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'The Protected Disclosures Act 2000: Limitation on the Defamation Law in South Africa'

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I hereby declare that I have read and understood the regulations governing the submission of LL.M. dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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Dedication

To Roger-Claude and Juliana-Grace Liwanga, respectively my father and daughter; I dedicate you this research.

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Introduction

Freedom of expression is constitutionally protected by the 1996 Constitution of South Africa. The constitution makes special provision to include freedom of the press and other media, freedom to receive or impart information or ideas, freedom of artistic creativity, academic freedom and freedom of scientific research. [FN1] However, the scope of freedom of expression does not cover the propaganda for war, incitement of imminent violence and advocacy of hatred based on race, ethnicity, gender or religion. [FN2]

While freedom of expression constitutional protected, it is not the paramount value. It is limited as well by section 36 of Constitution, with the possibility of one being charged with defamation. Defamation is a public communication that tends to injure the reputation of another. [FN3] It includes both *libel* (written defamatory statement) and *slander* (oral ones). [FN4] Most jurisdictions, including South African, allow legal actions, civil and/or criminal against the defamatory statement. In the Court, therefore, in order to be found innocent, the defendant has to establish the *"truth"* of his/her statement. Failing to do so implies his/her liability and/or guilt.

Nevertheless, in certain circumstances there are possible exceptions to this. For example, when the defendant is a media body, the defendant can use the *"reasonableness defense"* when it is unable to rely on the defense of truth and public interest. [FN5] Generally, establishing the truth of an allegation is the defense that will be used, notwithstanding the communication has been made for the public interest. Therefore, this need to establish the veracity of a statement in order not to be found guilty of defamation may in fact limit the right of free speech, when the discloser is unable to prove the accuracy of the information disclosed.

In contrast, the advent of the Protected Disclosures Act 2000, which came into operation in 2001, introducing an innovation in South Africa law that may be also seen as a 'derogation' to the common law principle of defamation founded on the truth of the statement, in terms of which employees in both private and public sectors are protected after having disclosed any information in *'good faith'*. In other words, *good faith* is the condition sine qua non on grounds of which the communication of information is protected; it does not matter whether the said information disclosed is true or false and it is enough that employees reasonably believe that the allegation made is true. Yet, there is no requirement in terms of which the 'whistleblower' must prove the accuracy of the concern that he raises in his disclosure. [FN6]

Seen from this perspective, the Protected Disclosures Act (PDA) 2000 might appear to have primacy in its relationship with the defamation law. In other words, while the common law of defamation represents a *limitation* of freedom of

speech the PDA may constitute a *limitation* on that *limitation* and thereby expands the freedom of expression in certain circumstances.

However, to conclude that the PDA totally sanctifies the right to free speech would be excessive because of the nature of the scope of its application. The PDA offers a narrow scope of protection, as it requires a relationship between an employer and an employee. The PDA offers no protection to a person who does not fall into the definition of 'employee'. Accordingly, an unemployed person is not covered under provisions of PDA. Consequently, he may be found liable for a defamatory statement after having disclosed information of which he is unable to establish the truth.

The current state presents both an anomaly and also a potentially discriminatory or inequitable situation. It appears that some people, such as employees, enjoy the protection of a substantial limitation to the limitations on freedom of expression (offered through the PDA) while other people, for instance, unemployed persons, do not enjoy such protection. This inequitable situation may be in breach of section 9 of the Constitution of South Africa; Section 9 professes the equality of everyone before the law and the right of equal protection and benefit of the law. Thus, it appears to be necessary to extend the scope of the PDA's application beyond the mere relationship between the employer and employee.

For this purpose, the research will analyse the relationship between the South African common law of defamation, founded on the 'truth' of the allegation and, the Protected Disclosures Act 2000, which protects disclosures of any information made in 'good faith'.

The dissertation contains three chapters, the first chapter deals with the Protection of Right to Freedom of Expression; the second chapter explores the Defamation Law as a limitation on the Right to Free Speech and, finally, the third chapter analyses the Protected Disclosures Act 2000 as limitation over Defamation Law.

Chapter One: Protection of the Right to Freedom of Expression

The right to freedom of expression is protected by several juridical instruments on the international as well as the national level. On the international level, the right to freedom of expression is, for instance, granted by the 1948 Universal Declaration of Human Rights (UDHR) and the 1966 International Covenant on Civil and Political Rights (ICCPR). Internally, freedom of expression is constitutionally protected by section 16(1) of the 1996 Constitution of South Africa, which specially includes protection for freedom of the press and other media, freedom to receive or impart information or ideas, freedom of artistic creativity, academic freedom and freedom of scientific research. However, section 16(2) reduces the scope of freedom of expression, in that does not cover the propaganda for war, incitement of imminent violence and advocacy of hatred based on race, ethnicity, gender or religion. This South African conception is in line with the International Covenant on Civil and Political Rights (ICCPR), which in terms of articles 19 and 20 guarantees the freedom of expression and limits its scope to activities that may be viewed as an incitement to violence and hatred.

In this chapter, first I will briefly analyse the expressions that are constitutionally protected and, second I will explore the expressions that are specifically excluded.

Section 1: Constitutional protection of freedom of expression

As previously noted, protection of the freedom of expression is enshrined in section 16(1) of the 1996 Constitution of South Africa. This includes freedom of the press and other media, freedom to receive or impart information or ideas, freedom of artistic creativity, academic freedom and freedom of scientific research.

But, before deeply developing this kind of protected expression, the following question needs to be asked, what is the purpose of protecting the freedom of expression?

1.1. Purpose of the protection of freedom of expression

The reasons for protecting freedom of expression can be divided into two groups: those that focus on 'the human nature of the speaker' and those that take into account 'the interest of the audience.' Firstly, considering 'the human nature of the speaker', the reason to protect freedom of expression is the ability that free speech confers to the speaker to feel 'fully human' [FN7]. It means that to deny someone free speech implies to deny his/her humanness. The protection of freedom of expression, as was said by Lucy Vickers, *"helps to maintain the personal autonomy of the individual speaker."* [FN8] Similarly, Curie and De Waal in citing Ronald Dworkin alleged that *"free speech is valuable because expression is an important part of what it means to be human."* [FN9] Secondly,

'the interest of audience', 'protecting the free speech in some circumstances also protect the interest of those who hear the speech'. [FN10] For example, the information provided by press and other media tends to benefit of the rest of society more than the media agencies themselves.

1.2. Freedom of press and other media

The freedom of press and other media is protected by section 16 (1) of the Constitution. Indeed, the rationale behind this protection is related to the role or contribution of the press to democratic society. As the Constitutional Court held, in the *Khumalo* case:

'The ability of each citizen to be a responsible and effective member of our society depends upon the manner that in which the media carry out their constitutional mandate... The media thus rely on freedom of expression and must foster it. In this sense they are both bearers of rights and bearers of constitutional obligation in relation to freedom of expression.' [FN11]

Furthermore, in *Midi Television Ltd v Director of Public Prosecutions*, the Court held that *'the Constitutional promise is made rather to serve the interest that all citizens have in the free flow of information, which is possible only if there is a free press. To abridge the freedom of the press is to abridge the rights of all citizens and not only the rights of the press itself.'* [FN12] Similarly, in United States, the public's 'right to know' is one of the central principles of society; and this is facilitated by the press and other media. This why, the First Amendment of United States' Constitution said, *'Congress shall make no law... abridging the freedom of speech or of the press...'* [FN13] This Amendment expresses how strongly the US constitutional law is devoted to the right to freedom of expression or press, as it has an 'exalted status.' [FN14]

Unlike in South Africa, where, although the constitutional law acknowledges the press as an important contributor to an open and democratic society, the press does not enjoy a societal primacy. As Cameron J held, *in Holomisa v Argus Newspapers* case *'press exceptionalism the idea that journalism has a different and superior status in the constitution is not only an unconvincing but also a dangerous doctrine.'* [FN15] Therefore, by this statement, Cameron J explicitly recognized the important role of the press in open and democratic society however; it does not imply that 'journalists must enjoy particular constitutional immunity beyond that accorded to ordinary citizens'. [FN16]

1.3. Freedom to receive and impart information and ideas

Section 16(1)(b) protects the freedom to receive or impart information or ideas. Similarly, section 32 (1) of the Constitution states that *'everyone has the right of access to information held by both public and private bodies...'* This protection of

the right to receive and impart information and ideas is the corollary of the right to freedom of expression.

Therefore, there is not any doubt that whether the right to freedom of expression tends to protect the speaker, it is logical that the same right protects the listener or receiver. As Mokgoro J held for minority of judgment, in *Case v Minister of Safety and Security*, *'Freedom of expression is impoverished...if it does not embrace also the right to receive, hold or consume expressions transmitted...'* [FN17]The right to express is severely impaired if rights to hear the speech are not protected. [FN18] Clearly, it appears that not protecting the freedom to receive or impart information or ideas implicitly denies individuals the right to access to information which, implies to the individual to request and receive information to both public and private bodies [FN19] and *mutatis mutandis*, impose the duty to the State to provide necessary information to the public.

