considered the dominant legislation regarding whistleblowing as well as the promotion of transparency and accountability. However, many pieces of South African legislation promote corporate and government

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[56] PDA s 6.
[57] David Lewis A Global Approach to Public Interest Disclosure (2010) 161.
[58] Transparency International 'Recommended draft principles for whistleblowing legislation'.-availible at http://right2info.org/resources/publications/09_12_02%20ti-draft%20principles%20WB%20legislation.pdf [accessed on 4 July 2011.]
[59] Official South African Government Gazette.
[60] SA Law Commission: Project 123 para 1.82.
[61] Telephone discussion with Mr, Henk du Preez, Senior State Law Advisor with the Department of Justice and Constitutional Development [on 30 August 2011.]

responsibility in terms of transparency, accountability, and disclosure of irregularities and improprieties. Apart from the Constitution,[62] which provides fundamental values, the Companies Act,[63] plays a complimentary role with respect to the PDA.

Currie and De Waal[64] advocate, "The 1996 constitution as having completed South Africa's constitutional revolution, the product of a democratically elected constitutional assembly. The 34 constitutional principles are the framework for the creation of a democratic state with a supreme constitution in which the fundamental rights and freedoms of all citizens are protected", which can be interpreted as the right to transparency.

The Constitution further states that public administration must be governed by the democratic values and principles enshrined in the Constitution, including that of transparency as in section 195 (1) *(g)*.[65] The PDA goes on to advocate transparency and public and private sector accountability at the highest level.

2.11 Whistleblowing provisions in the Companies Act 71 of 2008

The whistleblowing provisions under section 159 of the new Companies Act supplement the provisions of the PDA.[66]

According to Cassim,[67] 'the Companies Act will have an effect on whistleblowers who disclose irregularities and contraventions of the Companies Act. Whistleblowers are generally protected by the PDA but the new Companies Act will perhaps provide more effective and comprehensive protection. It widens the ambit of protection given to whistleblowers. The disclosure must however be made in good faith and to an appropriate body, failing which no protection is afforded. If protected the whistleblower would be immune from civil or criminal liability arising from the disclosure. Cassim concludes that the protection of whistleblowers is a novel feature of the companies Act.'

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[62] The Constitution of the Republic of South Africa of, 1996, Chapter II, ss 7 and ss 32.
[63] The Companies Act 71 of 2008, s 159(1-7).
[64] Currie and De Waal 'The Bill of Rights Handbook' 5ed (2005) 6.
[65] Transparency must be fostered by providing the public with timely, accessible and accurate information.
[66] Companies Act 71 of 2008.
[67] Professor Farouk H.I.Cassim 'The Practitioner's Guide to the Companies Act 71 of 2008' (2011) 14.

Section 159(4) widens the scope of the Protected Disclosures Act to include independent contractors, service providers and trade union shop stewards. Importantly, this section widens the scope of Act to include a shareholder, director, company secretary, prescribed officer or employee of a company, a registered trade union that represents employees of the company or another representative of the employees of that company, a supplier of goods or services to a company, or an employee of such a supplier.

The Companies Act also imposes a duty on companies to introduce whistleblowing policies and publicise them.[68]

2.12 Summary and conclusions

In its current form the PDA makes provision for procedures in terms of which employees in both private and public sectors may disclose information regarding unlawful or irregular conduct by their employers or other employees in the employ of their employers and to provide for the protection of employees who make a disclosure in terms of this Act and the Act provides for matters connected therewith.

The statutory framework is as follows:

(a) Disclosure procedure – PDA section 1 and PDA sections 5-8 and section 9.
(b) Protected disclosure – PDA section 3.
(c) Victimisation – PDA section 1 and section 3 and the LRA section 186 (2) *(d)*.
(d) Dismissal – [automatically unfair] PDA section 1 and section 3 and the LRA section 187(1) *(h)*.
(e) Occupational detriment – PDA section 1 and section 3.
(f) Remedies – PDA section 4.

The Act slots neatly into Chapter 8 of the LRA under section 186, unfair labour practices and section 187, automatically unfair dismissals. The dispute resolution system is contained in section 191 (13) *(a)* of the LRA.

[68] Companies Act 71 of 2008 s 159 (7).

Disputes may be referred to the CCMA[69] for conciliation and thereafter to the Labour Court[70] for adjudication.

First, under section 186(2) *(d)* of the LRA, an unfair labour practice means any unfair act or omission that arises between an employer and an employee involving an occupational detriment other than dismissal in contravention of the PDA on account of the employee having made a protected disclosure defined in that Act.

Occupational detriment is a term used in both the PDA and LRA for victimisation as a result of making a protected disclosure.

Second, under section 187 (1) *(h)* of the LRA, a dismissal is automatically unfair if the employer dismisses the employee, and the reason for dismissal is a contravention of the PDA by the employer on account of the employee having made a protected disclosure as defined in the Act.

Third, under section 191 (13) *(a)* of the LRA, an employee may refer a dispute concerning an alleged unfair labour practice to the Labour Court for adjudication if the employee has alleged that the employee has been subjected to an occupational detriment by the employer in contravention of section 3 of the PDA for having made a protected disclosure as defined in that Act.

The PDA was enacted with a view to creating a culture in which employees may disclose information of criminal and other irregular improprieties in the workplace in a responsible manner so as to promote the eradication of crime and misconduct in public and private sectors. In terms of the Act, every employer and employee is now regarded as having a responsibility to address all forms of impropriety, including criminal behaviour or unethical conduct in the workplace. The employer must take all the necessary steps to ensure that employees who disclose such information are protected from retaliation as a result of having made disclosure.

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[69] The Commission for Conciliation, Mediation and Arbitration (CCMA) is a dispute resolution body established in terms of the Labour Relations Act, 66 of 1995 (LRA). It is an independent body, does not belong to and is not controlled by any political party, trade union or business.

[70] The South African Labour Court has the same status as a High Court. The Labour Court adjudicates matters relating to labour disputes.

CHAPTER 3

REFLECTING ON THE JURISPRUDENCE OF THE LAST 10 YEARS

3.1 Introduction

There is value in employees making disclosures concerning improprieties and unlawful conduct within the workplace, but these employees are often seen as destructive and wanting to upset the harmony of the workplace for personal recognition. It is also common knowledge that many employees do not consider blowing the whistle for fear of retaliation and occupational detriment.

According to Grogan,[71] 'the PDA protects only certain disclosures made in particular circumstances. The disclosure must be made by an employee who has reason to believe that a wrongful act is being committed or has taken place. The wrongful act must either be a criminal offence which has been, is being, or is likely to be committed, or a failure to comply with any legal obligation, or a miscarriage of justice, the endangering of the health and safety of any individual, damage to the environment, or unfair discrimination,[72] or the deliberate concealment of such matters.'

The disclosure is protected only if made in good faith to a legal advisor, an employer, a member of the cabinet or executive council of a province, or an employer. An employee making the disclosure must also use the procedure described or authorised by the employer for reporting or remedying the impropriety.

Le Roux explains, 'After a slow start, the PDA is now litigated more frequently. For a long time the judgements of *(Grieve v Denel (Pty) Ltd)*[73] and *(CWU v Mobile Telephone Network (Pty) Ltd)*[74] were the only cases decided under the PDA, but more recently there has been an increase in the jurisprudence on this front.'[75]

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[71] John Grogan *Dismissal* (2010) 132.

[72] Promotion of Equality and prevention of Unfair Discrimination Act 4 of 2000.

[73] Grieve v Denel (Pty) Ltd (2003) 24 *ILJ* 551 (LC).

[74] Communication Workers Union v Mobile Telephone Networks (Pty) Ltd (2003) 24 *ILJ* 1670 (LC).

[75] Professor Rochelle Le Roux 'The Protected Disclosures Act 26 of 2000: is this as good as it is going to get for whistleblowers? A review of some recent jurisprudence' (2010) *SLR* 508.

3.2 Selected whistleblowing cases

Despite clearly defined legislation regarding protected disclosures several cases concerning the dismissal of whistleblowers have been referred to the courts in recent times. The courts have been tasked to rule on whether the disclosure of information constituted a protected disclosure as regulated by the PDA or not. The next section deals with a few selected cases in this regard in order to illustrate both the limitations and positive aspects of the PDA.

3.2.1 The *Tshishonga* cases: General disclosure – disclosure to the media[76]

The *Tshishonga v Minister of Justice and Constitutional development*[77] cases have been chosen as they enjoyed high profiling in both the printed and electronic media, substantiating the fact that whistleblowing is instrumental in the fight against crime and corruption in South Africa.

In the first Tshishonga case,[78] the Labour Court needed to determine the case *in limine* as the disciplinary hearing had already taken place. Tshishonga was employed as deputy director-general of the Department of Justice. One of his tasks was to eradicate the corruption that riddled the administration of insolvent estates, particularly around the appointment of liquidators. In the course of his duties, he had uncovered certain malpractices and made serious allegations to the media about his former employer, a former minister of justice. He was immediately suspended. The chairperson of the disciplinary tribunal found that the information divulged by the applicant to the media was a protected disclosure as defined in the PDA and that the applicant's suspension and disciplinary enquiry therefore qualified as occupational detriments as defined in section 1 of the PDA.

Tshishonga approached the Labour Court claiming compensation for an unfair labour practice for being subjected to an occupational detriment in

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[76] See *Tshishonga v Minister of Justice & Constitutional Development & Another* (2007) 28 *ILJ* 195 (LC) para 252: "Was it reasonable for the applicant to make the disclosure to the media? ...Corruption undermines democracy. The media's exposure of corruption is good for democracy. Whistleblowers depend on the media and other organs of civil society to help level the playing fields, as they are often lone voices against powerful interests. As an employee the isolation and vulnerability are even more acute. So symbiotic is the relationship between whistleblowers and the media that Brewers Dictionary defines whistleblowing to mean 'exposing to the press a wrongdoing or a cover-up in a business or government office'."

[77] *Tshishonga v Minister of Justice & Constitutional Development & Another* (2006) 27 *ILJ* 1541 (LC); *Tshishonga v Minister of Justice & Constitutional Development & Another* (2007) 28 *ILJ* 195 (LC); *Tshishonga v Minister of Justice & Constitutional Development & Another* (2009) 30 *ILJ* 1799 (LAC).

[78] *Tshishonga v Minister of Justice & Constitutional Development & Another* (2006) 27 *ILJ* 1541 (LC).

contravention of section 3 of the PDA and that section 191(13) of the LRA permitted him to approach the Labour Court directly for adjudication.

