TABLE OF CONTENTS

Page

CHAPTER 12: THE POSITION OF THE WHISTLE-BLOWER IN AUSTRALIA – VICTORIA, MEASURED

CHAPTER 13: THE POSITION OF THE WHISTLE-BLOWER IN THE UNITED KINGDOM

CHAPTER 1: AN INTRODUCTION TO THE STUDY AT HAND

1.1 Introduction

Whistle-blowing encompasses the act utilising the right to freedom of speech, the right to impart information, and which culminates in the reporting of, and the exposure of alleged wrongdoing of various kinds.

Generally, whistle-blowing is regarded as a valuable, if not an invaluable, contribution to transparency and accountability within society, as it provides a solution, opening non-existent or hidden sources and channels of information.

However, there are consequences for each action taken, and each action is open to a reaction, this is so with blowing the whistle as well.

Many whistle-blowers [1] have been widely celebrated for blowing the whistle; however, retribution taken against whistle-blowers is unfortunately also a common occurrence.

Some of the most famous or infamous whistle-blowers include Daniel Ellsberg[2], Collin Wallace[3], William McNeilly[4], Frank Serpico[5], Moss Phakoe[6] and Imraahn Mukaddam[7], to mention but a few whose refusal to remain silent has shaped history.

The heavy price whistle-blowers pay is underscored by the fact that whistle-blowing legislation has been necessitated in order to regulate various aspects relating to whistle-blowing, such as by way of example, who would qualify as a whistle-blower,

---

1 Throughout the text of the study at hand, reference will be made to “whistle-blower” spelt in this way. Various authors have spelt it differently. The only instances in which a different spelling is reflected in this text, is in the circumstances in which an author quoted has used an alternative spelling thereof, such as, for example, "whistle blower" and "whistleblower". The same consideration has been applied in respect of whistle-blowing.

2 Daniel Ellsberg leaked Pentagon documentation which related to how the United States of America had become involved in the Vietnam War.

3 Collin Wallace exposed child abuse at the Kincora Boys Home in Belfast.

4 William McNeilly revealed information about serious security breaches at Trident, in respect of nuclear submarines.

5 Frank Serpico attempted to draw attention to the alleged corruption in the New York City Police Department.

6 Moss Phakoe, an African National Congress councillor in Rustenburg, was shot to death two days after having handed over documentation relating to corruption within the Bonjanala Municipality.

7 Imraahn Mukaddam raised the complaint regarding price-fixing, which culminated in the Competition Commission fining Premier Foods, Tiger Brand and Pioneer Foods.

how the whistle is to be blown and ultimately, what types of protection the whistle-blower is afforded, should the disclosure be met with retribution instead of thanks.

A whistle-blower is in the normal course of events not distinguishable from others that surround him, other than the fact that he happens to know of wrongdoing, and decides to act on this knowledge by disclosing this knowledge of the wrongdoing in question.

Evans opines that for some, blowing the whistle is simply an act of disagreement or dissent, however, it is emphasised that it is consequential to distinguish whistle-blowing from other broad negatives, such as complaining, litigating or arguing. Rather it is a specific form of dissent, with its own particular characteristic, stemming from the practice of the English policemen who blow a whistle when observing a crime, thereby also alerting the general public to the wrongdoing.[8]

Uys[9] highlights the fact that the whistle-blower expects a positive reaction from the employer, and expects to be seen as a loyal employee who has the interests of the organisation at heart. However, the retaliatory reaction often received changes such employee to a "committed activist who wanted above all to have his concerns recognised in order to save his professional reputation".[10] She recognises that retaliatory action against the whistle-blower paves the way for a power struggle that is engaged in between the whistle-blower and his or her employer, which usually involves the employer attempting to discredit the whistle-blower, branding him or her as a difficult employee, and the employee publishing the wrongdoing even wider, in an attempt to defend himself or herself. Uys points out that in order to disempower whistle-blowers the organisation in question will ensure the isolation of the whistle-blower, thus lessening support and the potential or actual impact.[11]

Camerer[12] expresses the opinion that "putting effective legal protection in place for bona fide whistle blowers is but one of a number of measures necessary to fight corruption effectively in South Africa."[13]

---

8 Evans 2008 *Innovation: the European Journal of Social Science Research* (21)(3) 267-279.
9 Uys 2000 *Business Ethics: A European Review* (9)(4) 259-267.
10 Uys 2000 *Business Ethics: A European Review* (9)(4) 263.
11 Uys 2000 *Business Ethics: A European Review* (9)(4) 263.
12 Camerer 2001 *Occasional Paper* 47.

This lies at the heart of the matter, in other words, the *rationale* behind the importance of the protection of whistle-blowers.

1.2 Background

A great deal of the impetus behind this thesis is to be found in the spirit of Chapter 14 of the National Development Plan – 2030.[14]

During May 2010, President Zuma appointed the National Planning Commission (hereinafter referred to as "the Commission"), as an advisory body which comprised of 26 individuals, mostly from outside the sphere of government, to develop the National Development Plan (hereinafter referred to as the "NDP").

Chapter 14 is entitled *Fighting Corruption,* stating that the vision thereof includes *inter alia* that by 2030 South Africa will have a zero tolerance in respect of corruption, that both public and private officials will be held accountable, that the leadership will display integrity and high ethical standards, and that the anti-corruption agencies will have the necessary resources and independence with which to achieve their mandate.[15]

The Commission regards part of the requirements of fighting corruption as support from citizens, and *inter alia* proposes the strengthening of the protection offered to whistle-blowers, elaborating on the societal approach to combating corruption.[16] In respect of the strengthening of the protection offered to whistle-blowers, the Commission states that protection for whistle-blowers facilitates a culture of exposing wrongdoing, and whilst the Protected Disclosures Act 26 of 2000 provides a measure of protection, it is insufficient, with the percentage of people indicating that they are willing to blow the whistle having dropped by ten percent in the last four years, and with the legislation having revealed weaknesses.[17]

---

13 Camerer 2001 *Occasional Paper* 47.
14 National Planning Commission http://www.npconline.co.za/medialib/downloads/home/NPC%20National%20Development%20Plan%20Vision%202030%20-lo-res.pdf (Date of use: 13 February 2013).
15 National Development Plan 447.
16 National Development Plan 449.
17 National Development Plan 450.

The Commission proceeds to list some of the perceived weaknesses of the Protected Disclosures Act 26 of 2000 (hereinafter referred to as the "PDA") as including the following considerations:

- The PDA's scope is too narrow, in that it only provides protection against occupational detriment, only finding application within a formal employment relationship, and as such excluding external whistle-blowers from the protection offered;
- The number of bodies to whom protected disclosures may be made is limited, excluding complaints (disclosures) made to sectoral complaints mechanisms available and professional bodies;
- No immunity is provided for a whistle-blower in respect of criminal and civil law implications that may follow, even in circumstances in which the disclosure was made in good faith;
- Adequate security has not been established in respect of whistle-blowers should the need arise;
- Confidentiality in respect of the identity of the whistle-blower is not protected; and
- Physical and economic protection of the whistle-blower is not catered for.

The Commission points out that further policy research is required to strengthen whistle-blower protection[18] adding by way of closure of the topic the following recommendations:

- A review of the PDA. This review should consider expanding the scope of the whistle-blower protection outside the limits of "occupational detriment", permit disclosure to bodies other than the Public Protector and the Auditor-General and strengthen measures to ensure the security of whistle-blowers.
- Regulations to the PDA should be developed as soon as possible and government departments must develop policies to implement the act.

However, the Commission's recommendations regarding the perceived weaknesses are by no means the first time that the challenges in respect of the PDA have been

18 National Development Plan 450.

highlighted. During 2004 the challenges were highlighted by the South African Law Reform Commission (hereinafter referred to as the "SALRC") in Discussion Paper 107.[19] In reaching its provisional recommendations, the SALRC took cognisance by way of a comparative study of whistle-blowing legislation of the United Kingdom, New Zealand, the United States of America and Australia.

A summary of the SALRC's provisional recommendations include the following:[20]

- That the scope of the PDA should be extended to include independent contractors, consultants, agents and other workers that fall outside the strict definition of the employer/employee relationship; including the changing of the definition of "employee" to "worker" and the changing of the definition of "employer" in order to cater for the wider scope.
    - In this respect consideration was also given to what was termed as being "citizen's whistleblowing", in other word the extension of the scope of the PDA beyond the boundaries of the employment relationship altogether;
- The list comprising the forms of victimisation often encountered by whistle-blowers should be left open-ended to effectively include all forms of reprisal;
- The list of persons/bodies to whom disclosures may be made should be extended;
- The PDA should provide for indemnity in respect of civil and criminal liability of the whistle-blower where appropriate;
- The identity of the whistle-blower should be protected;
- Section 4 should be amended to:
    - provide for damages without limit, with the courts and tribunals taking into account the actual loss suffered by the whistle-blower when awarding damages; and
    - to provide for specific remedies such as interdicts;
- The provisions of the PDA should not make it an offence to "subject an employee or a worker to an occupational detriment ".[21]

19 http://www.justice.gov.za/salrc/dpapers/dp107.pdf (Date of use: 18 October 2013).
20 SALC Discussion Paper 107, page xi –xii.
21 SALC Discussion Paper Par 4.95.

- Section 5 of the PDA should be amended in order to include good faith as a requirement, and include the protection of a disclosure made to a union representative.

It is noted that since these abovementioned recommendations were made in 2004, no changes have been effected to the text of the PDA.

1.3 Problem statement

The question to be addressed in this thesis is whether whistle-blowers in South Africa are appropriately protected in terms of the provisions of the relevant legislation, namely the PDA.

The attempt to answer this question will entail a twofold enquiry, namely, the determination of the protection availed to a whistle-blower in South Africa, falling within the sphere of the PDA, and further, such whistle-blower's position when one compares his or her legal position with that of whistle-blowers blowing the whistle in the United Kingdom, Australia and New Zealand.

Should it become clear that the whistle-blower protected by the South African legislation is comparatively in a worse position than other countries' whistle-blowers, it needs to be determined whether the law could and or should be changed within this context, in order to most effectively reach the actual stated objectives of the PDA.

In order to achieve this, the following needs to be established:

- Who the persons are that qualify for protection in terms of relevant legislation, and under what circumstances they will be able to enjoy the protection so availed with reference to –
    - The Republic of South Africa;
    - The United Kingdom;
    - Australia; and
    - New Zealand.

- Under what circumstances protection in terms of the relevant legislation is not availed to whistle-blowers in the selected countries, and in terms of the relevant legislation.
- Whether the South African legislation meets the objectives set in the legislation itself?
- How the protection availed to the whistle-blower in terms of the South African legislation measures up to that availed to whistle-blowers in the other selected countries?
- Should the protection availed to the whistle-blower in terms of the South African legislation measures up negatively in the comparison to that availed to whistle-blowers in the other selected countries, determine how the legislation can be amended to strengthen the position of the whistle-blower in South Africa.

1.4 Hypothesis

A hypothesis is a proposition or set of propositions which are provisionally accepted and which stand to be tested, with the specific aim of proving or disproving the proposition or set of propositions.

It forms the starting point of the study in question.

Taking into account the above-mentioned, as well as the problem statement and research questions to be tested in terms of this research, it is argued that the following hypothetical points of departure are relevant:

- Legislation regulating the responsible disclosure of wrongdoing by either an individual, individuals or an organisation, including public interest matters, crime and corruption will promote public confidence, ethical citizenship, good governance, accountability and transparency;
- One of the most important tools in fighting wrongdoing, crime and corruption is the legislation providing appropriate protection and remedies to the person or persons speaking out against wrongdoing, crime and corruption, in the public interest. This is due to the fact that whistle-blowing is a detection mechanism.

- Without legislation providing appropriate protection and remedies to the person or persons so speaking out, the said person or persons are much less likely to "blow the whistle" on such wrongdoing, crime and corruption;
- In South Africa such protection and remedies are provided to whistle-blowers in terms of the provisions of the PDA;
- In fact, the South African PDA is a world-class piece of legislation, that when compared to the protection and remedies availed to whistle-blowers in England, Australia, and New Zealand compares favourably in this regard.[22]

1.5 Research methodology

The study encompasses a review of literature, books, journals articles, legislation, case law, and as such will not be empirical in nature. It consists primarily of an analysis of the protection afforded to whistle-blowers in terms of legislation pertaining to the mentioned selected countries, and a comparison pertaining to the different remedies availed in this regard.

1.6 Content

As a starting point the general concepts that are pertinent to this study will be explored, in order to ensure a clear understanding of the relevant concepts such as what whistle-blowing is, who a whistle-blower is, why it is important that the whistle should be blown, why people choose to blow the whistle or not, and what the actual or potential cost is of blowing the whistle.

Hereafter in terms of each country selected, this study will examine the legislation which regulates the whistle being blown, who qualifies as a whistle-blower, what remedies are availed to such whistle-blowers, and in what circumstances the protection will not be availed.

---

22 Within this context, the following considerations would be equally pertinent:

- In the United Kingdom such protection and remedies are provided to whistle-blowers in terms of the provisions of the Public Interest Disclosure Act 1998;
- In New Zealand such protection and remedies are provided to whistle-blowers in terms of the provisions of the Protected Disclosures Act 7 of 2000;
- In Australia such protection and remedies are provided to whistle-blowers in terms of the various pieces of legislation, including Protected Disclosures Act 85 of 2012;
- The protection and remedies provided are effective enough to ensure that people wishing to blow the whistle for public interest's sake will do so without fear of reprisal;

As such, and in main the legislation that has been reviewed includes the following:

Australia

Whilst it is so that Australia has many pieces of whistle-blower legislation, its content is too comprehensive to be dealt with completely within this study. As such, within the Australian context the legislation applicable in Victoria, the Protected Disclosures Act 2012 has been selected and dealt with herein.

South Africa

Protected Disclosures Act 26 of 2000

United Kingdom

Public Interest Disclosure Act 1998

New Zealand

Protected Disclosure Act 2000

The above countries were chosen as a result of the similarities regarding the legal systems when compared with South Africa.

In this regard it needs to be noted that whistle-blowing and the whistle-blower are referred to in both the narrow and broader sense, with the whistle-blower legislation usually defining who would qualify as a whistle-blower in the narrow sense. However, for example, in respect of the South African position, when discussing the remedies availed to whistle-blowers is also discussed in a broader sense, so as to include informers and whistle-blowers falling within the sphere of criminal proceedings.

The content of the study includes the following:

CHAPTER 1:

This chapter contains a basic introduction to the study at hand with reference to the background to the problem being considered, the problem statement expressed, the

hypothesis, the research methodology, and the elements considered in respect of determining measurable comparative elements in respect of the chosen countries.

CHAPTER 2:

This chapter explores the origins of whistle-blowing and the definition of the concepts of the whistle-blower and whistle-blowing as they apply in South African law.

It is acknowledged at the start of the study that the topic of whistle-blowers and whistle-blowing does not conjure up positive images and thoughts, even though it is more often than not something done with noble intentions, and with the whistle-blower knowing full well that more likely than not, doing so may end in hardship, for him or her and his or her family, real risk to any career related aspirations, and even the risk of bodily harm being perpetrated against him or her or them.

Why anyone would want to blow the proverbial whistle is explored.

CHAPTER 3:

This chapter considers noteworthy influences in respect of whistle-blowing within the South African context.

When looking at these noteworthy influences, excluding the relevant legislation, put in place by the South African government, one cannot help but to state that there is an apparent "*political will*" to fight corruption in all earnest, including, providing for the protection of whistle-blowers within this context.

In this chapter the influences, both at a national and an international level, where the Republic of South Africa has explicitly pronounced agreement and as such commitment, is touched on.

CHAPTER 4:

This chapter serves as an introduction to the main whistle-blowing legislation in South Africa, namely the Protected Disclosures Act 26 of 2000, including within this context –

- who would qualify as an employer and employee;

- what would qualify as a disclosure and further as a protected disclosure;
- how disclosures are to be made in order to enjoy the protection offered; and
- what type of conduct would fall within the ambit of occupational detriment, exacted against a whistle-blower.

The chapter also considers possible pivotal exclusions from the legislation in respect of ethical and policy related matters, as well as employees bound by secrecy conditions as a matter of employment.

CHAPTER 5:

This chapter acknowledges that in actual fact the Protected Disclosures Act 26 of 2000 is but a small part of legislation and legislative provisions within the South African context, either placing duties on employees in respect of whistle-blowing or providing potential remedies in this respect. It further acknowledges that not only whistle-blowers as defined in the Protected Disclosures Act 26 of 2000 have potential remedies within the employment relationship, but that whistle-blowers in the wide sense also have potential recourse.

CHAPTER 6:

This chapter looks at the various remedies availed to whistle-blowers in South Africa, and within the specific context of the Protected Disclosures Act 26 of 2000. The text stretches further than just the Protected Disclosures Act 26 of 2000, due to the specific provisions of the Act. The various provisions are identified and discussed, in respect of which a whistle-blower would need to qualify in order to have access to the specific remedy or remedies sought, including:

- the role of jurisdiction;
- appropriate relief availed;
- automatically unfair dismissals and unfair labour practices;
- the transfer of a whistle-blower;

Two further considerations elicited and discussed relate to the vicarious liability of an employer within the context of whistle-blowing and delictual considerations.

CHAPTER 7:

This chapter takes a look at South African case law relating to the provisions of the Protected Disclosures Act 26 of 2000, in order to establish practically the approach taken by the courts.

It also looks at the actual remedies afforded to whistle-blowers thus far.

CHAPTER 8:

This chapter is an overview of the whistle-blower protection discussed, together with an analysis of the identified measurables of the relevant legislation.

CHAPTER 9:

This chapter explores the content of the Protected Disclosures Act 2000, which is the main legislation pertaining to the protection of whistle-blowers in New Zealand.

CHAPTER 10:

Chapter 10 measures the position of the whistle-blower in New Zealand, and within the context of the Protected Disclosures Act 2000 in accordance with the identified measurables.

CHAPTER 11:

Within the context of this study, due to the proliferation of the whistle-blower legislation in Australia, it was chosen to include and analyse only the Protected Disclosure Act 2012, applicable in Victoria, Australia, incorporating amendments as at 11 February 2013, and which repealed the Whistleblower Protection Act 2001 in its entirety.

The Protected Disclosure Act 2012 is comprehensive, interrelated with many other pieces of legislation, and at its core it envisions a basic three phase process in respect of the making of a protected disclosure, namely, the receipt of the disclosure, the assessment thereof in order to determine whether the disclosure is in fact a protected disclosure, and the investigation of the allegations contained in the protected disclosure

CHAPTER 12:

Chapter 12 measures the position of the whistle-blower in New Zealand, and within the context of the Protected Disclosures Act 2000, in accordance with the identified measurables.

CHAPTER 13:

This chapter explores the provisions of the main piece of whistle-blowing legislation in the United Kingdom, namely the Public Interest Disclosure Act 1998, which has been inserted after part IV of the Employment Rights Act 1996 (hereinafter referred to as the "PIDA"), which too regulates in the main the remedies availed to whistle-blowing employees covered by the provisions of the PIDA.

The similarities between the PIDA and the Protected Disclosures Act 26 of 2000 are identified.

CHAPTER 14:

Chapter 14 measures the position of the whistle-blower in the United Kingdom, and within the context of the PIDA, in accordance with the identified measurables.

CHAPTER 15:

Chapter 15 provides the final conclusions in respect of the questions posed in this chapter, and the measurement elements identified.

1.6.1 The elements of analysis - considerations

When analysing and comparing the various whistle-blower Acts selected for the purpose of this study, regard is had to the guidelines set out in a 2009 draft resolution by the Parliamentary Assembly of the Council of Europe, penned by Pieter Omtzigt of the Committee on Legal Affairs and Human Rights (hereinafter referred to in this section as "the Committee") regarding the protection of whistle-blowers, in addition to the considerations raised by the Commission in the NDP.[23]

23 Omtzigt P http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=12302&Language=EN (Date of use: 29 October 2013).

The Committee stressed the importance of whistle-blowing by stating that individuals with concerns who sound the alarm in order to stop wrongdoing which puts others at risk is an opportunity to strengthen accountability and the fight against corruption and mismanagement, in all sectors.[24]

The Committee urged states to review their whistle-blowing legislation, especially pertaining to the protection of whistle-blowers, and in accordance to basic guidelines set out, especially when bearing in mind that potential whistle-blowers are often discouraged for fear of reprisal or a lack of interest demonstrated regarding warnings sounded, to the detriment of the public interest, effective management and accountability.

> Whistle-blowing has always required courage and determination. But "whistle-blowers" should at least be given a fighting chance to ensure that their warnings are heard without risking their livelihoods and those of their families. Relevant legislation must first and foremost provide a safe alternative to silence, whilst avoiding offering potential "whistle-blowers" a "shield of cardboard" which would entrap them by giving them a false sense of security.[25] (Own emphasis)

The guiding principles that are considered in this thesis are the following:

- Whistle-blowing legislation should be comprehensive:
    - The definition of protected disclosures should include all *bona fide* disclosures against various types of unlawful acts including –
        - Serious human rights violations which may affect life, health or freedom;
        - Any other legitimate interests.
    - It should cover both public and private sector whistle-blowers, including employees employed by the armed forces;
    - It should provide for various legal issues including labour law, criminal law, civil law, media law and specific anti-corruption measures.
- Whistle-blowing legislation should provide an alternative which is safe as opposed to remaining silent such as–

24 http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileD=12302&Language=EN (Date of use: 29 October 2013).

25 Omtzigt http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=12302&Language=EN (Date of use: 29 October 2013).

    - Appropriate incentives offered by government for both the public and private sectors to ensure that internal whistle-blowing procedures are in place;
    - Ensuring that disclosures are effectively and timeously investigated;
    - Ensuring that where necessary or appropriate identity of the whistle-blower is protected
- The legislation should protect anyone who makes use of internal whistle-blowing procedures in good faith from any form of retaliation;
- Where internal channels do not exist or function effectively, or in circumstances in which it could not possibly be expected to function properly given the nature of the disclosure, whistle-blowing externally should be protected;
- Any "whistle-blower" acting in good faith when blowing the whistle should be protected even in circumstances in which it later comes to light that the allegations were unfounded;
- The relevant legislation should protect the whistle-blower from forms of retaliation and such retaliation should be punishable;
- Appropriate protection should also be provided in respect of accusations which are made in bad faith;
- Regarding the burden of proof to be borne, it should rest with the employer to establish beyond reasonable doubt that reprisal alleged to have been taken was not due to a protected disclosure made by an alleged whistle-blower;
- The implementation and the resultant impact of the relevant legislation should be monitored and evaluated at regular intervals.