Accordingly, Mokgoro J also held that the Indecent and Obscene Photographic Matter Act 37 of 1967 which, prohibited the possession of indecent or obscene photographic matter, is inconsistent with the constitutional provision of freedom of expression; [FN20] because, the Act in question, only seems shielding the transmitter in detriment of receiver. The right to freedom of expression, as earlier mentioned, safeguards both spreader and recipient.

1.4. Freedom of artistic creativity

In terms of section 16(1)(c) of the Constitution, artistic creativity is regarded as a manifestation of freedom of expression. Accordingly, '"art" as a product and the "process of creating art" should be considered similarly' [FN21], and therefore receive the same legal treatment. Therefore all activities that form part of the "art making process" must be covered by the constitutional protection. [FN22] In addition, in terms of section 16, the term "art" appears to be a generic term that may include, for example, 'the making of films and music'. [FN23] As the Supreme Court of India held in *S. Rangarajan v Jagjivan Ram*, involving the film *Ore Oru Gramathile*, *'If the film is unobjectionable and cannot constitutionally be restricted under law...freedom of expression cannot be suppressed on account of threat of demonstration and processions or threats of violence. That would be tantamount to negation of the rule of law and surrender to blackmail and intimidation.'* [FN24]The Indian's Supreme Court estimated that as long the artistic creativity (film), considered, as a manifestation of freedom of expression, does not infringe the law through its content, it seems important to confer to it a legal protection. Consequently, it appears necessary to control the production and exhibition of art.

1.5. Academic freedom and freedom of scientific research

The legal concept of academic freedom originated in Germany around 1850, where the Prussian Constitution of 1850 declared that *'science and its teaching shall be free.'* [FN25] In South Africa, academic freedom is constitutionally protected.

Unlike, the interim Constitution that included the academic freedom among the right to freedom of religion, belief and opinion by stipulating *'Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic institutions of higher learning'* [FN26]. The 1996 Constitution moved it to the category of freedom of expression. [FN27] So, the current formulation of the academic freedom is broader than its counterpart in the previous one. [FN28] This right therefore does not only protect 'institutions of higher learning' [FN29] but may also protect any academic enterprise (Curie and De Waal, p.370).

The term "academic freedom" refers to the right to intellectual autonomy, enabling an 'individual to conduct research, to publish and disseminate knowledge through teaching, without government interference'. [FN30] Similarly, the U.S. Supreme Court, the the *Wieman v Updegraff* case [FN31], held

'Teachers are regarded as the priests of our democracy... They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them... They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by national or State government...'

Section 2: Categories of expression specifically excluded

If it has been acknowledged that the right to freedom of expression is protected both internationally and nationally. It is important however, to bear in mind that this protection however global it may be in reach, does not cover all categories of expression. Accordingly, Article 20 of the International Covenant on Civil and Political Rights (ICCRP) stipulates that *'any propaganda for war shall be prohibited by law. And, any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.'* Likewise, the South African Constitution does not extend the protection of freedom of expression to propaganda for war, incitement of imminent violence and hate speech.

So, why does the Constitution protect certain categories of expression and not others? The reason for the constitutional protection of some form of speech may be found in the Constitutional Court judgment *Islamic Unity Convention v Independent Broadcasting Authority* [FN32] where the Court acknowledged that

'certain expression does not deserve constitutional protection because, among other things, it has the potential to impinge adversely on the dignity of others and cause harm.' Therefore, considering the fact that the Constitution is founded on the principles of dignity, equal worth and freedom, it is rational that the scope of constitutional protection could not be extended to any form of speech that affects another's dignity.

2.1. Propaganda for war

As already elucidated, the propaganda for war does not fall into the category of protected expressions. Therefore, neither the provision of the ICCRR nor the 1996 South African Constitution that excludes it from the group of protected expressions, tried to define the propaganda for war. Accordingly, 'war propaganda' can be understood to be any manipulation people's so as to encourage attitude war rather than engaging in open dialogue. [FN33] Therefore, 'the word "war" refers to acts of external aggression, and not violent internal resistance to the government of the day'. [FN34] Consequently, any propaganda for war shall be prohibited by law. [FN35]

2.2. Incitement of imminent violence

Incitement of imminent violence is another form of expression that is not covered by the constitutional protection. The US Supreme Court, in *Brandenburg v Ohio* [FN36],

'has fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.' [FN37]

Accordingly, another issue that should be considered is how does one test if an expression or speech incites imminent violence or constitutes propaganda for war? At this question, it is important to consider the effect that this speech will have on the audience or recipients. [FN38] This is why the US Supreme Court upheld, in *Noto v United States*[FN39], *'the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.'*

2.3. Hate speech

Similar to war propaganda and incitement of imminent violence, hate speech does not benefit from constitutional protection afforded to other categories of expression. Section 16(2)(c) of the Constitution defines hate speech as: *'Advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.'* Through this provision, it clearly appears that two cumulative elements compose hate speech. In order words, an expression can be labeled hate speech only if the expression constitutes an

advocacy of hatred based on race, ethnicity, gender or religion and; the advocacy constitutes incitement to cause harm. [FN40]

'The constitutional test whether speech is to be judged as hate speech can therefore be considered to be a stringent one.' [FN41] The *advocacy* of hatred that is based on race, ethnicity, gender or religion, 'probably implies more than merely a statement, and includes an element of exhortation, pleading for, supporting or coercion.' [FN42] Whereas, *hatred* 'may be interpreted to mean an intense, passionate or active dislike, ill-will, malevolence, or feeling of antipathy or enmity connected with a disposition to injure.' [FN43]

As the Court held, in *Freedom Front v South African Human Rights Commission* [FN44], 'calling for the killing of people because they belong to a particular community or race must amount to the advocacy of hatred, unless the context clearly indicates otherwise.' [FN45] The slogan such as 'Kill farmer, kill Boer' has been obviously seen as advocacy of hatred based on race or ethnicity [FN46], because "Boer" is a 'derogatory epithet for Afrikaner'. [FN47]

Section 3: Limitations of freedom of expression

The right to freedom of expression is not listed in the table of non-derogable rights attached to section 37 of the Constitution. Consequently, the Constitution does not see freedom of expression as an absolute value. In other words, it does not enjoy a superior status in South African law. Furthermore, like other rights, freedom of expression may be limited by complying with the provisions of the general limitations clause (section 36) of the Constitution. We should also consider the rights of other individuals to dignity, which the common law of defamation tends to protect, may also limit the right to free speech.

3.1. General limitation clause: section 36 of the Constitution

Section 36(1) of the Constitution stipulates,

'The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right; the importance of the purpose of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.'

Section 36(2) provides that no law may limit any right entrenched in the Bill of Rights, except as provided in subsection (1) or in any other provision of the Constitution.

Broadly speaking, it seems that a law possibly will limit a right in the Bill of Rights if only if, on the one hand, it is a '*law of general application* and, on the other

hand, it is *reasonable and justifiable* in an open and democratic society based on human dignity, equality and freedom. Consequently, a law of general application means that it must be sufficiently clear, accessible and precise that those who are affected by it can ascertain the extent of their rights and obligations.' [FN48] Furthermore, the 'reasonableness' and 'justifiability' of the limitation test whether it is a permissible limitation under the section 36 of the Constitution. [FN49] Therefore, determining the fairness and reasonableness supposes 'an exercise in proportionality, involving the weighing up of factors in a balancing exercise.' [FN50] Thus, the factors enumerated by section 36(1) must all be taken into account to determine whether a right may be reasonably and justifiably limited. [FN51]

3.2. Specific limitation

Besides the general limitation of section 36 that limits all rights in the Bill of Rights, including the right to freedom of expression. Freedom of expression itself is specifically limited also by the law of defamation, which we will be explored in the following lines.

Chapter Two: Defamation law as limitation of freedom of expression

The right to freedom of expression, which includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice [FN52]; it however carries with it special duties and responsibilities so that it may therefore be subject to certain restrictions, such as the respect of the rights or reputations of others. [FN53]

In this chapter I will scrutinise the common law of defamation in South Africa, which is presented as a limitation to the right of freedom of expression.