Adjudication in this case proceeded in the same way as adjudication of an automatically unfair dismissal or retrenchment, and it is a trial *de novo*. The court found that the findings of a preceding disciplinary enquiry were not binding on the court or on Tshishonga's former employer.

In the second Tshishonga case,[79] the Labour Court stated that several instances need to be fulfilled before disclosures can be deemed general protected disclosures as defined in the PDA. The important issues that the courts needed to explore included the following:[80]

(a) The disclosure must be in good faith. 'By setting good faith as a specific requirement, the legislature must have intended that it should include something more than reasonable belief and the absence of personal gain. An employee may reasonably believe in the truth of the disclosures and may gain nothing from making them, but his good faith or motive would be questionable if the information does not disclose an impropriety or if the disclosure is not aimed at remedying a wrong.'

Good faith is a finding of fact. 'The Labour Court needed to establish by considering all the evidence cumulatively to decide whether there was good faith or an ulterior motive, or, if there existed mixed motives and what the dominant motive was. A whistleblower is unlikely to have exhibit compassion toward the wrongdoing or person against whom disclosure is made. At the other extreme, a whistleblower that is making a disclosure maliciously with an ulterior motive, that is, a motive other than to prevent or stop wrongdoing, may not claim the protection under the PDA. The requirement of good faith therefore invokes a proportionality test to determine the dominant motive.'

A malicious motive could affect the remedy awarded to the whistleblower.

In this context, 'good faith is required to test the quality of the information. 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.'

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[79] *Tshishonga v Minister of Justice & Constitutional Development & another* (2007) 28 *ILJ* 195 (LC).

[80] *Tshishonga v Minister of Justice & Constitutional Development & another* (2007) 28 *ILJ* 195 (LC) para 202-209.

(b) The second requirement is that the employee must have a reasonable belief. 'In the context of determining whether a disclosure is protected the test is more stringent. The reasonableness of the belief must relate to the information being substantially true.'

(c) The third requirement that the disclosure should not be for personal gain. 'The disclosure should be construed to include any commercial or material benefit or advantage received by or promised to the employee as a quid pro quo for the disclosure and any expectation by the employee of a benefit or advantage that is not due in terms of any law. If the employee benefits incidentally from the disclosure it will be protected provided that was not the purpose of making the disclosure.'

The Labour Court examined whether it was reasonable for Tshishonga to make the disclosure to the media.[81] 'Although the media is one of the pillars that promote and uphold democracy, caution must be exercised when the media is used as vehicle to blow the whistle. The court stated that corruption undermines democracy and the media's exposition of corruption is good for democracy. Whistleblowers depend on the media and other organs of civil society to help level the playing fields as they are often lonely voices against powerful interests.'

However, the court cautioned that disclosures to the media will not be justified if it is not in the public interest.[82] That might be the case if confidentiality has to be maintained so that the complaints can be better investigated or the employer can be protected until the suspicions are confirmed. Such disclosures, if made to the police, a professional body or prescribed regulator, would better serve the public interest. Disclosures to the media will also not be justified if the complaint has already been addressed internally or by a prescribed regulator. In the Tshishonga case, the court found that the disclosures were not for personal gain. Furthermore, there was likelihood that he would be subjected to an occupational detriment if he made the disclosure to his employer. In addition, he believed that the information was substantially true and that any reprisal would be vicious. The court was satisfied with the view that the impropriety would be

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[81] *Tshishonga v Minister of Justice & Constitutional Development & another* (2007) 28 *ILJ* 195 (LC) para 252.

[82] *Tshishonga v Minister of Justice & Constitutional Development & another* (2007) 28 *ILJ* 195 (LC) para 254.

concealed or destroyed if the disclosure was made directly to the employer. The director-general had been reluctant to investigate the allegations and the disclosure had also been made to the Public Protector and the Auditor-General, both persons referred to in section 8 of the PDA, and they had failed to investigate. The court was satisfied that Tshishonga had allowed a reasonable period of time to elapse before making the disclosure and had met all the conditions in section 9(2) of the Act. The court then considered the appropriate remedy and ruled that Tshishonga be paid the maximum of 12 months' remuneration.

Le Roux[83] notes that the second Tshishonga case 'represents one of the most comprehensive jurisprudential analyses of the PDA and based on the extent to which it has been referred to in subsequent judgments,[84] is clearly a landmark judgment as far as the interpretation of the PDA is concerned.'

The third Tshishonga case[85] came before the Labour Appeal Court where the Department of Justice appealed the judgement made by the Labour Court. The appeal launched by the employer contended that the award was excessive as the employee had been remunerated in full during his period of transfer and suspension and that in terms of the settlement agreement, the employee had been paid until retirement age and had also received his pension benefits calculated to retirement age and therefore had received more than adequate compensation

The Labour Appeal Court found that the Labour Court erred in its interpretation of section 194(4) of the LRA. It appeared to have merged the award of compensation with an amount of remuneration. Section 194(4) employs remuneration purely as a means of capping the amount of the award, but in contrast the Labour Court had employed remuneration as the basis for the quantification of the award. The appeals court was therefore at liberty to determine the amount of compensation. The court ruled in favour of Tshishonga, granting compensation in the amount of R100,000 apart from the R177,000 in respect of costs incurred by him in his defence.

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[83] Professor Rochelle Le Roux 'The Protected Disclosures Act 26 of 2000: is this as good as it is going to get for whistleblowers? A review of some recent jurisprudence' (2010) *SLR* 518.

[84] *Young v Coega Development Corporation (Pty) Ltd (1)* 2009 6 BLLR 597 (ECP); *Young v Coega Development Corporation (Pty) Ltd (2)* 2009 6 BLLR 607 (ECP); *Radebe v Mashoff Premier of Free State Province* 2009 30 *ILJ* 1900 (LC); *Ramsammy v Wholesale and Retail Sector Education & Training Authority* 2009 *ILJ* 1927 (LC); *Sekgobela v State Information Technology Agency (Pty) Ltd* 2008 29 *ILJ* 1995 (LC).

[85] Tshishonga v Minister of Justice & Constitutional Development & Another (2009) 30 *ILJ* 1799 (LAC).

The Tshishonga judgment from the Labour Appeal Court can be heralded as very positive for the media sector in South Africa.

3.2.1 The *Young v Coega* cases

Young was employed by the Coega Development Corporation as the chief financial officer.

Young v Coega (1)[86] was heard on an urgent basis by the Eastern Cape High Court after Young had been advised of a disciplinary hearing, alleging irregularities in discharging his duties. The charges were based on auditor's reports furnished nine months earlier that had identified operating deficiencies in his performance. At the time, an investigation recommended that no disciplinary action be taken.

Young claimed that the disciplinary action was a reprisal for disclosures that he had made relating to certain improprieties on the part of the employer and not as a result of the auditor's report. Young initiated legal action under the PDA, seeking a legal right that the charges against him amounted to an occupational detriment as defined in section 1 of the PDA. Attempts at postponing the hearing failed, and he sought an interdict from the court to prevent his employer from proceeding with the hearing.

The employer argued that in terms of the PDA section 4(2)*(b)* the High Court has no jurisdiction in the matter.

The court held that section 4(1)*(a)* made it clear that the Labour Court was not the only court of instance, and as the High Court had been approached it had jurisdiction to hear the matter.[87]

In granting the interdict the court considered whether the disciplinary action taken was as a result of the previous audit report. Failure to take action at the time of the report and the speed with which action was taken following the disclosures indicated that the disclosures were the reason for the disciplinary action rather than the audit report.

In the second case, *Young v Coega* (2),[88] three days after the granting of the interdict, *Young* was summonsed to attend a disciplinary enquiry at

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[86] *Young v Coega Development Corporation (Pty) Ltd (1)* (2009) 30 *ILJ* 1776 (ECP).
[87] PDA s 4(a).
[88] *Young v Coega Development Corporation (Pty) Ltd (2)* (2009) 30 *ILJ* 1786 (ECP).

which he was dismissed. Young approached the court once again seeking an interdict. The court concluded that the conduct of the employer in proceeding with disciplinary action after an interdict was granted preventing such action was unlawful. The dismissal was set aside and reinstatement was ordered.

According to Le Roux,[89]

> '[T]he *Young v Coega* cases unfortunately illustrate the relative ease with which an employer can sustain the victimisation of a whistleblower despite the existence of a court order addressing such victimisation. While, section 4 of the PDA and its interpretation in both these cases suggests that employees subjected to occupational detriments for making protected disclosures, as opposed to employees who are unfairly dismissed or treated unfairly by employers for other reasons, are not necessarily limited to the redress provided by the LRA, this may be of little solace to whistleblowers in terms of job security. The prospect of being able to recover only compensation equal to 24 months' remuneration may not be a very attractive proposition for potential whistleblowers who know that they risk dismissal if they proceed with their actions. This risk will be more pronounced for senior employees who are approaching retirement age and who are less likely to secure new employment.'

3.2.2 Charlton v Parliament

For the purpose of reference I have listed the cases as *Charlton v Parliament* (1) *and* (2)

Charlton v Parliament (1)[90] is the first of two cases. In brief, the first case had two issues: first, Parliament had submitted to the Labour Court that Charlton's claim did not disclose a cause of action. The Court found that Charlton was entitled to disclose irregularities in terms of the PDA. The Court considered Charlton an employee of Parliament who was thus entitled to protection in terms of the PDA. The Court consequently dismissed the exception raised by Parliament. Second, Parliament contended that the

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[89] Professor Rochelle Le Roux 'The Protected Disclosures Act 26 of 2000: is this as good as it is going to get for whistleblowers? A review of some recent jurisprudence' (2010) *SLR* 513.
[90] *Charlton v Parliament of the Republic of South Africa* (2007) 28 *ILJ* 2263 (LC).

Labour Court had no jurisdiction, LRA section 157 (5),[91] to hear the dispute relating to Charlton's conduct. Charlton had claimed both an unfair dismissal and an automatically unfair dismissal. The Court noted that the question whether a dismissal is automatically unfair requires evidence to be led. Without such evidence, the court was unable to conclude that the dismissal was not automatically unfair. A dismissal that is not automatically unfair may well be unfair.[92]The court subsequently dismissed the second exception raised by Parliament.

Charlton had been employed as a chief financial officer. He was dismissed after facing charges of misconduct arising out of his disclosures relating to improper travel benefits claimed by members of parliament. Charlton referred the dispute to the CCMA where it was not resolved. He then referred the matter to the Labour Court for adjudication claiming that the disclosures were protected disclosures as regulated by the PDA and that his dismissal was therefore automatically unfair. He also contended that his dismissal was unfair.