Martin[26] in taking stock of the status of whistle-blowing in South Africa takes a similar approach in identifying the desired characteristics of an effective piece of whistle-

26 Martin 2010 http://www.opendemocracy.org.za/wp-content/uploads/2010/10/ODAC_Whistleblowing_Report_web.pdf (Date of use: 18 August 2012). http://www.opendemocracy.org.za/wp-content/uploads/2010/10/ODAC_Whistleblowing_Report_web.pdf (Date of use: 18 August 2012).

blowing legislation, and or framework. Additionally to Omtzigt's[27] recommended indicators Martin includes the following:[28]

- That the law oblige investigations and corrective measures in response to disclosures that are made;
- Protect the whistle-blowers against both criminal and civil liability or sanction;
- Prohibiting an act or agreement that aims at excluding any protection that is availed to a whistle-blower;
- Ensuring a full range of remedies availed to the whistle-blower including for example interim and final interdicts, compensation for pain and suffering, loss of earnings and loss of status, mediation and legal costs.
- The prohibition of any kind of interference with a disclosure by a whistle-blower; and
- The facilitation (by the law) of the acceptance, participation in and public awareness of whistle-blowing.

1.7 The template to be utilised in determining measurable comparative points/ elements

In order to constructively and fairly compare all the selected legislation in terms of the strengths, weaknesses and shortcomings, it is necessary to establish a set of uniform, clearly measurable points identified for analysis and comparison.

The template reflected below has been designed by the author in order to constructively and fairly measure the strengths, shortcomings and weaknesses.

This template is utilised in this study in Chapters 8, 10, 12, 14 and 15.

Taking into account best practice pertaining to whistle-blowing, and what one would expect such legislation to address, the various Acts selected will be analysed and compared on the following uniform basis:

27 Omtzigt P http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=12302&Language=EN (Date of use: 29 October 2013).

28 Martin 2010 http://www.opendemocracy.org.za/wp-content/uploads/2010/10/ODAC_Whistleblowing_Report_web.pdf (Date of use: 18 August 2012).

Measurable 1:	Definition of a protected disclosure includes all *bona fide* disclosures against various types of unlawful acts including serious human rights violations, life, liberty and health.			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
Measurable 2:	Covers public and private sector whistle-blowers, including armed forces and special forces.			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
Measurable 3:	Provides for various legal issues as set out below:			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
Employment laws				
Criminal law				
Civil law				
Media law				

Specific anti-corruption measures				
Interim interdicts				
Final interdicts				
Compensation for pain and suffering				
Loss of earnings				
Loss of status				
Mediation				
Legal costs				
Measurable 4:	Appropriate incentives offered to private and public sectors to put appropriate whistle-blower measures in place			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
Measurable 5:	Independent oversight body			

Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
Measurable 6:	Ensuring that disclosures are timeously and properly investigated			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
Measurable 7:	Ensuring that the identity of the whistle-blower is protected			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
Measurable 8:	Protect anyone who makes use of internal whistle-blower procedures in good faith from any retaliation			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
Measurable 9:	Prohibition of interference with a disclosure by a whistle-blower			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*

Measurable 10:	In relevant circumstances, external whistle-blowers are protected			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
Measurable 11:	Whistle-blowers acting in good faith when blowing the whistle are protected even if it turns out later that the allegations were unfounded.			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
Measurable 12:	Enforcement mechanism to investigate the whistle-blower's allegations			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
Measurable 13:	Appropriate protection provided for accusations made in bad faith			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
Measurable 14:	Burden of proof should rest with the employer to prove that the alleged action/ omission wasn't in reprisal due to protected disclosure made			

Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
Measurable 15:	The impact and implementation of the legislation measured at regular intervals			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
Measurable 16:	Facilitation by the law of acceptance, participation in whistle-blowing and public awareness of whistle-blowing			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*

TABLE 1: MEASURABLES TEMPLATE

1.8 Conclusion

The South African Government has decidedly indicated in the NDP – 2030 that fighting corruption within our country is a national priority, as is the strengthening of the position of the whistle-blower in achieving this objective. The recognition of ensuring appropriate protection for whistle-blowers is pivotal. At the very centre of this thesis lies the question as to whether or not the whistle-blower in South Africa indeed enjoys the necessary protection needed and as envisaged by the relevant provisions of the PDA, and further to this what the whistle-blower in South Africa's position is when compared to the protection afforded to whistle-blowers in the United Kingdom, Australia and New Zealand.

In order to determine the aforementioned, it has been deemed necessary to ensure that the manner of determination is undertaken in a uniform manner and to this end 16 (sixteen) clearly measurable points of comparison have been identified. These 16 measurable points are contained in the format as represented in **table 1,** which will be utilised in the relevant chapters going forward in accordance with the content as summarised. The measurables identified are based on accepted best practice regarding whistle-blowing, as well as the expectation of one would regard as central to such protection.

In the main Chapters 8, 10, 12 and 14 deal with the findings in accordance with the identified 16 measurables, with Chapter 15 providing the final conclusions in answer of the question posed.

CHAPTER 2: WHISTLE-BLOWING

2.1 Introduction

Gabriella[1] states that research results, recently released, showed that 40% of South Africans thought that parliamentarians and councillors were corrupt; this figure showed a significant increase from 2008, when 25% of South Africans believed that almost all or most members of parliament were involved in corruption.

It has to be borne in mind that although the abovementioned refers specifically to parliamentarians and councillors, the perceptions regarding whistle-blowers and whistle-blowing ripple out much further and are applicable far beyond only politicians.

This is however indicative of the perceptions and ties in with the government's determination[2] to tackle corruption head-on in the coming years. It is also a priority as expressed in the NDP – 2030.

The Association of Certified Fraud Examiners (hereinafter referred to as the "ACFE") recently published the second *Report to the Nations on Occupational Fraud and Abuse*[3] with some of the findings relating to the fact that the average fraud lasts 18 months before it is reported, and that corruption and billing schemes pose the greatest threats to organisations globally, as these two types of schemes comprised more than 50 per cent of the frauds reported to the ACFE. Two further significant findings were that the banking and financial service industry, government and public administration, and manufacturing sectors are most commonly victimised; and in cases in which such victim organisations had implemented any one of the 16 'common' anti – fraud controls, experienced significantly lower losses, as well as a shortened period in respect of detection.

One of the conclusions reached in the report was that by providing individuals with a manner in which to report suspicious activity is indeed a pivotal part of any anti-fraud

---

1 Gabriella 2012 June 1 "Perception of corruption on the increase" http://opengovpartners.org/za/2012/06/01/perception-of-corruption-on-the-increase/ (Date of use: 15 September 2012).

2 As referred to and discussed under paragraph 1.2 *supra.*

3 Association of Certified Fraud Examiners. 2012 Report to the Nations on occupational fraud and abuse 2012 Fraud Study http://www.acfe.com/uploadedFiles/ACFE_Website/Content/rttn/2012-report-t-nations.pdf (Date of use: 28 October 2013).

programme; in fact they assert that management should actively encourage employees to report suspicious activity, and adopt and enforce an "anti-retaliation policy".

It has to be postulated that the topic of whistle-blowers and whistle-blowing does not conjure up positive images and thoughts, even though it is more often than not something done with noble intentions, and with the whistle-blower knowing full well that more likely than not, doing so may end in hardship, for him or her and his or her family, real risk to any career related aspirations, and even the risk of bodily harm being perpetrated against him or her or them.

Uys[4] acknowledges that although whistle-blowers are generally viewed as being pivotal in respect of fighting "corporate misconduct", it is the whistle-blowers who pay the heaviest price, even when taking into account all the noble values espoused by those same organisations who shun and isolate the whistle-blower. According to Uys whistle-blowing is typically viewed as betrayal, a deviant act, threatening to the organisation against which it is made, and as a result of which the whistle-blower is dealt with as one would deal with a traitor.[5]

She continues to list the ways in which the whistle-blower is usually punished including the ostrich approach, pretending to take the matter disclosed seriously whilst in actual fact doing nothing, the cold-shoulder type treatment and isolation, identifying the whistle-blower as a "troublemaker", stonewalling, immediate dismissal, abrupt decline in performance scoring, suspension, transfer, harassment, character assassination, disciplinary action and even "sexual exploitation". She states that the fact that the whistle-blower is an "insider is an essential element of the perception of betrayal."[6]

This argument is strongly underscored by some of the synonyms used with reference to whistle-blowers, such as a narc, rat, scab, snake, snitch, squealer, stool

4 Uys 2008 *Current Sociology* October 15 904-921.
5 Uys 2008 *Current Sociology* October 15 905.
6 Uys 2008 *Current Sociology* October 15 906.

pigeon, stoolie, tattletale, tipster, weasel, informer, betrayer, blabbermouth, canary, deep throat, double-crosser, fink, spy, source or a plant, to mention but a few.[7]

In Afrikaans a whistle-blower is sometimes referred to as a *verkliker,* which is understood as being a squealer, and which bears the same negative connotation.

Then there is, of course, the very specifically South African slang for a whistle-blower, to be seen against the authoritarian historical advent of apartheid, namely "*impimpi*", which within South Africa's context, considering the country's history, has the most derogatory meaning and connotations associated with the political history, which often involved informers. Statements made to the Truth and Reconciliation Commission quite aptly express the feelings and connotations pertaining to whistle-blowers or informers, and in this regard reference is made to a newspaper article published in 1997 and entitled "ANC Says it assassinated top impimpi and other informers".[8] But the negativity connected with *impimpis* has far outlived the apartheid era, as a newspaper article, relating to the fact that the South African Police Services used footage obtained by journalists to identify the perpetrators of crime, shows. In this regard the rural journalist Oris Mnisi made the statement that in effect the police, in using material from journalists would lead to the community regarding journalists as impimpis, police spies, and endanger the lives of the journalists. [9]

It is damning indeed to note the reporter himself interprets "impimpi" as meaning a "police spy", and as such a whistle-blower outside the meaning assigned to it in terms of the South African whistle-blowing legislation.

2.2 The origins of whistle-blowing

Evans[10] at page 268 avers that for some whistle-blowing is not much more than an act of dissent; it is argued that a more specific definition of whistle-blowing is required in order to distinguish it from other broad acts of dissent, including 'suing or arguing'. It is further averred that whistle-blowing is a particular type of dissent with

7 Anonymous 2012 http://theasaurus.com/browse/whistle-blower (Date of use: 15 September 2012).

8 SAPA 1997 May 12 http://www.justice.gov.za/trc/media/1997/9705/s970512e.html (Date of use: 14 September 2012).

9 ZIWAPHI "Police use journalists' footage to arrest protestors, says Premier DD Mabuza" 2009 http://www.ziwaphi.com/ziwaphi/Police_use_journalists%E2%80%99_footage_to_arrest_protestors,_says_Premier_DD_Mabuza.html (Date of use: 15 September 2012).

10 Evans 2008 *Innovation: the European Journal of Social Science, Research* (21)(3) 267-279.

its own characteristics, and finding its origins from the practice utilised by the English "bobbies" or policemen.

There are many opinions as to where the term "whistle-blowing" originated, including the opinion that it is derived from the metaphor of the whistle blown by a British policeman ("Bobby") in olden times when the perpetration of a crime was noticed, or a whistle blown by a referee in a soccer or rugby match when a foul (broken rule) is noted, all signalling that untoward or illegal conduct is taking or has taken place.

It is also averred that Ralph Nader coined the term in an effort to remove the negative connotations, being drawn back to the first whistle-blowing conference hosted by Nader in the United States in 1971 with the topic being "Professional Responsibility". Nader later published a report following the conference regarding cases of employees who had blown the whistle at work.[11]

However, whistle-blowing and *qui tam* are often linked, with *qui tam's* earliest history being traced to 13th century England, in which *qui tam* writs were used to enforce the laws of the Crown. It was commonly used by ordinary citizens to access the King's court in order to redress alleged personal injury caused by lawbreakers. It is averred that the British Settlers took the roots of *qui tam* with them to their colonies.[12]

Qui tam is the Latin for "who as well", and relates to litigation instituted by a private person as plaintiff, as well as for the government as a plaintiff. [13]

It seems that the first legislation providing for whistle-blowers was made available in the United States of America in terms of the provisions of the False Claims Act in approximately 1863, and in respect of *qui tam*.[14]

The False Claims Act provides for private persons to bring *qui tam* action against another who has allegedly defrauded the United States government by knowingly presenting a false claim for payment thereof. Further to this, in *qui tam* actions, in terms of which the plaintiff files a suit on his own behalf, and that of the United States

11 Anonymous http://www.uib.no/rg/bbrg/research/whistleblowing (Date of use: 9 May 2013)
12 Anonymous http://www.whistleblowingprotection.org/?q=node/12 (Date of use: 1 July 2015).
13 Anonymous http://www.law.cornell.edu/wex/qui_tam_action (Date of use: 9 May 2013).
14 Anonymous http://www.law.cornell.edu/wex/qui_tam_action (Date of use: 9 May 2013).

government, if successful, the plaintiff will be entitled to share in the proceeds of any recovery made therein. [15]

The United States' Continental Congress enacted the False Claims Act during Abraham Lincoln's presidency, in attempt to address the alleged endemic fraud that was fraught amongst the private suppliers to the Union's army. The False Claims Act was amended in 1943, significantly reducing the share that the whistle-blower could claim, and further included a requirement pertaining to the fact that the whistle-blower had to have personal knowledge regarding the allegations levelled.[16]

During 1986 the False Claims Act was again amended, which amendments are said to make it both easier and more profitable for private citizens to blow the whistle in terms of its provisions. The 1986 amendments included the protection of whistle-blowers who were demoted, suspended, threatened, harassed, or otherwise discriminated against in their employment as a result of having blown the whistle. [17]

The protection of what amounts to whistle-blowers is also to be found in the Termination of Employment Convention, 1982, no. 158[18] of the International Labour Office. [19] Article 5(c) provides that submitting a complaint, participating in proceedings which involve the employer, which employer is allegedly involved in the violation of laws or regulations, and recourse sought to a competent administrative authority do not constitute a valid reason for the termination of employment.

Articles 8 and 9 of the Convention provide for the remedies available to a worker who is of opinion that his employment has been unjustifiably terminated, as well as the powers of the bodies or courts considering the alleged unjustifiable termination.

2.3 Defining the whistle-blower and whistle-blowing

Who is defined as a whistle-blower and what is defined as whistle-blowing also does not enjoy a commonly accepted definition, as the description of both is influenced by the context in which it is used.

15 Anonymous http://www.justia.com/employmnet/qui-ta-whistleblower/ (Date of use: 9 May 2013).
16 Anonymous http://www.whistleblowingprotection.org/?q=node/12 (Date of use: 1 July 2015).
17 Anonymous http://www.justia.com/employmnet/qui-tam-whistleblower/ (Date of use: 9 May 2013).
18 International labour Office (1982), Termination of Employment Convention, No 158 http://www.oli.org/public/libdoc/ilo/1983/83B09_27_engl.pdf (Date of use: 10 May 2013).
19 Ratified by the Governing Body, 222nd Session, 1983, Geneva, Switzerland.

In general terms there is consensus regarding the fact that a whistle-blower is someone who brings attention to wrongdoing, and in this regard some of the definitions to be found involve the following:

- A person who tells someone in a position of authority about something illegal that is happening, especially in a government department or a company.[20]
- An employee who publicly reports illegal activities going on inside his/her company.[21]
- An informant who exposes wrongdoing within an organization in the hope of stopping it.[22]
- A person who informs on a person or organization engaged in an illicit activity.[23]

Thus the commonalities seem to be centred regarding the fact that a person informs another of alleged wrongdoing within a sphere relevant to the attendant circumstances.

Dawson [24] defines a whistle-blower as someone who alerts another regarding scandal, malpractice or corruption, as well as negligence, a waste of resources, misrepresentations and violations regarding safety.[25]

He later defines whistle-blowing as the deliberate and voluntary disclosure of either individual or organisational wrongdoing by a person who has or has had access to data, information or events relating to the actual, suspected or anticipated wrongdoing within or by an organisation, and in respect of which it has the ability to control the wrongdoing alleged. He states that this disclosure may be internal or external and may or may not become part of public record.[26]

---

20 Cambridge Dictionaries online http://dictionary.cambridge.org/dictionary/british/whistle-blower (Date of use: 9 May 2013).
21 InvestorWords http://www.investorwords.com/5304/whistle_blower.html (Date of use: 9 May 2013).
22 The Free Dictionary http://www.thefreedictionary.com/whistleblower (Date of use: 15 September 2012).
23 Oxford Dictionaries http://www.oxforddictionaries.com/definition/english/whistle-blower (Date of use: 9 May 2013).
24 Dawson www.bmartin.cc/dissent/documents/Dawson.html (Date of use: 20 August 2012).
25 Dawson www.bmartin.cc/dissent/documents/Dawson.html (Date of use: 20 August 2012).
26 Dawson www.bmartin.cc/dissent/documents/Dawson.html (Date of use: 16 September 2012).

Bouville [27] defines whistle-blowing as the act by which an employee or former employee discloses what he believes to constitute unethical or illegal behaviour to a higher level of management, or to an external authority or even to the wider public. [28]

Pierson *et al*[29] refer to whistle-blowing as the term which is applied to the reporting of an employee regarding illegal, immoral or illegitimate practices which are perpetrated under the control of their employer, to a party who is in a position to take corrective action.[30]

The Minimum Anti-Corruption Capacity guidelines [31] under the auspices of the Department of Public Service Administration, defines whistle-blowing[32] as the raising of a concern regarding malpractice in the organisation, whilst the whistle-blower is defined as the person who reports the corruption.

The disconnection in relation to the type of matter the whistle can or may be blown on, to be found in the definitions is noted, as the definition of a whistle-blower seems to imply that only a person reporting on corruption can in fact qualify as a whistle-blower.

Mansbach [33] surmises whistle-blowing as being the public disclosure made by a person working within an organisation, regarding acts, omissions, practices or policies perpetrated by that specific organisation that wrongs or harms a third party, with the intention of the whistle-blower being to gain the attention of the public or authorities, in order to end the wrongdoing alleged.

Mansbach's definition is particularly narrow, and in no way clarifies to whom the report is made or to be made.[34]

---

27 Bouville 2007 *Journal of Business Ethics* http://mathieu.bouville.name/education-ethics/Bouville-whistle-blowing.pdf (Date of use: 21 August 2012).
28 Bouville 2007 *Journal of Business Ethics* http://mathieu.bouville.name/education-ethics/Bouville-whistle-blowing.pdf (Date of use: 21 August 2012).
29 Pierson 1993 *AJIS* (1)(1) 58-62.
30 Ellison FA1982 *Journal of Business Ethics* 167-177.
31 Department of Public Service Administration, 2006. Anti-Corruption Capacity Requirements – Guidelines for implementing the Minimum Anti-Corruption Capacity Requirements in Departments and Organisational Components in the Public Service, South Africa.
32 Minimum Anti-Corruption Capacity Guidelines 51.
33 Mansbach 2007 *Business Ethics: A European Review* 16.
34 Mansbach 2007 *Business Ethics: A European Review* 124.

Whilst in turn, Blonder[35] defines whistle-blowing and its various forms as applying to unauthorised disclosures made by an employee or a person in some category of labour relationship, to an organisation, concerning a concern relating to organisational or professional misconduct, and which is often made public by way of the media. He goes further in stating that the disclosures are referred to as being unauthorised as the employee making the disclosure typically does not have the necessary consent from his or her supervisor to report the misconduct.

2.4 The protection of whistle-blowers

Domfeh and Bawole[36] opine that whistle-blowing is often the most effective weapon against wrongdoing of a collective nature, adding that the practice of whistle-blowing has the potential of being hazardous with damaging consequences for the whistle-blower and in certain instances for the organisation involved.[37]

They state further[38] that whilst South Africa is known for officially acknowledging the pivotal role of whistle-blowing through the implementation of the Protected Disclosures Act of 2000, it remains so that the image of the whistle-blower remains pertinently negative, with the whistle-blower remaining tainted. Thus whilst the provisions of the legislation protects the whistle-blower in theory, the whistle-blower often remains unprotected from the backlash of reprisal. According to them, the Travelgate Affair in South Africa has raised critical questions regarding the moral dilemmas facing the whistle-blower, and the public.[39]

"Travelgate", as it is commonly referred to, is known as the biggest post-apartheid corruption scandal in South Africa's history, in terms of which forty past and present members of Parliament stood to be charged with the fraudulent usage of parliamentary travel vouchers.

Domfeh and Bawole's conclusion[40] reached, is what lies at the heart of this research. They commend the enactment of the whistle-blower legislation as a '*commendable effort',* demonstrating that the countries have shown the will to fight corruption and

35 Blonder 2010 *Criminal Justice Ethics* (29)(3) 258-277.
36 Domfeh and Bawole 2011 *Journal of Public Affairs* (11)(4) 334-343.
37 Domfeh and Bawole 2011 *Journal of Public Affairs* (11)(4) 340.
38 Domfeh and Bawole 2011 *Journal of Public Affairs* (11)(4) 340.
39 Domfeh and Bawole 2011 *Journal of Public Affairs* (11)(4) 342.
40 Domfeh and Bawole 2011 *Journal of Public Affairs* (11)(4) 342.

strengthen governance efforts; however, they point to the case law, asking whether it is in fact enough.[41] However, they hasten to add that people will not report come forward to report alleged wrongdoing just because whistle-blower legislation has been enacted. They forward the argument that people will only do so in circumstances in which they are truly satisfied that the whistle-blower laws and the institutions related thereto are substantive.[42]

As should be clear, whistle-blowing is not glamorous in any way, and the consequences to the people who do speak up and do speak out about wrongdoing sometimes pay the ultimate price. Dawson[43] refers to an Independent Commission against Corruption (hereinafter referred to as "ICAC") study which revealed that 71 per cent of those surveyed expected that people who report corruption would suffer as a result of having reported it. He states:

> Those who had been in the public service for more than a year were much more likely to hold this view than those who had been employed for less than a year (73 per cent v 55 per cent). One third of those surveyed were not confident that their organisation would handle reports of corruption appropriately, with markedly less confidence in rural areas. While 84 per cent believed that something could be done about corruption, only 26 believed that something would be done about it."

ICAC was established by the New South Wales Government, Australia, in 1989, in order to address the growing community concern about the integrity of public administration in New South Wales.[44]

2.5 Why blow the whistle?

Uys,[45] highlights three basic characteristics of people who do blow the whistle, namely that they are usually highly respected, competent and core employees within the organisation; value a dedication to higher moral principles more than the organisational norms '*held dear by management'* and are naïve in their beliefs that the organisation actually wants to hear the truth.

She states that usually the whistle-blower begins his or her employment as a loyal employee, who usually realises that the employer generally speaking does not

41 Domfeh and Bawole 2011 *Journal of Public Affairs* (11)(4) 342.
42 Domfeh and Bawole 2011 *Journal of Public Affairs* (11)(4) 343.
43 Dawson www.bmartin.cc/dissent/documents/Dawson.html (Date of use: 20 August 2012).
44 The official ICAC website is to be found at www.icac.nsw.gov.au (Date of use: 30 June 2015).
45 Uys 2000 *Business Ethics: A European Review* (9)(4) 259-267.

appreciate being told bad news. In fact Uys labels this as one of the ironies of blowing the whistle, as the response of management will determine whether or not the whistle-blower will evolve into an active political agent. [46]

She also points to the fact that usually the whistle-blower becomes the enemy.