Section1: Definitions of defamation

Defamation may be defined as 'a public communication that tends to injure the reputation of another. It includes both *libel* (written defamation statements) and *slander* (oral defamation statements).' [FN54] Ranchod defines defamation 'as consisting of the intentional publication of matter which tends to lower the esteem in which the plaintiff is held by others.' [FN55] According to Kinghorn, the delict of defamation refers to 'the unlawful publication *animo injuriandi* of a statement concerning another person which has the effect of injuring that person in his reputation.' [FN56] The South African Constitutional Court defines the delict of defamation as 'a wrongful and intentional publication of a defamatory statement concerning another'. [FN57]

In the United States, the Restatement (Second) of Torts refers to defamation as a communication that 'tends so to harm the reputation of another as to lower him in the estimation of community or to deter third persons from associating or dealing with him.' [FN58] Similar definition is also given by the Congolese Penal Code, which through its Article 74 stipulates that *'la diffamation suppose l'imputation d'un fait précis de nature à porter atteinte à l'honneur ou à la considération d'une personne ou à l'exposer au mépris.'* [FN59] It means that the defamation supposes the imputation of a precise fact that hurts someone's honor or consideration or exposes him to scorn of public.

The definition of defamation varies from jurisdiction to jurisdiction [FN60], and from author to author, but the common denominator is that the defamatory statement is an intentional publication that hurts someone's reputation. So, a statement that is merely 'unflattering, annoying, irksome, or embarrassing, or that hurts only the plaintiff's feelings, is not actionable.' [FN61]

From the above definitions, it is clear that there are two elements of that constitute defamation; (1) a material element and (2) a mental element (*mens rea*)

Section 2: Constitutive elements of defamation

Before dealing with material and mental elements of defamation, it is important to explore the 'axiological element' of defamation, which refers to the value that the law of defamation tends to protect.

2.1. Axiological Element

What is the value that the law of defamation tends to protect? One is tempted to allege that 'the purpose of the law of defamation simply is the protection of the right to an unimpaired reputation.' [FN62] The Constitutional Court, in the *Khumalo v Holomisa* case [FN63] seems to answer the question posed when it states that *'The common law of defamation sought to protect individuals' legitimate interest in their reputations, it was one of the aspects of the law supporting the protection of human dignity.'*

Freedom of expression, though fundamental, is not a paramount value and it should be understood in the context of other values enshrined in the Constitution, such as the values of human dignity, freedom and equality. [FN64] In addition, the Court considered that the 'recognition and protection of human dignity was a foundational constitutional value.' [FN65] Thus, there is the necessity to protect 'both the personal sense of self-worth as well as the public's estimation of the worth or value of the individual.' [FN66]

From this judicial perspective, one could conclude that there is a need to protect human dignity and the reputation of an individual against any communication that

tends to harm them. But stopping here would be an oversimplification of defamation law. [FN67] So, 'the law of defamation has to find a workable balance between freedom of communication and individual reputation.' [FN68]

2.2. Material Element

Materially, the common law of defamation based on the '*actio injuriarum*' of Roman law, which consists of publication of communication that injures the reputation of another. The material element therefore is doubly characterised because; it implies, on the one hand, *the publication of communication* (A), and on the other hand, *the harm of reputation* (B).

A. Publication of communication

In this context; according to Burchell, 'publication is the act of making known a defamatory statement, or the act of conveying an imputation by conduct, to a person or persons, other than the person who is the subject of the defamatory imputation.' [FN69] The publication therefore can be 'particular' as well as 'general'. [FN70] Indeed, the particular publication is this one made to a specified person or group of persons [FN71] while the general publication refers to publication to an amorphous group of persons, which is similar to 'dissemination' [FN72] and would apply to mass media. [FN73]

Moreover, the communication of defamatory statements can have two forms; it may be *libel*, the written statements that include namely, newspaper articles, books, correspondence, images, drawing and painting [FN74] or; *slander*, the oral ones including the spoken word, broadcasting and music; or a defamatory statement may contain both libel and slander.

As earlier noted, the defamation law requires from libel and/or slander a character of 'publicity'. This is materialised through the publication of communication; without 'publication' defamatory action cannot be undertaken.

Yet, South African cases on defamation seemed to adopt the approach according to which there can be publication only when the person(s) to whom the information was communicated, understood their meaning. [FN75] For instance, as Burchell noted,

'There can be no publication of spoken words to a deaf person, although an imputation could be conveyed to such person by conduct. Similarly, the communication published in a foreign language or in secret cipher, would imply no publication to readers or hearers who do not understand such language or cipher. Publication however to someone who instead of immediately understanding the meaning of words used, but later discovering their meaning is sufficient a publication.' [FN76]

Similar point had been illustrated in the *Vermaak v Van der Merwe* case [FN77] where the Court held that *'there was sufficient publication when a person who*

read the defamatory statement did not immediately know that it referred to the plaintiff but was informed soon afterwards that it did so.' [FN78]

Finally, the character of publicity is contextualised by taking into account the circumstances and places of the communication. [FN79] It therefore may emanate from the publication of newspaper [FN80], distribution or sale of images or public oral declaration in the public place or in the presence of the victim and a third person. [FN81]

B. Harm of reputation

Harm of reputation is the second characteristic of the *actio injuriarum* (material element) of defamatory statement. Besides the requirement of the publication of communication as material aspect of the delict, the defamation law also requires that the communication published could harm or hurt the reputation of the plaintiff.

According to De Villiers, the person's reputation is that 'character for moral or social worth to which he is entitled amongst his fellow-men.' [FN82] The reputation reflects the 'estimation or good opinion which an individual has in the eyes of society.' [FN83] So, harm of reputation implies the lowering of the person's standing in the estimation of others. [FN84] Consequently, it seems that the publication of communication that injuries the reputation of another is actionable for defamation.

However, as mentioned previously, a 'mere unflattering, annoying, irksome, or embarrassing [statement], or [one] that hurts only the plaintiff's feelings, is not actionable.' [FN85] 'People should be tough enough not to be injured by such statements, which would flood the courts if actionable.' [FN86] But, a simple moral damage is enough to constitute the defamatory action. In the same way, the Congolese Court of Appeal has condemned a journalist for defamation because he published a defamatory article, which morally prejudiced a judicial authority. [FN87]

2.3. Mental Element (mens rea)

The publication of communication, which causes harm to the reputation of another, is in itself insufficient to give rise to delictual liability for defamation. [FN88] For liability to follow, one requires the existence of a moral element, the intention that animates the individual to act.

Indeed, in the context of the delict of defamation, the mental element *(mens rea)* consists of *animus injuriandi*, the intention to cause injury or a subject intention to defame or injury the reputation of someone; [FN89] in terms of which 'the person

who made the defamatory statement to have been conscious of the wrongful character of his act.' [FN90]

In addition, the knowledge of unlawfulness has been perceived as a constituent of *animus injuriandi*. [FN91] It means that the *animus injuriandi* would be extended over the knowledge of the unlawful character of the communication disclosed.

This intention to hurt another's reputation, according to J. Burchell [FN92], covers *dolus directus* [FN93], *dolus indirectus* [FN94], *dolus eventualis* [FN95], and *dolus indeterminatus*[FN96]. Therefore, the *dolus* is generally expressed through the using of the words "*wrongful and intentional*". [FN97]

Furthermore, it is quite obvious that the wrongful intention of defamatory communication is always presumed. But the presumption in this case is not irrefragable because it may be rebutted by the contrary proof. [FN98] Moreover, the conception of the presumption of *animus injuriandi* raises the issue on whether an individual can be liable for delict of defamation without fault (*animus injuriandi*) or strict liability.

Yet, it is appropriate to mention here that, the question of liability for delict of defamation without fault or strict liability has a distinct fault line in its history in South African jurisprudence.

Indeed, in *Pakendorf en Andere v De Flamingh* case [FN99], the Appellate Division placed strict liability upon the media for the unlawful publication of defamatory material, holding that *'the mass media could not avoid liability for the publication of defamatory statement by relying on a defence that the publication was not intentionally injurious.'*

However, recently, in the *Bogoshi* case, the Supreme Court of Appeal overruled this decision. [FN100] Hefer JA held that 'the Court in *Pakendorf's* case had failed to recognise the importance of freedom of expression and, in particular, the important role the mass media perform in a democratic society.' [FN101] He concluded that: *'It must be clear that strict liability cannot be defended and should have been rejected in Pakendorf.* [FN102]'

The exegesis of both *Pakendorf* and *Bogoshi* judgments can lead us to conclude that there have been two different interpretations of liability, when one appreciates the *mens rea* of the delict of defamation. Indeed, during the *Pakendorf* era there was cohabitation liability for defamation with fault (*animus injuriandi*), applying for non-media delinquent and, liability for defamation without fault (strict liability), strictly reserved for media delinquent. However, under the *Bogoshi* era, the strict liability for defamatory statement, mostly for media defendant, has been rejected *in toto.* It seems that the media defendant, considering its important role in the society, should not be liable without fault (a

lack of knowledge of wrongfulness) for its defamatory statement, it does not matter if the lack of knowledge is the result of its negligence.

Section 3: Initiation of actions

The defamed person, whose reputation has been injured by the defamatory statement, is entitled to approach the court in order to seek relief. When instigating an action for defamation a party, in numerous countries, can choose between civil and/or criminal law. [FN103] 'Both civil and criminal options have the potential to interfere with freedom of expression, but their structural differences require different responses.' [FN104]

Furthermore, the initiation of civil or criminal action raises the issue of standing. In other words, who has the title to sue or *locus standi* for defamation? Does a juristic person have a standing for defamation action?

