

PUBLIC INTEREST SOUTH AFRICA: WHISTLEBLOWERS SUMMIT

HIGH-LEVEL PLENARY PANEL

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THEME: WHISTLEBLOWER PROTECTION REFORM: TOWARDS A VICTIM-CENTRED LEGAL AND INSTITUTIONAL FRAMEWORK

REHANA CASSIM – OPENING REMARKS

Good afternoon. It is a privilege to have the opportunity to make a few opening remarks for this panel, the theme of which is Whistleblower Protection Reform: Towards a Victim-Centred Legal and Institutional Framework.

Introduction

Whistleblowers play a crucial role in exposing crime, corruption, mismanagement and other wrongdoing threatening the rule of law, financial integrity, human rights, the environment and public health and safety. Article 4(e) of the SADC Community Protocol against Corruption, which South Africa ratified, obliges member states to create, maintain and strengthen “systems for protecting individuals who, in good faith, report acts of corruption”.

Although whistleblowing is recognised as a vital anti-corruption tool in South Africa, our current legal system offers no incentives and little protection to whistleblowers. This must change.

The need for a victim-centred framework in whistleblower protection

South Africa’s urgently needs a victim-centred whistleblower protection framework for three important reasons:

1. First, the scale of corruption is staggering, necessitating a strong legal framework that both encourages whistleblowing and effectively protects whistleblowers.
2. Secondly, reporting rates of wrongdoing in South Africa are low. The reasons given for not reporting wrongdoing are the fear of being victimised, belief that no action will be taken on the disclosure, belief that the disclosure will not be anonymous and fear of losing one’s job. There is also a negative perception of whistleblowers in South Africa, which may stem from South Africa’s political history, as highlighted by our Honourable Deputy Minister of Justice and Constitutional Development this morning.

3. Thirdly, in recent years there has been an increasing number of reports of whistleblowers in South Africa who have suffered physical harm or been threatened with physical harm after exposing corruption.

Babita Deokoran is a stark example. She blew the whistle on massive corruption at Tembisa Hospital in her role as chief director of financial accounting, and was gunned down outside her home in 2021. Just three weeks ago the Special Investigating Unit raided the home of businessman Hangwani Maumela involved in this corruption at the Tembisa Hospital where over R2 billion Rand was stolen through fake tenders, inflated prices and ghost deliveries, while the hospital staff struggled with medicine shortages and failing infrastructure. Following this report of the SIU, the head of the Gauteng Department of Health was subsequently suspended. Other whistleblowers, like Atholl Williams, fled the country fearing for their lives. Many whistleblowers suffer from intimidation, loss of jobs, loss of career prospects, panic attacks, depression, post-traumatic stress disorder, anxiety and insomnia after exposing corruption. These consequences are unacceptable.

Effective protection from retaliation is urgent. Article 32(2) of the UN Convention against Corruption and Articles 5 and 6 of the African Union Convention on Preventing and Combating Corruption, both ratified by South Africa, call for whistleblower protection, including physical safety. These commitments must be honoured.

Intersections between the Protected Disclosures Act and the Companies Act 71 of 2008

Currently, whistleblowing in South Africa is mainly regulated by two statutes.

The Protected Disclosures Act 26 of 2000 is the overarching statute regulating whistleblowing by employees. It applies to employees in public and private sectors and protects them from occupational detriments, such as dismissal, demotion or harassment, for making a protected disclosure.

Section 159 of the Companies Act 71 of 2008 governs whistleblowing in all companies registered under the Companies Act. Since the state holds its shares in state-owned companies in trust for the nation, whistleblowing in state owned entities is important for the country as a whole. Section 159 of the Companies Act protects shareholders, directors, company secretaries, prescribed officers, employees, registered trade unions and suppliers of goods or services to a company and their employees who make a disclosure of wrongdoing.

How do these two statutes interact? Section 159 of the Companies Act applies concurrently with the Protected Disclosures Act. As far as section 159 of the Companies Act creates a right or establishes protection for an employee, this right and protection is in addition to, and does not replace, the right and protection conferred by the Protected Disclosures Act. If section 159 of the Companies Act and the Protected Disclosures Act conflict with one another both apply concurrently to the extent that this is possible. Insofar as this is not possible, the Companies Act prevails.