Why anyone would in fact blow the whistle is a mystery to many, especially when one takes into account the potential fate of whistle-blowers in general. Bouville[47] quite aptly explains the two sides of the face of whistle-blowers by stating that whistle-blowing's status is in fact debatable. On the one side there are the whistle-blowers who are viewed as traitorous violators of the organisation's norms, whilst on the other side there are those who view them as heroic defenders of values which are seen as being superior to company loyalty. The whistle-blower is left with the choice between betraying his organisation or his humility.[48]

Expressed above, one finds a rather dark and cynical view and opinion of the whistle-blower, as the intent seems to be to interpret their actions within the context of betrayal, thus strengthening the view that whistle-blowers are not welcomed for airing their concerns or opinions. Pierson[49] hold a slightly more positive view in stating that although there are problems and challenges pertaining to whistle-blowing, and despite the fact that it is a controversial issue, there is seemingly a heightened interest from management, even extending to the question of how to deal with such incidences. Pierson opines that it would seem that the most employees, whether or not they are within a managerial position have seen wrongdoing at their place of employment, with most of these wrongdoings never being reported, as seemingly ignoring such incidents are the norm.[50]

---

46 Uys 2000 *Business Ethics: A European Review* (9)(4) 260.

47 Bouville 2007 *Journal of Business Ethics* http://mathieu.bouville.name/education-ethics/Bouville-whistle-blowing.pdf (Date of use: 21 August 2012).

48 Bouville 2007 *Journal of Business Ethics* http://mathieu.bouville.name/education-ethics/Bouville-whistle-blowing.pdf (Date of use: 21 August 2012).

49 Pierson 1993 September http://dl.acs.org.au/index.php/ajis/article/view/432/392 (Date of use: 20 August 2012).

50 Pierson 1993 September http://dl.acs.org.au/index.php/ajis/article/view/432/392 58 (Date of use: 20 August 2012).

In exploring the links between morality and self, Bouville [51] states that codes employed by the employer merely places more duties upon the shoulders of professionals, whilst failing to acknowledge the fact that these professionals are individuals as opposed to only being a route for duty. Bouville further states that the question of whistle-blowing then boils down to comparing a duty towards the public with a duty towards the employer. [52]

He acknowledges however that in holding this view one would be discounting the duty that one owes to oneself, and that usually thoughts about the duty toward oneself would encompass feelings of guilt and selfishness. However, inevitably, it is argued, that a whistle-blower would have to consider the duty not only toward him or herself, but also a duty or obligations he or she may have towards the people in his or her life, such as a spouse and children. Not to do so would be irresponsible and even frivolous.

Bikinos [53] uses the definitions attributed to Camerer, and Uys, defining whistle-blowing as the unauthorised disclosure of perceived organisational wrongdoing by a member or former member of the organisation to parties who are in a position to take corrective action in circumstances in which the disclosure is in the public interest. [54]

He attributes the "unauthorised" nature of the disclosure to two basic factors, namely: the fact that the nature of the wrongdoing may be sensitive and protected, and as such a disclosure in this regard breaches both the confidentiality and the trust of the whistle-blower's access to the relevant information; and for the above-mentioned reason, such disclosure when made may be met with responses of "ambivalence or an unwillingness to acknowledge the issue".

It is in light of the above that the whistle-blower will blow the whistle outside the realm of what is seen as acceptable, in his or her search for an "appropriate response". He

---

51 Bouville 2007 *Journal of Business Ethics* http://mathieu.bouville.name/education-ethics/Bouville-whistle-blowing.pdf (Date of use: 21 August 2012).

52 Bouville 2007 *Journal of Business Ethics* http://mathieu.bouville.name/education-ethics/Bouville-whistle-blowing.pdf (Date of use: 21 August 2012).

53 Bikinos www.uj.ac.za.EN/Faculties/humanities/departments/sociology/about/Documents/Bibikos%20Sounds.pdf (Date of use: 21 August 2012).

54 Bikinos www.uj.ac.za.EN/Faculties/humanities/departments/sociology/about/Documents/Bibikos%20Sounds.pdf (Date of use: 21 August 2012).

further avers that whistle-blowing takes place when there is a lack of trust towards the organisation, and also refers to the dilemma requiring the whistle-blower to make a choice between loyalty to the organisation, and either accepting or rejecting the wrongful behaviour perceived by the whistle-blower.

Bikinos states that as a result of the authority that the organisation is cloaked with, the leadership cadre has as much reason to distrust the whistle-blower as the whistle-blower has to distrust the organisation. The whistle-blower ceases to recognise the organisation's authority, which makes it more likely that the whistle-blower will blow the whistle externally becoming the so-called enemy within.

He used a questionnaire, and was able to successfully establish that organisational trust was in fact the influencing variable in the decision taken as to whether or not to blow the whistle internally. The conclusion reached included the fact that organisational trust did not play a major role in external whistle-blowing, and that other considerations may play a role in this regard including for example political behaviour or personal gain.

It seems as though, in deciding whether or not to blow the whistle, whistle-blowers are indeed faced with a dilemma pertaining to doing what is right versus what is safe for them, in light of the professional gamble it may turn out to be, or even the gamble with his or her life itself.

Luke[55] has identified 5 dilemmas that face an employee in deciding whether or not to blow the whistle, and as such are considered by the said employee namely:

- The disapproval of management regarding whistle-blowers;
- The disapproval of co-workers regarding whistle-blowers;
- Whether or not the relevant conduct is personally affecting the whistle-blower (employee);
- Feelings of loyalty towards the employer; and
- How much evidence the employee has against the perpetrator.

55 Luke www.ehow.com/info_8546932_five-dilemmas-faced-employees-whistleblowing.html (Date of use: 23 August 2012).

Gehringer[56] in discussing the ethical dilemmas of whistle-blowing identifies at least three approaches to whistle-blowing ethics, namely:

- The first view is that a whistle-blower is someone who "rats" on the company, and so doing undermines not only the team work but also the hierarchical authority that exists within the company;
- The second view is that whistle-blowing may be seen as a "tragedy to be avoided". In this regard he states that, "In certain cases, it may be a necessary evil, but it is almost always bad news all around. It is proof of organizational trouble. It threatens the careers of managers, disrupts collegiality (because colleagues resent the whistle-blower), and damages the informal network of friends at the workplace." He compares it to being as painful as a "disintegrating marriage".
- The third view is that it is an obligation when "serious and considerable harm to public is involved".

Further to this he states that it is better not to marry in haste, but rather choose a partner in marriage (in his comparison of whistle-blowing, and with the marriage partner being the employer) carefully in order to reduce the need for blowing the whistle right from the start. He also opines that blowing the whistle is never a decision to be taken lightly, and that the time to prepare for such an eventuality is to be found in the now, in order to avoid the need arising in the future. However, should it become necessary to blow the whistle, he warns that the whistle-blower should be aware of the attendant risks and above all, the obligations to family, the profession and the public.

Clarke[57] discusses the whistle-blower's dilemma from an accountant's perspective, and refers to three potential choices in a situation which involves an ethical dilemma, namely: to attempt to change the situation; to attempt to mentally isolate oneself from the situation in question; or to resign.

---

56 Gehringer http://people.engr.ncsu.edu/efg/379/sum06/lectures/wk15lecture.html (Date of use: 21 August 2012).

57 Clarke 1999 *Sunday Business Post* October www.sme.ie/articles/business_ethics/whistleblowers_dilemma.pdf (Date of use: 15 August 2012).

In the article he quotes a Chief Financial Officer who was not spared the anguish of whistle-blowing as an ethical dilemma, and who stated, “I am a white knight who did the right thing and was out of work for 18 months, losing my self-respect in the process. Was it worth it? That is a personal question that I don’t have the answer to. But please, God, don’t offer me this choice again.”

Opining as to why it is so difficult to blow the whistle, Clarke states that there may be various contributing factors in this regard, such as the conflicting emotions and thoughts of wanting to be loyal to someone or an organisation, and wanting to correct the wrong perceived; hen the wrongdoer is personally known to the whistle-blower; and the thin or grey line between what is right, even when it feels wrong, and the ensuing feelings of guilt.

In closing Clarke refers to the phrase coined by General ‘Stormin’ Norman Schwarzkopf, who states, “The truth of the matter is that you always know the right thing to do. The hard part is doing it.”

Dawson states that in many documented whistle-blowing cases, the whistle-blower was the sole person in a group who was prepared to take a stand regarding the issue in question, whilst other members of the group were often aware of the conduct complained of, even viewing the said conduct with disapproval. However, due to considerations relating to *inter alia* career interests and prospects, the other members of the group chose to remain silent and disassociate themselves, even on a personal level, from the whistle-blower.[58]

Van Es and Smit looked at blowing the whistle and the involvement of the media.[59] They referred to research[60] pertaining to whistleblowing that had concluded that the most productive manner in which to solve ‘moral conflict’ in the workplace is to deal with the conflicts internally, as opposed to cases in which the whistle-blower had chosen to air the conflicts externally, in which case usually one out of ten cases would be resolved. They are of the view that research shows that the majority of whistle-blowers experience negative personal consequences, especially in respect of

58 Dawson www.bmartin.cc/dissent/documents/Dawson.html (Date of use: 20 August 2012).
59 Van Es and Smit 2003 *Business Ethics: A European Review* (12)(2) 144-150.
60 Vermaas 2002 http://docs.szw.nl/pdf/35/2002/35_2002_3_2107.pdf (Date of use: 18 June 2014).

social and financial sanctions imposed. They further opine that in making the revelations public, the personal interests of the whistle-blower are effectively damaged and the moral conflicts less effectively solved.[61]

In making the choices relevant to blowing the whistle, they identify three "moral domains and perspectives", namely public ethics, personal ethics and organisational ethics.[62]

They conclude that within the context of external whistle-blowing there are three parties involved, each with their own motivation and background within the given circumstances. They stated further that in overreacting to a potential whistle-blower, the problem may increase, pointing out that whistle-blowers long for recognition, whether internally or externally. Prevention is lauded as the best option, reached by an attempt to solve the conflicting perspectives and interests between the managers and professionals in the relevant organisation.[63]

2.6 Conclusion

Although explanations as to the origins of the term “whistle-blower” are varied, what is clear is that whistle-blowers are not always viewed in a positive light. Although they may have blown the whistle with the noblest of intentions, only in exceptional circumstances will it not impact negatively on the whistle-blower’s life, with the whistle-blowers sometimes paying the ultimate price.

The definitions regarding what a whistle-blower is also differ, however, in the main it refers to an individual who points out or brings to someone else’s attention actual or perceived wrongful (intentionally or negligently so) conduct in the form of either an act or an omission, whether in the public or private sector.

Although the decision as to whether or not to blow the whistle is an intensely personal decision, it is usually influenced by beliefs, the strength of the trust relationship between the whistle-blower and both the party allegedly in the wrong and the party receiving the disclosure from the whistle-blower. Irrespective of what the actual reason and or motivation is behind the whistle-blower’s disclosure, he or she

61 Van Es and Smit 2003 *Business Ethics: A European Review* (12)(2) 144.
62 Van Es and Smit 2003 *Business Ethics: A European Review* (12)(2) 145.
63 Van Es and Smit 2003 *Business Ethics: A European Review* (12)(2) 150.

will in most instances experience internal conflict and regret as a result of the ethical dilemma it places him or her in.[64]

64 Fredin 2011 *Ethics & Behaviour* (21)(5) 404-427.

CHAPTER 3: AN INTRODUCTION TO NOTEWORTHY INFLUENCES IN RESPECT OF WHISTLE-BLOWING WITHIN THE SOUTH AFRICAN CONTEXT

3.1 Introduction

The protection afforded to a whistle-blower is a great deal more enticing when the relevant provisions are embodied in legislation, such as in the PDA. This chapter briefly explores the other noteworthy influences within the South African context, including internal measures, specifically within the public service domain, and international instruments.

When looking at the content of this chapter, one cannot help but to say that there is an apparent “political will” to fight corruption in all earnest, including, providing for the protection of whistle-blowers within this context.

Within the context of this chapter it is to be understood that with regard to conventions and protocols, the signing thereof indicates the intention of a State to take steps in order to express its consent to be bound by the convention and/or protocol.

Such signing also creates an obligation, in the period between signing and consent to be bound (ratification), to refrain from any acts that would defeat the object and purpose of the relevant convention and/or protocol.However, to be binding on a signatory state, it is thereafter to be ratified, whereby the signatory state clearly establishes its consent to be bound thereby.

In this section the relevant instruments, guidelines and provisions in this regard, both at a national and an international level, where the Republic of South Africa (hereinafter referred to as the “RSA”) has explicitly pronounced agreement and as such commitment, will be touched on.

3.2 The Code of Conduct for the Public Service

Within the context of the South African government and civil servants, the Code of Conduct for the Public Service, as contained in Chapter 2 of the Public Service Regulations, 2001, states that the Code of Conduct “…should act as a guideline to

employees as to what is expected of them from an ethical point of view, both in their individual conduct and in their relationship with others."[1]

Paragraph C.4 deals with the performance of duties, and C. 4.10 provides that employees, within the course of their official duties, shall report fraud, corruption, nepotism, maladministration and others acts constituting an offence or which is prejudicial to the public interest to the appropriate authorities.

Paragraph C.4 (a-c) clearly places a duty on such employee; however, it has to be noted that no concurrent provision is made in the regulations, placing a duty on the employer or senior management not to cause detriment or more specifically occupational detriment to an employee who makes such a report. In terms of ethical conduct, all that is expected of senior management is that they:

- Exhibit the type of conduct which meets the highest standards regarding conduct of an ethical nature;
- Serve as an example to their subordinates; and
- Ensure that through their conduct they limit potential conflicts of interest, prioritising the public interests.

This aspect will be dealt with more extensively under the auspices of Chapter 4.

3.3 Minimum anti-corruption capacity requirements

The Department for Public Service and Administration (hereinafter referred to as the "DPSA") has published a comprehensive document entitled "Guidelines for implementing the Minimum Anti-Corruption Capacity Requirements in Departments and Organisational Components in the Public Service (hereinafter referred to as the "MACC") in January 2006.[2] The purpose of the MACC is to provide the minimum requirements that all departments and organisational components within the South African Public Service have to develop and implement in order to fight corruption from within. The model is based on four pillars namely, prevention, detection, investigation and resolution.

---

1 Paragraph A2, Chapter 2 of the Public Service Regulations, 2001. http//www.dpsa.gov.za/dpsa2g/documents/acts&regulations/regulations1999/PSRegulations_13_07_2012.pdf (Date of use: 8 May 2013).

2 Department of Public Service Administration. Minimum Anti-Corruption Capacity. South Africa. www.ccps-africa.org/actoolkit/pdf/guidelines/DPSA_AC.pdf (Date of use: 8 May 2013).

In terms of the MACC model, presented below for ease of reference, whistle-blowing forms part of the second pillar, namely the detection of corruption; the other parts of detection are made up of the corruption database, internal audit, and management action.[3]

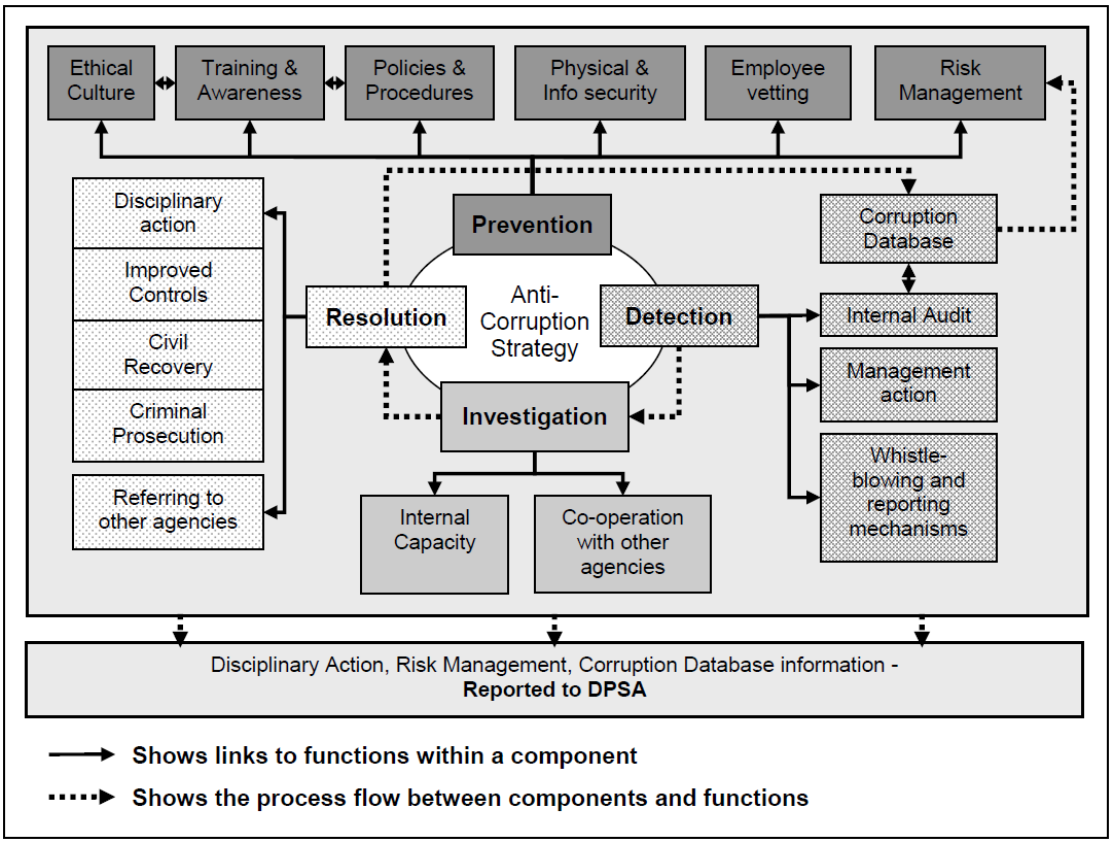


Figure 1

The document defines whistle-blowing and whistle-blowers [4] as:

> Whistleblowing is the raising of a concern of a malpractice in an organisation. People who report corruption are commonly known as "whistleblowers" and a reporting mechanism that makes it easy and safe for people to report is often referred to as a whistleblowers reporting mechanism.

It is stated that the most effective manner of detecting corruption is when people, either internal or external to that organisation, come across it in their "daily business". It is however recognised that due to mistrust, the fear of retaliation, and a

3 Currently the Anti-Corruption Working Group (ACWG) reporting to the Anti-Corruption Task Team (ACTT) is in the process of developing the new Anti-Corruption Framework (ACF), in which whistle-blowing and its importance is carried forward.

4 Department of Public Service Administration. Minimum Anti-Corruption Capacity. South Africa. www.ccps-africa.org/actoolkit/pdf/guidelines/DPSA_AC.pdf (Date of use: 8 May 2013).

lack of anonymity in reporting, such experiences are seldom reported. Suggestions for dealing with the kind of fears mentioned above include the use of the National Public Service Anti-Corruption Hotline (often referred to as "NACH"); the use of internal reporting mechanisms; and whistle-blowing or protected disclosure policies.

3.3.1 The Anti-Corruption Framework[5]

During 2011, the Inter-Ministerial Security Committee took the decision to establish the Anti-Corruption Task Team (hereinafter referred to as the "ACTT"), within the Justice Crime Prevention and Security Cluster (hereinafter referred to as the "JCPS"), in order to focus on government's prioritisation of anti-corruption measures.

The JCPS Cluster works as a collective in order to ensure that the priorities of, amongst others, reducing crime, improving the efficiency of the criminal justice system, dealing with corruption, managing the borders of the RSA, improving the RSA population registration system and prioritising the combating and prevention of cyber-crime, are efficiently and effectively achieved. It includes *inter alia* the South African Police Service, Department of Home Affairs, Department of Correctional Services, National Prosecuting Authority, Special Investigations Unit and the South African Revenue Service.

The aim was to develop and implement an updated strategy within the Public Service in the fight against corruption, which is proving to present a challenge to the Government. A number of Outputs were developed, and each relevant Output has a working group to oversee the co-ordination of the work to be performed in respect of the Outputs. During July 2012 Outputs 3 and 5 (now referred to as Output 3) were combined at ACTT level and approved; it is aimed at reducing corruption nationally. Part of the tasks performed by the Anti-corruption Working Group (hereinafter referred to as the "ACWG") was the performance of a MACC effectiveness audit on all JCPS cluster departments and components, during 2012/2013.

An additional task of the ACWG is to develop an updated MACC framework for implementation. The ACWG has developed the Anti-corruption Framework (hereinafter referred to as the "ACF"), which in principal has been accepted by all the

5 Approval for the inclusion of this portion has been obtained from the Chairperson of the ACWG, Mr. C. P. Collings.

participating JCPS Cluster department and entities, and which is accompanied *inter alia* by a JCPS Cluster Strategy, “Tackling Corruption Together”.

The ACF was crafted in a manner to ensure alignment, where relevant, with the NDP. The ACF is pictorially presented as follows, with whistle-blowing falling under the category of detection.

The core of the ACF espouses that the four pillars in combatting corruption centres on prevention, detection, investigation and resolution.

Whistle-blowing forms part of the detection of corruption related activities, leading to the investigation of the conduct so reported and resolution thereof, but more importantly leading to prevention of similar future conduct, based on the lessons learnt relating to the matter investigated.

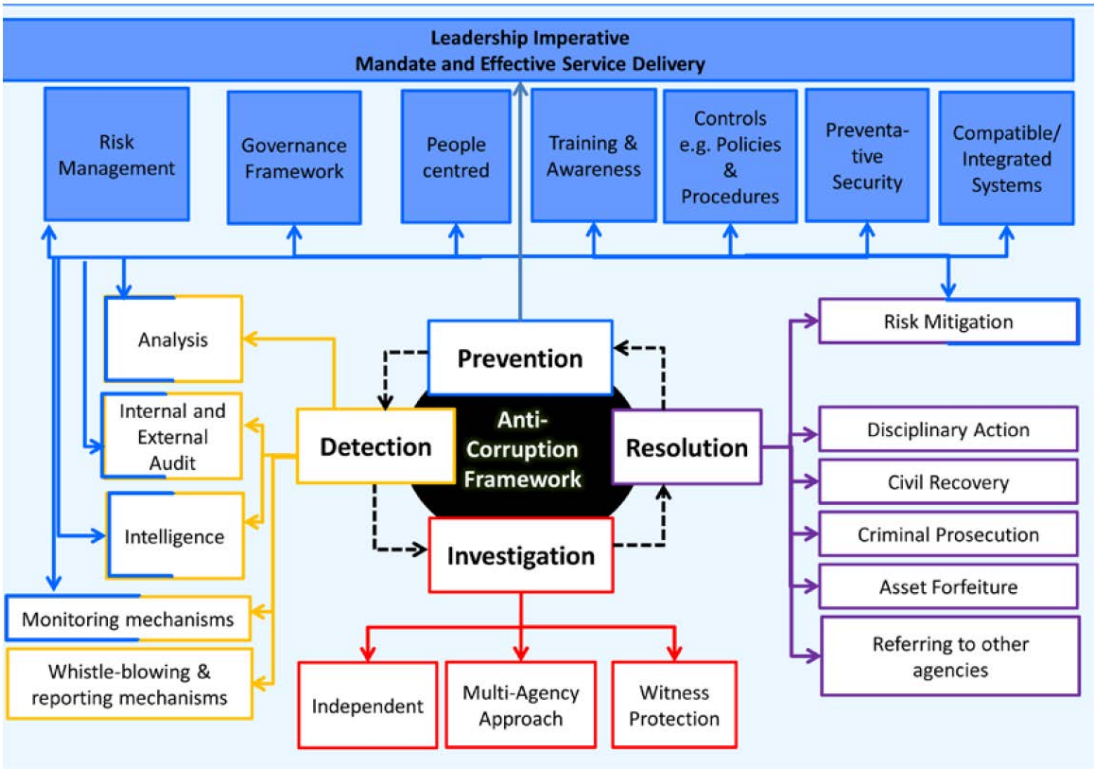


Figure 2

3.4 United Nations Convention against Corruption

The United Nations Convention against Corruption (hereinafter referred to as "UNCAC" or the "Convention") was approved by the *ad hoc* Committee, and adopted by the General Assembly by resolution 58/4 of 31 October 2003. South Africa is one of the 161 signatories to the UNCAC[6] and ratified it on 22 November 2004[7].