Parliament submitted that the disclosures were not protected disclosures because members of parliament were neither employers of the parliamentary staff nor employees of parliament. The court confirmed that members of parliament fit into the definition of employee in that they perform duties for Parliament which is an organ of state because they are entitled to and also receive remuneration. Their remuneration is not paid in terms of the BCEA,[93] but they do in fact receive salaries, allowances and benefits from the national revenue fund. The members of parliament are remunerated for services rendered to Parliament.[94] The court also confirmed that members of Parliament occupy positions that are of its own kind. The court added that parliamentary staff, of which the applicant was a member, supports the operation of Parliament as carried out by members of Parliament because without the members of Parliament there would be no staff to carry out the work. Importantly, the members of Parliament thus

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[91] LRA s 157(5)'Except as provided in s158(2), the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if this act requires the dispute to be resolved through arbitration'.

[92] Section 158(2) of the Labour Relations Act provides that: 'If at any stage after the dispute has been referred to the Labour Court, it becomes apparent that the dispute ought to have been referred to arbitration, the court may-
(a) stay the proceedings and refer the dispute to arbitration; or
(b) with the consent of the parties and if it is expedient to do so, continue with the proceedings with the court sitting as an arbitrator, in which H case the court may only make any order that a commissioner or arbitrator would have been entitled to make.'

[93] Basic Conditions of Employment Act 75 of 1997.

[94] *Charlton v Parliament of the Republic of South Africa* (2007) 28 *ILJ* 2263 (LC) para 22.

permit the staff to assist them in the carrying out of their business. The court also added that for the members of Parliament to be employers in terms of the PDA, they do not have to employ or remunerate support staff. They however satisfy the definition of being employers by providing work and permitting other persons to assist in the carrying on of their business.[95]

The court further added that Parliament was the employer of the applicant in terms of the PDA.[96] The court went on to state that it should be pointed out that while the LRA, the BCEA and the PDA have the same definition of employee, only the PDA has a definition of employer and in the courts view the definition of employer covers members of Parliament.[97]

The court stated that the true reason for dismissal had to be established by evidence. Only after hearing the evidence would the court be in a position to decide whether it had jurisdiction or not and whether the unfair dismissal dispute had to be referred to arbitration. The court accordingly ruled in favour of Charlton with costs. Charlton was successful in proving that he fell within the jurisdiction of the PDA and for that reason he could approach the court for an unfair dismissal based on a protected disclosure in terms of the PDA.

Parliament v Charlton (2)[98] is the second case in the saga

Parliament approached the Labour Appeal Court (LAC)[99] in an attempt to overturn the ruling of the Labour Court stating that both decisions were appealable. The LAC considered legislation in the LRA section 187(1)*(h)* and section 158(2)*(a)(b)*, and in the PDA the preamble and purpose of the Act, and the definitions of 'employer', 'employee', 'disclosure' and 'protected disclosure'.

In deliberating the structures and powers of Parliament,[100] the LAC went onto explain that Parliament consists of two houses, namely the National Assembly and the National Council of Provinces.[101] Section 43 of the Constitution further provides that legislative authority vests in Parliament.

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[95] *Charlton v Parliament of the Republic of South Africa* (2007) 28 *ILJ* 2263 (LC) para 24-27.
[96] PDA Preamble 'the employer has a responsibility to take all necessary steps to ensure that employees who disclose information are protected from any reprisals as a result of such disclosure'.
[97] *Charlton v Parliament of the Republic of South Africa* (2007) 28 *ILJ* 2263 (LC) para 44-50.
[98] *Parliament of the Republic of SA v Charlton* (2010) 31 *ILJ* 2353 (LAC).
[99] *Parliament of the Republic of SA v Charlton* (2010) 31 *ILJ* 2353 (LAC).
[100] *Parliament of the Republic of SA v Charlton* (2010) 31 *ILJ* 2353 (LAC) para 26-29.
[101] The Constitution s 42(3)(4).

Parliamentarians hold an office.[102] MPs have a statutory right to remuneration under the Remuneration of Public Office Bearers Act 20 of 1998. Parliamentarians, like judges, are subject to their own codes of conduct. The LAC went on to remark that members of parliament are elected and suggested that if they were to lose an election and consequently their seat in parliament, they would not have recourse to the Labour Courts.

The LAC accordingly found that members of parliament are not included in the PDA.

Regarding the jurisdiction of the Labour Court to hear the case, the LAC found that the Labour Court had been correct in finding that it had to hear evidence prior to making a decision about jurisdiction. However, once Charlton submitted that his dismissal was a based on automatically unfair dismissal, the court was bound to stay the proceedings and refer the unfair dismissal dispute to arbitration.

The Labour Appeal Court accordingly upheld the appeal.

The Charlton cases go to prove that a person cannot rely on the provisions of the PDA if the person does not fall within the ambit of the Act.

3.2.3 Randles v Chemical Specialities

The *Randles v Chemical Specialities* cases were both held in the Labour Court and involved disciplinary proceedings and protected disclosure.

Randles,[103] who was employed as the legal officer for the company approached the Labour Court for an urgent order interdicting his company from proceeding with disciplinary action against him pending the outcome of a dispute referred to the CCMA and, if conciliation failed, was pending adjudication by the Labour Court. The application was premised on the submission that he had made a protected disclosure in terms of the PDA and that he was being subjected to an occupational detriment, namely the disciplinary enquiry, on account of his having made a protected disclosure. Randles had sent a letter to the board of directors and the JSE in which he disclosed that there had been certain corporate governance irregularities within the company as reported to him by the financial director. The

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[102] The Constitution s 48.
[103] *Randles v Chemical Specialities Ltd (2010)* 31 *ILJ* 2150 (LC).

company responded by conducting an audit finding that Randles had authorised lease agreements that were not sanctioned by the board of directors and disciplinary proceedings were instituted against Randles for misconduct, suspending him in the process.

Randles contended that he was protected by the PDA in that the disciplinary proceedings brought against him constitute an occupational detriment in terms of the Act and were instituted by way of retaliation against protected disclosures made.[104]

The company contended that Randles was not protected under the provisions of the PDA. They contested that Randles had chosen to attend the disciplinary hearing and then seek relief under the PDA to interdict and stop the hearing. The Court pointed out that Randles had to show that he had a *prima facie* right to the relief he sought and that, having met the legal requirements, he was entitled to be protected under the terms of the PDA.[105] The court found that Randles had fulfilled the requirements of section 6 of the PDA and that disclosure to the board of directors was a protected disclosure in terms of the Act. The court also agreed that Randles had probably suffered occupational detriment[106] as defined in the Act that would have to be proved after the outcome of a trail. The court ruled in favour of Randles, granting an interdict against the company from proceeding with any disciplinary action or enquiry against him pending the outcome of a dispute referred to the CCMA if the conciliation did not resolve the dispute, pending the adjudication of that dispute by the Labour Court.

In the second Randles[107] case, a statement of claim was filed by Randles. The company responded citing that he was acting as a legal practitioner when he received the information from the financial director. The information was privileged and therefore he could not be afforded the protection of the PDA as contemplated by section 5(a),[108] and the disclosures relied on were made to him with the object of and in the course of obtaining legal advice as contemplated by section 5(b).[109]

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[104] *Randles v Chemical Specialities Ltd (2010)* 31 *ILJ* 2150 (LC) para 23-24.
[105] *Randles v Chemical Specialities Ltd (2010)* 31 *ILJ* 2150 (LC) para 57.
[106] PDA s 3.
[107] *Randles v Chemical Specialities Ltd (2011)* 32 *ILJ* 1397 (LC).
[108] PDA s 5(a) 'to a legal practitioner or to a person whose occupation involves the giving of legal advice is a protected disclosure.'
[109] PDA s 5(b) 'with the object of and in the course of obtaining legal advice, is a protected disclosure.'

The parties agreed that the court would consider the following *in limine* points: Who bore the onus and duty to begin and whether the disclosures relied on by the Randles constituted protected disclosures as defined in the PDA.

It is important to note that the term, legal advisors, appears in the PDA in two instances. The first is a disclosure made by the whistleblower to a legal adviser; in terms of section 5 of the PDA that is considered to be a protected disclosure. The second is a disclosure by a legal adviser of certain information. The disclosure is not protected if the disclosure by a legal adviser is of the information that was disclosed to him by an employee in the course of obtaining legal advice in accordance with section 5 of the PDA.

Two conditions exist concerning legal advice, both of which are not protected by the PDA. The first is whether a person has an occupation involving the providing of legal advice.[110] The second concerns the person who receives the disclosed information from a whistleblower who disclosed the information with the object of, and in the course of, obtaining legal advice.[111] Once these two requirements have been met, the disclosures by the legal adviser will not be protected in terms of the PDA.

It is important to bear in mind that the court noted the provisions of section 5 of the PDA in that any disclosure made to a legal practitioner or to a person whose occupation involves the giving of legal advice and with the object of and in the course of obtaining legal advice, is a protected disclosure. This section had to be considered together with the exception to the definition of protected disclosure, which stipulates that a protected disclosure does not include a disclosure made by a legal adviser to whom the information concerned was disclosed in the course of obtaining legal advice in accordance with section 5 of the PDA.

The court ruled accordingly that the company bore the onus to prove that the exclusion provided for in the PDA[112] was applicable and also had the duty to begin.

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[110] PDA s 5(a).
[111] PDA s 5(b).
[112] PDA ss 1: Definition of 'protected disclosure' means a disclosure made to but does not include a disclosure made by a legal adviser to whom the information concerned was disclosed in the course of obtaining legal advice in accordance with s 5.

3.2.4 *Ramsammy* case[113]

As previously discussed, for a disclosure to be afforded the protection of the PDA, the disclosure must meet all the requirements listed in the PDA. Ramsammy, a senior executive of the WRSETA,[114] failed to meet that condition. He claimed that he had been given an anonymous tip pointing to an article that appeared in a magazine a year earlier in which it was alleged that one of the executives at the WRSETA had falsely claimed to have a university degree when she applied for her post. An email was sent to the CEO in which Ramsammy claimed that his colleague had obtained her post under false pretences. A committee was appointed to investigate the allegations, but Ramsammy refused to co-operate with the investigation and in reprisal the original email was again circulated to all SETA[115] managers, the Public Protector and the Department of Labour, accusing the organisation for which he worked of fraud and maladministration.

Regrettably, the magazine article turned out to be untrue. The colleague in question did not have a degree, never purported to have one and the post that she occupied did not require her to have a tertiary qualification.