Generally speaking, the current jurisprudence on defamation suits refers to political speech, statements targeting government or an affiliated body. [FN105] Very often, a juristic or artificial person such as government, political party, organ of state and, state-owned corporation are denied a standing for defamation [FN106] because they do not have reputation on their own. As Lord Keith of Kinkel noted that '*it is difficult to say the local authority as such has any reputation of its own. Reputation in the eyes of the public is more likely to attach itself to the controlling political party and with a change in that the reputation itself will change.*' [FN107]

The reason upheld is that the elected bodies regularly change membership. [FN108] This instability of membership also implies the instability of its reputation. So, it appears that only a natural person, having a stable reputation, is able to sue a judicial action for defamatory statement.

Even though the standing for defamation action has been denied to juristic persons, it fits to note however that whether the defamatory statement personally injuries the reputation of each member of juristic person, thereby the member who is victim may sue *ut singuli*, this defamatory statement to the court. [FN109] For instance, it was said that 'an individual party member maintains the right to sue the defamatory communication harming his/her reputation while political parties, like government, must defend their reputations in other forums'. [FN110]

So, what are defenses for defamation action?

Section 4: Defenses to defamation

In defamation cases, the thorny issues tend to be those pertaining to defense, as the 'two parties often agree on the contents of the controversial statement'.

[FN111] The major questions for the court go round the truth of statement and, the '*mens rea* of the person who made it'. [FN112] The burden of proof therefore weighs on parties to establish the falsity or truth of the statement.

The South African common law of defamation distinguishes two types of defendants, the media-defendant and, the non-media defendant (ordinary member of community). Furthermore, the defenses provided by both of can be divided into two periods: prior to 1994 and, post to 1994, which we will analyse bellow.

4.1. Defenses to defamation prior to 1994

Once an action reaches trial it is presumed that both elements of defamation are present; namely that it is (1) an unlawful act (*actio injuriarum*) and a (2) contains a subjective element of fault (*animus injuriandi*). [FN113] The plaintiff therefore was required, in terms of an old age maxim: '*Actori incumbit probatio*' (the burden of proof weighs on the plaintiff), to establish that the defendant had acted unlawfully and with *animus injuriandi*. [FN114] After the plaintiff's allegations, the defendant had to admit to or to deny these allegations. [FN115] In denying them, three traditional defenses were offered to defendant: truth, fair comment and privilege.

A. The Truth

The truth is an absolute defense for a statement of fact. [FN116] If the defendant is able to establish the truth of the defamatory statement, he/she cannot be held liable for damages. [FN117] The statement in question does not need to be true in every minuscule detail. [FN118] It is enough that the defendant could show that the statement is 'substantially correct'. [FN119]

In addition, the truth of a statement means 'the truth of such statement in so far as it is of a defamatory nature.' [FN120] The defendant has to establish that his truth statement is made for public interest. The public interest therefore 'lies in telling the public something of which they are ignorant, but something which is in their interest to know. If they already knew it, it hardly seems that mere repetition can be of any value' [FN121].

For instance, to inform the unaware consumers about the poor nutritional value of foods from the manufacture X can only be seen to be in the public interest if it is not already 'common knowledge'. Such communication can be considered to be in the public interest. In reference to the above example, the defendant will be delictually discharged if he successfully establishes the truth and the public interest of that statement. Therefore the failure to do so will imply his delictual liability.

B. The Fair comment

The defense of fair comment presents shield for the expression of opinion. [FN122] Therefore it appears the necessity to distinguish whether a statement is fact or opinion. Indeed, the major tests to distinguish whether a statement is fact or opinion take into account the provability of the statement. It means it should be considered as 'fact', a statement that may be proved true or false; whereas, an 'opinion' is a statement that cannot be proved. [FN123] Accordingly, the court, during the defense of fair comment, 'does not need to agree with the opinion; instead, it must determine "whether the views could honestly have been held by a fair-minded person based on facts known at the time." Defendants must prove their opinions were based on facts and made for the public interest.' [FN124] The public interest is easily provable, unless 'defamation deals with the private life of someone who is not a public figure.' [FN125] In addition, it is not required to defendants to establish the honesty of the opinion held; it is enough to prove that a reasonable person could hold such an opinion. [FN126]

Yet, the fair comment can be overwhelmed if the plaintiff establishes that the defendant acted maliciously. [FN127] This implies that the fair comment would be an irrelevant defense for a defamer if his disclosure is made on the grounds of malice.

C. The Privilege

The Privilege is the third defense traditionally offered to the defamer in order to escape his delictual liability for defamation.

Indeed, the privilege that refers to the exemption from delictual liability for someone's defamatory communication made in the exercise of a right, duty or legal obligation. Therefore, one distinguishes two kinds of privileges: 'absolute privilege' and 'qualified privilege'. [FN128] 'The absolute privilege offers a complete defense for people with a public duty to speak out.' [FN129] Accordingly, it has been accepted that 'in the interest of the efficient and democratic functioning of certain government institutions, freedom of speech should, in strictly defined instances, predominate over protection of reputation.' [FN130] For instance, the members of Parliament enjoy from absolute immunity (privilege) for communication held before Parliament or any parliamentary committee. Similarly, judges, lawyers, and witnesses cannot be held liable for allegations made during the suit and; also members of government speaking about state's matters cannot be accountable for the concerns raised. [FN131]

Qualified privilege produced similar effect than absolute privilege whether the communication is made for public interest, unless the statement could be proven to have been made maliciously. [FN132] It therefore requires 'reciprocity of interest' [FN133] between the speaker and the receiver.

In addition, the communications will enjoy qualified privilege if they are 'published in the discharge of duty, the exercise of a right, or the furtherance of a legitimate interest; statements published in the course of judicial or quasi-judicial proceedings; and reports of proceedings of courts, parliamentary and public body.' [FN134]

D. The lack of animus injuriandi

Besides the establishment of truth, fair comment and privilege, it is also required to defendants to prove the lack of *animus injuriandi*. It is important to distinguish between the non-media defendants and the media defendants.

Although, the similar defenses are granted to both of media and non-media defendants regarding the proof of material elements; however, there is a distinction between them about the defenses of *mens rea*. Indeed, the dissimilarity is that the media defendants are strictly (no-fault) liable for defamatory statement while the non-media defendants are liable for fault. For instance, in *Pakendorf en Andere v De Flamingh* case [FN135], the Appellate Division has devoted the strict liability upon the media for the unlawful publication of defamatory material, in holding that 'the mass media could not avoid liability for the publication of defamatory statement by relying on a defense that the publication was not intentionally injurious.' Therefore, this strict liability approach of the Court over media defendants avoided defendants to adduce evidence of lack of intention. [FN136] In other words, the Court devoted the irrefragable presumption of *animus injuriandi* for the media defendants that may not be rebutted.

Whereas, non-media defendants, for example, may provide evidences of lack of *animus injuriandi* by establishing that they were 'negligently unaware of the wrongfulness of the publication or the publication was made in jest.' [FN137] Thus, this is the non-irrefragable presumption of *mens rea* for non-media defendants.

4.2. Defenses to defamation post to 1994

The common law defenses to defamation post to 1994, in South Africa, are characterised by two cases: the *Bogoshi* case and the *Khumalo* case. These cases constitute an important innovation within the common law of defamation, in terms of defenses to defamation available to media defendants.

Indeed, in *National Media Ltd v Bogoshi case* [FN138],

'the appellants, being the owner and publisher, editor, distributor and printer respectively of a newspaper, had been sued by the respondent for damages arising from the publication of a series of allegedly defamatory articles published in the newspaper. The appellants had applied to amend their plea by the introduction of three additional

defenses. In essence, the third of the proposed additional defenses was that (a) the appellants had been unaware of the falsity of any averment in any of the articles; (b) had not published recklessly, i.e. not caring whether or not the contents of the articles had been true; (c) had not been negligent in publishing any of the articles.' [FN139]

As already mentioned, the Appellate Division in *Pakendorf en Andere v De Flamingh* case [FN140] placed strict liability without fault on media defendants, and upheld that 'the mass media could not avoid liability for the publication of a defamatory statement by relying on a defense that the publication was not intentionally injurious.' [FN141] Moreover, it furthered that the media 'could escape liability, were the articles to be found defamatory, only if they could at least establish that what they had published was true.' [FN142]

However, in *Bogoshi case* [FN143], the Supreme Court of Appeal rejected this strict liability of media and, held 'the *Pakendorf* decision had been wrong and the proposed additional defense of lawfulness was valid under the common law.' [FN144] In summary, Hefer JA who wrote the judgment, inspired by the High Court of Australia in *Theophanous v H and W Times* [FN145], has erected defense of 'the reasonableness' of the publication, and the ability to rebut the presumption of *animus injuriandi* as defenses to defamation in order to escape liability.