The purpose of the Convention is set out in Article 1 (*a* – *c*) as including to:

- Ensure the promotion and strengthening of measures aimed at the prevention and combatting of corruption, in a more effective and efficient manner;
- Ensure the promotion facilitation and support, at an international level, of co-operation and technical support in the fight against corruption and the recovery of relevant assets;
- Ensure the proper management of public financial affairs and property, promoting both integrity and accountability.

Article 32 of the UNCAC deals with the protection of witnesses, experts and victims, providing that each party to the Convention shall take appropriate measures to provide effective protection from potential retaliation and intimidation of witnesses and experts who testify about offences established in terms of the Convention, including the protection of relatives and other people who are close to them, as may be relevant in the given circumstances.[8] This includes physical protection and protection whilst testifying, pertaining to the manner in which evidence may be given and what personal information may be reflected.

Article 33 provides for the protection of whistle-blowers (reporting persons); however, interestingly enough this article is couched in language that does not place a duty on the Party State, but rather provides discretion in this regard. Article 33 provides that each party State, and as such South Africa, shall consider incorporating appropriate measures into its domestic legal system, to provide protection against any unjustified

6 United Nations "United Nations Convention against Corruption" http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf (Date of use: 8 May 2013).
7 Status of Ratification of the United Nations Convention against Corruption https://www.unodc.org/documents/treaties/UNCAC/COSP/session4/V1186007e.pdf (Date of use: 30 June 2015)
8 Article 32(1) of the UNCAC.

treatment for any person who reports to the competent authorities any facts relating to offences established in terms of UNCAC, in good faith and on reasonable grounds.

3.5 African Union Convention on Preventing and Combating Corruption

The African Union Convention on Preventing and Combating Corruption (hereinafter referred to as the "AUC on PCC") was adopted on 11 July 2003 by the Second Ordinary Session of the Union in Maputo in the Republic of Mozambique, and to which South Africa is a signatory;[9] in addition South Africa is one of the 34 member states that ratified the AUC on PCC.[10]

In relation to whistle-blowing and directly related matters Article 5 (5-7) of the AUC on PCC requires of the ratifying countries, and as such South Africa, to:

- Adopt legislative and other measures providing for the protection of informants and witnesses in respect of corruption and related offences, including measures providing for the protection of their identities;[11]
- Adopt measures in terms of which citizens may report corruption without fear and reprisals;[12] and
- Adopt domestic legislative provisions which provide for the punishment of those who make false and malicious reports regarding corruption and related offences against innocent people.[13]

3.6 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

The OECD (Organisation for Economic Co-operation and Development) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, (hereinafter referred to as the "OECD Anti-Bribery Convention") was

9 African Union Convention on Preventing and Combating Corruption July 16 2003 www.assetrecovery.org/kc/node/b08103a3-a348-11dc-bf1b335d0754ba85.0:jsessionid=9B32A990EB65F2DEE01FE5A (Date of use: 8 May 2013).
10 African Union Advisory Board on Corruption, "Status of Ratification of the Convention on Corruption" http://www.auanticorruption.org/auac/about/category/status-of-the-ratification (Date of use: 30 June 2015)
11 Article 5(5) of the AUC on PCC.
12 Article 5(6) of the AUC on PCC.
13 Article 5(7) of the AUC on PCC.

adopted by the Negotiating Conference on 21 November 1997, signed on 17 December 1997, coming into force on 15 February 1999. South Africa is a signatory to the OECD Anti-Bribery Convention;[14] South Africa ratified the OECD Anti-Bribery Convention on 19 June 2007[15]

Article 12 provides for monitoring and follow-up in respect of the provisions of the Convention, which provides for both self-assessment and mutual evaluation. South Africa is currently taking part in the mutual evaluation aspect hereof, in terms of being assessed by peers.

The OECD Anti-Bribery Convention includes *inter alia* commentaries on the Convention, as well as recommendations for further combating foreign bribery. The recommendations were adopted by the Council on 26 November 2009. Recommendation IX has regard to the reporting of foreign bribery, and recommends that member countries should ensure that:

- Channels of communication which are easily available, are put in place through which suspected acts of bribery of foreign public officials in international business transactions can be reported, in accordance with the country's legal principles;
- Appropriate measures are put in place in order to facilitate the submission of reports by public officials, especially those posted abroad;
- Appropriate measures are adopted to ensure the protection of public and private sector employees from discriminatory action or disciplinary action taken against them for making a report in good faith, based on reasonable grounds, to the appropriate authorities, regarding acts of bribery of foreign public officials in international business transactions.

3.7 SADC Protocol against Corruption

The South African Development Community (hereinafter referred to as "SADC") Protocol against Corruption was signed on 14 August 2001 and came into force on 6

14 Anonymous OECD Anti-bribery Convention http://en.wkiipedia.org/wiki/OECD_Anti-Bribery_Convention (Date of use: 8 May 2013).

15 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Ratification Status as of 21 May 2014 http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf (Date of use: 30 June 2015).

August 2003, having been ratified by South Africa as a member State.[16] The purpose[17] of the Protocol includes:

- promoting and strengthening the development by the parties, of instruments needed to prevent, detect, punish and eliminate corruption on the public and private sectors;
- advocating, facilitating and regulating co-operation between the parties, in order to ensure the efficiency of the measures and actions aimed at preventing, detecting, punishing and eliminating corruption in the public and private sector spheres; and
- Advance the development and compatibility of policies and legislation domestically aimed at preventing, detecting, punishing and eliminating corruption in the public and private sector spheres.

It has to be recognised that whistle blowing plays a crucial role in the detection of corrupt activities. However, the authors of the Protocol chose to include provisions relating to whistle blowing under the heading of "preventative measures"; bearing in mind that when one has something to report, the wrongdoing has in all probability taken place already, making it too late for prevention or preventative measures.

Article 4(e) and (f) of the Protocol provides that each State Party undertakes to adopt measures which will create, maintain and strengthen systems for the protection of people who have in good faith reported corruption and legislation that punishes those people who have made false and malicious reports against innocent persons.

3.8 Conclusion

The South African government has arguably expressed a strong commitment to protecting whistle-blowers, both at a national and international level, which is most certainly encouraging as the tone is set from the top in such matters.

The commitment expressed at a national and international level includes:

16 Anonymous SADC Protocol Against Corruption http://www.sadc.int/documents-publications/show/795 (Date of use: 8 May 2013).

17 Article 2 of the SADC Protocol against Corruption.

- The Code of Conduct for the Public Service, which places a duty on employees (civil servants) to report to the appropriate authorities acts of fraud, corruption, nepotism, maladministration and the like. What is however concerning in this regard is that the Code of Conduct does not place a reciprocal duty on the employer's representatives (senior management and management) not to act in reprisal as a result of such a report having been made. It merely states that senior management (thus excluding middle management) is expected to display the highest possible standard pertaining to ethical conduct. It may as such perhaps be argued that it could be seen as an implicit requirement then. The further concerns to be noted in this respect are dealt with in Chapter 4.
- The MACC refers to whistle-blowing as one of the most effective ways of detecting corruption, setting minimum standards for attempting to appease the fears whistle-blowers may experience, including the NACH, internal whistle-blower channels and internal procedures and policies.
- The advent of the ACF has brought about a pivotal change in the way anti-corruption activities are to be tackled within the JCPS departments and entities, in that the focus of the MACC was on the anti-corruption capacity available within the relevant department or entity, the ACF makes it clear that the fight against corruption is not the "problem" of the anti-corruption unit or capacity, or their responsibility, but rather that it is the duty of each and every employee to fight corruption by, at the very least reporting suspicions in this respect. The basis of this approach may be seen to be seated in the considerations pertaining to derivative misconduct, although not specifically mentioned within the ACF.
- The UNCAC, which South Africa has ratified, provides for the protection of witnesses, experts and victims, requiring that appropriate measures be taken to provide effective protection from potential retaliation. However, article 33 which specifically deals with whistle-blowing does not place a duty on the Member State to protect whistle-blowers, but rather merely suggests it as a recommendation to be considered.
- The AUC on PP, ratified by South Africa, requires the party States to adopt protective measures with regard to whistle-blowers.

- The OECD Anti-Bribery Convention, ratified by South Africa, recommends that appropriate measures are put in place to protect whistle-blowers; and
- The SADC Protocol, ratified by South Africa, states that each State Party has by ratification undertaken to adopt whistle-blower protection measures.

The above-mentioned, as stated, not only sets the tone from the top of the country's hierarchy, but also sets the stage for the PDA.

CHAPTER 4: THE PROTECTED DISCLOSURES ACT 26 OF 2000

4.1 Introduction

In the RSA, the legislation relating to whistle-blowing, and the remedies that are availed to a whistle-blower are mainly seated within the contents of the PDA. The PDA was assented to on 1 August 2000, enacted on 7 August 2000 by the Presidency, and has since remained the same with not one amendment having been incorporated. Within the context of the PDA the term “good faith” is used, without being defined by the Act, and as such it is deemed necessary to explore the meaning of the usage thereof, especially in light of the fact that it is also used in the text of some of the other international legislation within this document.

In order to ensure that the objectives of this research are effectively met, it is deemed expedient to set out briefly the most basic provisions relating to the PDA, in order to ensure that the context in which it provides remedies is clearly understood. It would however, go amiss, should the author fail to recognise the constitutional imperative in relation to the PDA.

The Constitution of the Republic of South Africa, 1996 (hereinafter referred to as “the Constitution”), which is seen to be the supreme law of the country, does not in its text explicitly make provision for the protection of whistle-blowers, however, it is argued that it does expound the values pertaining to how all people in the Republic of South Africa (hereinafter referred to as the “RSA”), including whistle-blowers, are to be treated.[1]

Having said this, it is argued that although it does not directly provide for whistle-blowers or whistle-blowing, it does indirectly provide for whistle-blowing within the provisions of section 16, which provides for freedom of expression. More specifically, section 16(1)(*b*), provides that everyone has the right to freedom of expression which includes the freedom to **receive or impart information** (own emphasis) or ideas. It is argued that blowing the whistle in fact amounts to imparting information and or ideas.

1 The Constitution of the Republic of South Africa, 1996; Human dignity (s 1(*a*), 7(1) and 10), equality (s1 (*a*), 7(1) and (9) and freedom (s1 (*a*), 7(1) and 12(1)(*c*) and (*e*)).

Another standard which is clearly set by the text of the Constitution[2] is embodied in section 23(1), which provides that everyone has the right to fair labour practices. This is particularly relevant when it is borne in mind that the provisions of the PDA apply in respect of the employment relationship. It is noted that this right granted goes wider than applying only to employees, as it grants the right to *everyone,* and as such would include independent contractors and everyone else in an employment relationship, including the employer. What constitutes a *fair labour practice* is not defined within the body of the Constitution, nor in the Labour Relations Act 66 of 1995. In *NEHAWU v UCT*[3] the Constitutional Court considered the fact that the meaning of a "fair labour practice" has not been defined, determining that it was in fact not desirable to attempt to define the concept, as a precise definition is impossible and would depend on the facts of each case, requiring a value judgement to be made. Having consideration of the test formulated by the Constitutional Court in this respect, it is argued that circumstances involving an alleged unfair labour practice as a result of the whistle having been blown, would find application in this manner.

The importance of the provisions and objectives of the PDA are to be seen within the context of the Constitution in another respect, was affirmed in *Tshishonga v Minister of Justice and Constitutional Development and Another:*[4] in which the court stated that the PDA takes its cue from the Constitution of the RSA. The PDA asserts the democratic values of human dignity, equality and freedom, although it is not restricted to a particular section of the Constitution, although each one of the rights provided for can be invoked by a whistle-blower.

> Although each of these rights can be invoked by whistle blowers, the analysis in this case is from the perspective of the overarching objective of affirming values of democracy, of which the particular rights form a part. Democracy embraces accountability as one of its core values. Accountability, dignity and equality are the main themes flowing through the analysis that follows.[5]

---

2 Constitution of the Republic of South Africa, 1996 http://www.info.gov.za/documents/constitution/1996/a108-96.pdf (Date of use: 8 May 2013).

3 *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC).

4 *Tshishonga v Minister of Justice & Constitutional Development & another* 2007 (28) ILJ 195 (LC);

5 *Tshishonga v Minister of Justice & Constitutional Development & another* 2007 (28) ILJ 195 (LC);

This is a clear acknowledgement that whistle-blowing and whistle-blowers are a necessary check and balance in ensuring accountability, a core value of democracy, within our democratic society. As pointed out in the previous chapters, one of the key challenges in respect of whistle-blowing is that more often than not people are too afraid to speak out, and it is in this respect that the protection and remedies offered by the PDA becomes pivotal.

The court summarised these considerations eloquently in *Tshishonga* by stating that whistle-blowers are not impimpis, self-serving or socially reprehensible, but rather that the negative connotations are recently being replaced by the concepts of openness and accountability. The court stated that:

> Employees who seek to correct wrongdoing, to report practices and products that may endanger society or resist instructions to perform illegal acts, render a valuable service to society and the employer. Still of 230 whistle-blowers in the United Kingdom and the USA, a 1999 survey found that 84% lost their jobs after informing their employer of fraud, even though they were not party to it.[6]

Martin[7] also recognises the importance of the Constitution in respect of transparency and resultant transparency, and in relation to whistle-blowing, stating that whistle-blowing is central to the principles underscoring the Constitution, and further that it is pivotal to the fight against corruption and mismanagement, especially in respect of public funds; that it is pivotal to the strengthening of transparency and accountability, not only within organisations, but also within society in general. [8] The preamble of the PDA recognises that:

- In South Africa neither the common – or statutory law provides for procedures or mechanisms by way of which employees may or can make disclosures pertaining to suspected or alleged criminal or irregular conduct by colleagues or their employers in the public or private sectors, without fear of reprisal; and

6 *Tshishonga v Minister of Justice & Constitutional Development & another* 2007 (28) ILJ 195 (LC); *Tshishonga v Minister of Justice and Constitutional Development and Another* 2007 (4) BLLR (LC) [168].

7 Martin 2010 http://www.opendemocracy.org.za/wp-content/uploads/2010/10/ODAC_Whistleblowing_Report_web.pdf (Date of use: 8 May 2013).

8 Martin 2010 http://www.opendemocracy.org.za/wp-content/uploads/2010/10/ODAC_Whistleblowing_Report_web.pdf (Date of use: 8 May 2013).

- Every employer and employee has the duty to disclose criminal or irregular conduct alleged or suspected in the workplace; and that
- Every employer has a duty to take necessary steps to ensure that employees who disclose such information are protected from potential or actual reprisals as a result of having made such disclosure.

It is stated that the provisions of the PDA are necessary to enable the creation of a culture which will facilitate employees disclosing information relating to alleged or suspected criminal or other irregular conduct in the workplace, in a responsible manner, by providing a comprehensive guideline for both disclosing such information and the protection against any reprisals for such disclosures made; and promote eliminating criminal and other irregular conduct in public and private bodies.

The PDA was widely welcomed; the Public Service Commission stated that as of February 2001South Africa has had the most extensive, state of the art whistle-blowing legislation in the PDA which will assist in halting and surfacing wrongdoing that occurs within the workplace.[9]

The National Anti-Corruption Forum, in the Guide to the Whistle-blowing Act, stated in 2006 that the purpose of the PDA is to embolden employees to report wrongdoing that they know of in their workplace without fearing reprisal, and that the PDA is to be viewed as a pivotal part of corporate governance.[10]

The Congress of South African Trade Unions (hereinafter referred to as "COSATU" also put its support behind the PDA, expressing the belief that the PDA is a pivotal interposition in respect of corruption within the South African society.[11]

Thus the impetus behind the purpose of the PDA is clear.

---

9 Public Service Commission "A Guide for Public Sector Managers Promoting Public Sector Accountability Implementing the Protected Disclosures Act – Introduction" www.psc.gov.za/documents/docs/guidelines/psc_odac_update.pdf (Date of use: 23 May 2013).

10 National Anti-Corruption Forum http://www.nacf.org.za/guide_to_the_whistle_blowing_act/section_two.html (Date of use: 9 May 2013).

11 COSATU "Cosatu submission on the SALC's Issue Paper on Protected Disclosure submitted to the South African Law Commission" http://www.cosatu.org.za/show.php?ID=2222 (Date of use: 9 May 2013).

It is in essence against this background that the relevant provisions of the PDA need to be viewed.

4.2 Good faith and the PDA

Richard Calland, Executive Chair of the new Open Democracy Advice Centre, states in Camerer[12] that at the core of the PDA is the ideal that prevention is better than cure, encouraging whistle-blowers to first make a disclosure to their employer, in order to avail the employer the opportunity to address the alleged wrongdoing. He points out that potential whistle-blowers need to do so first, in respect of which the test is that of good faith, rather than blowing the whistle externally in the first instance. The provisions of the PDA require that disclosures are to be made in good faith, in order for the disclosure to be a protected disclosure.[13] It is to be noted that the only instance in which a disclosure does not need to be made in good faith, is when it is made to a legal practitioner, in accordance with the provisions of section 5 of the PDA.

What would constitute good faith is not defined within the text of the PDA.[14]

In *Ramsammy v Wholesale & Retail Sector Education & Training Authority*[15] the court *inter alia* considered the meaning of good faith, also considering the *Tshishonga* [16] matter. The court referred to a United Kingdom case, *Street v Unemployed Workers' Centre*[17], in which the meaning of good faith within the context of a disclosure was discussed at paragraphs 203-206.

In *Street v Unemployed Workers' Centre*[18]*,* the court stated that at the core meaning of good faith is **honesty** (own emphasis), opining that by setting good faith as a legislative requirement it was clear that the legislature required more than just a reasonable belief, to form the basis of a disclosure made.

12 Camerer 2001 *Occasional Paper* 47.
13 Sections 6 to 9 of the PDA.
14 Camerer 2001 *Occasional Paper* 47.
15 2009 (30) ILJ 1927 (LC).
16 *Tshishonga v Minster of Justice & Constitutional Development & Another* 2007 (28) ILJ 195 (LC) at para 185 – 192.
17 2004 (4) All ER 839 (CA).
18 *Street v Unemployed Workers' Centre* 2004 (4) All ER 839 (CA).

Whether or not good faith was present in the making of a disclosure would centre on a finding of fact, with the court considering all the evidence cumulatively.

The Supreme Court of Appeal in *Brisley v Drotsky*[19] considered the concept of good faith, albeit within the sphere of contractual law, with the court stating at paragraph 22 that what emerges from recent academic writing and from some leading cases is that good faith may be regarded as an ethical value or controlling principle, which is founded in community standards of decency and fairness.

Ngcobo J, in the Constitutional Court's judgment in *Barkhuizen v Napier*[20] at paragraph 80, confirmed that good faith includes the concepts of justice, reasonableness and fairness.

One has to wonder why the legislature did not rather provide for an honest disclosure; as long as the information provided is truthfully made on the basis of reasonable belief, the motive of the whistle-blower should be irrelevant, thus negating the requirement of good faith.

4.2.1 The objectives of the PDA: defining the scope thereof

The objectives of the PDA are stated as follows:

- To make provision for procedures in terms of which employees in the private and public sector may disclose information pertaining to irregular or unlawful conduct by their employers or other employees in the employment of their employers;
- To provide for the protection of employees who make a protected disclosure as provided for in terms of the PDA; and
- To provide for matters connected with regard to making protected disclosures.

The objectives of the PDA are further elaborated on in section 2(1) (a-c) of the Act, providing that the objectives include:

19 *Brisley v Drotsky* 2002 4 SA 1 (SCA).
20 *Barkhuizen v Napier* 2007 5 SA 323 (CC).

- Protecting employees in the public and private sectors from being subjected to reprisal in the form of occupational detriment, for having made a protected disclosure;
- Providing remedies for employees so subjected to occupational detriment; and
- Providing procedures which prescribe the manner in which protected disclosures are to be made.

What should as such be clear from the outset is that the provisions of the PDA are only aimed at protecting *employees,* and further to this, only from *occupational detriment.* The scope of the provisions of the PDA is further defined in terms of the provisions of section 2(2), by providing that its provisions apply only to protected disclosures made *after* the date on which section 2 came into operation, irrespective of whether the alleged irregular or criminal conduct took place before or after the specified date.

The PDA specifically specifies that any provision in a contract of employment or other agreement entered into between an employer and an employee that attempts to exclude any provision of the PDA is void,[21] including any such provision which attempts to preclude an employee from the protection offered by the PDA or discourage the employee from making a protected disclosure.[22]

The importance of defining the employment relationship, in terms of who would qualify as an employer and an employee, is simply stated by McGregor *et al*[23] as understanding the protective nature of labour laws, in terms of which labour laws may be compared to an umbrella. In McGregor's analogy used, those persons not standing under the umbrella will either get wet or will need to find another umbrella to protect them with from the rain. Succinctly put, persons not protected by the scope of the labour laws will need to find other laws with which to protect themselves.[24]

Thus the establishment of the people falling within the scope of the provisions of the PDA is of importance.

21 Section 2(3)(*a*) of the PDA.
22 Section 2(3)(*b*) of the PDA.
23 McGregor *et al Labour Law* 15.
24 McGregor *et al Labour Law* 15, fn 17.

4.2.1.1 Who is the employer?

As the provisions of the PDA apply specifically to the relationship between the employer and an employee, it is necessary to establish who the employer would be within the context of the PDA.

Who the employer is, is defined in section 1of the PDA as including any person who:

- Employs or provides work for any other person, and who remunerates that other person, or who undertakes to remunerate that person; or
- Permits another to assist in the carrying on or conduct of his, her or its business in any way, and includes a person who allows the aforementioned on behalf or on the authority of the relevant employer.

It is to be noted that sections 78 and 231 of the Labour Relations Act 66 of 1995 (hereinafter referred to as the "LRA") do not define the employer.