The court found that the employee according to section 6(1)*(a)*[116] could not have acted in good faith, as he had fabricated the evidence on which his allegation of recruitment fraud was based.

The court stated that he had no right to proceed with the external disclosures where he had failed to cooperate with the internal processes initiated by the SETA, and that he had not acted in good faith. The court was accordingly satisfied that the employee had not made a protected disclosure in terms of section 6(1) of the PDA. The PDA encourages internal procedures and remedies to be exhausted before the disclosure is made public and it follows that the disclosure needs to be in good faith and with the reasonable belief that the information is substantially true.[117]

The court concluded that there was no basis for an external disclosure. He had not acted in good faith, and because of his refusal to co-operate with

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[113] *Ramsammy v Wholesale & Retail Sector Education & Training Authority* (2009) 30 *ILJ* 1927 (LC).
[114] Wholesale & Retail Sector Education & Training Authority.
[115] Sector Education and Training Authority.
[116] Good faith requires the applicant to have acted: honestly; in the reasonable belief that the information was true; with sincerity of intention and; not for an ulterior purpose and not with the intention of embarrassing or harassing his employer.
[117] *Tshishonga v Minister of Justice & Constitutional Development & another* (2007) 28 *ILJ* 195 (LC) para 196.

the internal investigation, it was clear that he held no reasonable belief that there was an impropriety. The court found that Ramsammy could not claim protection from the PDA and that he had not made a protected disclosure and thus dismissed the application.

3.2.5 Television program: The PDA

The Carte Blanche TV program exposed two cases. Glen Chase had been employed at the Department of Public Works when he discovered massive travel and contract fraud. Chase blew the whistle to his own detriment. The second case involved Beige Holdings where Andre Du Toit, a chartered accountant discovered fraud amounting to millions of rand, he too lost his job. Richard Calland, formerly the executive director of ODAC and one of the drafters of the Protected Disclosures Act, was interviewed during the program. He pointed out that the Act needs revision, particularly to give the honest witness of wrongdoing who is prepared to come forward more protection. He said: 'We have to make it ordinary for people to blow the whistle. We have to make it so that people who are not born heroes, who are just doing their ordinary work; to make them feel comfortable to come forward, and only then can we say that whistle-blowing policy law has succeeded.' Calland is also of the opinion that, 'we have to raise the ceiling on damages that will be awarded against employers that do allow a reprisal to take place against the whistleblower. In other words we have to create a disincentive for a bad unhealthy response to a whistleblower.'[118]

3.2.6 Concluding remarks

The PDA has gone a long way to encourage those who want to blow the whistle in good faith on wrongdoing and malpractice in their place of work, in both the public and private sectors. Meeting the provisions of the Act will ensure that the whistle blowing incident constitutes a protected disclosure with legal protection against victimisation and reprisal by employers. The

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[118] Carte Blanche Program 'Whistleblowers'-available at http://beta.mnet.co.za/carteblanche/Article.aspx?Id=2650 [accessed on 12 July 2011.]

aim of whistleblower legislation is to ensure that employees who speak out in the public's interest are protected and in fact encouraged.

Despite the PDA regulations and legislation to protect a disclosure, the reality is that whistle blowers are often subjected to fierce retaliation from their employers or from the institutions for which they work.

South Africa is progressive in terms of the PDA in wanting to root out corruption in the workplace. However, the examples provided above clearly show that all is not well with its implementation. Some of the problems have been highlighted by these and other examples, as well as by whistleblowers themselves, as in the Tshishonga cases where Tshishonga was brave enough to expose the wrongdoing in the media and ready to suffer the consequences of his actions. Tshishonga expected retaliation despite the provisions of the PDA in his quest to stop corruption in his place of work.

The PDA protects the whistleblower only when all the conditions as required by the Act have been met. The Act therefore needs legislation that will force companies in the private sector and organisations in the public sector to have whistleblower policies and procedures in place and to encourage whistleblowing.

CHAPTER 4

WHISTELBLOWING GLOBALLY: SELECTED EXAMPLES

4.1 Introduction

It is my opinion that the legal environment has a primary influence on a person's decision to muster the courage to report perceived wrongdoing because of his or her analysis of the potential for retaliation. The legal environment therefore provides a starting point for understanding a community or culture receptiveness to whistleblowing because the presence of legislation goes a long way toward mitigating fear of retaliation.

4.2 What is the purpose of the global analysis?

In examining the protection provided by the various Acts globally, it is important to note that whistleblowing does not exist in isolation. It is a part of other employment legislation, freedom of information, data protection privacy, and human rights statutes. Specific procedures are also adopted in disclosing information, and in many countries there are laws attached to whistleblower legislation to deal with victimisation and reprisals.

According to Lewis,[119] 'because of Article 5(c) of ILO Convention 158 on termination of Employment (making it invalid for employment to be terminated if the reason was for filing a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities), attention has frequently focused on outlawing dismissal rather than providing a general right not to suffer detriment.'

Regarding the type of information that can be disclosed, it is clear that the UK and South African statutes are the most all-embracing as they cover most of the matters covered by the other jurisdictions.

UK legislation[120] defines a qualifying disclosure as one that a worker reasonably believes tends to show a matter falling into one or more of the following: a criminal offence; a failure to comply with any legal obligation; a miscarriage of justice; danger to the health and safety of any individual; damage to the environment; the deliberate concealment of information

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[119] David Lewis 'Whistleblowing at work: On what principles should legislation be based? (2001) ILJ at 172.
[120] Employment Rights Act 1996, s 43B(1).

tending to show any of the listed improprieties. Apart from disclosures made to legal advisors, the UK provisions only apply to whistleblowers who act in good faith. South Africa's PDA is virtually identical, the major differences being that an employee who makes a disclosure must ensure that it relates to the conduct of an employer or an employee of that employer for it to be afforded the protection regulated in the Act.

The UK legislation applies to government employment as it does to other sectors, except national security. In addition, the UK Act was amended to ensure that persons with contracts of employment in the police were precluded from making protected disclosures. Employees are allowed to make a disclosure about a matter that occurs outside the UK or that is not covered by UK law. However, a disclosure will not be protected if the person commits an offence by making the disclosure. Section 1 of the South African PDA has similar provisions within the definition of protected disclosure in that 'a protected disclosure means any disclosure made to any person or body in accordance with section 9 of the Act but does not include a disclosure made in respect of which the employee concerned commits an offence by making the disclosure' and in both countries, disclosures made to a legal advisor are protected by statute.

It should be noted that both South African and UK legislations provide for the matter to be disclosed having occurred in the past, currently occurring, or likely to occur in the future. The UK and South African statutes do not require a link between the matter disclosed and the employee's employment. Furthermore, both jurisdictions require that the person making the disclosure must believe that the information is true. In both the UK and South Africa, both legislations focus on the disclosure being made in good faith and the whistleblower must not act for personal gain.

4.3 Employment protection for whistleblowers in the UK

The Public Interest Disclosure Act 1998 (PIDA) came into effect after attempts made in 1995 and 1996 to get Public Interest Disclosure Bills (popularly called "Whistleblower Bills") through Parliament failed.

The Act gave legal protection to employees against detriment as a result of disclosing information relating to crimes, breaches of a legal obligation,

miscarriages of justice, health and safety dangers, and environmental dangers and to the concealing of evidence relating to any of these. There was no requirement for an employee to complete any particular period of employment in order to qualify for protection. However, the employee had to act in good faith, believe in the truth of the allegation he or she was making, and have reasonable grounds for believing that the information disclosed indicated the existence of one of the above conditions.

The Employment Appeal Tribunal (EAT) provides a constant review of cases involving public interest disclosure law in the UK. What follows is a reflection on some of the important issues raised in an assessment of the UK statute by His Honour Judge McMullen QC[121] who assessed the impact of PIDA during its first 10 years. He states 'that there have been an increasing number of Employment Tribunal and EAT hearings that have taken place on a trio of statutes dealing with disclosure and non-disclosure of information namely, the Public Interest Disclosures Act 1998, the Human Rights Act 1998 and the Freedom of Information Act 2000.'

According to Judge McMullen,[122] the following drivers were identified as affecting the UK's whistleblowing legislation held predominantly in PIDA. The Human Rights Act,[123] which has been at the forefront of creating public awareness since its implementation in 2000, allows for wide areas of legal challenge to exist with less respect for old style employer authority. In addition, the radically changing economic climate brings with it recession and unemployment. With fewer jobs, there is less inclination to accept harsh workplace decisions but rather to challenge them, which ultimately ends in litigation. Retrenchments are on the rise and employers make tough headcount decisions to keep their businesses viable.

Once cases reach litigation, parties inevitably face Employment Tribunal intervention, interim applications and appeals with serious consequences for those who do not comply with procedure. Employment judges have taken a strong view, empowered by the rules of the Employment Tribunal[124] in deciding issues at prehearing reviews to resolve serious issues of

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[121] Deputy High Court Judge, Senior Judge, Employment Appeal Tribunal.
[122] His Honour Judge Jeremy McMullen QC *'A Global Approach to Public Interest Disclosure'* (2010) 7.
[123] The Human Rights Act 1998.
[124] Her Majesty's Courts and Tribunal Service is responsible for the administration of justice in courts and tribunals in partnership with the judiciary.

jurisdiction and to disallow cases that are misconceived with no reasonable prospect of success.

There has been more focus on conciliation following the amendment of the Employment Tribunals Act[125] to give the Advisory Conciliation and Arbitration Service (ACAS) discretion to be involved at various stages of a claim.

There are commonly two approaches to whistleblowing in the UK:

(a) the protection of whistleblower is a protection against discrimination; and
(b) the dismissal of a person making a protected disclosure is a form of unfair dismissal.

In both approaches, the preamble of PIDA is instructive: 'to protect individuals who make certain disclosures of information in public interest; to allow such individuals to bring action in respect of victimisation; and for connected purposes.'

South Africa in not unlike the UK in that the PDA protects the employee from any form of occupational detriment as defined in the Act,[126] and the employer also has the protection of the LRA[127] in terms of unfair labour practices.