In considering the reasonableness of a publication, the Court held that:

"Account must be obviously taken of the nature, extent and tone of the allegations. The tone in which a newspaper article is written, or the way in which it is represented sometimes provides additional, and perhaps unnecessary, sting. Ultimately there can be no justification for the publication of untruths, and members of the press should not be left with the impression that they have a license to lower the standards of care which must be observed before defamatory material is published in a newspaper. A high degree of circumspection must be expected of editors and their editorial staff on account of the nature of their occupation, particularly in regard to the powerful position of the press and the credibility which it enjoys amongst large sections of the community. Other factors like opportunity given to the person concerned to respond, and the need to publish before establishing the truth in appositive manner are also relevant. In the light of the above considerations, the amendment to the extent that it relied on the lawfulness of the publications was not excipiable." [FN146]

Furthermore, considering the proof of reasonableness, the Court deemed necessary that the burden of proof could weigh on the defendant, in holding that *'The defendant bear the onus of proving all the facts upon which he or she relied to show that publication had been reasonable and that he or she had not been negligent. Proof of reasonableness would usually (if not inevitably) be proof of lack of negligence.'* [FN147] Hefer JA placed the burden of proof on the defendant 'because the facts upon which defendants rely are peculiarly within their knowledge.' [FN148] It means that if the defendant is unable to establish the reasonableness of his/her publication, he/she therefore will be liable for delict of defamation.

Unlike the *Bogoshi* case, in *Khumalo and Others v Holomisa* [FN149], O'Regan J placed the burden of proof on the plaintiff, holding *'Plaintiffs may never succeed unless they can establish that a defamatory statement was false would clearly put plaintiff at risk.'* [FN150] *Aliis verbis,* if the plaintiff fails to prove the falsehood of the defamatory communication, the defendant would not be delictually liable. This position gives primacy to freedom of expression over protection of reputation [FN151] and; 'it would destabilise the careful balance struck between plaintiffs' and defendants' interests achieved by the Supreme Court Appeal's development of a defense of reasonable publication.' [FN152]

In my submission, in light of the above developments, it appears that the reasonableness defense is available only to the media defendants, when they are unable to establish the truth of a statement, or that it was made in the public interest. It may happen when it becomes evident that the allegations or comments published were in fact untrue, or were published in circumstances of urgency to the public interest. The truth seems to be an unavoidable defense to defamation and, the reasonableness defense should only be available to media bodies in cases where they are unable to establish the truth of a statement. However, this means if the media defendant proves the truth of the communication published, they will not need to refer to the reasonableness defense. Furthermore, fair comment and privilege are somewhat problematic as they only apply in limited situations because the qualified privilege, for example, requires reciprocity between speaker and receiver while fair comment protects only opinions (Docherty, p.275).

In my view, it seems to be evident that the reasonableness defense, which the media defendants enjoy, tends to protect freedom speech more strongly than reputation or dignity. This becomes apparent when one takes into account the fundamental role the press play in fostering the democratic culture. But, this predominance offered by the reasonableness defense is not absolute, because of the restrictive nature of its scope in that its protection is limited to media defendants. So, when we confronted with a case concerning a non-media defendant, the balance between the protection of freedom of expression and reputation still confers priority on the latter. This is because non-media defendants are still required to establish that their statements are 'true' in order to be delictually non-liable for defamatory communications. It is clear that non-media defendants do not enjoy the use of the reasonableness defense.

From this perspective, it appears that the common law of defamation limits freedom of expression as it obliges the communicator to establish the truth for his discharge.
Next we shall consider the instance where an employee discloses in *'good faith'* information with regards to the wrongdoing of his/her employer or other employee without being able to establish the truth of his/her allegation. Should he/she be held delictually liable in terms of the common law of defamation that

based on the truth of statement? If not, on which grounds will he be delictually non-liable?

Unlike the common law of defamation founded on the truth of the communication, the Protected Disclosures Act 2000(PDA) is therefore based in the *good faith* of the information disclosed. It does not matter whether information divulgated is accurate or false; therefore it is enough that the statement has been made in good faith in order to be delictually discharged.

Consequently, seen from this angle, the PDA places a limit on the common law of defamation.

Chapter Three: Protected Disclosures Act 2000 as limitation over Defamation Law

Unlike the law of defamation, where the establishment of the 'truth' is a prerequisite to a defense for the delictual unaccountability, the Protected Disclosures Act 2000, simply requires that the statement be made in 'good faith' to protect the employee-discloser from delictual accountability, regardless of the factual accuracy of the statement.

In chapters three, we will examine the conceptual and legal scheme of the Protected Disclosures Act 2000(PDA) as a limitation to defamation law and as a bulwark to the right of free expression.

Section 1: Conceptual approach of the PDA

Neither the common law nor statutory law has given employees a general right to disclose information about their employment. [FN153] As D.Lewis and S. Homewood noted that:

'Even the revelation of non-confidential material could be regarded as undermining the implied duty of trust and give rise to action for breach of contract. In relation to confidential information obtained in the course of employment, the common law again both express and implied terms. The duty of fidelity can be used to prevent disclosures while the employment subsists and restrictive covenants employees after the relationship has ceased.' [FN154]

Employees are not able to blow the whistle concerning unlawful, irregular conduct or wrongdoing made by the employer or other employees. The disclosure of wrongdoing generated severe sanctions against the whistleblower for instance, disciplinary actions, dismissal, suspension, transfer against the will of employee, refusal of transfer or promotion, etc.

However, the advent of the Protected Disclosures Act 2000 (PDA), which came into operation in 2001, drastically changed this situation.

1.1. The policy purpose of the PDA

With the increasing scope of corruption, numerous countries around the world deemed it necessary to adopt measures to protect and encourage those who disclose irregular and illegal behaviour.

At the international level, agreements on 'whistleblowing' are viewed both as anti-corruption tools as well as recognition of the importance for free speech and good governance. [FN155] Some of important international instruments on whistleblowing are: the United Nations Convention Against Corruption[FN156], which through Article 33 facilitates 'protection for reporting persons of corruption' [FN157], the African Union Convention on Preventing and Combating Corruption, which compels 'State parties to adopt legislative and measures to protect informants and witnesses in corruption and related offences, including protections of identities' [FN158] and, the Organisation for Economic Cooperation and Development (OECD) [FN159], which in terms of its 2003 Guidelines for Managing Conflict of Interest in the Public Service recommended that

'Complaint-handling develops complaint mechanisms to deal with allegations of non-compliance, and devise effective measures to encourage their use. Provide clear rules and procedures to ensure that those whose report violations in compliance with stated rules are protected against reprisal and that the compliance mechanisms themselves are not abused.' [FN160]

Similarly, the Southern African Development Community (SADC) through its 2001 Protocol on 'Prevention against Corruption', states in Article 4 that *'for the purposes set forth in Article 2 of this protocol, each state party undertakes to adopt measures, which will create, maintain and strengthen...systems for protecting individuals who, in good faith, report acts of corruption.'* [FN161]

Nationally, the South African Protected Disclosures Act 2000, conceived under the model of the British 1998 Protected Interest Disclosure Act (PIDA), states in its preamble that its purpose is to create a culture which facilitates the disclosure of information by employees relating to criminal and other irregular conduct in the workplace, to promote the eradication of criminal and other irregular conduct in organs of State and private bodies and, to protect the informer against any reprisals as a result of such disclosure. [FN162] In other words, the focus of the PDA is to protect a person making a disclosure from reprisal and provide a secure and legislated mechanism for disclosure to be made. [FN163]

In addition, section 2(1) stipulates that the PDA provides for certain remedies in connection with any occupational detriment suffered on account of having made a protected disclosure and provides procedures regarding the disclosure of information. The purpose of the legislation therefore is emblematically noteworthy

in a culture where whistleblowing is 'traditionally very stigmatised and negative' [FN164]. One such example is the concept of *"impimpis"*, which refers to Black apartheid-era informants who betrayed their comrades. [FN165]

Section 2: The legal scheme of the PDA

The PDA was inspired by a model of UK legislation (Protected Interest Disclosure Act 1998). To make sense of the PDA, we will explore: qualifying disclosures (1), protected disclosures (2), scope and nature of protection (3), defense (4), and legal remedies (4).

2.1. Qualifying disclosures

In terms of section 1 of the PDA a *qualifying disclosure* is defined as

'any disclosure of information regarding any conduct of an employer, or an employee of that employer, made by any employee who has reason to believe that the information concerned shows or tends to show one or more the following: 1) a criminal offence; 2) a failure to comply with any legal obligation; 3) a miscarriage of justice; 4) danger to the health and safety of any individual (not necessarily a worker); 5) damage to the environment; 6) unfair discrimination and 7) the deliberate concealment of information tending to show any of the matters listed above'

We agree with Lewis and Homewood about the general observations noted in relation to these above categories.