An interesting development in this regard was the court's approach in *Charlton v Parliament of the Republic of SA.*[25] In this case the Labour Court (hereinafter referred to as the "LC") was asked to differentiate between an employee and employer as defined in terms of the LRA, and an employee and employer for the purposes of the PDA. Although this point was found to be appealable by the Labour Appeal Court (hereinafter referred to as the "LAC"), the appeal was upheld in the Supreme Court of Appeal (hereinafter referred to as the "SCA").[26] It seems to indicate that the differentiation in this respect may be entirely acceptable, and that

25 *Charlton v Parliament of the Republic of SA* 2007 (28) ILJ 2263 (LC); *Parliament of the Republic of SA v Charlton* 2010 (31) ILJ 2353 (LAC) and *Charlton v Parliament of the Republic of South Africa* 2012 (1) SA 472 (SCA).

26 In the LC, the Parliament of the Republic of South Africa had excepted to Charlton's statement of claim on six grounds, identified as grounds A to F. However, grounds B to E were not pursued at the LC hearing, which left only exceptions A and F to be dealt with. Exception A related to the first cause of action, whilst exception F related to the LC's alleged lack of jurisdiction to entertain the fourth and fifth causes of action. The LC had dismissed both exceptions in June 2007, however, Parliament was granted leave to appeal to the LAC. In July 2010, the LAC upheld the exceptions previously dismissed by the LC and made orders staying the proceedings under section 158(2)*(a)* of the Labour Relations Act 66 of 1995 and referring 'the dispute' to the Commission for Conciliation, Mediation and Arbitration for arbitration. Charlton obtained special leave from the SCA in order to appeal the decision handed down by the LAC. The order of the LAC was set aside and replaced with the following: 'The appeal is struck from the roll with costs, including the costs of two counsel.'

the employment relationship could well be defined in respect of the parameters set by the definitions contained in the PDA.

4.2.1.2 Who is an employee?

As the provisions of the PDA apply specifically to the relationship between the employer and an employee, it is necessary to establish who the employee would be within the context of the PDA.

Who the employee is, is defined in section 1(ii)(a-b) of the PDA including:

- any person who works for another or the State, and who receives or is entitled to receive remuneration, excluding an independent contractor; and
- any other person who in any manner assists in conducting or carrying on the business of the employer.

It has to be noted that this is the exact definition (own emphasis) of an employee as per the provisions of section 213 of the LRA.

However, section 78 of the LRA in respect of workplace forums defines an employee as being any person who is employed, excluding a senior managerial employee, and whose employment contract or status allows him or her to represent the employer in its dealings with the workplace forum or determine policy in the workplace and take decisions on the employer's behalf that may be in conflict with the representation of the employees in the workplace.

Thus by definition as per the PDA and as mirrored in section 213 of the LRA, both private and public sector employees are included, however, excluding independent contractors from the protection offered. Further to this, section 78 of the LRA excludes from *employees* senior managerial employees who may represent the employer in dealings with the workplace forum or who may determine policy and take decisions on behalf of the employer which may be in conflict with the representation of employees in the workplace. Note is taken that this definition pertains to workplace forums and their functioning, and as such is not to be seen as such senior employees being excluded from the protection offered by the provisions of the PDA.

Who qualifies as an independent contractor is not defined under the auspices of the LRA, leaving the distinction to be made on the grounds of the reality test.[27] In this respect, the presumption created by the provisions of section 200A of the LRA is of pivotal importance. Section 200A provides that, until the contrary is proved, a person who works for or renders service to another, is presumed to be an employee, regardless of the form of the contract or agreement between them, if any one or more of the following factors are present, namely:

- if the manner in which the person works is subject to either the control or the direction of another person;
- if the person's working hours are determined or subject to the control or direction of another;
- if the person forms part of the organisation in question;
- if the person has worked for that other person for at least 3 months, for an average of 40 hours per month;
- if the person is economically dependent on the other for whom he works or to whom he delivers a service;
- if the person in question is provided with tools or equipment in order to perform the work or service;
- if the person only renders a service or works for that one other person.

In terms of section 200A (2), the above-mentioned does not apply to someone who earns more than the amount determined by the Minister, in terms of section 6(3) of the Basic Conditions of Employment Act 75 of 1997 (hereinafter referred to as the "BCEA"). At the present date[28] the earnings threshold in this respect has been set at 205433.40 by the Minister of Labour.[29] In terms of section 200A (3), if the proposed or existing working arrangement in question involves a person who earns less than or an amount equal to the earnings threshold, any of the contracting parties may approach the CCMA for an advisory award in respect of whether or not the persons involved are employees or not.

---

27 See *Denel (Pty) Ltd v Gerber* 2005 26 ILJ 1256 (LAC).
28 5 November 2013.
29 *Government Gazette* July 1 2013 http://www.labour.gov.za/DOL/downloads/legislation/sectoral-determination/basic-conditions-of-employment/Determination%20Earnings%20Threshokd%202013.pdf (Date of use: 5 November 2013).

Section 83A of the Basic Conditions of Employment Act 75 of 1997 is a mirror image of the provisions of section 200A of the LRA, and as such will not be repeated. In the *Charlton* case *supra*,[30] the court distinguished between employees in respect of the LRA and employees for the purpose of the PDA.[31]

It also needs to be noted that the LRA specifically differentiates between an independent contractor and a temporary employee, as a temporary employee is regarded as an employee. See in this respect the provisions of section 198 of the LRA.

4.3 A protected disclosure

There has been a noticeable trend in respect of the description of what a *protected disclosure* in fact encompasses, for example:

> In general, such disclosures become protected when they are made to certain persons and offices under certain conditions…However, irrespective of the person or office to whom the disclosure is made, a disclosure will be protected if certain conditions are met. The disclosure must be in good faith, the employee must reasonably believe that it is substantially true and it must not be made for personal gain; and the employee must have reason to believe that if disclosure is made to the employer, he or she will suffer an occupational detriment or the same information was previously disclosed to the employer with no action within a reasonable period or it is exceptionally serious.[32]

In 2005 it was added that in general, such disclosures[33] become protected when they are made to certain persons and offices under certain conditions.

> Not every disclosure made by an employee will be protected and only gradually are our Courts beginning to consider the nature of a protected disclosure and the protection to be afforded employees.[34]

In the 2009 the matter is not directly broached:

> Not every communication or disclosure by an employee will constitute a protected disclosure.[35]

30 *Charlton v Parliament of the Republic of SA* 2007 (28) ILJ 2263 (LC); *Parliament of the Republic of SA v Charlton* 2010 (31) ILJ 2353 (LAC) and *Charlton v Parliament of the Republic of South Africa* 2012 (1) SA 472 (SCA).
31 See Chapter 6.
32 Basson *Essential Labour Law* (3rd ed) (1) 301.
33 With reference to what would constitute a disclosure.
34 Basson *Essential Labour Law* (4th ed) 197.
35 Basson *Essential Labour Law* (5th ed) 211.

Before attempting to define a *protected disclosure,* one would need to establish what would constitute a disclosure. Section 1 of the PDA defines the concept of a disclosure as including any disclosure of information relating to the conduct of an employer or an employee of the relevant employer, and which is made by an employee who has grounds on a reasonable basis for believing that the information so reported has bearing on the following types of conduct that has taken place, is taking place, or is likely to take place:

- A criminal offence;
- A failure to comply with a legal obligation;
- A miscarriage of justice;
- The endangerment of the health or safety of a person;
- Damage to the environment;
- Unfair discrimination as provided for in terms of the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000;
- That any of the abovementioned is or has been deliberately concealed.

From the above it is clear that the manner of action which would constitute a disclosure is not defined within the PDA, but rather the type of information that the disclosure relates to. What is also to be noted is how wide the relevant subjects have been worded, which it is argued may make it difficult for the potential whistle-blower to determine with safety whether his potential disclosure would in fact amount to a disclosure as defined above.

A further point in this regard is that seemingly the ambit of this definition has been widened by the provisions of section 1(i)(*a*) and (*b*) of the Financial Services Law General Amendment Act 45 of 2013, by the insertion of the Pensions Fund Act 24 of 1956, after the definition of “dependant” of the widened definition of a disclosure. It provides that in addition to the meaning of a disclosure as defined in terms of section 1 of the PDA, a disclosure includes the disclosure of information relating to:

- Any conduct of a pension fund, the administrator, board member, principal offer, deputy principal officer, valuator, officer or employee of a pension fund or administrator; and
- The affairs of the pension fund which may prejudice the fund or its members.

4.3.1 A protected disclosure defined

Not all disclosures made are protected by the provisions of the PDA, but only protected disclosures.

What constitutes a protected disclosure is defined in section 1 of the PDA. According to the provisions of section 1, a protected disclosure includes a disclosure made to a legal advisor in accordance with the provisions of section 5, or to an employer in accordance with the provisions of section 6, or to a member of Cabinet or of the Executive Council of a Province in accordance with the provisions of section 7, or a person or a body in accordance with the provisions of section 8, or any other person or body in accordance with the provisions of section 9.

However, a protected disclosure does not include a disclosure in terms of which the employee involved commits an offence by making the disclosure; [36] or made by a legal advisor to whom the relevant information was disclosed in the course of getting legal advice in accordance with the provisions of section 5.[37]

Although the PDA does include a definition of what would constitute a disclosure, which is extremely relevant when determining whether a disclosure is indeed a protected disclosure, as one would first have to determine whether a disclosure has been made, should it be challenged by the opposition in the given matter, the definition relates more to the information disclosed than what would constitute an actual or alleged disclosure.

4.3.2 Pivotal exclusions?

During 2002, Klaaren pointed out serious challenges in respect of the scope of protection, and specifically with regard to what would qualify as a protected disclosure.[38] He opined that there were at least three categories of information in respect of which an employee may wish to make a disclosure or would wish to disclose, but would not be able to claim the protection provided in terms of the PDA.

36 Section 1(ix)(*e*)(i) of the PDA.
37 Section 1(ix)(*e*)(ii) of the PDA.
38 Klaaren 2002 *South African Law Journal* (119) 721- 732.

These would include matters of ethical, professional and public or policy related concerns.[39]

When measuring whether there is in fact merit in this argument, regard is to be had to the definition of a disclosure as provided for in terms of section 1 of the PDA, that provides that a disclosure is the disclosure of information regarding the conduct of either the employer or an employee in the employ of that employer, made by any employee (the potential whistle-blower) who has reason to believe that the information he has disclosed shows or tends to show the type of conduct provided for in terms of the aforementioned definition.

Bearing in mind additionally the provisions of section 1(i)(a) and (b) of the Financial Services Law General Amendment Act 45 of 2013, it would seem that the collective terms in respect of the above-mentioned would be an "impropriety", as referred to in terms of section 1 of the PDA, whether or not the impropriety took place in the RSA or in another country, or whether or not the applicable law is that of the RSA or another country.

Section 1 includes the explicitly exclusionary portion, which provides that a disclosure will not be a protected disclosure if the employee involved commits an offence by making the disclosure or where it is made by a legal adviser to whom the information was disclosed whilst the client was seeking legal advice.

4.3.2.1 A disclosure made in respect of an ethical issue or a policy matter

Section 1 of the PDA expressly **excludes**, from the protection afforded by the PDA, any disclosure made by an employee in respect of ethical and policy related issues, if as an impropriety they do not actually or potentially also amount to an offence. Often time policy issues overlap with ethical issues, especially in the public sector, such as policies regarding the declaration of private interests, the declaration of gifts, (other) conflicts of interest and the declaration of work outside the 'main' employment relationship (which often in turn, overlaps with declaration of private interests).

A policy relates to the expression of the relevant organisation of its official stance in respect of the relevant issue.

39 Klaaren 2002 *South African Law Journal* (119) 722.

Undoubtedly, ethical issues come into play in respect of whistle-blowing, whether it is the manner in which whistle-blowers are to be treated, whether the payment or reward of a whistle-blower is ethical, or whether a whistle-blower wishes to blow the whistle in respect of an ethical issue, as opposed to purely criminal conduct, such as a senior manager who does not disclose his close relationship to an employee "headhunted" by him, or the non-declaration of financial interests as required in terms of an organisation's Code of Conduct, especially within the sphere of the public sector.

The South African government too has recognised the importance in this respect, when reference is made to the MACC and the ACF. Preston remarks that indeed much of what is presented as reforms regarding accountability pertaining to parliamentary review committees, may be said to be part of an ethics regime within the public sector. Preston opines that the concerns of such an ethics regime are three-pronged in that it relates to political morality of elected public sector officials, the administrative morality of what he terms "career officials" and the constituted morality of existing public sector institutions.[40]

Within a changing environment within the public sector of South Africa, with government employees being required to follow codes of ethics and conduct, declaring their financial interests on a yearly basis, and being required to apply for permission to perform additional work to that for which they have been appointed, one will not be hard-pressed to realise that a situation may arise, in which a whistle-blower will want to blow the whistle in respect of such matters; ethical matters. Further to this, the most ethical matters within the public sector are regulated by policy, as opposed to legislation. Having said this, it is clear that the exclusion of ethical and professional concerns from the ambit of protection offered by the PDA constitutes a potentially serious dilemma to the professional. Thus the relevant considerations would lean more heavily in terms of subjective value judgements in respect of what is perceived to be ethical conduct, or not. However, what is certain is that a disclosure made in respect of policy provisions, whether or not overlapping with value judgements in respect of ethical conduct, and disclosures pertaining to

40 Preston 1995 *Australian Journal of Public Administration* (54) (4) 462.

conduct falling outside policy provisions, will not fall within the protection of the PDA, unless it also falls within one of the defined categories of a protected disclosure.

Great circumspection is required by the whistle-blower in determining whether or not the matter he intends blowing the whistle is likely to fall within the realm of protected disclosures. All public service employees in South Africa need to take cognisance in this respect, especially when seen in light of the Code of Conduct, as implemented by the Public Service Commission.[41]

4.3.2.2 A disclosure made in respect of which the employee concerned commits an offence

Section 1 of the PDA expressly **excludes**, from the protection afforded by the PDA, any disclosure which is made by an employee, and in terms of which that employee commits an offence by making the said disclosure. This specific provision is differentiated from that discussed under paragraph 4.3.2.1 above, in that disclosures in respect of ethical issues and policy matters do not necessarily involve the employee committing a criminal offence by doing so. Snyman[42] explains it as an offence or a crime when the conduct is in fact legally forbidden, which in principle may be prosecuted by the State, and which always culminates in the imposition of punishment.[43]

Taking the Tax Administration Act 28 of 2011, (hereinafter referred to as "TAACT") as an example, the South African Revenue Service introduced TAACT as tax administration legislation aimed at providing generic provisions in order to minimise duplication contained in the different tax related legislation.[44]

Section 236 of the TAACT, provides for criminal offences in respect of the South African Revenue Service (hereinafter referred to as "SARS") so-called 'secrecy provisions', providing that anyone who contravenes the provisions of sections 67(2), 67(3), 68(2), 69(1), 69(6) or 70(5) is guilty of an offence, and upon conviction may be subject to a fine or imprisonment for a period not exceeding two (2) years.

---

41 Public Service Commission. Code of Conduct for Public Servants. South Africa. http://www.psc.gov.za/documents/code.asp (Date of use: 29 October 2013).
42 Snyman *Criminal Law* (5th ed).
43 Snyman *Criminal Law* (5th ed) 4-5.
44 South African Revenue Service "Tax Administration" http://www.sars.gov.za/Legal/TaxAdmin/Pages/default.aspx (Date of use: 28 October 2013).

In terms of the provisions of section 67(1) of the TAACT, the general prohibition of information applies to SARS 'confidential information' as referred to in section 68(1)[45] and taxpayer information, and in respect of which SARS employees are required to make an oath or solemn declaration in respect of such secrecy. Section 67(3) takes this a step further, by also prohibiting any other person to whom such information was disclosed from, in any manner, disclosing, publishing or making it known to any other person who is not a SARS official.

Section 68(2) would seem to attempt to soften the restrictions a little, although it seems to be aimed it still restricting disclosure, even with the SARS, as it provides that someone who is a current or former SARS official, may not disclose SARS confidential information to another, who is not a SARS official, and further that someone who is a current or former SARS official, may not disclose SARS confidential information to a SARS official who is not authorised to have access to the information in question.

---

45 **SARS confidential information and disclosure 68.** (1) SARS confidential information means information relevant to the administration of a tax Act that is—

(a) personal information about a current or former SARS official, whether deceased or not;
(b) information subject to legal professional privilege vested in SARS;
(c) information that was supplied in confidence by a third party to SARS the disclosure of which could reasonably be expected to prejudice the future supply of similar information, or information from the same source;
(d) information related to investigations and prosecutions described in section 39 of the Promotion of Access to Information Act;
(e) information related to the operations of SARS, including an opinion, advice, report, recommendation or an account of a consultation, discussion or deliberation that has occurred, if—
    (i) the information was given, obtained or prepared by or for SARS for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law; and
    (ii) the disclosure of the information could reasonably be expected to frustrate the deliberative process in SARS or between SARS and other organs of state by—
        (aa) inhibiting the candid communication of an opinion, advice, report or recommendation or conduct of a consultation, discussion or deliberation; or
        (bb) frustrating the success of a policy or contemplated policy by the premature disclosure thereof;
(f) information about research being or to be carried out by or on behalf of SARS, the disclosure of which would be likely to prejudice the outcome of the research;
(g) information, the disclosure of which could reasonably be expected to prejudice the economic interests or financial welfare of the Republic or the ability of the government to manage the economy of the Republic effectively in the best interests of the Republic, including a contemplated change or decision to change a tax or a duty, levy, penalty, interest and similar moneys imposed under a Tax Act or the Customs and Excise Act;
(h) information supplied in confidence by or on behalf of another state or an international organisation to SARS;
(i) a computer program, as defined in section 1(1) of the Copyright Act, 1978 (Act No. 98 of 1978), owned by SARS; and
(j) information relating to the security of SARS buildings, property, structures or systems.

So too, a person who is an existing or former SARS official may disclose SARS confidential information if: the information concerned is public information;[46] it is authorised by the Commissioner of SARS;[47] disclosure thereof is authorised under any other Act which provides expressly for the disclosure of information despite the provisions of this Chapter of TAACT;[48] access to the information and its subsequent disclosure has been granted in terms of the provisions of the Promotion of Access to Information Act;[49] or the disclosure of the information in question is required by an order of the High Court.[50]

Section 69 of the TAACT, provides for the secrecy of taxpayer information and general disclosure. Both former and current SARS employees must preserve the secrecy of taxpayer information, except when performing their duties under a tax act[51], including the disclosure of such information to the SAPS and the NPA, as a witness to litigation and the like.

Section 69(2)(b) provides that section 69(1) does not prohibit the disclosure of taxpayer information by a former or current SARS official, under *any other Act which expressly provides for the disclosure of the information, despite the provisions of this Chapter.* It is argued that this section too does not include the PDA, as the PDA in no manner **expressly** provides for such information to be disclosed. Consideration is also to be given to the fact that all employees dealing with classified information, as provided for in terms of the Minimum Information Security Standards, and classified as confidential, secret and top secret, would potentially be committing an offence in attempting to make a protected disclosure involving such information, and as such would not enjoy the protection offered by the PDA. It is argued that JCPS Cluster employees would potentially fall within this category of employees, depending of course on the relevant circumstances, and ascertained on a case-by-case manner.

It seems worthy to point out in this respect that state or public service employees are mostly potentially affected in this regard, and that this provision strongly contends with the concept of state privilege.

---

46 Section 68(3)(*a*) of the TAACT,
47 Section 68(3)(*b*) of the TAACT,
48 Section 68(3)(*c*) of the TAACT,
49 Section 68(3)(*d*) of the TAACT,
50 Section 68(3)(*e*) of the TAACT,
51 Section 69(2)(a) of the TAACT.

Schwikkard and Van Der Merwe[52] broach the background to state privilege and the impact of constitutional provisions, pointing out that the repeal of section 66 of the Internal Security Act 74 of 1982 followed on the interim Constitution, a mere 6 months before the final Constitution came into operation. In terms of the provisions of section 66 (1) of the Internal Security Act 74 of 1982, the courts' jurisdiction was unseated in matters affecting state security. They state further that the provisions of section 66(1) would not have been able to withstand constitutional scrutiny, especially in light of the provisions of sections 165, 32, 34 and 35(3) (i) of the Constitution. [53]

The provisions of section 9(1)(*b*) of the PDA may (perhaps indirectly) attempt to enforce a type of state privilege in respect of disclosures sought to be made, and involving for example classified information. This position seems intolerable, especially when seen in light of the constitution imperative in terms of section 16 of the Constitution, as mentioned at the beginning of this chapter.

Whistle-blowers should not be (potentially) unconstitutionally and unfairly bound as a result of classified information; the legislature should rethink this provision, and perhaps construct strict guidelines and requirements to be met in this respect in order to be in accordance with the requirements of an open and accountable democratic society based on fairness and equality. The reasoning of the court in the case of *Swissborough Diamond Mines (Pty) Ltd & others v Government of the Republic of South Africa*[54] and as reflected in Schwikkard and Van Der Merwe[55] may provide useful considerations in this respect, in that in such matters:

1. The Court is not bound by the *ipse dixit* of any cabinet minister or bureaucrat irrespective of whether the objection is taken to a class of documents or a specific document and irrespective of whether it relates to matters of State security, military operations, diplomatic relations, economic affairs, cabinet meetings or any other matter affecting the public interest.

52 Schwikkard and Van der Merwe *Principles of Evidence* (3rd ed).
53 Schwikkard and Van der Merwe *Principles of Evidence* (3rd ed) 163.
54 *Swissborough Diamond Mines (Pty) Ltd & others v Government of the Republic of South Africa* 1999 (2) SA 279 (T) 343-344.
55 Schwikkard and Van der Merwe *Principles of Evidence* (3rd ed) 164.

2. The Court is entitled to scrutinise the evidence in order to determine the strength of the public interests affected and the extent to which the interests of justice to a litigant might be harmed by its non-disclosure.
3. The Court has to balance the extent to which it is necessary to disclose the evidence for the purpose of doing justice against the public interest in its non-disclosure.
4. In this regard the onus should be on the State to show why it is necessary for the information to remain hidden.
5. In a proper case the Court should call for oral evidence, in camera where necessary, and should permit cross-examination of any witness or probe the validity of the objection itself.

The similarities and conflicts are clear.

4.3.3 A disclosure made by a legal adviser

Section 1 of the PDA expressly excludes a legal advisor from claiming the protection proffered by the PDA in circumstances in which such legal advisor discloses information that was disclosed to him, whilst the initial discloser was disclosing in order to obtain legal advice in respect of the matter. One has to wonder whether this provision relates to the rules of the law of evidence pertaining to private privilege. In both criminal and civil proceedings the communications which are made between a lawyer (legal professional) and his client may not be disclosed without the client's consent. In *S v Safatsa*[56] the court expressed clear views regarding the rationale behind privilege in this context, stating that in the conflict between the principle that all relevant evidence should be disclosed in the hearing of a matter and the principle that communications that have transpired between a lawyer and his client, it has been determined that the communications between a lawyer and client prevails. The rationale behind this determination lies in the public interest, as it is said that otherwise the accomplishment of justice would otherwise be handicapped. The court further expressed the view that this privilege between a lawyer and his client reaches beyond only those communications made for the purpose of litigation, covering all communications made for the purpose of seeking and receiving advice, and that seen in this light is more than just a rule of evidence.