Mummery's[128] view is also important as he, more than any other judge, has determined the law and its social policy content. The principles on which the law of public interest is based are reiterated in the statement he made during the *ALM Medical Services v Bladon*[129] court proceedings:

> 'The self evident aim of the provisions of the Public Interest Disclosure Act 1998 is to protect employees from unfair treatment in the form of victimisation and dismissal for reasonably raising in a responsible way genuine concerns about wrongdoing in the workplace. The provisions strike an intricate balance between (a) promoting the public interest in the detection, exposure and elimination of misconduct, malpractice and potential dangers by

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[125] Employment Tribunals Act 1996 s 18 (3).
[126] Protected Disclosures Act 26 of 2000 s1.
[127] Labour Relations Act s186(2)*(d)*; s187(1)*(h)*; s191(13)*(a)*.
[128] Sir John Mummery PC, DL is a Lord Justice of Appeal and President of the Investigatory Powers Tribunal and member of the Court of Ecclesiastical Causes Reserved in the UK.
[129] *ALM Medical Services Ltd v Bladon* (2002) *IRLR* 807.

those likely to have early knowledge of them, and (b) protecting the respective interests of employers and employees. There are obvious tensions, private and public, between the legitimate interest in the confidentiality of the employer's affairs and in the exposure of wrong. The enactment, implementation and application of the "whistleblowing" measures and the need for properly thought out policies in the workplace, have over the last three years, received considerable publicity from various quarters, including the valuable activities of an independent charity, Public Concern at Work, established in 1993 and experienced in providing assistance to both employers and employees".

According to McMullen,[130] there are five main problems in handling public interest disclosure cases, which are all fact-sensitive;

(a) deciding between the competing interests of the employer and the employee;
(b) the mixed motives of the employee;
(c) the power of the chronology;
(d) causation; and
(e) reasonableness of belief.

It can be stated that all five central issues that arise in whistleblowing cases are resolved by the facts when they come before the UK Employment Tribunal.

If an employee in a whistleblowing case claims a dismissal was automatically unfair, the critical issue for an Employment Tribunal is to determine whether all the requirements of the protected disclosure and relevant statutory provisions have been met.

PIDA offers whistleblower protection that is consistent with three tiers, namely:

(a) it offers protection to a person for internally raising concerns within and outside the chain of command of an organisation;
(b) it offers protection for blowing the whistle to a prescribed regulator if the internal route has failed; and

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[130] His Honour Judge Jeremy McMullen QC *'A Global Approach to Public Interest Disclosure'* (2010) 10.

(c) if the second option to a prescribed regulator fails, wider disclosures are also protected.

Since the implementation of the public interest disclosure legislation the law has been clarified by the courts to allow employees to know where they stand and employers to respect their rights to raise concerns in public interest.

South Africa has similar legislation in the PDA in that no employee may be subjected to any form of occupational detriment by his or her employer on account of having made a protected disclosure. The disclosure can be made to:

(a) a legal advisor;[131]
(b) an employer;[132]
(c) a member of Cabinet of Executive Council;[133]
(d) certain persons or bodies as listed;[134] and
(e) a general protected disclosure.[135]

The South African whistleblower legislation promotes internal whistleblowing as a first resort, and organisations such as ODAC[136] are at the forefront of promoting whistleblowing policy in the public and private sectors.

4.4 European Union: Whistleblower protection

This section discusses disclosure of information and whistleblower protection in countries of the European Union (EU) excluding the UK, which was discussed in the previous section.[137] Most countries have in one form or another adopted the UK three-tiered-model derived from the PIDA.[138]

Whistleblowing lobbyists in continental Europe in the 1970s wanted organisations open to public scrutiny. The UK model offered a balanced approach to the public disclosure of information involving organisational improprieties. In the first tier, the information does not leave the organisation. In the second tier, the information becomes known to an agent acting on behalf of the state. However, this second tier will only be

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[131] Protected Disclosures Act 26 of 2000 s 5(a)(b).
[132] Protected Disclosures Act 26 of 2000 s 6(1)(2).
[133] Protected Disclosures Act 26 of 2000 s 7(a)(c).
[134] Protected Disclosures Act 26 of 2000 s 8(1).
[135] Protected Disclosures Act 26 of 2000 s 9(1-4).
[136] Open Democracy Advice Centre, Cape Town, South Africa.
[137] Switzerland, although not a member of the EU, released a draft Bill in 2008, issued by the Federal Council. The Bill offers whistleblowers similar protection to that of the UK model.
[138] Public Interest Disclosure Act 1998.

accessed when first-tier whistleblowing is unsuccessful or when the organisation fails to correct the malpractice for which it carries responsibilities, or fails to deal adequately with the concern being raised and the person raising it. The possibility of the second tier being invoked then serves as a deterrent to the employer or organisation. A similar relationship is instituted between the second and the third tier, but here the third tier is a watchdog over the second tier should it not take its deterring or rectifying duties seriously.

The three tier model therefore establishes that organisations do not necessarily become directly accountable to the wider public for their practices, but that they are held accountable for dealing adequately with concerns raised with them and the persons raising them. The UK model has been adopted in whistleblowing legislation mostly throughout the UE.

Some specific EU examples include the following:

The Netherlands has the longest history of trying to regulate whistleblowing policy, which dates back to 1993. According to Vandekerckove,[139] the Ministry published the Ministerie van Binnenlandse Zaken en Koninkrijksrelaties (MBZK) report in 1999 stipulating a whistleblowing policy for the Dutch public sector.[140] The city of Amsterdam implemented the policy in 2002 and a year later, the Law on Public Officials[141] was amended so that all public service organisations had whistleblowing policies and procedures. The Integrity Commission[142] was consolidated in 2006 on a national level with a mandate to investigate all concerns raised by whistleblowers. There is no anonymity for the whistleblower and no protection against reprisal. To date, no official whistleblower policy exists in the Dutch private sector.

In Belgium, civil servants in the Community of Flanders in the federal state of Belgium have enjoyed protection since the implementation of the Whistleblowers Decree in 2005,[143] which was specifically aimed at protecting whistleblowers called 'denunciators'. In addition, individuals can

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[139] Dr Wim Vandekerckove *'European whistleblower protection: tiers or tears? 'A Global Approach to Public Interest Disclosure'* (2010) 16.

[140] Ministerie van Binnenlandse Zaken en Koninkrijksrelaties (MBZK) 1999.

[141] Ambtenarenwet Nederland 2003.

[142] Commissie Integriteit Overheid Nederland 2006.

[143] Council of Europe 'Protection of Whistleblowers'-available at http://fairwhistleblower.ca/files/fair/docs/ti/Council_of_Europe_Draft_WB_Resolution.pdf [accessed on 31 August 2011.]

raise concerns to the Flemish Ombudsperson when they experience or fear retaliation or when the internal audit body has not responded within 30 days.

Ireland has had the Whistleblower Protection Bill since 1999, but the Bill has never been enacted. Sector-specific Irish legislation, which includes forms of whistleblower protection,[144] exists, but these pieces of legislation lack uniformity with regard to employment rights, the protection of the whistleblower from prosecution in respect of disclosing information, and keeping the whistleblower's identity confidential.

In Germany, according to the Group of States against Corruption (GRECO)[145], the German Civil Service Status Law[146] is a German Federal Law[147] for public service employees who have had the right since 2005 to report suspicions of criminal offences and corruption directly to law enforcement authorities. However, they are protected only when doing so in good faith and when their actions are not considered inconsistent. In the private sector, German labour law is regarded as favouring the employer. In an attempt to provide legislation, the Whistleblower Bill for the private sector was tabled in April 2008.[148] However, since it was drafted the Bill has not progressed any further.

4.3.1 Conclusion

Whistleblower protection in the EU is very diverse, with many differences in public and private sector policy, in addition to differences in culture and language. A 'golden thread' appears to flow through the legislation, offering the whistleblower at least some form of protection, predominantly in relation to internal processes and in some cases to official external judicial bodies. Unfortunately most of the whistleblower protection law relates to the public sector.

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[144] Ethics in Public Office Acts 1995-2001 ; Protections of Persons Reporting Child Abuse Act 1998 ; The Competition Act 2002 ; Garda Siochana Act 2005 ; Safety Health and Welfare at Work Act 2005 ; Employment Permits Act 2006 ; Consumer Protection Act 2007 ; The Health Act 2007; Communications Regulation (Amendment) Act 2007.

[145] Council of Europe '24th GRECO Plenary Meeting'-availible at http://www.coe.int/t/dghl/monitoring/greco/documents/2005/Greco(2005)19_EN.pdf [accessed on 31 August 2011.]

[146] Beamtenstatusgesetz s 37.

[147] Deutsches Bundesgesetz.

[148] Bundestag Committee on Food, Agriculture and Consumer Protection.

For the purpose of this paper, a comparison will be drawn between the UK legislation (PIDA) and the South African (PDA) as much of the legislation in the EU has been adopted from the UK three-tier legislation.

The UK and SA whistleblower Acts advocate disclosures made internally to employers' and the disclosures are protected if the conditions have been met.[149] External disclosures are also protected in both Acts provided the conditions are met.[150] Both Acts provision good faith disclosure as a requirement for protection, with PDA going a step further in relation to the requirement that the information needs to be believable, substantively true and not for personal gain.[151] Neither of the Acts makes provision for disclosures to be investigated nor do they stipulate criteria for such an investigation. Both Acts provide for the private sector although the PDA, unlike PIDA, confines the private sector disclosures to the employee-employer relationship. PIDA provides for compensation to the whistleblower while the PDA is linked to the maximum award as defined in the LRA.[152]

4.5 United States of America : Whistleblower protection

The past decade has seen growth in the attempts of US legislators to enlist whistleblowers in controlling organisational wrongdoing. Every state has at least one law, and these laws differ, as do the federal laws: therefore, only a broad overview is possible.

4.4.1 Sarbanes-Oxley Act

The Sarbanes-Oxley Act (SOX)[153] passed by the United States Congress represents the importance of whistleblowing in the control, detection and deterrence of wrongdoing. The SOX Act applies to publicly traded companies, including contractors, subcontractors and agents of those companies and calls for the establishment of a code of ethics and whistleblowing procedures. Malpractices covered in the act are mail, bank and securities fraud. The SOX Act specifies different reporting channels for

[149] PIDA s 43 and PDA s 6 respectively.
[150] PIDA s 43 and PDA s 9 respectively.
[151] PDA s 9(1)*(a-b)*.
[152] Labour Relations Act s 194 Limits on Compensation.
[153] Sarbanes-Oxley Act of 2002.

internal and external information disclosure about the fraud to ensure the protection of the whistleblower.[154]

An internal disclosure must go to a person with supervisory authority over the employee or to a person employed by the employer with the authority to investigate, discover or terminate the wrongdoing. Internal audit committees are charged with establishing whistleblowing procedures for employees to anonymously submit issues of concern regarding accounting or auditing matters. Furthermore, procedures for retaining and investigation the complaints are required.

A person who reports the suspected fraud externally must give the information to a federal regulatory or law enforcement agency or to any member or committee of Congress.