Thus, employees in corporate environments must refer to both the Protected Disclosures Act and the Companies Act when disclosing wrongdoing. This task is challenging given the different requirements of each statute for disclosures to qualify for protection. Adding to this complexity is the fact that only some, but not all, of the categories of disclosable matters under the Protected Disclosures Act are replicated in the Companies Act.

These two statutes are not the only ones regulating whistleblowing in South Africa. There are at least nine other statutes regulating whistleblowing, some of which protect individuals in the context of whistleblowing, others which encourage whistleblowing, or oblige persons in positions of authority to report wrongdoing. These statutes include the Constitution of the Republic of South Africa, 1996; the Labour Relations Act 66 of 1995; the Prevention and Combating of Corrupt Activities Act 12 of 2004; the Financial Intelligence Centre Act 38 of 2001; the National Environmental Management Act 107 of 1998; the Pension Funds Act 24 of 1956; the Local Government: Municipal Finance Management Act 56 of 2003; and the Public Finance Management Act 29 of 1999.

This fragmented whistleblowing regulation presents a confusing web for whistleblowers to navigate, and provides inconsistent protection. Its complexity and vagueness may also discourage people from disclosing wrongdoing in their environment.

In 2023, the Department of Justice and Constitutional Development released for public comment a Discussion Document on Proposed Reforms for the Whistleblower Protection Regime in South Africa. These proposals are a step forward but in my view they are too limited. They are confined to enhancing only the Protected Disclosures Act, and widening the protection in this Act to include persons that are not in an employer and employee relationship.

While this recommendation will broaden the scope of the Protected Disclosures Act, it will not alleviate the problem of whistleblowers having to navigate a confusing web of dispersed

legislation, nor the problem of inconsistent protection provided for whistleblowers in the various statutes.

In my view, South Africa needs one consolidated and uniform legislative framework governing whistleblowing that applies across all sectors. In this framework the requirements to be satisfied before whistleblowers will be protected must be consistent in the different sectors. This will bring clarity, ensure consistent protection for whistleblowers across multiple sectors, and make the whistleblowing laws easier to understand and to rely on.

Having one consolidated piece of legislation to govern whistleblowing will also align with the recommendation of the G20 High-Level Principles published in 2019 that G20 countries, which includes South Africa, should establish clear laws for the protection of whistleblowers and should consider adopting legislation that is dedicated exclusively to protecting whistleblowers.

As we heard from our Honourable Deputy Minister of Justice and Constitutional Development this morning, South Africa's Whistleblower Protection Bill is expected to be presented to Parliament this year.

Current protections for whistleblowers

What protections are currently given to whistleblowers under South African law?

To mention them briefly, under the Protected Disclosures Act whistleblowers can apply to court for relief if they are subjected to an occupational detriment. Under both the Protected Disclosures Act and Companies Act they are granted immunity from civil, criminal or disciplinary proceedings if the disclosure is prohibited by any law or agreement requiring them to maintain confidentiality. For example, a contract to which the whistleblower is a party may not be terminated on the basis that the disclosure is a breach of a confidentiality clause. But this protection from liability extends only to the making of the disclosure itself and not to any liability of the whistleblower that is revealed by the disclosure.

Whistleblowers under the Companies Act are also given qualified privilege, which means that they cannot be sued for defamation, unless they were motivated by malice.

Also under the Companies Act, whistleblowers can claim compensation for any damages if they are victimised. There is a rebuttable presumption in the Companies Act that the victimisation was due to their disclosure, unless the person who engaged in the threatening conduct can show evidence in support of another reason for the conduct. The European Union Whistleblower Directive has a similar reverse onus to protect whistleblowers who are

victimised. The Discussion Document recommends that a reverse onus should also be created under the Protected Disclosures Act.

The Discussion Document also proposes that persons who victimise whistleblowers under the auspices of the Protected Disclosures Act should be liable on conviction to a fine not exceeding R5 million or to imprisonment for up to five years, or both. This is a laudable recommendation. But it is confined to the Protected Disclosures Act. So if a disclosure is made under another statute regulating whistleblowing, such as the Companies Act, and a whistleblower is victimised, the proposed penalty will not apply. This is another reason why I think that the Discussion Document is too narrow in focusing only on amending the Protected Disclosures Act.