56 *S v Safatsa* 1988 (1) SA 686 (A) 886.

> **It is a doctrine which is based upon the view that confidentiality is necessary for the proper functioning of the legal system and not merely the proper conduct of particular litigation…**(own emphasis).[57]

This stance was echoed by the court in the case of *Bennett v Minister of Safety and Security,*[58] with the court emphasising that the privilege between a client and an attorney is in fact a substantive rule of law which demands compliance. It would seem that the legislature has sought to place a double gate of safety in place, in respect of communications with a legal practitioner. The first *gate* placed in respect of communications with legal practitioners is set in terms of the principles of the law of evidence (substantive law), and in respect of which, such communication is privileged should set requirements be met, such as the following: during the communication, the legal advisor must be acting in his professional capacity, which will of necessity be determined on the basis of the relevant matter's circumstances; the communication must be made in confidence, which will also be determined on the facts of each matter; the communication must be made for the specific purpose of obtaining legal advice; and the client (person seeking the legal advice) must claim the privilege of the communication.

The rationale behind privilege is clarified by Heydon in Schwikkard and Van der Merwe[59] as being in essence to level the playing fields between people who may not be equal in wealth, power, intelligence and the capacity to handle the challenges they may be facing. Privilege seeks to encourage the client to share all the facts of the matter with the legal representative should hear, as opposed to only the facts that the client believes may favour him or her. [60]

It needs to be noted that in terms of the provisions of the PDA, it would not seem as though the client is in a position to waive the privilege, enabling the legal advisor to disclose in a protected manner.

A protected disclosure made in terms of the provisions of section 5 of the PDA, is the only disclosure that need not be made in *good faith.* It is uncertain as to why the legislature chose to differentiate in this manner, but it may be motivated by the same

57 *S v Safatsa* 1988 (1) SA 686 (A) 886 at 146.
58 *Bennett v Minister of Safety and Security* 2006 (1) SACR 523 (T)
59 Schwikkard and Van der Merwe *Principles of Evidence* (3rd ed).
60 Schwikkard and Van der Merwe *Principles of Evidence* (3rd ed) 145-146.

reasoning set out in the paragraph above.[61] This section[62] provides that any disclosure made to a legal practitioner, or to a person whose job involves giving legal advice, and with the aim of and in the course of getting legal advice is a protected disclosure. Section 201 of the Criminal Procedure Act 51 of 1977 strengthens this principle and provides as follows in this regard:

> No legal practitioner qualified to practise in any court, whether within the Republic or elsewhere, shall be competent, without the consent of the person concerned, to give evidence at criminal proceedings against any person by whom he is professionally employed or consulted as to any fact, matter or thing with regard to which such practitioner would not on the thirtieth day of May, 1961, by reason of such employment or consultation, have been competent to give evidence without such consent: Provided that such legal practitioner shall be competent and compellable to give evidence as to any fact, matter or thing which relates to or is connected with the commission of any offence with which the person by whom such legal practitioner is professionally employed or consulted, is charged, if such fact, matter or thing came to the knowledge of such legal practitioner before he was professionally employed or consulted with reference to the defence of the person concerned.

4.3.4 A protected disclosure made to an employer

Under certain circumstances a disclosure made to an employer will be a protected disclosure; however, it needs to meet the following requirements: the disclosure has to be made in *good faith*;[63] and the disclosure has to be made substantially in accordance with any procedure that the employee's employer has prescribed or authorised, for reporting or otherwise addressing the impropriety concerned;[64] or a disclosure made in good faith to the employer of the employee, where there is no prescribed procedure as mentioned in the above-mentioned paragraph.[65]

An employee who makes a disclosure to someone who is not his or her employer is deemed for the purposes of the PDA to have made a disclosure to his or her employer, if the disclosure is made in accordance with a procedure that has been authorised by his or her employer.[66] It is argued that examples in this regard would include a civil servant using the NACH to make a protected disclosure, if the department he works for allows or promotes this, or where an employee makes the

61 Schwikkard and Van der Merwe *Principles of Evidence* (3rd ed) 145-146.
62 Section 5 of the PDA.
63 Section 6(1) of the PDA.
64 Section 6(1)(a) of the PDA.
65 Section 6(1)(b) of the PDA.
66 Section 6(2) of the PDA.

disclosure to a hotline (such as one run by KPMG or PWC), and where the hotline function has been outsourced to a service provider by the employer.

4.3.5 A protected disclosure to a member of Cabinet or the Executive Council

A protected disclosure can also be made to a member of Cabinet or the Executive Council of the RSA, in accordance with the provisions of section 7 of the PDA.

Such a disclosure, to be protected, has to meet the following requirements:

- The disclosure has to be made to such member in good faith;[67] and
- The employee making such disclosure has to be in the employ of an employer who is:
    - An individual appointed in terms of legislation by a member of Cabinet or of the Executive Council of a province in the RSA;[68]
    - A body, the members of which have been appointed in terms of legislation by a member of Cabinet or of the Executive Council of a province of the RSA;[69] or
    - An organ of state falling within the sphere of responsibility of the member concerned.[70] An *organ of state* is defined in section 1(vii) of the PDA as being –
        - Any department of state or administration in both the national or provincial sphere of government or any municipality in the local sphere of government;[71] or
        - Any other functionary or institution when –
            - Exercising a power or performing a duty in terms of the Constitution or a provincial constitution;[72] or
            - Exercising a public power, or performing a public function in terms of any legislation.[73]

67 Section 7 of the PDA.
68 Section 7(a) of the PDA.
69 Section 7(b) of the PDA.
70 Section 7(c) of the PDA.
71 Section 1(vii)(a) of the PDA.
72 Section 1(vii)(b)(i) of the PDA.
73 Section 1(vii)(b)(ii) of the PDA.

4.3.6 A protected disclosure made to certain persons or bodies

Disclosures made in terms of the following requirements will also be regarded as being protected disclosures:

- Any disclosure made in good faith to the Public Protector;[74]

The Public Protector's mandate, as stated on the official website page, includes *inter alia* the strengthening the South African constitutional democracy by investigating and addressing improper and prejudicial conduct, maladministration, and the abuse of power. [75] It also includes the Public Protector investigating violations of the Executive Members Ethics Act of 1994, resolving disputes relating to the Promotion of Access to Information Act of 2000, and discharging other responsibilities as mandated by the following legislation:

- Constitution of the Republic of South Africa Act 108 of 1996;
- Public Protector Act 23 of 1994;
- Executive Members Ethics Act 82 of 1998;
- Promotion of Access to Information Act 2 of 2000 (PAIA);
- Electoral Commission Act 51 of 1996;
- Special Investigation Units and Special Tribunals Ac t 74 of 1996;
- Protected Disclosures Act 26 of 2000;
- National Archives and Record Service Act 43 of 1996;
- National Energy Act 40 of 2004;
- Housing Protection Measures Act 95 of 1998;
- National Environmental Management Act 108 of 1999;
- Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000;

74 Section 8(1)(a) of the PDA.
75 Public Protector of South Africa, Vision and Mission of the Public Protector http://www.pprotect.org.about_us/Vision_mission.asp (Date of use: 23 May 2013).

- Public Finance Management Act of 1999 and
- Lotteries Act 57 of 1997.

- Any disclosure made in good faith to the Auditor General;[76]

The mandate and functions of the Auditor General are described in section 188 of the Constitution, and also regulated in terms of the provisions of the Public Audit Act 25 of 2004.[77]

Further to this, the employee making the disclosure must reasonably believe that the relevant impropriety falls within the description of matters that are ordinarily dealt with by the person or body concerned;[78] and the information disclosed, including any allegation made thereby is or are substantially true.[79]

A person or a body referred to in section 8 or prescribed in terms of the provisions of section 8(1), who is of opinion that the matter would in fact be more appropriately dealt with by another person or body referred to or prescribed in terms of section 8, must render such assistance as may be necessary, to enable the employee to comply with the provisions of section 8.[80]

4.3.7 Making a general protected disclosure

Besides the manners in which a protected disclosure may be made, and as dealt with above, there are additional ways in which a general protected disclosure may be made, and as prescribed in terms of the provisions of section 9 of the PDA. This includes the following:

Any disclosure which is made in good faith by an employee who reasonably believes that the information disclosed, and any allegation in it are substantially true [81], and

76 Section 8(1)(b) of the PDA.
77 Auditor General of South Africa, Mandate and Functions of the Auditor General http://www.agsa.co.za/AboutUs.aspx (Date of use: 23 May 2013).
78 Section 8(1)(c)(i) of the PDA.
79 Section 8(1)(c)(ii) of the PDA.
80 Section 8(2) of the PDA.
81 Section 9(1)(a) of the PDA.

who does not make the disclosure for personal gain, excluding any reward which is payable in terms of any law[82], is a protected disclosure if:

- In all the circumstances of the case it is reasonable to make the disclosure; and
- One or more of the following conditions apply -
    - That at the time of making the disclosure the employee has reason to believe that he or she will be subjected to occupational detriment if he or she makes the disclosure to his or her employer as provided for in terms of section 6 of the PDA;
    - That in the set of circumstances no body or person has been prescribed for the purposes of section 8[83] in relation to the relevant impropriety, the employee making the disclosure has reason to believe that it is likely that evidence relating to the allegation/s will be concealed or destroyed if he or she makes the disclosure to his or her employer;
    - That the employee has previously made the same disclosure, with substantially the same information, to the employer or a person or body referred to in section 8, in respect of which no action was taken within a reasonable period after the disclosure was made. In determining whether it was reasonable for the employee in these circumstances to make the disclosure, what has to be considered is any action taken by the employer or the person or body to whom the disclosure was made, or might reasonably be expected to have taken as a result of the previous disclosure. Further to this, where the disclosure was previously made to the employer, whether the employee complied with any procedure that was authorised by the employer. A **subsequent disclosure** may be regarded as a disclosure of substantially the same information as provided for in section 9(2)(*c*), where such subsequent disclosure extends to information concerning an action taken or not taken by any person as a result of such previous disclosure.

82 Section 9(1)(b) of the PDA.
83 Protected disclosure to certain persons or bodies.

- Or that the impropriety is of an exceptionally serious nature.

In establishing whether it was **reasonable** to make the disclosure, as provided for above, and in terms of section 9(1)(ii) of the PDA, the following factors according to section 9(3)(*a-g*) have to be taken into account: the identity of the person to whom the disclosure was made; the seriousness of the impropriety; whether or not the impropriety is or is likely to continue in the future; whether or not the disclosure has been made in breach of a duty of confidentiality of the employer towards any other person; and the public interest.

4.3.7.1 Reconciling the section 1 definition of a 'disclosure' and section 9(1)(b) of the PDA

The section 1 definition of the PDA of a 'disclosure' makes it clear that any number of the categories might relate to alleged actual or potential criminal conduct, which the potential whistle-blower might wish to disclose in a manner that renders it a protected disclosure. Within this context, and in relation to general disclosures, note must be taken of the provisions of section 9(1)(*b*) of the PDA, which provide that should the prescribed circumstances and conditions provided for be met, the good faith *disclosure* by the employee may not be made for the purposes of personal gain, excluding any reward payable in terms of any law (own emphasis).

Once again the legislature thought it good to cast the net exceptionally wide in respect of the payable rewards, and the potential whistle-blower would be well advised and warned to ensure that should he be granted or offered a financial or other *reward* for relinquishing his information held, within the context of an employment relationship, the said *reward* is legislatively sanctioned. It can only be assumed in this respect the legislature perhaps meant to distinguish between an informer, an information merchant and an extorter.

4.4 Occupational detriment

The PDA provides that an employee making a protected disclosure may not be subjected to *occupational detriment* by the employer as a result of the employee

having made a protected disclosure.[84] What constitutes occupational detriment in the working environment of the employee is defined in section 1of the Act as:

- being subjected to any disciplinary action;
- dismissed, suspended, demoted, harassed or intimidated;
- transferred against his or her will;
- refused either a transfer or a promotion;
- subjected to a term or condition of employment or retirement which is altered or kept altered to his or her disadvantage;
- refused a reference, or being provided with an adverse reference by his or her employer;
- denied appointment to any employment, profession or office;
- being threatened with any of the actions referred to in the paragraphs above;
- being adversely affected in another manner in respect of his or her employment, profession or office, including both employment opportunities and work security

In this regard it is noted that the legislature did not attempt to define the categories of occupational detriment in the PDA.

McGregor[85] identifies three requirements to be met in order to establish an unfair labour practice founded on occupation detriment[86], namely that:

- the employee must have made a protected disclosure in terms of the provisions of the PDA;
- the employee's employer must have taken action against the employee, which action amounts to occupational detriment; and
- there must be a causal link between the disclosure made and the occupational detriment alleged.

She has further opined[87] in an in-depth discussion of the *Engineering Council of SA & another v City of Tshwane Metropolitan Municipality*[88] case that the reason for

84 Section 3 of the PDA.
85 McGregor 2007 *Juta's Business Law* 15(4) 160-163.
86 McGregor 2007 *Juta's Business Law* 15(4) 160.

prohibiting the infliction of occupational detriment[89] upon an employee who has made a protected disclosure, within the meaning of the PDA is to be found in the fact that the PDA promotes accountability and openness in the workplace, without fear of reprisal aimed at the whistle-blower.

The court in a relatively recent case, *Ngobeni v Minister of Communications and another*[90] very clearly summarises the potentially precarious position of the whistle-blower in respect of occupational detriment to be suffered as follows[91]:

> The irony however is that our whistle-blowing framework does not always and immediately provide the protection whistle-blowers expect and deserve. Given the various powerful political forces and interests at stake in the scramble to lay hands on the public purse, that valiant act of exposing malfeasant within the public service might be a career limiting move if not the beginning of a long nightmare.

It also highlights how pivotal the nexus is that needs to be demonstrated between the disclosure made and the alleged occupational detriment,

In this case, the whistle-blower had approached the court in a bid to have a pending disciplinary enquiry, with him as the accused employees, halted, claiming that the disciplinary enquiry was in actual fact retribution being exacted against him as a result of a protected disclosure made.

The court specifically sought a causal connection between the disclosure and the disciplinary action sought.

In light of the fact that there were allegations which had been levelled against the whistle-blower, which at that stage remained untested the court held that he would have to answer the allegations so levelled against him, no matter how spurious and unsustainable.[92] The court couldn't find that there was the necessary nexus, holding that the employer was entitled to invoke the disciplinary actions, and that in this regard, the whistle-blower's remedies were to be found in the provisions of section 4 of the PDA.

---

87 McGregor 2014 *GST Journal of Law and Social Sciences (JLSS)* 4(1) 87-94.
88 *Engineering Council of SA & another v City of Tshwane Metropolitan Municipality* (2008) 29 *ILJ 899 (T).*
89 McGregor 2014 *GST Journal of Law and Social Sciences (JLSS)* 4(1) 88.
90 *Ngobeni v Minister of Communications and another* (2014) 35 ILJ 2506 (LC).
91 At paragraph 2.
92 At paragraph 71.

4.5 Conclusion

The central South African whistle-blowing legislation, defining the relevant concepts and offering both the defined avenues of reporting and protection to whistle-blowers is the PDA. Since its inception no amendments have been made to its text. With reference to who it aims to protect it is clear that the protection is aimed only at the relationship between the employer (both a natural and juristic person) and employee (excluding independent contractors), in both the private and public sectors. Within this relationship, the PDA provides clearly that no provision in a contract of employment or other agreement entered into between the employer and employee may attempt to exclude the provisions in the Act. However, what needs to be noted in this regard at the very outset is that the PDA does not offer protection to the whistle-blower who as a result of his or her position has had to agree to or sign an "oath of secrecy" or secrecy clause, in respect of which disclosure would then become illegal.

The PDA provides the following reporting avenues:

- to a legal advisor in terms of section 5 (interestingly enough the only one that does not require the whistle-blower to report in good faith);
- to the employer or an external party if authorised by the employer's internal procedures (section 5);
- to a member of Cabinet or the Executive Council (section 7);
- the Public Protector, the Auditor General or another body prescribed for this purpose (section 8);
- general disclosures (section 9)

Two very basic determinations that need to be made relate to whether a *disclosure* was made, and if such disclosure is found to have been made, whether the said disclosure is a *protected disclosure.* The definition of a disclosure excludes the manner of the disclosure, and only relates to the widely defined type of information disclosed.

The ambit of a disclosure as per the provisions of sections 1(*a*) – (*g)* of the PDA has ostensibly been widened by the provisions of sections 1(i) (a) and (b) of the Financial Services Law General Amendment Act 45 of 2013 and in respect of the Pension

Fund Act 24 of 1965, by providing for defined disclosures relating to the affairs of pension funds and their administration which may prejudice the fund or its members. A potentially pivotal exclusion from the ambit of a *protected disclosure* is that disclosures pertaining to ethical, professional and policy related matters are excluded from protection in as far as they do not relate to a legal obligation.

A challenge of a concerning nature has been identified in terms of section 1(ix)(ii) of the PDA, which excludes from protection afforded by the PDA any disclosure which is made by an employee, and in terms of which the employee commits an offence by the making of such disclosure. This would seem to pose the greatest threat to state employees and public servants, especially in light of classified information, which often is part of their employment world and duties. It is opined that the legislature will need to rethink this specific provision and the approach to it as it may be unconstitutional when weighed up against the requirements of our open and democratic society based on fairness and equality, firmly cemented within our Constitution.

Section 1 of the PDA expressly excludes a legal advisor (professional) from claiming the protection proffered by the PDA in circumstances in which he discloses information disclosed to him, whilst the initial discloser was disclosing in order to obtain legal advice in respect of the matter. This limitation is opined to have its foundation acceptable and firmly set in substantive law which demands that confidentiality in this context is maintained for the proper functioning of our legal system.

In keeping with this view and in terms of section 5 of the PDA a disclosure need not be made in good faith to a legal professional in order to be a protected disclosure. It is assumed that this is so to ensure the required frankness by the client in consulting with the legal professional.

In respect of a general disclosure, and more specifically in respect of the provisions of section 9(1)(*b*) of the PDA, the potential whistle-blower would be well advised to ensure that if a *reward* is offered for the information concerned, and in respect of the employment relationship, that that reward is legislatively sanctioned, and that he is

acting in good faith as an informer as opposed to an actual or perceived information merchant or extorter, which would nullify the protection sought.

The protection that is provided is aimed against acts causing *occupational detriment* to the whistle-blower, and as widely defined in terms of section 1 of the PDA.

CHAPTER 5: FURTHER PROVISIONS WITHIN SOUTH AFRICAN LAW AFFECTING WHISTLE-BLOWERS

5.1 Introduction

Martin[1] in her stock-taking of the state of whistle-blowing in South Africa refers to four key elements that make up the whistle-blowing framework in South Africa,[2] including the Promotion of Access to Information Act 2 of 2000, Protected Disclosures Act 26 of 2000, Companies Act 71 of 2008, and the Open Democracy Bill 71 of 2008 (which was never enacted).

There is however, a fifth main piece of the framework which relates to the guidelines for employees that came into operation at the end of August 2011. Simultaneously, it should be noted that there are various pieces of legislation that further contribute to bolstering or pertain to the provisions of the PDA and the predicament faced by informers who may not fall within the ambit of the PDA, even taking into account that some of these were enacted before the PDA.

There are also provisions in South African legislation which requires the whistle to be blown under threat of criminal charges being instituted in the face of non-compliance, such as the provisions of the Prevention and Combating of Corrupt Activities Act 12 of 2004 and the Financial Intelligence Centre Act 38 of 2001, involving even the gagging of the whistle-blower. In turn this leads to considerations pertaining to the protection of whistle-blowers and informants in respect of testifying, especially in criminal procedures.

5.2 Practical guidelines for employees in terms of section 10(4)(a) of the PDA

Section 10(4)(*a*) of the PDA provides that guidelines which explain the provisions of the PDA and all the procedures which may be available to employees in terms of legislation, to employees who are desirous of reporting or otherwise remedying an impropriety. On 31 of August 2011 the Practical Guidelines for Employees in terms of

1 Martin 2010 www.opendemocracy.org.za/wp-content/uploads/2010/10/ODAC_Whistleblowing_Report_web.pdf (Date of use: 24 May 2013).

2 Martin 2010 www.opendemocracy.org.za/wp-content/uploads/2010/10/ODAC_Whistleblowing_Report_web.pdf (Date of use: 24 May 2013).

section 10(4)(a) of the Protected Disclosures Act, 2000 (hereinafter referred to as "the guidelines") were issued. The introduction to the guidelines[3] states that both employees and employers have a responsibility in respect of disclosing criminal and other irregular conduct in the workplace, and further that every employer is responsible for taking all the necessary steps to facilitate disclosures without fear of reprisal. The guidelines go on to describe the purpose of the PDA, how it works, how to make a disclosure in order for it to be protected, against what a whistle-blower is protected, and what to do should he or she be victimised as a result of the fact that a protected disclosure has been made. Part II of the guidelines deal with "other" procedures available to a whistle-blower, outside the provisions of the PDA, and in this regard, the following are referred to:

- The Public Service Act 103 of 1994;
- The Defence Act 42 of 2000;
- The South African Police Act 68 of 1995;
- The National Environmental Management Act 107 of 1998; and finally
- The Western Cape Public Protector Act 6 of 1994.

Each of these will now be dealt with in the context of whistle-blowing.

5.3 The Public Service Act 103 of 1994

The Public Service Act aims at providing for matters pertaining to the public service in South Africa, including *inter alia* the regulation of employment conditions, discipline and discharge of public service employees.

The guidelines point to the fact that in terms of the Public Service Act (hereinafter referred to as the "PSA") a complaint or grievance regarding an official act or omission may be investigated by the Public Service Commission, in terms of the provisions of section 35(1). It terms of the provisions of section 35(1) an officer or employee is permitted to lodge a complaint or grievance with the relevant executing authority in prescribed circumstances, on prescribed conditions and in the prescribed manner. Should the complaint or grievance so submitted not be resolved, the

3 Practical Guidelines for Employees in terms of Section 10(4) (a) of the PDA, 2000. Government Gazette No. 34572, Government Notice No. 702 www.justice.gov.za/legislation/notices/2011/20110831_gg34572_n702-disclosure-guidelines.pdf (Date of use: 25 May 2013).

executing authority in question shall then submit the dispute to the Public Service Commission in the prescribed manner, and within the prescribed time.

What needs to be noted from section 35(1) is that it differentiates between an "employee" and an "officer".