Like all state statutes, the SOX Act does not protect whistleblowers that go to the media. Conversely, the South African PDA[155] protects the whistleblower provided the person making the disclosure has met the requirements of the Act. In the Tshishonga case, the Labour Court found 'That in respect of the requirements of the PDA section 9(3), the court found that it was reasonable for the applicant to make the disclosure to the media. The media is one of the pillars that promote and uphold democracy, and its exposure of corruption is good for democracy. Whistleblowers depend on the media and other organs of civil society to help level the playing fields as they are often lonely voices against powerful interests. As an employee the isolation and vulnerability are even more acute. The court found further that the disclosure had been made in good faith and the applicant had met all the other requirements of section 9(3) of the PDA.'[156]

Concerning detriment, the SOX Act provides for an employee suffering dismissal, suspension, threatening behaviour toward an employee, harassment and in any other manner discriminating against a whistleblower.

If the whistleblower suffers retaliation for reporting a matter the Act provides the employee the right to bring a civil suit. However, before that can happen the employee must file the complaint with the Secretary of Labour, who then

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[154] Professor Terry Morehead Dworkin *'US Whistleblowing: a decade of progress?': 'A Global Approach to Public Interest Disclosure'* 2010 45.
[155] PDA s 9.
[156] *Tshishonga v Minister of Justice & Constitutional Development & another* (2007) 28 *ILJ* 195 (LC).

refers it to the Occupational Safety and Health Administration to investigate the complaint. An administrative law judge from the Department of Labour hears the evidence resulting from the investigation and renders a decision. This decision can be appealed to the Administrative Review Board and after that to the Federal Court. Congress established a time limit of 180 days within which the Secretary of Labour should pronounce sanction failing, which the employee is entitled to bring the civil suit.

The effectiveness of the protection for occupational detriment is tempered by a short 90-day statute of limitations within which the original claim must be brought and limited by the redress available, which is: reinstatement, back pay with interest, and legal fees.

A significant change in whistleblower legislation was implemented in the SOX Act to provide for criminal penalties for companies and individuals for knowingly and intentionally retaliating against a whistleblower who furnishes truthful information concerning any federal offence to a law enforcement officer.

Positive attributes of the SOX Act are that it provides more than one channel to report the wrongdoing; it broadly defines acts that can be considered retaliation; it allows for anonymous reporting; it allows the employee to seek a de novo review in court if the administrative does not act within 180 days and it provides criminal penalties for retaliation

Despite these provisions, regulated protections the SOX Act has generally failed.[157]

4.4.2 False Claims Act

Enacted in 1863 in response to contractors' cheating the government, the False Claims Act is a federal law that was significantly revised in 1986 to make the monetary claims instituted by whistleblowers, easier and more rewarding.

Under the Act, a whistleblower files a suit[158] with the Department of Justice on behalf of the government. If the claim is proved, the whistleblower receives 30 per cent of the judgment. If assisted by the Department of

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[157] Morberly, R. 'Unfulfilled expectations: an empirical analysis of why Sarbanes-Oxley whistleblowers rarely win', *William & Mary Law Review*, (2007) 49, p 65.

[158] *Qui tam* suit: (a Latin abbreviation for "Who sues on behalf of the King as well as for himself").

Justice the whistleblower receives 25 per cent. Since government contracts are usually significant, there is ample incentive to blow the whistle on suspected fraud.

Unfortunately, like the SOX Act this law has problems for the whistle blower making it less effective than intended. Time delays are the main issue, and the whistleblower often faces reprisal during these delays that result in dismissal. The delay in compensation places a burden on the employee, and being a "whistleblower" makes it difficult to find alternative employment.

4.4.3 Public employees

The Office of the Special Counsel (OSC) was established under the Civil Service Reform Act of 1978 (CSRA) to protect federal government employees from reprisal, enabling them to report fraud, waste and other malpractices.

The Merit Systems Protection Board (MSPB) was authorised to hear and adjudicate reprisal complaints from whistleblowers.

Despite the intent, the system proved ineffectual, resulting in Congress passing the Whistleblower Protection Act of 1989 (WPA) to strengthen whistleblower protection. The WPA applies only to federal employees. The Act strengthened the Office of Special Counsel and allowed federal employees to pursue their own retaliation cases against agencies if the OSC refused to take them to the MSPB, thus easing the burden of proof necessary to prove reprisal due to whistleblowing.

4.4.4 Other protections

Dworkin[159] states that the US Congress continues to bolster whistleblower legislation to stop reprisals and encourage the disclosure of information in a protected environment.

In 2002, the Notification and Federal Employee Antidiscrimination and Retaliation Act (NO FEAR) was passed. The US Congress required federal agencies to furnish annual exception reports with copies to the attorney general and the Office of Personnel Management (OPM) listing disciplinary actions taken that were inconsistent with federal whistleblower protections.

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[159] Professor Terry Morehead Dworkin *'US Whistleblowing: a decade of progress?': 'A Global Approach to Public Interest Disclosure'* 2010 37.

The reports needed to include the number of federal court cases pending, resolved and the number of employee's disciplined, the nature of the disciplinary action and the monetary value paid to the judgement fund. However, NO FEAR only requires that reports concern discrimination against whistleblowers brought under the anti-discrimination law and does not include federal whistleblowing law. This omission results in the whistleblower being afforded less protection than is possible thus weakening the NO FEAR statute.

The cycle of failure of whistleblower legislation in the US continues and in its current format deters the whistleblower from taking action to disclose wrongdoing. Reluctant courts and, overwhelmed or resistant agencies can negate the impact of laws, leaving a culture of reluctant whistleblowers not believing in the protection offered by the various statutes. Whistleblowers need to be given tools to better protect themselves and encourage public information disclosure.

It has been suggested in legal quarters that Congress pass a law that is all encompassing in that it covers all jurisdictions, empowers the employee with a choice of where to lodge a claim, educates the process to follow and rewards the whistleblower for his or her effort in exposing corruption or impropriety.

The South African PDA offers protection to employees within the public and private sectors as one piece of legislation backed up by both the Labour Relations Act and the Constitution of the Republic of South Africa as the supreme law of the land, making it one of the most progressive of its kind and all encompassing.

4.6 Conclusion

In global terms, the fundamental decision for any legislature is whether to protect all whistleblowers or only those engaged in some form of employment. The complication in terms of methodology is to make protection available to all citizens irrespective of their status; the remedies of such protection are complex. One can only assume that legislators will concentrate on protected disclosure for those engaged in employment and

who are receiving remuneration from one or another person in both the public and private sectors.

At present, there is a global leaning towards protection of public service employees only, but this could change as pressure mounts from within the private sector. Equally, given the nature of global business, whistle blowing legislation is likely in future to cover disclosures made outside of a particular jurisdiction but still concerned with public or private sector within that jurisdiction. Some countries are considering not excluding the security services, such as the police and other security institutions. These could be included within special rules of disclosure offering protection regarding whistleblowing in those sectors.

In relation to the types of information that may be disclosed in order to qualify for protection, the UK and South African models both offer broad definitions of qualifying disclosures that could be universally adopted. The provisions of allowing disclosures of wrongdoing that is likely to occur, occurring at present and having occurred in the past should also be adopted universally as in the UK and South African statutes. These statutes also provide protection for the disclosure irrespective of whether there is a link between the incident disclosed and the whistleblowers employment.

There remains the controversy around questions of good faith disclosures and the protection offered by the various jurisdictions. The majority are of the opinion that whistleblowers should not have to establish good faith as well as reasonable grounds for believing that their information is true or likely to be true, and their motive for making the disclosure should not suffer scrutiny. Statutes need to encourage whistleblowing in order to uncover corruption and wrongdoing and protect the whistleblower from threats of investigation into the reasons for making the disclosure. Protection should be denied to those who knowingly make a false allegation, rendering them liable for prosecution. Similarly, false information could be grounds for not acting upon such disclosure. However, it should not result in the loss of protection for individuals who honestly believe that the information disclosed is true and correct.

No jurisdiction considered here requires employers to establish and monitor whistle blower policy and procedure. In the interests of curtailing corruption

and maladministration authorities should follow the UK and South African models. South African employment law establishes a duty to public and state-owned companies to directly or indirectly establish and maintain a system to receive disclosures confidentially, act on them, and routinely publicise the availability of that system,[160] thus maintaining an effective public interest disclosure mechanism. Protection should be guaranteed to whistleblowers for making disclosures, provided they satisfy the provisions of the various Acts and are made in the interests of public safety and well being.

Authorities need to educate the greater public in the understanding of whistleblower legislation, internal procedures and remedies. Organisations should be encouraged to have policies in place to manage protected disclosures. Only with these processes in place would it be appropriate to expect the employee to exhaust all internal procedures before making an external disclosure. The actions of employers and investigation bodies are factors in whistleblowers assessing the merits of wider disclosure. This practise can be limited by providing timely and proper feedback, as should be the focus.

Legislation should also relieve individuals of civil and criminal liability for making a protected disclosure.

Finally, governments need to take note of what is happening elsewhere in the world regarding whistleblower legislation and be prepared to reconsider their statutes in following best practice standards. From a South African perspective, this country is at the forefront of protected disclosure legislation. It is disappointing to see that many larger first world economies do not have specific whistleblower legislation in place and still rely on public interest defence in common law.

[160] The Companies Act 71 of 2008 s159.

CHAPTER 5

CHALLENGES AHEAD: THE PROTECTION OF INFORMATION BILL

5.1 Introduction

This section is based on information available as of 30 August 2011. The Protection of Information Bill (the Bill)[161] was recently introduced at the National Assembly to provide for the protection of certain information from destruction, loss or unlawful disclosure and to regulate the manner in which information is protected with the intention of repealing the Protection of information Act.[162]

The Bill has drawn much criticism and controversy from the private sector and organisations like ODAC,[163] which are fighting for information disclosure in the public interest.

As the Bill currently stands, the draft legislation will still not pass the constitutional test. Legal Brief[164] states that the Bill in general is vague, complicated, and hard to interpret. Moreover, it opens the path to inconsistency and a wide opportunity to classify material that could be politically embarrassing to the government of the day and even to classify that which is false and, ultimately, to withhold facts from the public which is entitled to have access. Ultimately, a result of the Bill would be that people could be found guilty by a court for disclosing classified information and sent to prison for many years based on a classification that was not in accordance with the basic values of the Constitution.[165]

The grounds for classification of documents and the definition of national security remain overly broad and will lead to documents that are of considerable public interest and importance being declared secret.