'First, they are not restricted to confidential information and are independent of the common law concept of public interest. Second, there is no requirement for any link between the matter disclosed and the worker's employment. Third, the matter disclosed might have occurred in the past, be currently occurring or likely to occur'. [FN166] The word "likely" therefore means 'more probable than not.' [FN167]

Finally, the disclosure of information will no be protected if the person 'commits an offence by making it.' [FN168]

Furthermore, it is important to note that the definition of qualifying disclosure covers both oral and written communications. [FN169] The whistleblower may disclose information in writing, through correspondence, books, an article in the newspaper, images, or in an oral statement, using broadcast, speech, interview and so forth.

2.2. Protected disclosures

There are procedures and substantive requirements for a disclosure to be considered protected under the statute. The procedural standards for a protected disclosure depend on who receives the report. [FN170] However, like PIDA and the Japanese Whistleblower Protection Act [FN171], the basic philosophy of the

PDA is to promote internal disclosure, generally based on 'an assumption that changing the internal culture to enhance internal communications to prevent problems is a key means to resolve problems.' [FN172]

Accordingly, section 1(ix) of the PDA indicates that a protected disclosure is a disclosure that is made to (1) a legal advisor, (2) an employer, (3) a member of Cabinet or the Executive Council or (4) a person or body in accordance with the Act, or (5) that is made generally. Firstly, a disclosure will be protected if it is made to a legal practitioner or a person whose occupation involves giving legal advice. In this circumstance, the good faith is not required. 'The legal advisor is bound by professional privilege and cannot make a protected disclosure'. [FN173] 'There is a case for establishing a specialist body to ensure that advisory and counseling services are available and educate the public about the legitimacy of reporting concerns in a democratic society.' [FN174] Secondly, a good faith disclosure made to one's employer within any prescribed procedure, or made to a person authorised by the employer will be considered protected. [FN175] Thirdly, a disclosure will be protected if made in good faith to a member of Cabinet or Executive Council, if such an individual or body employs the employer of the person making the disclosure. [FN176] Also protected will be a disclosure made in good faith to the Public Protector, the Auditor-General or a prescribed entity that the person making the disclosure believes usually deals with the relevant wrongdoing and the information disclosed is substantially true. [FN177]

Finally, any disclosure made in good faith, with reasonable belief that the information is substantially true, and not made for personal gain, excluding any legal reward, will be considered a 'general protected disclosure.' [FN178] Thereby section 9(3) of PDA states that a 'general disclosure' will be considered reasonable, giving consideration to such factor as (1) the identity of the recipient, (2) the seriousness of the wrongdoing, (3) whether the wrongdoing is continuing or likely to occur in the future, (4) whether the disclosure is made in breach of a duty of confidentiality of the employer to another person, (5) any action that the first recipient of the disclosure might have taken, (6) whether any prescribed procedure was followed, and (7) the public interest.

In summary, all disclosures must follow this internal procedure and, a general (public) disclosure to the media as a last resort. This encourages employees who detect wrongdoing in the workplace to internally disclose it so that one could resolve it before it becomes a larger problem. [FN179] Accordingly, in the *Pedzinski v Andisa Securities* case [FN180], the Court held that the applicant's disclosure was protected because she had internally made it to her manager, his superior and others employees. [FN181] Similarly, in the recent *Theron v Minister of Correctional Services and Other* case [FN182], the Court held that the applicant's disclosure to the Inspecting Judge and Portfolio Committee was a protected disclosure because 'he had previously made disclosures of

substantially the same information to his employer and that no action had been taken within a reasonable period.' [FN183]

But, the internal procedure of disclosing is not imposed to all legal systems. For instance, in the United States of America, there is no requirement to make a disclosure internally (within the government agency) so that the disclosures can be made to any person [FN184]. It means that employees may directly make a public disclosure.

In any case, the disclosure, except to legal counsel, must be made in good faith. Consequently, *'good faith'* is a prerequisite that covers the disclosure of the information.

2.3. Scope and nature of protection

A. Scope of protection

Section 1(iii) of PDA enables everyone who falls within the definition of 'employee' to benefit from its protection while disclosing information. In terms of this provision,

'an employee is 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 or; any other person who in any manner assists in carrying on or conducting the business of an employer.' [FN185]

In addition, Section 1(iii) of the PDA also extends the definition of employer; accordingly, the term employer refers to 'any person who employs or provides work for any other person and who remunerates or expressly or tacitly undertakes to remunerates that other person.' [FN186] Indeed, the extension consists of the fact that the definition of employer includes 'any other person who in any manner assists in the carrying on or conducting of his or her or its business, including any person acting on behalf of or on the authority of such employer.' [FN187] This extension, in my view, would indicate that the legislator wanted to provide to the employee as broad a space or opportunity as possible, thus allowing them to receive protection from any person performing on behalf of their employer.

In this way that the Court, in *Communication Workers Union v Mobile Telephone Networks case* [FN188], held that 'the person claiming the protection must be made by a person who is an employee.' Clearly, it appears that the scope of protection is restrictive in the relationship between the employer and the employee. Therefore, anyone who is outside the definition cannot be entitled from the protection of the PDA even though he/she disclosed information in good faith. The Middlesex University research projects, however, expose that an important number of respondents made their procedure accessible to people who do not labor for them. [FN189] This implies that 'there is some appreciation that

procedures should exist in order to encourage the reporting of wrongdoing and not merely as a legal defense mechanism'. [FN190] So, we are wondering why not society should support all citizens to reveal wrongdoing and shield them from oppression if they do so.

Yet, to confine the scope of the applicability of the PDA seems to represent both an anomaly and also a potentially discriminatory as well as inequitable situation. This means that some people, such as employees, enjoy the protection of the PDA against any kind of disciplinary and/or judiciary actions while some, for instance, unemployed persons, do not enjoy such protection. This inequitable situation breaches the spirit and the letter of Section 9 of the Constitution of South Africa that dedicates the equality of everyone before the law and the right of equal protection and benefit of the law.

Accordingly, it seems important to extend the coverage of the provision of the PDA beyond the mere relationship between the employee and the employer. In other words, it would be wishable for the PDA to also cover and protect unemployed persons.

B. Nature of protection

The nature of protection granted by the PDA is to provide to employee the right to not be subjected to any 'occupational detriment' on the ground that the worker has made a protected disclosure. [FN191]

In terms of section 1 of the PDA, 'occupational detriment' means any disciplinary action, dismissal, suspension, transfer against the will of employee, refusal of transfer or promotion, retirement which is altered or kept altered to the disadvantage, refusal of reference or adverse reference, deniedness of appointment, threatenedness of any above actions or adverse affected employment emanating from the fact of employee's protected disclosure. In addition, the 'occupational detriment' also refers to the transfer of the employee against his or her will mostly, when this occurred owing to disclosure made and where there was no suggestion that he or she had agreed to be transferred. [FN192]

As the Court, in *Pedzinski v Andisa Securities case* [FN193], held: 'the applicant was dismissed because of the protected disclosure she had made. The employee's dismissal was found to be an automatically unfair dismissal.' Similar view has been reiterated in *Tshishonga case* [FN194] where the Court acknowledged that 'the employee was subjected to an occupational detriment...and he had been denied the dignity of employment.' [FN195] Therefore, 'employer, by doing so, had committed an unfair labour practice in terms of s 186(2) (d) of the LRA.' [FN196] Recently, the Labour Court, in *Theron v Minister of Correctional Services and Other case* [FN197], held that the respondents have committed the unfair labour practice by the fact of removal the

applicant from his post as the senior medical practitioner at Pollsmor Prison because of his disclosure to the Inspecting Judge and Portfolio Committee about the standard of healthcare at Pollsmor Hospital. [FN198] In other words, the Court considered that the removal of the applicant was an occupational detriment and unlawful administrative action. [FN199]

So, what are the conditions that the employee must meet in order to attract the shield of the PDA against reprisal for the disclosure that he or she made?

2.4. Defense to whistleblowing

As we have already alleged, disclosures, in terms of the PDA, except those to legal advisor, must be in 'good faith'. Consequently, the good faith seems being the condition sine qua non of the protected disclosure; its establishment by the court therefore should be the only defense for the whistleblower. So, what does *good faith* mean? How to determine that information is disclosed by *good faith* or not?

Indeed, in terms of Section 9(1) of the PDA, the *'good faith'* may be understood as 'a reasonably believes of an employee that thinks that information disclosed is unlawful and true and, doing so for impersonal gain.'