Section 8(1)(*a*) excludes the following from the definition of an employee as set out in section 8(1)(*c*):

> (a) hold posts on the fixed establishment [4]—
> (i) classified in the A division and the B division;[5]
> (ii) in the services;[6]
> (iii) in the Agency[7] or the Service; and
> (iv) in state educational institutions;[8]

> **"officer"** means a person who has been appointed permanently, notwithstanding that such appointment may be on probation, to a post contemplated in section 8(1)(a), and includes a person contemplated in section 8(1)(b) or 8(3)(c);

Section 8(1)(*b*) provides that:

> *(1) The public service shall consist of persons who—*
> (a) hold posts on the fixed establishment—
> (i) classified in the A division and the B division;
> (ii) in the services;
> (iii) in the Agency or the Service; and
> (iv) in state educational institutions;
>
> (b) (i) having ceased to hold posts on the fixed establishment contemplated in paragraph (a), and not having retired or having been discharged, are employed additional to the fixed establishment or who are deemed to continue to hold posts under the circumstances contemplated in subsection 3(c);
> (ii) are appointed permanently additional to the fixed establishment;

Section 8(3)(*c*) provides that:

> Any officer whose post has been excluded from both the divisions aforementioned shall, for the purposes of this Act and the applicable pension

---

4 Section 1 of the PSA defines a *fixed establishment as follows* - **"fixed establishment"** means the posts which have been created for the normal and regular requirements of a department.

5 The PSA in no manner clarifies the terms *A Division* and *B Division.*

6 Section 1 of the PSA defines *services* as follows - **"Service"** means the Service as defined in section 1 of the Intelligence Services Act, 1994.

7 Section 1 of the PSA defines *agency* as follows - **"Agency"** means the Agency as defined in section 1 of the Intelligence Services Act, 1994.

8 Section 1 of the PSA defines *state educational institution* as follows - **"state educational institution"** means an institution (including an office controlling such institution), other than a university or technikon, which is wholly or partially funded by the State and in regard to which the remuneration and service conditions of educators are determined by law;

> law, be deemed to continue to hold a post in the division in which his or her post was included immediately before the determination whereby such exclusion was effected came into force.

Note needs to be taken of the fact that employees within the employ of the South African Secret Service, as defined in terms of the Intelligence Services Act 65 of 2002 are specifically excluded from the right created in terms of section 35(1) of the PSA, as are employees working within education institutions, other than universities partially or wholly funded by the State. The Intelligence Services Act does not define an *employee* at all.

An "executing authority" is defined in section 1 of the Act as including the Office of the President, the Office of the Deputy President, a department or organisational component which falls in a Cabinet portfolio, the Office of the Commission, Office of the Premier of a province, and a provincial department within the Executive Council portfolio.

In this regard the guidelines also refer to the Public Service's Code of Conduct which obliges a public service employee to report certain matters, and as dealt with in Chapter 3. It has to be highlighted that the guidelines in no manner clarifies the position in respect of when an employee's disclosure would qualify as a protected disclosure if made in terms of section 35(1) of the PSA. It is assumed that the potential whistle-blower would need to weigh up his obligation within his circumstances, and decide in terms of which section to make the disclosure.

The guidelines in no manner clarify which employees within the public service are accorded the right in accordance with the provisions of section 35(1), and certainly do not forewarn those excluded. Further to this section 35(1) of the PSA makes mention of the submission of the complaint in terms of the prescribed conditions and in the prescribed manner. A thorough search of the internet site of the PSC (Public Service Commission) reveals only one option in respect of whistle-blowing, and that is submitting a complaint electronically to the National Anti-Corruption Hotline (NACH).[9]

9 Public Service Commission "Feedback information" http://www.psc.gov.za/feedback/feedback_form.asp (Date of use: 24 May 2013).

The second portion in this regard deals with the Code of Conduct for public servants which place a duty on a public servant to report in respect of an employee who is enjoined to report to the appropriate authorities fraud, corruption, nepotism, maladministration and any other act or omission for that matter which constitutes an offence or which is prejudicial to the public interest, during the course of his or her official duties.

What is noteworthy in this respect is that the Code places a duty on such an employee, whilst section 35(1) of the PSA imposes an optional right, couching it as "may", as opposed to "shall" or *"must"*. The guidelines reveal another anomaly in respect of the application of the "above-mentioned" [10] in stating that "it" applies to the following persons who are employed in the public service:

> (a) employees of all national departments, provincial administrations and provincial departments and organisational components listed in Schedules 1 to 3 of the Public Service Act, 1994; and
>
> (b) employees in the South African Police Service, the South African National Defence Force, Department of Correctional Services, state educational institutions, as defined in the Public Service Act, 1994, the National Intelligence Agency, and South African Secret Service, but only insofar as they are not contrary to the laws governing their employment.[11]

Contrary to the provisions of section 35(1) of the PSA, the Code places a perilous duty upon employees in the National Intelligence Agency and the South African Secret Service, adding though that they may not meet this duty so imposed if it would mean that the disclosure would be contrary to any legislation governing their employment. Further to this, it would seemingly also mean that a double duty is placed upon employees of the SAPS.

5.4 The Defence Act 42 of 2000

The guidelines mention the Defence Act, as well as the fact that the South African Defence Force (hereinafter referred to as the "SANDF") is comprised of two types of

10 It is not clear whether the "above-mentioned" includes only the Code of Conduct or section 35(1) of the PSA as well.

11 This classification is not referred to in any legislation or document by the guidelines.

members, namely those appointed in terms of the PSA (or so-called "civilians") and those appointed in terms of the Defence Act 42 of 2002.[12]

In terms of whistle-blowing the civilian members of the SANDF are entitled to utilise the provisions of the PDA. The members appointed in terms of the Act (hereinafter referred to as the "DA 2002"), are however subject to the provisions of the DA 2002, as well as the provisions of the Defence Act 44 of 1957 (hereinafter referred to as "DA 1957"), as the Military Discipline Code is still embodied within the First Schedule of this Act. In respect of the DA 2002, there are noteworthy legislated limitations relevant within the context of whistle-blowing that cognisance must be taken of, provided for in terms of section 50 and in respect of the communication of information and the right to join and participate in the activities of trade unions.

In terms of the provisions of section 50, subject to the Constitution, the rights of employees and members may be restricted in the following manners:

- Members of the Defence Force and employees may be subjected to restrictions of any kind of information to the extent that may be necessary for security and the protection of information;
- As may be necessary for national security and the maintenance of structure and discipline in the Defence Force, the rights of members of the regular force, serving members of the reserve force and members of any auxiliary force to join in and participate in the activities of any organisations and trade unions may be restricted.

No mention of the above-mentioned restrictions, and within context of the duties provided for in terms of the Military Discipline Code, is made in the guidelines, nor is it mentioned that both the civilian employees and members fall under the blanket coverage of the section 50 provisions. Nor is any mention made of the potentially harsh penalties that have been provided for in terms of section 104 of the DA 2002 for offences which may very well be committed in attempting to blow the whistle.

On conviction the person may be liable to either a fine or imprisonment for up to 25 years.

12 Note has to be taken that the SANDF encompasses the South African Army, Air Force, Navy and Military Health Service.

It would seem that the only safeguard in such circumstances would be to obtain the necessary authority required in terms of the provisions. However, having said that, within the context of the SANDF environment, two provisions were found that could potentially be aimed at protecting a whistle-blower,[13] who is a member, namely, sections 104(16) and (17).

In terms of the provisions of section 104(16) any person who discloses the identity of a covert source of the SANDF, without the necessary authority, is guilty of an offence and liable on conviction to a fine or imprisonment for a period of not more than 25 years.

Section 104(17) provides that any person who undermines or stifles any procedure for the redress of grievances, or attempts to do is guilty of an offence and liable on conviction to a fine or imprisonment for a period of not more than 5 years.

As pointed out by the guidelines, the Military Discipline Code as found in the First Schedule of the DA 1957, sections 7, 21 and 134 have bearing on potential whistle-blowers. However, the Military Discipline Code is not available on the internet for analysis purposes within this context. The SANDF's homepage was also searched in this regard, to no avail.

5.5 The South African Police Act 68 of 1995

As discussed above, and in accordance with the provisions of the guidelines, South African Police Service members fall within the ambit of the duty created by the Public Service Code of Conduct, and in respect of reporting certain irregularities as defined.

The guidelines further refer to the South African Police Service Act 68 of 1995, (hereinafter referred to as the "SAPS Act") which is aimed at providing for the establishment, organisation, regulation and control of the South African Police Service (hereinafter referred to as the "SAPS"), and matters related thereto; and more specifically Regulation 18(10) of the SAPS Discipline Regulations, issued in terms of section 24(1)(g) of the SAPS Act.

13 For obvious reasons not necessarily meaning the whistle-blower as provided for in the strict sense within the PDA context.

Government Gazette 28985, Government Notice 643, dated 3 of July 2006 states that it pertains to the disciplinary regulations for the SAPS, and has been provided for by the Minister for Safety and Security under section 24(1) of the SAPS Act. No updated relevant regulation could be found.[14] It has to be noted that the guidelines refer to the fact that an employee commits misconduct if he or she "withholds or unreasonably delays any complaint or an adverse communication in connection with another employee or person employed by the Service. In this regard reference is then made to Regulation 18(10) of the South African Police Service Discipline Regulations, issued under section 24(1)(g) of the SAPS Act, 1995. Reference is also made of Regulation 18(9), although no *Government Gazette* cross reference is supplied. Within the current discipline regulations, it has to be noted that there is no Regulation 18(9) or (10), as regulation 18 ends at regulation 18(5).

It seems probable that the guidelines may have been referring to the repealed Discipline Regulations 2005. Then there are the regulations applicable to the Directorate for Priority Crime Investigation (hereinafter referred to as "DPCI"), as provided for in terms of *Government Gazette* No. 33524, Government Notice No.783, dated 7 September 2010. Reference to these regulations is not made at all in the guidelines. The establishment of the DPCI was provided for in terms of the South African Police Service Amendment Act 57 of 2008. The said regulations were promulgated in terms of section 24(1)(*ee*A) of the SAPS Act.

Regulation 4 deals with "measures to protect confidentiality of information", and any breach of this regulation will be treated as serious misconduct.

The regulations refer to how complaints are to be made to a retired judge in terms of regulation 5, the origin of which is to be found in section 17L of the South African Police Service Amendment Act 57 of 2008. Section 17L is entitled "Complaints mechanism" and provides as follows:

- The appointment of a retired judge to investigate complaints;[15] it is noted in this regard that the performance of such functions by a retired judge does not detract at all from the powers of the Independent Complaints Directorate

14 16 August 2012.
15 Section 17L (1)(a) of the South African Police Service Amendment Act 57 of 2008;

which is empowered to investigate complaints against SAPS members and DPCI members.[16]

- Such retired judge is precluded from investigating complaints pertaining to intelligence matters;[17]
- In the investigation of such matter, the retired judge may –
    - Request information from the Director of Public Prosecutions (hereinafter referred to as the "NDPP"), who may however, on reasonable grounds refuse to provide such information requested;[18]
    - Obtain any information or documents under the control of SAPS;[19]
    - Enter any SAPS building or premises to obtain SAPS information and documents;[20]
    - Shall be entitled to reasonable assistance;[21]
- The retired judge shall report on the investigation undertaken;[22]

In no manner does the Amendment Act make provision for the protection of such a member of the public, nor are any additional remedies availed to such a DPCI employee.

5.6 The National Environmental Management Act 107 of 1998

The National Environmental Management Act (hereinafter referred to as "NEMA") is aimed at providing for co-operative, environmental governance by establishing principles for decision-making on matters affecting the environment, institutions that will promote co-operative governance and procedures for co-ordinating environmental functions exercised by organs of State; and to provide for matters connected therewith. NEMA was legislated before the PDA came into effect.

Section 31 of the NEMA is entitled "Access to environmental information and protection of whistle-blowers". Section 31(4) of NEMA provides that notwithstanding the provisions of any other law, no person is civilly or criminally liable or may be dismissed, disciplined, prejudiced or harassed as a result of having disclosed any

16 Section 17L (1)(b) and (2) of the South African Police Service Amendment Act 57 of 2008;
17 Section 17L (3) of the South African Police Service Amendment Act 57 of 2008;
18 Section 17L (7) of the South African Police Service Amendment Act 57 of 2008;
19 Section 17L (8)(a) of the South African Police Service Amendment Act 57 of 2008;
20 Section 17L (8)(b) of the South African Police Service Amendment Act 57 of 2008;
21 Section 17L (8)(c) of the South African Police Service Amendment Act 57 of 2008;
22 Section 17L (6) of the South African Police Service Amendment Act 57 of 2008;

information, if in making that disclosure the person involved in good faith believed reasonably, at the time of making the disclosure, that he or she was in fact disclosing evidence of an environmental risk, and that the disclosure in question was made in accordance with the provisions of subsection 5.

As such, any person who makes such a disclosure is offered the said protection, irrespective of whether he or she is an employee or not. Section 31(6) of NEMA provides that section 31(4) applies whether or not the whistle-blowers has used or exhausted "any other applicable external or internal procedure to report or otherwise remedy the matter concerned." Further to this, sections 31(7) – (8) provide that:

- No one may advantage or undertake to advantage any person for not blowing the whistle as provided for in terms of section 31(4); and
- No one may threaten retribution against a person because that person has or intends to blow the whistle in accordance with the provisions of section 31(4);

Besides making the disclosure in good faith, reasonably believing at the time of the disclosure that he or she was disclosing evidence of an environmental risk, the whistle-blower also needs to meet the requirements set out in section 31(5), namely that:

- The whistle-blower must disclose the information to:[23]
    - a committee of Parliament or of a provincial legislature;
    - an organ of state responsible for protecting any aspect of the environment or emergency services;
    - the Public Protector;
    - the Human Rights Commission;
    - any attorney-general or his or her successor; or
    - more than one of the bodies or persons referred to above.

The alternative to this is provided in terms of section 31(5)(b) of the NEMA, in that the whistle-blower disclosed the information concerned to one or more news media and on clear and convincing grounds believed at the time of the disclosure that: the disclosure in question was necessary in order to avert an imminent and serious

23 Section 31(5)(a) of the NEMA.

threat to the environment, in order to ensure that the threat to the environment was both timeously and properly investigated, or alternatively, to protect himself or herself from serious or irreparable harm from reprisal; or in giving due weight and or consideration to the importance of administration that is open, accountable and participatory in nature, and that the public interest regarding the disclosure of the information outweighs not disclosing the relevant information.

The last alternatives are provided in terms of section 31(5)(*c*) and (*d*) of the NEMA, which provides that: disclosed information, so disclosed substantially in accordance with any applicable procedures, whether internal or external,, other than procedures provided for in section 31 (5) (*a*) or (*b*), for reporting or remedying the matter at hand or disclosed information which had become available to the people in the RSA, or elsewhere, before the disclosure was made.

5.7 The Western Cape Public Protector Act 6 of 1994

The Western Cape Public Protector Act (hereinafter referred to as the "WCPPA"), states in section 1(*a-f*) that its purpose is to determine the *inter alia* procedures regarding complaints laid with the Public Protector, procedures regarding the resolution of disputes, service standards that are applicable in respect of investigations conducted by the Public Protector, and applicable timelines.

The WCPPA was legislated before the PDA came into effect.

As to who may lodge a complaint, section 3(3)(*a-j*) provides that *any* person may report a matter falling within the jurisdiction of the Public Protector, and includes any person, group of persons or organisation that approaches the Public Protector in terms of various pieces of legislation.[24]

24 Constitution of the Republic of South Africa 1996, Public Protector Act 23 of 1994, Executive Members Ethics, 1998, Prevention and Combating of Corrupt Activities Act 12 of 2004, Promotion of Access to Information Act 2 of 2000, Protected Disclosures Act 26 of 2000, Housing Consumer Protection Measures Act 95 of 1998, Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, Lotteries Act 57 of 1997; and National Environmental Management Act 107 of 1998.

In this regard the guidelines read that "…any person (own emphasis) and which includes employees of the Western Cape Province may report …"[25]

The Public Protector of South Africa[26] is appointed by the President, on the recommendation of the National Assembly, in terms of Chapter 9 of the Constitution and is required to be a South African citizen who is suitably qualified and experienced and has exhibited a reputation for honesty and integrity. The Constitution also prescribes the powers and duties of the Public Protector. Further powers, duties and the execution thereof are regulated by the Public Protector Act.[27] Section 181 of the Constitution determines that the Public Protector shall be subject only to the Constitution and the law, and must be impartial; exercising his/her powers and performing his/her functions without "fear; favour or prejudice". No person or organ of state may interfere with the functioning of the Public Protector's office.

The Public Protector has the power to investigate any conduct in matters pertaining to the State, or the public administration in any sphere of government, that is either alleged or suspected of being improper, or which is alleged or suspected to result in any impropriety or prejudice. Once such an investigation has been completed, the Public Protector has to report thereon, and where appropriate take the necessary remedial action. Additional functions and powers have been granted in this respect in the provisions of the Public Protector Act, 1994. However, the Public Protector is excluded from investigating court decisions.

Further to this, the Public Protector must be accessible to all persons and communities; is neither an advocate for the complainant or for the public authority concerned, but rather ascertains the facts of the case and reaches an impartial and independent conclusion on the merits of the complaint. Other organs of state must assist and protect the institution to ensure its independence, impartiality, dignity and effectiveness.

Section 4 of the WCPPA sets out the information that is required from all reporting a matter to the Public Protector, and inter alia includes the full names, physical and

25 Par 6.5.
26 Public Protector of South Africa: History and Background to the Office of the Public Protector http://www.publicprotector.org_us/history/accessinfo_act.pdf (Date of use: 24 May 2013).
27 Public Protector Act 23 of 1994.

postal addresses of the complainant, telephone, facsimile, email addresses of the complainant, as well as “any other information that identifies the complainant”.

Section 5 of the WCPPA sets out what the Public Protector may investigate, as also referred to in the guidelines. Section 6 of the WCPPA deals with confidentiality, and should a complainant wish to remain anonymous, the Public Protector may decline to investigate the complaint, and in terms of section 8 the manner of lodging the complaint is stipulated, which in all instances includes the fact that the complaint has to be in written format.

It has to be stressed that the WCPPA makes no provision for the protection of complainants whatsoever. This has to be seen in light of the fact that “any person” may make such complaint, and then bearing in mind that should that person not be an “employee” within the meaning allocated in terms of the PDA, such as just a member of the public acting in public interest, he or she has no recourse whatsoever to any additional protection not already available in law (own emphasis). An employee making a disclosure will only enjoy the protection offered by the PDA if he or she meets the relevant requirements as set out in terms of section 8(1) of the PDA.

5.8 A few more considerations not covered in the guidelines

The guidelines as discussed above deal with disclosures made only by employees, and when taking into consideration that the PDA only provides protection for employees making a protected disclosure, it is interesting to note that there are a few pieces of South African legislation that place an obligation on members of the public (non-employees) to make disclosures, whilst offering no protection in return. Two of these pieces of legislation are the Prevention and Combating of Corrupt Activities Act 12 of 2000 and the Financial Intelligence Centre Act 38 of 2001.

5.8.1 Prevention and Combating of Corrupt Activities Act 12 of 2004

The Prevention and Combating of Corrupt Activities Act (hereinafter referred to as the “PRECCA”, is aimed at:

- Providing for strengthening measures to prevent and combat corruption and corrupt activities;
- To provide for the offence of corruption and offences relating to corrupt activities;
- To provide for investigative measures in respect of corruption and related corrupt activities;
- To provide for the establishment and endorsement of a Register in order to place certain restrictions on persons and enterprises convicted of corrupt activities relating to tenders and contracts;
- To place a duty on certain persons holding a position of authority to report certain corrupt activities/ transactions**;** (Own emphasis)
- To provide for extraterritorial jurisdiction in respect of the offence of corruption; and
- To provide for matters related thereto.

Section 34 of the PRECCA places a duty on certain persons to report corrupt activities:

> **34.** (1) Any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any other person has committed-
> (a) an offence under Part 1, 2, 3 or 4, or section 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2; or
> (b) the offence of theft, fraud, extortion, forgery or uttering a forged document, involving an amount of R100000 or more, must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to any police official.
>
> (2) Subject to the provisions of section 37(2), any person who fails to comply with subsection (l), is guilty of an offence.

Section 34(4) of PRECCA defines a person of authority as including people who hold a position of authority, including:

- The Director-General, head or equivalent officer, of a national or provincial department;
- The municipal manager of a municipality;
- Any public officer who form part of the senior management cadre of a public body;
- The head, rector or principal of a tertiary institution;

- A manager, secretary or director of a company as defined in terms of the provisions of the Companies Act 61 of 1973, and a member as defined in terms of the provisions of the Close Corporation Act 69 of 1981;
- Executive Manager of a bank or financial institution;
- A partner of a partnership;
- A Chief Executive Officer;
- Any person responsible for the overall management and control of a business;
- Any of the aforementioned who have been appointed in a temporary or acting capacity.

In such circumstances it is quite imaginable that the person so required to report a matter is not an employee who would thus otherwise qualify for protection should the disclosure have been made in a manner qualifying for protection. PRECCA does not make provision in any manner for the protection of such a whistle-blower, even when seen in light of the fact that it has placed a legal obligation on such person.

5.8.2 Financial Intelligence Centre Act 38 of 2001

The Financial Intelligence Centre Act (hereinafter referred to as the "FICA") is aimed at:

- Establishing a Financial Intelligence Centre and Money Laundering Advisory Council in order to combat money laundering activities;
- To impose certain duties on institutions and other persons who might be used for money laundering purposes; (own emphasis) and
- Provide for related matters.

Sections 28 of the FICA places a duty on an accountable institution and a reporting institution to report prescribed particulars to the FIC, within the prescribed time, regarding cash transactions above the prescribed limit (as determined).

Section 29 of the FICA places a duty on people who carry on a business, manage a business or who are employed by a business, and who know or suspect certain things, to report such knowledge or suspicions. In terms of the provisions of section 29(1)(a-c) of the FICA, a person who carries on a business or is in charge of or

manages a business, or who is employed by a business and who knows or suspects that the business has received or is about to receive the proceeds of unlawful activities, or a transaction or a series of transactions to which the business is a party:

- Is facilitated or is likely to facilitate the transfer of the proceeds of unlawful activities;
- Apparently has no lawful business or purpose;
- Is being conducted in order to avoid having to report something as required in terms of the FICA; or
- May be relevant to the investigation of tax evasion; or that
- The business is or will be used for money laundering purposes;

Such knowledge and or suspicions as aforementioned must within the period specified be reported to the FIC, as well as the facts on which the knowledge or suspicion is based.

Further to this, the FICA also specifies that such a person may not disclose such information, knowledge or suspicion to any other person, including the person about whom such a report must be made or has been made.[28] Sections 29(3)(a) – (d) set out the exceptions in this regard.

Section 37(1) provides that no duty of secrecy or confidentiality, or any other restriction on the disclosure of information that has to be disclosed in terms of the provisions of the FICA, whether it arises from legislative provisions or common law agreement, affects the compliance with the duty to make such required report. The exception in this regard relates to client attorney privilege as provided for in terms of section 37(2) of the FICA.