The preamble of the Bill recognises the importance of information to the national security while acknowledging the harm of excessive secrecy. It aims to protect and regulate the access to information within a transparent framework aiming to promote the free flow of information within an open and democratic society without compromising security.

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[161] Protection of Information Bill (As published in Government Gazette No. 32999 of 5 March 2010).
[162] Protection of Information Act, No.84 of 1982.
[163] Open Democracy Advice Centre.
[164] Legal Brief Today 'Secrecy Bill still contravenes Constitution'-available at http://www.legalbrief.co.za/index.php?page=Legalbrief_Today [accessed on 1 July 2011.]
[165] The Constitution Preamble: The Bill of Rights chapter 2 ss7.

5.2 Objects of the Protection of Information Bill

The Bill is meant to ensure a coherent approach to the protection of State information and the classification and declassification of State information. It will create a legislative framework for the State to respond to espionage and other associated hostile activities.

The Bill sets out procedures on how classified documents are to be handled during court proceedings, and requires courts to prevent public disclosure of classified documents that form part of court records.

The Bill aims to protect state information from destruction or from unlawful disclosure. It also sets a process for the classification and declassification of information. The Bill creates a set of offences and proposed sentences for unlawful disclosure of information. It establishes guidelines for courts in terms of classified documents and, provides powers to the Minister to regulate.

5.3 Criticism of the Bill

The Bill is a potential threat to whistleblowers in its present form and a threat to South Africans' democratic right to be fully informed on matters of public interest. This Bill is a significant setback for the protection of openness, transparency and accountability guaranteed by the Constitution. Apart from the fundamental substantive concerns with the Bill, no compelling reasons have been provided to explain why this Bill is being rushed through Parliament. The bill would undermine the Constitution and destroy key pillars of a vibrant democracy, hard fought media freedom, open government, and an informed public.

The Bill could be used to cover up information on corruption and misuse of public resources. The Bill would empower officials in nearly every state body to classify any document as secret on the basis of a vague definition of 'national security'. The Bill would also facilitate the conviction of anyone who possess or publishes anything that is classified, even if that information is clearly in the public interest, deterring investigative journalists and whistleblowers who try to expose crime and corruption. The Bill should only apply to core state bodies in the security sector, and state intelligence

agencies should be held to account by public scrutiny. Secrets with a bearing on national security should be determined by an independent panel appointed by Parliament and not the Minister of State Security. Penalties for unauthorised disclosure should apply only to those responsible for keeping secrets, and investigative journalists and legitimate whistleblowers should always be protected to release information in the public interest.

When the South African government introduced the Bill to parliament in March 2010 no one would have predicted the media frenzy around its prohibition.

Headlines in the press have clearly reflected opposition to the Bill.[166]

The Right-To-Know[167] campaign group has a reported support of over 9000 individuals, 350 institutions, the opposition party and the Democratic Alliance. It recently delivered a petition supported by close to 30 000 South Africans. At stake are constitutionally enshrined principles of transparency of the public service, accountability and open democracy, which are seen to be under threat from the provisions of what has come to be referred to by its critics as the Secrecy Bill.

The Bill proposes that restrictions are imposed by classifying information according to categories of increasing levels of sensitivity, confidential information, secret information, and top secret information.

In a recent press statement, [168] COSATU[169] reported that

> The criteria to determine whether information may be classified and at what level, can be interpreted very broadly and subjectively. For example, how accurately and objectively can a distinction be made between what is 'harmful' as opposed to what 'endangers' security in order to justify a more stringent classification? Can the unlawful disclosure of the ministerial handbook or excessive spending by a Minister on an unauthorised trip or hotel bills be considered to be

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[166] Legal Brief Today 'ANC digs in on Secrecy Bill'; Opposition to Secrecy Bill grows'; Secrecy Bill still contravenes Constitution'; 'Secrecy deliberations may be cut short'; 'ANC accused of using Bill to target journalist' sources'; 'ANC stand on Secrecy Bill labelled anti-democratic'-available at http://www.legalbrief.co.za/index.php?page=Legalbrief_Today [accessed on 6 August 2011.]

[167] Right2Know 'Let the truth be told! Stop South Africa's Secrecy Bill!'-available at http://www.r2k.org.za/ [accessed on 22 July 2011.]

[168] Patrick Craven 'Protection of Information Bill, a threat to whistle-blowers'-available at http://groups.google.com/group/cosatu-daily-news/browse_thread/thread/c9901fc7bc14786d [Accessed on 18 June 2011.]

[169] Congress of South African Trade Unions.

revealing personal information (such as whereabouts and movements of a minister) that would endanger his/her personal safety? And in any event is it not in the public interest for this information to be made public? Or would disclosure of the sale of arms to a foreign country in contravention of international law be considered to compromise both national security *and* diplomatic relations? Would it not be in the interests of the public to do so?

There has been widespread criticism of the Bill from people in all walks of life and spheres, including domestic and international non-governmental organisations, domestic and international media freedom structures, trade unions, faith-based organizations, business formations, foreign and diplomatic representatives to South Africa, and the African Commission on Human and People's Rights. Initially, the government seemed unmoved by such widespread criticism, but the continual pressure from the private sector is forcing dialogue with a view to compromise.

5.4 Concerns: The protection of whistleblowers

The main problem is that the Bill as it stands is not synchronised with current whistleblower legislation[170] and it overrides public interest in the Promotion of Access to Information Act. The Bill trumps the protection these Acts afford to the disclosure of crime, abuse of power and threats to public safety with the effect that possession and disclosure of classified and potentially some declassified information is penalised by the same heavy penalties of up to 25 years imprisonment, even where the intention is to expose corruption or environmental threats. This is a serious disincentive to whistleblowing and investigative journalism.

In this context, it would be better to include a public interest defence, consistent with existing law, where unauthorised possession and disclosure is intended to serve the public interest.

The Bill still contains harsh penalties for those having disclosed or published classified information. Even though the government has agreed to a public interest override for requests for information or review of classification decisions, there is no agreement on a public interest defence for people that

[170] Protected Disclosures Act 26 of 2000; The Companies Act 71 of 2008.

disclose, publish or distribute classified information. This means that both whistleblowers and journalists are still liable for conviction in terms of disclosure of information considered to be classified in terms of the Bill.

A key concern is that the Bill will discourage whistle-blowing, especially by blue collar workers, who are often the ones who have access to, or witness, irregularities. This concern is borne out by examining the provision of section 33(1) of the Bill that defines hostile activity offences as applicable if a person unlawfully discloses or obtains classified information that he or she knows, or ought reasonably to have known or suspected, would directly or indirectly prejudice the state.

This provision is far too broad and ignores the fact that some disclosures may be in the public interest despite the disclosure having a prejudicial impact on the state.

The Bill clearly violates legal protections provided for in terms of the PDA. Furthermore, the Bill is definitely not aligned to the PDA or any of the other legislation protecting the rights of whistleblowers. According to Van Rooyen[171],

> '...the terminology of the Bill is likely to be held as unconstitutional as a result of being too vague and open to subjective criticism, in spite of inbuilt guidelines in section 17[172] and if the offence created in section 42, if a classifier knowingly classifies according to norms other than those provided for in the Act.[173] Whilst whistle blowing[174] would also be permitted where such a section 42 offence has been committed, the clandestine nature of classification would make whistle blowing in this sphere a mere principle without any practical effect. The whistleblower will only be protected against prosecution if he or she could show that the classifiers intentionally contravened section 42.'

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[171] JCW van Rooyen SC 'Protection of Information Bill' -available at http://www.afriforum.co.za/english/category/documents-and-reports/ [accessed on 9 July 2011]

[172] S 17 'Directions for Classification of Information'.

[173] S 42 'Any person who knowingly classifies information in order to achieve any purpose ulterior to this Act, including the classification of information in order to-

(a) Conceal breaches of the law;
(b) Promote or furthers an unlawful act, inefficiency or administrative error;
(c) Prevent embarrassment to a person, organisation or agency; or
(d) Give undue advantage to anyone within a competitive bidding process, is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding three years'.

[174] Protected Disclosures Act 26 of 2000.

The protection of the whistle blower is thus ineffective, despite the rules in section 9 of the PDA.[175]

Section 38 of the Bill specifically has a major impact on existing whistleblower legislation. ODAC recently released comments and suggestions on section 38 of the bill.[176] Section 38 states that:

Disclosure of classified and related information; '[a]ny person who discloses classified information referred to in section 11(3)*(g)*[177] outside the manner and purpose of this Act, except where such disclosure is for the purpose and in a manner authorised by law, is guilty of an offence and liable on conviction to imprisonment for a period not less than three years but not exceeding five years, subject to section1(6).'[178]

ODAC proposes an amendment to section 38 to read as follows:

'[*Subject to section 1(6)*] any person who discloses information in contravention of this Act is guilty of an offence and liable on conviction to imprisonment for a period [*not less than three years*] but not exceeding five years, except where such disclosure is; Protected under the protected Disclosures Act, 2000 (Act No.26 of 2000); section 159 of the Companies Act, 2008 (Act No.71 of 2008); or authorised by any other law.'[179]

It is important that the Bill does not take away the rights that employees have under the PDA and the Constitution to blow the whistle on crime, corruption and unlawful State action by creating crimes under a new law, which may to a large extent serve to undermine the purpose and objectives of the existing whistleblower legislation.

ODAC has further commented [180] that

> '...reference to the PDA in an attempt to limit a public interest defence actually contradicts the aims of the PDA that has a public interest motivation. The PDA has its own procedures and definitions

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[175] Protected Disclosures Act 26 of 2000 s9 General Protected Disclosure.
[176] Open Democracy Advice Centre: The operation of s38 of the Protection of Information Bill.
[177] s11 (3)*(g)*:'all matters that are subject to mandatory protection in terms of sections 34 to 42 of the Promotion to Access of Information Act, whether in classified form or not.'
[178] s1(6): 'In regard to minimum sentences as provided in sections 32; 33; 34; 35; 36; 38; 40 and 43 of this Act, if a court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence prescribed in that section, it shall enter those circumstances on the record of the proceedings, and must impose such lesser sentence.'
[179] It is noted that the words in square brackets are not a part of the current Working Document 20.
[180] Open Democracy Advice Centre 'Whistle-blowing defences' -available at http://www.opendemocracy.org.za/ [accessed on 31 August 2011.]

which are made for protecting one category of persons (employees) from one form of harm only (occupational detriment). The Bill is seeking to deal with how to "protect genuine whistleblowers from being prosecuted for releasing classified material" into the public realm. The best way to do this is by narrowly tailoring any criminal provision for disclosure (and not mere possession) which excludes expressly all possibilities of genuine whistle-blowing (whether or not that of an employee) from harm (not merely that of occupational detriment) such as criminal prosecution. This is as the mere threat of prosecution creates a chilling effect on whistle-blowing.'