Notably, there are currently no mechanisms to safeguard the physical safety of whistleblowers. The Discussion Document recommends that under the Protected Disclosures Act whistleblowers should be allowed to request state protection if they have reasonable cause to believe that their lives or that of their family are endangered because of the disclosure. It also suggests that whistleblowers should be included in the definition of a witness under the Witness Protection Act. These are essential reforms.

There are no financial incentives to whistleblowers for making disclosures that lead to successful resolutions of matters. It is highly controversial whether whistleblowers should be rewarded financially for making disclosures. In my view the benefits of a whistleblower award system in South Africa will outweigh the possible misgivings about it, given the high level of corruption.

The G20 Principles suggest that G20 countries provide for effective and proportionate sanctions for those who retaliate against whistleblowers (principle 8). They also suggest that G20 countries should promote awareness of their frameworks to protect whistleblowers. The policy is to change public perceptions and attitudes towards whistleblowers (principle 10).

The responsibilities of boards in creating safe internal reporting system and ensuring consequence management

As we heard this morning, management often does not know how to deal with complaints from whistleblowers. Companies have a responsibility to protect whistleblowers by creating safe internal reporting systems for whistleblowers to report wrongdoing. One of the main reasons given in South Africa for not reporting wrongdoing is the belief that the disclosure will not be

anonymous. If whistleblowers are not sure how to report wrongdoing or whether they will be protected they will be discouraged from doing so.

According to the EU Whistleblower Directive lack of confidence in effectiveness of reporting is one of the main factors discouraging potential whistleblowers (para 63 of the preamble).

In my view, there are many problems with the current internal reporting system required to be set up by the Protected Disclosures Act and the Companies Act. The requirement to set up an internal reporting system under the Companies Act applies only to public and state-owned companies even though the whistleblower provisions in the Companies Act apply to all companies. These systems are neither monitored nor enforced, and the legislation fails to address the consequences of employers and companies failing to establish them. No mention is made of establishing a system to receive disclosures anonymously. Also of concern is that the recipient of the disclosure by the whistleblower does not have an express duty of confidentiality to protect the whistleblower's identity.

The Discussion Document recommends that the Protected Disclosures Act should require the recipient of the disclosure to use its best endeavours to keep the whistleblower's identity confidential, and that whistleblowers should be allowed to make disclosures anonymously.

While these are commendable recommendations, the Discussion Document only requires the recipient to use its best endeavours to keep the whistleblower's identity confidential. This is not enough and leaves too much room for potential abuse.

Another problem with the Discussion Document is that it allows the whistleblower's identity to be disclosed by the recipient of the wrongdoing on various grounds. Some of these grounds are that: (i) there are reasonable grounds to believe that identifying the whistleblower is essential for the effective investigation of the disclosure; (ii) to prevent a serious risk to public health, public safety, or the environment; (iii) to comply with the principles of natural justice; or (iv) for purposes of an investigation by a law enforcement or regulatory agency. Some of these grounds, such as complying with the principles of natural justice, are too broad, and are also open to abuse.

To protect whistleblowers, it is imperative to keep their identity confidential and to allow them to make disclosures anonymously. This will align with the recommendations of the G20 Principles (principle 5) and the European Union Whistleblower Directive (para 82 of preamble) that the identity of the whistleblower must be protected when making reports.

A system to receive disclosures anonymously would entail the company guaranteeing that whistleblowers cannot be identified by their personal attributes, such as their Internet Protocol (IP) address, voice or telephone number, and that all data transferred by whistleblowers may be processed and stored in an encrypted manner. One method of guaranteeing anonymity is to implement an independent anonymous whistleblowing hotline system, which is managed by a third party. Another method is to implement an electronic reporting system which protects and guarantees the anonymity of the whistleblower. This system could provide a reference number to whistleblowers, enabling them to follow up on the investigation while still remaining anonymous.

Clear and detailed guidance must be provided to companies and employers on what a compliant internal system must include. The guidance should include details of reporting procedures, timelines, the extent to which confidentiality will be ensured, investigation processes, the escalation to appropriate bodies, anti-retaliation measures, and sanctions for non-compliance.

Conclusion

In conclusion, in a country plagued by systemic corruption, there is a dire need both to protect and to encourage whistleblowers in order to expose wrongdoing. Whistleblowing is neither self-serving nor socially reprehensible. It involves a considerable risk for whistleblowers, who render a valuable service to society. Whistleblowers must be protected.

Thank you