Similarly, the Supreme Court of Texas, in *Texas Department of Transportation v Needham case*[FN200], referring to *Wichita County v Hart*[FN201], held: *'Good faith means that the employee believed that conduct reported was a violation of law and the employee's belief was reasonable in light of the employee's training and experience.'* It means that the *good faith* supposes, for the whistleblower, the mere belief that the communication divulgated being illegal conduct is true and, doing so for non-personal interest. In other words, the informer who is motivated by personal interest should not be covered by the provision of the PDA.

As the Court held, in *Tshishonga case* [FN202], *'A whistleblower who is overwhelmed by an ulterior motive that is, a motive other than to prevent or stop wrongdoing may not claim the protection under the PDA...'* Similar position has been previously adopted in *Street v Derbyshire case* [FN203] where the Employment Tribunal of UK dismissed the complaint, holding that, *'while the applicant had reasonably believed in the substantial truth of the disclosures... she had been motivated to make them by her personal antagonism to the manager...such personal antagonism was her dominant, if not her sole motive.'*

Consequently, the tribunal should consider that the disclosure has not been made in good faith when the dominant or predominant purpose of making it was for some ulterior motive unrelated to the statutory objectives. [FN204] It implies that sometimes there is more than one motive or, mixed motives that stimulate an employee to disclose information.

However, how to determine that information is disclosed by good faith and not, bad faith? Indeed, the requirement of good faith invokes a proportionality test to determine the dominant motive. [FN205]

Accordingly, the test to determine the dominant motive includes both a subjective and objective element. [FN206]

'The first element of the test is the "*honesty in fact*" element that ensures that an employee seeking a remedy believed he/she was reporting an actual violation of law. The second element of the test ensures that, even if the reporting employee honestly believed that the reported act was a violation of law, the reporting employee only receives protection if a *reasonably* prudent employee in similar circumstances would have believed that the facts as reported were violation of law.' [FN207]

It therefore appears that the subjective element relies on the 'honesty of the fact' while the objective element relies on the 'reasonable belief' of the informer. So, for instance, in *Texas Department of Transportation v Needham*[FN208], the Court of Appeals applied the 'Hart test' [FN209] to determine that Needham had a good faith belief that he was reporting the violation to an appropriate law enforcement authority.

'First, the Court of Appeals decided that Needham's persistence in reporting the drunken driving incident to various TxDOT supervisors demonstrates that he subjectively believed TxDOT was the appropriate law enforcement authority. Secondly, the Court concluded that TxDOT supervisors' telling Needham to whom he should report the co-worker's conduct reinforces the reasonableness of Needham's belief that the individuals to whom he has reporting was appropriate law enforcement authority.' [FN210]

Similarly, in *Pedzinski v Andisa Security (Pty) Ltd case* [FN211],

'The employee concerned, employed as a compliance manager, worked half days because of problems with her back. Because one of her colleague was sick for extended period of time, she often worked full days and overtime. Still, the employee's manager was sometimes the only one in the office in the afternoon. She reported to her immediate superior, as well as other persons in the organisation. But, her superior was unhappy with the way in which these irregularities were reported.' [FN212]

Here, besides the honesty in fact, the Labour Court, concluded that the reasonableness of employee's belief that she was acting within the scope of the procedures in place by reporting to her manager, his superior and others persons in the organisation. [FN213]

In addition, it is very significant to note here that the reasonableness of the employee's belief in divulging information to the media requires an element of 'public interest'. It means that 'disclosures to the media will not be justified if it is not in public interest', held the Labour Court, in *Tshishonga case* [FN214]. In this case, although the Court acknowledged that 'it was reasonable for the employee

to make the disclosure to the media, which is one of the pillars that promote and uphold democracy, corruption undermines democracy' [FN215]; the Court also tends to distinguish the 'internal interest' that is just limited for a particular organisation to the 'public interest' that is beyond.

From this perspective, if the worker fails to the test of determining the good faith of the information made, thereby, he/she should be considered as acting in bad faith. Therefore, he/she will not be covered by the protection of the PDA.

Instantaneously, the question of the *onus* of proving the good faith is raised. In other words, on whom does the burden of proof weigh? In *Communication Workers Union v Mobile Telephone Networks case* [FN216], the Court held that 'the requirement of good faith does not mean that the employee must offer proof." Similarly, the Employment Appeal Tribunal, in *Lucas v Chichester DHA* [FN217] held that 'the employer has to assert a lack of good faith... so the claimant can respond to it.' Clearly, it appears that the burden of proof weighs on the employer who has to establish that the employee acted in bad faith.

Consequently, it should only be after the employer's assertion that the employee will respond to by claiming to have acted in good faith. It means that the employee has to establish that he/she reasonably believed that the allegation made is true. It doesn't matter if definitely the information divulged is true or false. Unlike the common law of defamation founded on the truth of the allegation, in this particular circumstance, it is enough that the whistleblowers believe that the allegation making by him/her is true [FN218] in order to be delictually liableless.

So, what are remedies offered to an employee subject of reprisal owing to his disclosure made in good faith?

2.5. Legal remedies

The remedies available to individuals subject to reprisal can be found under section 4 of PDA. Essentially, any employee who has or may be subjected to 'occupational detriment' may seek recourse through any court having jurisdiction, including the Labour Court. [FN219] Furthermore, any employee who feels they may be adversely affected as a result of making a protected disclosure must be transferred if he or she request from the post or position occupied by him or her at the time of the disclosure to another post or position in the same division or another division of his or her employer or, to another organ of state if the informer is employed by an organ of state [FN220], may also approach any court to find remedy.

Indeed, it seems that the only remedies specifically included in the PDA are in relation to reprisal. [FN221] It means that the PDA only provides remedies

against the occupational detriment, which is considered as revenge over the whistleblower.

Commonly, it is important to underline here that, the Court, after recognising the occupational detriment against the whistleblower, only orders for reinstatement if the employee was dismissed or suspended or compensation of remuneration, or pay of salary. For instance, *in Pedzinski v Andisa Security case* [FN222], the Court acknowledged that the employee's dismissal was found to be automatically unfair dismissal and the employer was ordered to pay compensation of 24 month of remuneration. Similarly, in *Theron v Minister of Correctional Services and Other case* [FN223], the Court acknowledged that the employee was subject of an occupational detriment and suffered from irreparable harm on account of he had made the protected disclosure and; accordingly, it granted him an interim relief in the form of reinstatement him to his position as the senior medical practitioner at Pollsmor Prison. [FN224]

Yet, the PDA does not indicate how wrongdoing should be sanctioned. [FN225] Moreover, the Act does not specify the actual remedy for reprisal, but rather indicates that individuals may seek redress through the courts. [FN226] Accordingly, in *Tshishonga case* [FN227], the Court held that the employer who suspended the employee because of his divulgating of improprieties of the ministry to the press, 'had breached section 3 of PDA by doing so, the employer had committed unfair labour practice in terms of s 186(2)(d) of the LRA'. [FN228] In this case like others, although the Court acknowledged that the employer has breached the legislative provisions by committing the occupational detriment, it did not, unfortunately, provide a sanction against the employer in doing so.

Still worse, in the same *Tshishonga case*, after the fact that applicant has successfully challenged his suspension in the Labour Court and then, the latter has ordered his reinstatement; disturbingly, his employer (Department of Justice) refused to comply with the Labour Court's order to reinstate him and, his service was terminated by agreement after negotiation. [FN229]

Therefore, we are 'espousing' the allegation of Professor Calland who noted that the 'South African Protected Disclosures Act is based on prevention rather than cure and encourages the initial disclosure to be made to the employer'. [FN230] In other words, the PDA set up preventive measures to obstruct the occupational detriment against the employee-whistleblower. But, it does not provide a therapy when such employee is experiencing occupational detriments

This eloquently demonstrates that the PDA's provision does not provide an 'absolute' protection to the employees' whistleblowers so that the greater part of them are victims of, for instance, dismissal or suspension or any other forms of reprisal, after having disclosed information regarding the wrongdoing in the workplace.

Consequently, at the court, just a 'window' of reintegration or compensation, or remuneration is hugely opened for them. This inefficiency of remedy after disclosure can discourage employees to blow the whistle about the wrongdoing or, to lead them to proceed to anonymous disclosures, which 'raise a real problem of making the concern more difficult to investigate, to corroborate and exclude the possibility of clarifying any ambiguous information or asking for more.' [FN231]

Section 3: The rapport between the PDA and the common law of defamation

As already noted, the law of defamation tends to protect individual reputation (or dignity) against any communication, from another that tends to harm or injure it. Accordingly, the defamer, in order to be delictually discharged from the defamation charge has to establish the truth of his communication. Failure to prove the accuracy of the information implies the liability of the informer.

However, in terms of the PDA, the disclosures of any information, except those made to a legal advisor, must be made in *'good faith'*. This means that only disclosures made in *'good faith'* are covered under the provision of the PDA. A disclosure made in bad faith cannot be covered under the PDA, regardless of its factual accuracy. Therefore, *'good faith'* is a condition sine qua non on grounds of which the communication of information is protected. And then, only its *'good faith'* establishment can be a defense for the whistleblower. Finally, *'good faith'* implies the mere belief that the communication divulged is true, regardless of its accuracy at a later date. It is enough for the employee-whistleblower to reasonably believe that the allegation made is true.