5.5 Draft changes

To date, government has presented changes on a number of clauses in the Bill including, the removal of the concept of protection of information in national interest, the removal of the section related to the classification of commercial information and the public interest override for review of classification decisions.

As currently drafted the Bill will apply to all organs of state as defined in the Bill itself, a definition that is found in section 239 of the Constitution, public entities defined by section 1 of the Public Finance Management Act[181] and National Key Points as defined in the National Key Points Act.[182]

It must be noted that many of these points are with regard to private concerns such as oil refineries. There is extensive literature on oil refineries obstructing access to information about public health violations on the pretext that this would compromise their security and contravene state security legislation. This Bill would only further entrench such practices. All public institutions from national government departments, to provincial government departments and to municipalities will be subject to the law.

5.5.1 Independent review

It had been proposed that an Information Commissioner or Regulator be appointed as the appeals authority in term of this Bill. Government is still

[181] Public Finance Management Amendment Act No. 29 of 1999.
[182] National Key Points Act 102 of 1980.

considering this proposal and has suggested that it could consider an independent board that reports to the Minister for State Security.

5.5.2 Summary

According to Johannesburg Press Club Chairperson, Clare van Zwietens,[183]

> 'The committee's intention to spend more time considering the bill and the proposed amendments go some way towards relieving concerns about the negative implications this bill will have on our democracy.'

The proposed amendments limit the authority to classify information to state security services; allow for the appointment of a retired judge as an independent appeal authority to resolve disputes and remove minimum prison sentences for disclosing state secrets; and ensure that penalties for releasing a state secret are proportional to any harm caused. These proposals reduce the power of the proposed legislation somewhat and should help to prevent it from being used by government structures to cover up corruption and incompetence.

Currently the committee is still working on amendments to the bill and many meaningful and critical amendments have already been made to which all political parties have agreed. The original draft version defined national interest as a measure to determine which information should be classified. However, this provision has been removed, and classification of the information is now for national security reasons only.

Furthermore, the term, commercial information, has been removed and the bill has been aligned with the PDA to protect whistleblowers. The Bill will also be aligned with the Promotion of Access to Information Act, and the criteria for determining top secret, secret and confidential information will have been made far stricter.

Recommendations from public hearings and civil society have been incorporated into the latest version, which is one of the reasons that the Bill has been amended and the process is ongoing.

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[183] Advantage 'Deadline for the Protection of Information Bill extended'-available at http://www.advantagemagazine.co.za/author/gillian/ [accessed on 3 August 2011.]

Public hearing outcomes allowed the minister an opportunity to address the committee on the concerns that were raised. He made a number of recommendations. The committee deliberated on these and most if not all his recommendations were introduced as amendments into the Bill. The Bill is not final, but it has undergone important changes, which were released to the media on 25 June 2011.However, problems still exist despite the following amendments:

(a) Organs of state still classify information, the criteria of which are not open to scrutiny. This will continue to discourage whistle blowing.
(b) It seems that the appointment of a judge to address disputes is directed at declassification only. It also appears that the judge will in his or her capacity arbitrate disputes and that the decision will be final and only subject to review, which begs the question of fairness and perhaps irregularities in reaching a decision. A court that examines all the facts and arrives at a decision that is fair and equitable is perhaps a better option and such court decisions are open to appeal which bolsters the process.
(c) The minimum sentence of 15 years imprisonment is to be removed. However, jail sentences for having made a disclosure highlighting improprieties based on information classification is constitutionally flawed.

The deadline for the Bill has been extended to the 23 September 2011 to include the current and proposed amendments. Whether the amendments are too little, too late and whether the new law will stand up to scrutiny remains to be seen.

CHAPTER 6

CONCLUSION

Whistleblowers can play an essential role in detecting fraud, mismanagement and corruption. Their actions are instrumental in safeguarding the rule of law and whistleblowers often assume high personal risk to achieve this end. They may face victimisation or dismissal from the workplace, their employer may institute legal action against them for breach of confidentiality or libel, and they may be subject to criminal sanctions. In extreme cases, they face physical danger.

The whistleblower's right to speak up is closely related to freedom of expression, freedom of conscience and to the principles of transparency and accountability. It is increasingly acknowledged that effective protection of whistleblowers against retaliation will facilitate disclosure and encourage open and accountable workplaces.

The importance of whistleblowing cannot be emphasised enough in allowing concerned individuals to come forward and disclose wrongdoings that place fellow human beings and organisations at risk.

The action of the whistleblower strengthens accountability and bolsters the fight against corruption and mismanagement, in both the public and private sectors. Potential whistleblowers are often discouraged by the fear of reprisals and victimisation leading to the detriment of public interest, which should not be the case.

Whistle-blowing goes against what is generally expected of employees. In the writers opinion, culture plays a role in that many individuals in the past were brought up not to question the acts and authority of superiors and whistleblowing policy can be said to have the objective of dissuading this notion. However, a whistleblower is always at risk for making a disclosure reporting irregularities, often at the price of retaliation from the person, persons or organisation involved.

In South Africa, the PDA and now the Companies Act provides protection to not only employees but also other stakeholders who dare blow the whistle against irregularities or wrongdoing. In the UK, a series of avoidable disasters prompted the enactment of forward-thinking legislation to protect

whistleblowers who speak up in the public interest. Similar legislation has been in force in the United States for many years, with reasonably satisfactory results. Most EU counties have whistleblower legislation in some form or another.

The Council of Europe Resolution[184] encapsulates whistleblowing as 'having always required courage and determination, and whistleblowers should at least be given a fighting chance to ensure that their warnings are heard without risking their livelihoods and those of their families. Relevant legislation must first and foremost provide a safe alternative to silence and not offer potential whistleblowers a 'cardboard shield' that would entrap them by giving them a false sense of security.'[185]

The effectiveness of whistleblowing is dependent on the legislation provided to protect the person who makes the public interest disclosure. This study has highlighted the need for the following minimum provisions, some of which are already regulated in the Acts around the world. The definition of protected disclosures should include all types of unlawful acts, including all serious human rights violations that affect or threaten the life, health, liberty and any other legitimate interests of individuals as subjects of public administration or as shareholders, employees or customers of private companies. The legislation should cover both public and private sector whistleblowers, including members of the armed forces and special services. The whistleblower must be incorporated into employment law statutes affording protection against unfair dismissals and other forms of employment-related retaliation. The whistleblower must be incorporated into criminal law statutes for protection against criminal prosecution for defamation or breach of civil or business intelligence. The law should provide appropriate incentives to government and corporate decision makers to put into place internal whistle-blowing procedures. All disclosures need to be adequately investigated and mechanisms put in place to ensure that decision makers are in possession of the relevant information within a stipulated time limit. The identity of the whistle-blower is only disclosed with his or her consent, or in order to avert serious and imminent threats to the

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[184] The Council of Europe Resolution 1729 (2010).

[185] Council Of Europe 'Resolution 1729 (2010) Protection of "whistle-blowers" '-available at 'http://assembly.coe.int/defaultE.asp [accessed on 6 July 2011.]

public interest. The legislation should protect any person who, in good faith, makes use of existing internal whistle-blowing channels from any form of retaliation. In the case of internal channels, not existing, not functioning properly or not being reasonability expected to function properly, given the nature of the problem raised by the whistleblower, external whistle-blowing, including through the media, should be protected, and it should be accepted that any whistleblower has acted in good faith provided he or she had reasonable grounds to believe that the information disclosed was true, provided he or she did not pursue any unlawful or unethical objective. Conversely, the legislation should also provide for appropriate protection against accusations made in bad faith.

The implementation and impact of relevant legislation on the effective protection of whistleblowers should be monitored and evaluated at regular intervals by independent authorities, reported on, and recommendations made.

In South Africa, the PDA includes many of the provisions listed above, and is at the forefront of whistleblower legislation, worldwide. If this is the case, then it begs the question of why the jurisprudence is on the increase involving whistleblower cases.

Le Roux[186], best describes this situation:

> 'First, it is quiet striking how often the whistleblower referred to in the jurisprudence is no longer employed by the employer in respect of whom the whistleblowing occurred (one suspects that the same fate awaits the employee in the Coega saga). This suggests that while the PDA may provide some protection, it does not secure job security. Second, although there are a number of whistleblowing judgements where the employer was penalised (in terms of compensation ordered) to the maximum legislative extent possible for subjecting the employee to an occupational detriment, there are no indications that the improprieties disclosed by the whistleblower are being investigated.'

[186] Professor Rochelle Le Roux 'The Protected Disclosures Act 26 of 2000: is this as good as it is going to get for whistleblowers? A review of some recent jurisprudence' (2010) *SLR* 508 at 526.

It stands to reason then that if the employee has little or no job security after having made a protected disclosure, the only course of action is to challenge the employer in a court of law, claiming occupational detriment, in an attempt to be awarded the maximum compensation. It is also unlikely that the employee will find suitable employment after being labelled a whistleblower which is another reason to fight for compensation. If the improprieties are not investigated properly and eradicated from the system, the whistleblower faces further if not similar reprisal from the employer should he or she return to work, another reason to rather go for compensation sighting occupational detriment in court.

Perhaps the only way that jurisprudence will decrease involvement in whistleblower cases is if the Labour Court and common law courts are empowered to order payment of both compensation and actual damages to the employee concerned. This will deter employers from subjecting the employee to any form of occupational detriment for having made a protected disclosed as provided for in the PDA.

Chapter five raised the Protection of Information Bill as a concern. If the government passes this law in its current draft format it will undermine the foundational principles of freedom of expression and freedom to access of information. The law will make it virtually impossible for any worker, community member, government official, business owner, or ordinary citizen to independently possess and disclose any classified information in the public interest without being criminally prosecuted. This is a lethal blow to whistleblower legislation and the PDA.

The Parliament has acknowledged the complexities of the Bill by extending the deadline for completing deliberations to 30 September 2011. The extension, although welcome, does not imply that the major problems within the bill are going to be rectified by government.

The provisions remain fiercely contented: the broad application of organs of state, aggravated by the lack of an independent review bodies to hear appeals and review decisions to classify information; the severe penalties for disclosing classified information are problematic; and the prescribed minimum penalties for the unlawful disclosure of classified information are unacceptably harsh.

The government has yet to announce concessions in this regard. It remains to be seen what the final format will be, but as it currently stands, the Bill will reverse and undermine the positive gains made by the PDA.

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