If one wants to understand the relevance of the PDA to the law of defamation one would consider the defense provided and the concerns raised. It means that in terms of the law of defamation, the *'truth defense'* is a prerequisite one in order to be discharged while the *'good faith defense'* is the condition sine qua non for the protection of an employee-informer. No matter if his communication is not accurate. For instance, an employee- whistleblower that made in good faith a disclosure cannot be sentenced defamatory statement even though he is wrong and that the issue that he raises is defamatory of another person. Because, although the defamation law condemns false information the good faith covers any disclosing of information no matter if it true or false as long as the whistleblower reasonably believes that the allegation is true.

This begs the questions; what position would the court take in the hypothesis where, for instance, an employee-whistleblower who made in good faith an untrue disclosure that has harmed the reputation of another person. In such posit, can the employee-whistleblower be prosecutable for defamatory

statement? May a 'defamed' person against whom the allegation made in good faith have cause of action?

The hypothesis has not yet proven because, so far, there is no case law that has a legal authority. However, in my view, the PDA creates a special category of free speech, for public policy purposes, when it encourages employees to make disclosures of information concerning corruption and other forms of wrongdoing in order to act as an early warning mechanism. Therefore, if the case comes before the court, of an applicant who has been defamed by an *'Untrue but Good Faith disclosure'* by a whistleblower, the court would need to develop the common law pursuant to sections 8(3) and 39(2) of the Constitution so that it gave effect to the Constitution, by creating a *'limitation to the limitation'*. It means that the court ought to develop the common law of defamation in conformity to values contained in the Bill of Rights. [FN232] In connection with this posit, the Court would need to adjudicate on the constitutionality of the defense of 'truth' in a defamation case. It means that it would reconsider the truth defense as a prerequisite in order to be discharged in defamation litigation when the defamer is an employee-whistleblower (non-media defendant) who has divulgated the untrue but good faith information for public purposes. Such position of the court would not only comply with sections 8(3) and 39(2) of the Constitution, but also, it would confirm the decision of the Supreme Court of Appeal, in the *Bogoshi* case, where it has re-examined the common law of defamation by holding that the presumption of strict liability of the members of the press was unconstitutional because it impinged on the right of freedom of expression, on the other hand, it was not in accordance with the spirit, purport or objects of the Bill of Rights as required through section 35(3) of the interim Constitution[FN233]. A similar point of view has been subsequently confirmed by the Constitutional Court, in *Khumalo v Holomisa case*, which reaffirmed the reasonableness defense for media defendants and rejected the strict liability accordingly. [FN234]

In short, it appears that the 'defamed' person against whom the untrue allegation made in good faith by an employee-whistleblower has harmed the reputation can sue the discloser for defamatory communication. But, before the court, I submit that it would be improbable for the plaintiff to succeed with his action because the "protected disclosure" (under the PDA) would be held to represent a sound defense. From this point of view, the PDA would seem appear to represent a limitation on the common law of defamation, providing a new, free speech defense to defamation. And thereby, it would appear to enhance the right to free speech.

Section 4: Is the PDA really enhancing the right to free speech?

As early mentioned, the South African common law nor statutory law has never provided workers mechanisms or procedures or, a general right to disclose, without fear of reprisals, information about wrongdoing in their employment

environment. [FN235] Yet the revelation of non-confidential material could be perceived as discouraging 'the implied duty of trust and give rise to action for breach of contract'. [FN236] 'In relation to confidential information obtained in the course of employment, the common law again both express and implied terms. The duty of fidelity can be used to prevent disclosures while the employment subsists and restrictive covenants limit employees after the relationship has ceased.' [FN237]

The employees therefore were forced to adopt *'blind eyes'* and *'deaf ears'* in the workplace. Even the communication of concerns by employees, that they are unable verify, may lead to their delictual liability for defamation.

Under these conditions the right to freedom of expression was effectively reduced to the point of inexistence. This was because of the threat of disciplinary action or prosecution for defamation by employers. The disclosure of such wrongdoing generates enormous sanction against the whistleblower. Consequently, this enabled the proliferation of unlawful, irregular or unacceptable workplace practices orchestrated by the employer and/or other employees.

However, the Protected Disclosures Act (PDA) 2000 (which came into force a year later), imbued employees in both the public and private sector with the right to disclose any information about the wrongdoing, unlawful or irregular conduct in the workplace. In addition, the PDA protects employees against reprisals and sanctions from their employers on the account of the protected disclosure made. Moreover, the Act shields from defamatory action based on truth, workers who disclose information in good faith. This means that workers who reasonably believe that information disclosed was true are not delictually liable; even if subsequently it appears that the concern raised was untrue.

From this perspective, the PDA enhances and protects freedom of expression because it reduces the need for silence and secrecy in the workplace and has created mechanisms to safeguard employees from actions or systems that may impede their free speech or 'whistle blowing'.

But, it is also important to bear in mind that the safety granted by the PDA is not absolute. Indeed, the provisions of the PDA limit the coverage of protection to those engaged in a relationship between the employer and the employee [FN238] so that an unemployed person is not covered and, he therefore does not fall under 'umbrella' of protection of provided by the Act.

In addition, the PDA is based 'on prevention rather than cure and encourages the initial disclosure to be made to the employer.' [FN239] It means that it only limits its effects in preventing reprisals without proving efficient cure once the employee is victim of occupational detriment on the account of protected disclosure made.

This state of affairs, it can be argued, will in fact continue to encourage institutional silence and facilitate workplace malpractice (thus reducing our right to freedom of expression) because of the ineffective and unreliable legal protection offered to whistleblowers after they have spoken out.

Thereby, it appears that it would be beneficial to extend the scope of protection of the whistleblowing law to be broader than simply employer-employee. It means to extend the protection of the provision of the PDA over unemployed persons. This would also offer a more effective solution to employees who are victimised by their employers after they have 'blown the whistle', by guaranteeing that they will be able to retain their job and benefit from general indemnity.

Conclusion

Broadly speaking, the main thrust of this paper was to explore the relationship between the South African common law defense to defamation, which is founded on the 'truth' of the allegation, and the Protected Disclosures Act 2000, which protects the disclosure of any information made in 'good faith'.

Indeed, the constitutional right to freedom of expression is fundamental to democratic society. However, it is limited by section 36 of the Constitution, which provides a general limitation, and also in more specific instances by the common law of defamation, which protects individuals' reputations. In common law of defamation, proving the *'truth'* of a statement is a prerequisite for defense against defamation. So, someone who makes a defamatory communication, which tends 'to harm the reputation of another as to lower him/her in the estimation of community or to deter third persons from associating or dealing with him/her' [FN240], will be held delictually liable if he/she fails to establish the truth of his/her allegation.

Nevertheless, in terms of the Protected Disclosures Act (PDA) 2000, someone who is an employee and, divulges any information of wrongdoing in the workplace will not be held delictually liable if that the communication was made in *'good faith'*. It does not matter if the information in question is accurate or not. It is, therefore, sufficient that the employee reasonably believes that the allegation made is true.

So, what can happen whether the information disclosed in *good faith* by the employee-whistleblower is untrue and, harmed the reputation of the employer or another employee? May a 'defamed' person against whom the allegation made in good faith have cause of action? Considering the fact that the hypothesis has not yet proven because, so far, there is no case law that has a legal authority. I believe that such 'defamed' person against whom the untrue communication made in good faith by an employee-whistleblower has injured the reputation can

be improbable for him to succeed his action due to public purposes of the *good faith* disclosure (see supra).

Seen from this perspective, the Protected Disclosures Act (PDA) 2000 might appear to have primacy in its relationship with the defamation law. In other words, while the common law of defamation represents a *limitation* of freedom of speech the PDA may constitute a *limitation* on the *limitation* and thereby the dedication of freedom of expression.

On the other hand, to conclude that the PDA totally sanctifies the right to free speech seems to be very excessive because of the nature of the scope of its application. In other words, the narrowness scope of protection of the PDA is limited only in the relationship between the employer and employee will not cover a person who does not fall into the definition of employee. Accordingly, an unemployed person is not covered under provisions of PDA so that he may be found liable for defamatory statement after having disclosed information of which he is unable to establish the truth. Thereby, it appears the necessity to extend the scope of protection of the PDA to be broader than simply employer-employee.

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[FN95] *Dolus eventualis* is 'where the defendant subjectively foresees the possibility of such a consequence and nevertheless goes ahead and publishes the defamatory matter.' See Burchell, p.166

[FN96] dolus *indeterminatus* is 'an actual or legal intention where, for instance, a person couches the defamatory matter in such terms that it hit many people without caring which individual is struck.' See Burchell, p.166

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