Section 38 of the FICA provides for the protection of people making the required reports. Section 38(1) provides that no criminal or civil action lies against such whistle-blower, complying in good faith. Further to this in terms of the provisions of section 38(2) nobody who has made, initiated or contributed to a disclosure made in terms of sections 28, 29 or 31 of the FICA, or who has provided additional information to such a report made may be compelled to give evidence in criminal

28 Section 29(3)(b) of the FICA Act.

proceedings regarding his or her part of the report. In other words even though such a person is a competent witness, he or she is not a compellable witness. Section 38(3) provides that no evidence regarding the identity of the whistle-blower is admissible as evidence in criminal proceedings pertaining to the relevant report, unless the whistle-blower testifies.

However, Schwikkard and Van der Merwe[29] point out that the protection of identity in terms of the provisions of section 38(3) is confined to criminal proceedings, and ceases to exist should the person concern testify at the proceedings. Further it is pointed out that section 38(2) does not provide for the compellability of such a witness, but only the competency of such a witness to testify in criminal proceedings arising from such a report made.[30]

Even further to this section 39 of the FICA provides for the admissibility of reports made to the FIC, providing that a certificate issued by an official of the FIC, that information specified in the certificate was sent or reported to the FIC in terms of sections 28, 29, 30(2) or 31 will subject to the provisions of section 38(3)[31] be admissible as evidence on its production in court, provided that it would be admissible as direct oral evidence.

Section 40 of the FICA places certain restrictions on access to information held by the FIC, together with the required procedures to be followed. Section 41 also protects confidential information held by the FIC, in that no person may disclose confidential information held by or obtained by the FIC except within certain circumstances.

5.9 The protection of witnesses in terms of South African legislation

Although witness protection is not specifically mentioned in terms of the PDA, it does provide in terms of section 4(1)(*b*) of the PDA, that a whistle-blower (as an employee) who has been subjected to, is subjected to or may be subjected to an *occupational breach* may pursue any other process allowed or prescribed by law.

29 Schwikkard and Van der Merwe *Principles of Evidence* (3rd ed).
30 Schwikkard and Van der Merwe *Principles of Evidence* (3rd ed) 170.
31 Pertaining to the admissibility of evidence about the identity of the whistle-blower.

5.9.1 The Witness Protection Act 112 of 1998

One could well imagine circumstances in which the National Prosecuting Authority, the SAPS or even the whistle-blower would consider witness protection within the South African context, within relevant circumstances, and as provided for in terms of the Witness Protection Act 112 of 1998.

The natural question following on such a consideration would then be what kind of protection such a witness would be entitled to, and under which circumstances. The body mandated with implementing this legislation is the Office of Witness Protection (OWP), which "deals with the safekeeping of identified and intimidated witnessed [sic] and related persons requiring prosecution[32] whilst testifying in cases being prosecuted."[33] The OWP aims to provide a support service to the criminal justice system by protecting threatened or intimidated witnesses and related persons, and by placing them under protection to ensure that they will indeed testify in criminal matters and other defined proceedings. The only report publicly available was for the financial year 2008/9, and the following reported facts are noteworthy:

- No witnesses or related person on the programme were threatened, harmed or assassinated in the past 7 years;
- The unit had 431 witnesses, including family members, on the programme at the end of March 2009;
- The unit had 218 witnesses on the programme at the end of March 2009;
- 44 witnesses walked off the programme during the year;
- A witness stabbed his wife to death before committing suicide;
- Another witness drowned at sea whilst swimming;
- A witness and her baby were injured during transport;

  However, due to the fact that the programme intends to protect the relevant witnesses from external attacks and threats the 3 above-mentioned incidents are not reported in the figures give. One has to wonder where the protection was though when this was taking place; perhaps the answer is to be found in the notation below.

32 It is assumed "protection" was meant at this point.
33 Office of Witness Protection. Sub-programme 2, Witness Protection www.npa.gov.za/UploadedFiles/SUB-PROGRAMME%202%20-%204%20(OWP,%20DSO,%20AFU).pdf (Date of use: 25 May 2013).

- The ratio of protectors available to protect the witnesses is significantly lower than international best practice.

The Witness Protection Act 112 of 1998 provides for witness protection officers[34] and security officers.[35] The procedures pertaining to the application for witness protection is provided for in terms of section 7 of the Act. Temporary protection may be granted in relevant circumstances, whilst the application is being made, processed or considered, and which may not exceed 14 days.[36] Section 15 of the Act provides for the circumstances in which a party or witness in civil proceedings may be protected.

Employees in the WPO are required to take an oath pertaining to the confidentiality and disclosure of information within this context,[37] further to which in terms of section 17(4) of the Act, no person may disclose information that he or she has acquired in the line of duty (within the context of this Act), except for the purpose of giving effect to the provisions of the Witness Protection Act, when required to do so by a competent court, when authorised to do so by the Minister of Justice or in terms of the provisions of section 17(5) of the Act.

Section 18 provides that the presiding officer in a matter, despite any other legislation that may be applicable, must make an order prohibiting the publication of any information that could possibly disclose the place of safety where the witness is being kept or where the witness has been relocated to, the circumstances relating to his or her protection, and or the identity or place of safety at which another protected person is located.

Relocation specifics or change of identity specifics of a protected person; unless the Director of the WPO satisfies the presiding officer that exceptional circumstances exist, that would mean it would be in the interests of justice for such an order not to be made.

Section 22 provides for the various offences relating to the Act, including matters such as the disclosure of related information, interference with or hindrance of the duties of the WPO, its officials in their capacity and the like.

34 Section 5 of the WPA.
35 Section 6 of the WPA.
36 Section 8(1) of the WPA.
37 Section 17 of the WPA.

5.9.2 The informer as a witness in criminal proceedings

The situation may arise in which a matter initiated by or contributed to by a whistle-blower, whether the term (whistle-blower) is understood within the context of the PDA, or a wider sense, such as that envisioned by the FICA, PRECCA or the Companies Act 71 of 2008, may evolve and culminate in criminal proceedings in terms of the Criminal Procedure Act (hereinafter referred to as the "CPA"). In such circumstances, potential whistle-blowers need to be aware of the potential implications in terms of substantive law and the CPA, in their role as witnesses in criminal proceedings. Within the sphere of criminal procedure, a whistle-blower in the wider sense is referred to as an *informant* or *informer,* and it is well worth noting in this regard that the PDA in no manner provides for the protection of the identity of the whistle-blower.

A particularly useful definition of an informer was given by the court in *R v Van Schalkwyk*[38] as:

- the person who first discloses information which may be prejudicial to other parties, and who retaliation he may then provoke ;
- that the information disclosed must be the kind of information that may cause or may potentially cause the institution of a criminal prosecution; and
- the disclosure is to be made to officers of justice.

The court points out that it is desirable to ensure that a definition of who would comprise an informer, remains flexible, including any person who provides useful information relating to a crime, and who needs protection from retaliation as a result of having made the relevant disclosure.

This definition was also applied in *Suliman v Hansa.*[39]

It seems clear that the rationale behind the protection of informants would include the protection of the informant and those close to him against the wrath that may be exacted by those against whom he informed, and the encouraging of others regarding the provision of information pertaining to crimes to the police.

38 *R v Van Schalkwyk* 1938 AD 543 at 548.
39 *Suliman v Hansa* (1) 1971 (2) SA 437 (N) at 438G.

Schwikkard and Van Der Merwe[40] deal with the implications to the witness in his role as informer within criminal procedure; it is accepted that in order to ensure and facilitate efficient crime detection measures privilege has emerged which protects communications which would otherwise reveal the identity of an informer or the communications channels used during the investigation of crime. This privilege is provided for in section 202 of the Criminal Procedure Act 51 of 1977.[41]

They contend that the rationale behind this with reference to judgement in the *Abelson* case,[42] in which the learned judge stated that as crime is orchestrated in secret and underhanded ways against the state's interests, defeating criminal conduct must similarly be conducted in a similar manner.[43]

In cases, for example *Abelson supra* and *Peake,* [44] the manner in which communications were obtained or the methods by which investigations were conducted are sometimes held by our courts to be privileged.

In *Swanepoel v Minister van Veiligheid en Sekuriteit* [45] the court held that an informant has a substantive right to the non-disclosure of his identity, especially in circumstances in which he had requested to remain anonymous. A cause of action, in all probability falling under the auspices of civil law, lies therein, should the informer's identity be disclosed maliciously, intentionally and unlawfully.

However, Schwikkard and Van Der Merwe[46] sound a warning in this regard stating that in the constitutionalised system, care would have to be taken to ensure that any claim to privilege, concerning methods of investigation, is not a mere attempt at covering up the fact that the evidence in question was unconstitutionally obtained.

5.9.2.1 Section 202 of the CPA

Section 202 of the CPA provides for privilege from disclosure on the ground of public interest or public policy, and reads as follows:

---

40 Schwikkard and Van der Merwe *Principles of Evidence* (3rd ed) 165-170.
41 Schwikkard and Van der Merwe *Principles of Evidence* (3rd ed) 165.
42 *R v Abelson* 1933 TPD 227.
43 *R v Abelson* 1933 TPD 227 at 231.
44 *S v Peake* 1962 2 SA 288 (C).
45 *Swanepoel v Minister van Veiligheid en Sekuriteit* 1999 2 SACR 284 (T).
46 Schwikkard and Van der Merwe *Principles of Evidence* (3rd ed).

> Except as is in this Act provided and subject to the provisions of any other law, no witness in criminal proceedings shall be compellable or permitted to give evidence as to any fact, matter or thing or as to any communication made to or by such witness, if such witness would on the thirtieth day of May, 1961, not have been compellable or permitted to give evidence with regard to such fact, matter or thing or communication by reason that it should not, on the grounds of public policy or from regard to public interest, be disclosed, and that it is privileged from disclosure:
>
> Provided that any person may in criminal proceedings adduce evidence of any communication alleging the commission of an offence, if the making of that communication prima facie constitutes an offence, and the judge or judicial officer presiding at such proceedings may determine whether the making of such communication prima facie does or does not constitute an offence, and such determination shall, for the purpose of such proceedings, be final.

This section clearly states that the privilege is based upon considerations of public policy or public interest, within the circumstances of the specific case. There are however exceptions in respect of the invocation of the provisions of section 202, and which were thoroughly dealt with by the court in *Ex parte Minister of Justice: In re R v Pillay*[47] in which three such exceptional circumstances were mentioned, namely: circumstances in which it is material to disclose the identity of the informer, in respect of the ends of justice; circumstances in which it is either necessary or right to disclose the identity of the informer in order to show the accused's innocence; and circumstances in which the reason for the non-disclosure no longer exist.

Hiemstra[48] refers to the four fundamental conditions seen to be prerequisites for this kind of privilege, namely:

- The communication must originate in a confidence that they will not be disclosed;
- This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
- The relation must be one which in the opinion of the community ought to be sedulously fostered; and
- The injury that would be inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation.[49]

47 *Ex Parte Minister of Justice: In re R v Pillay* 1945 AD 653 at paragraphs 665-666.
48 Kruger *Hiemstra's Criminal Procedure* 23-44.
49 Kruger *Hiemstra's Criminal Procedure* 23-44.

He points out further exceptions to the provisions of section 202 as being as that peace officers can never be regarded as informers for the purposes of section 202 of the CPA,[50] if the disclosure of the identity of the informer would favour the innocent the court may in its discretion allow it,[51] and when the informer admits himself having been involved and his identity has already been disclosed in another manner.[52]

Finally, he points out that although the attitude of the informer is relevant when deciding whether or not it is to be disclosed, it is not the deciding factor, with the court having the final say in this respect.

5.9.2.2 Section 203 and 204 of the CPA

Should an informer (whistle-blower in the wider sense) himself have been complicit in the alleged criminal conduct which he has informed on, he may in certain circumstances be able to rely on the privilege against self-incrimination as provided for in section 203 of the CPA, and should the provisions of section 202 (informant privilege) not be applicable to him. Section 203 of the CPA provides that:

> No witness in criminal proceedings shall, except as provided by this Act or any other law, be compelled to answer any question which he would not on the thirtieth day of May, 1961, have been compelled to answer by reason that the answer may expose him to a criminal charge.

The provisions of section 203 go hand-in-hand with the provisions of section 204 of the CPA.

Section 204 relates to the potential "protection" of an accomplice testifying in criminal proceedings against himself being prosecuted in regard to the alleged crime that he is to testify about. When an informant as accomplice in these circumstances decides or agrees to testify against accomplices, the prosecutor will inform the court before he starts testifying that the witness will be required to answer questions during his testimony which may incriminate him.

The court will inform the witness that he is obliged to give evidence in the matter, that questions will be put to him by the prosecutor, the answers to which may incriminate

50 *R v Makaula* 1949 (1) SA 40 EC.
51 *Tranter v Attorney-General* 1907 TS 415 at 423; *S v Rossouw* 1973 (4) SA 608 (SWA) at 609H.
52 *Suliman v Hansa* (1) 1971 (2) SA 437 (N) at 72 D-E; *R v Van Schalkwyk* 1938 AD 548 at 549; *S v Rossouw* 1973 (4) SA 608 (SWA) at 609H; *S v Solani* 1987 (4) SA 203 (NC) at 23-44.

him, that he is obliged to answer such potentially incriminating questions, and that should he answer frankly and honestly all such questions put to him, he will be discharged from prosecution with regard to the specified offence.

Section 106(1)(*g)* pertaining to the kinds of pleas an accused may plea, confirms this, in that an accused may plea that he has been discharged under the provisions of section 204 from prosecution for the offence he has been charged with. Within the context of witnesses being required to testify, note should also be taken of the comprehensive provisions in this respect, such as sections 183,[53] 184 and 185,[54] and 188,[55] 189[56] of the CPA.

5.10 The Companies Act 71 of 2008

The Companies Act 71 of 2008 (hereinafter referred to as the "CA") has a section, section 159, completely devoted to provisions pertaining to the protection of whistle-blowers within the context of a company. The main provisions in this regard are as follows:

- Any provision contained in a company's Memorandum of Incorporation, rules or agreement which is inconsistent with, purports to limit or set aside the provisions of section 159 (in respect of the protection of whistle-blowers) is void to the extent that it is so inconsistent, purports to limit or set aside the protection of whistle-blowers.[57] This provision is comparable with section 2(3)(*a*) of the PDA.

---

53 This section requires a witness to keep the SAPS informed of his whereabouts until the disposal of the matter or until such time as he is officially informed that he will no longer be required as a witness.

54 Section 184 provides for dealing with witnesses who are about to abscond, and in relation to whom a warrant of arrest may be issued.
Section 185 provides for the detention of witnesses whose safety is in danger, who may abscond or who may be tampered with, or if it is deemed to be in the interests of the witness or the administration of justice that such witness be detained in custody.

55 This section provides that a witness subpoenaed to attend criminal proceedings or warned to attend such proceedings by the court, and who fails to attend or remain in attendance shall be guilty of a criminal offence.

56 This section provides for the powers of a court in respect of a recalcitrant witness. Should a witness refuse to answer a question put to him or fail to produce a book, paper or document which he is required to produce, the court may in a summary manner inquire into his refusal or failure in this regard. Unless the witness has a just excuse for his refusal or failure, and sentence him to imprisonment for a period not exceeding 2 years, or in circumstances in which the criminal proceedings relate to an offence in Part III of Schedule 2 of the CPA, to imprisonment for a period not exceeding 5 years.

57 Section 159(2) of the CA.

- A shareholder, director, company secretary, prescribed officer or employee of a company, a registered trade union that represents employees of a company or another representative of that employee, a supplier of goods and services to a company or an employee of such a supplier, who makes a disclosure as contemplated in the provisions of section 159, have –

    - Qualified privilege in respect of the relevant disclosure; and
    - Is immune from any civil, criminal and administrative liability for that disclosure.[58]

The provisions of this provision go much wider than the provisions of the PDA in that the protection offered to a whistle-blower goes wider than the ambit of the employment relationship; by include suppliers and employees of suppliers to the relevant company. It further goes wider by providing both privilege and immunity, as set out above.

Beside the remedies offered in terms of section 159, the whistle-blower is also offered remedies in terms of section 159(5) of the CA.

All those mentioned in section 159(4) are entitled to compensation from another person in respect of any damages suffered if the person is entitled to make or has made a disclosure as contemplated in the provisions of section 159, and because of that actual or possible (own emphasis) disclosure the second person engages in conduct with the intent to cause detriment to the first person (the whistle-blower, actual or potential), and the conduct causes detriment,[59] or directly or indirectly makes a threat, whether express or implied, conditional or unconditional, to cause any detriment to the first person or another person,[60] and intends the whistle-blower to fear that the threat will be carried out[61] or is reckless as to causing the first person to fear that the threat will be carried out, irrespective of whether the first person actually feared that the threat would be carried out.[62]

58 Section 159(4) of the CA.
59 Section 159(5)(a) of the CA.
60 Section 159(5)(b) of the CA.
61 Section 159 (5)(b)(i) of the CA.
62 Section 159(5)(b)(ii) of the CA.

This provision in effect means that an actual or potential whistle-blower is protected whether the conduct of the threatening party is intended or takes place, and whether or not the actual or whistle-blower actually believes him or not.

The provisions of section 159(6) of the CA create a rebuttable presumption, in that it is presumed that the threat or conduct described in section 159(5) has occurred as a result of a possible or actual disclosure that a person is entitled to make or has made.

In substantive law (law of evidence) a distinction is made between an irrebuttable presumption and a rebuttable presumption. Schwikkard and Van Der Merwe[63] state that an assumption which is demanded in law must be accepted in circumstances in which there is an absence of either evidence or proof to the contrary.[64]

The presumption can be rebutted if the person who engaged in the conduct or threat can show satisfactory evidence in support of another reason for engaging in the conduct or the making of the threat. It is opined that this rebuttable presumption potentially removes a hurdle relating to the evidentiary burden in respect of this aspect out of the way of the actual or potential whistle-blowers. Remember to distinguish between *burden of proof* and *evidentiary burden*. A burden of proof is that burden which a party bears, in that he or she will lose if he fails to persuade the court that he is entitled to the either the relief he or she seeks or the defence he or she has raised. Whereas an evidentiary burden refers to the burden on a party to a dispute to produce sufficient evidence entitling the presiding official to call upon the other party to answer the allegations levelled.[65]

Section159(7) of the CA places a duty on companies as well as state owned companies to implement that system to the persons mentioned in section 159(4).[66] Section 159(3)(*b*) of the CA is comparative to the provisions of section 1(a - g) of the PDA in respect of the definition of *disclosures,* but is wider in respect of being tailored for a company environment, providing as that it would include the disclosure of any information by a person provided for in terms of section 159(4), if:

63 Schwikkard and Van der Merwe *Principles of Evidence* (3rd ed).
64 Schwikkard and Van der Merwe *Principles of Evidence* (3rd ed) 23.
65 Schwikkard and Van der Merwe *Principles of Evidence* (3rd ed) 559.
66 Section 159(7)(b) of the CA.

- The disclosure has been made in good faith to the Commission, Companies Tribunal, Panel, a regulatory authority, legal advisor, director, prescribed officer, company person, auditor, board or committee of the company concerned;
- The person disclosing the information reasonably believed at the time at which he disclosed the information, that the relevant information showed or tended to show that the company or another company, or a director or a prescribed officer or a company that acted in that capacity had contravened the provisions of:
    - The Companies Act or an Act listed in schedule 4[67];
    - Failed to comply with a statutory duty to which the company was subject;
    - Engaged in any act or omission that endangered or was likely to endanger the health or safety of someone or harm the environment;
    - Unfairly discriminated or condoned unfairly discriminatory conduct as provided for in section 9 of the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act4 of 2000; or
    - Contravened the provisions of any other Act in a way which could expose the company to the risk of liability, or is inherently prejudicial to the company's interests.

5.10.1 Powers pertaining to investigations and inspections in terms of the CA

Section 159(3)(*a*) of the CA provides that disclosures may be made in *good faith* to the Commission,[68] the Companies Tribunal,[69] the Panel,[70] a regulatory authority,[71] an

67 In this regard it has to be noted that Schedule 4 merely refers to "legislation to be enforced by Commission". Clarification may be required in this respect.

68 Section 1 of the CA: **"Commission"** means the Companies and Intellectual Property Commission established by section 185.

69 Section 1 of the CA: **"Companies Tribunal"** means the Companies Tribunal established in terms of section 193.

70 Section 1 of the CA: **"Panel"** means the Takeover Regulation Panel, established by section 196.

71 Section 1 of the CA: **"regulatory authority"** means an entity established in terms of national or provincial legislation responsible for regulating an industry, or sector of an industry.

exchange,[72] a legal adviser, director,[73] prescribed officer, company secretary,[74] auditor,[75] or a board[76] or committee of the company concerned.

Sections 168 to 175 of the CA provide for complaints to be lodged with the Commission or panel.

Section 169 provides for matter relating to investigation by the Commission or Panel, including the designation of one or more persons to assist the inspector or investigator in conduction the investigation, or the appointment of an independent investigator at the expense of the company. In conducting such an investigation the inspector or investigator may investigate any person named in the complaint, including a person related to the person so named in the complaint, or whom the inspector reasonably considers may have information which is relevant to the investigation being undertaken.

Section 170 provides for matters regarding the outcome of the investigation and the related decisions and actions which may be taken, including for example commencing court proceedings in the name of the complainant if the complainant has a right to do so in terms of the CA and has consented to this. The matter may also be referred to the National Prosecuting Authority or other regulatory authority concerned, if the Commission or Panel alleges that a person has committed an offence in terms of the CA or any other legislation.

Part E of the CA (sections 176 to 179) provide for the powers needed in order to support investigations and inspections. In terms of section 176, the Commission or Panel may at any time during an investigation being conducted by it issue a summons to any person who is believed to be in a position to furnish any information pertaining to the subject of the investigation, or to have possession or control of any book, document or other object which has bearing on the matter to appear before the Commission, Panel, inspector or independent investigator in order to be

72 Section 1 of the CA: **"exchange"** when used as a noun, has the meaning set out in section 1 of the Securities Services Act, 2004 (Act No. 36 of 2004).

73 Section 1 of the CA: **"director"** means a member of the board of a company, as contemplated in section 66, or an alternate director of a company and includes any person occupying the position of a director or alternate director, by whatever name designated.

74 In terms of section 86 (1) of the CA a public company or state-owned company must appoint a company secretary.

75 Section 1 of the CA: **"auditor"** has the meaning set out in the Auditing Act.

76 Section 1 of the CA: **"board"** means the board of directors of a company.

questioned,[77] or to deliver or produce any book, document or object referred to above at a time and place specified in the summons to the Commission or Panel.[78]

Section 176(5) provides for the exclusion of self-incriminating answers or statements given when so summoned, and if criminal proceedings are thereafter instituted.

Section 177 of the CA provides for the authority to enter and search premises and in relation to such inspection or investigation, issued by a judge of the High Court or a magistrate, from information on oath or affirmation.

Section 178 of the CA provides for the powers in respect of a search and seizure warrant so issued. An inspector authorised to conduct such a search and seizure *may* be accompanied and assisted by a police officer. Whilst section 179 of the CA provides for the required conduct to be displayed and undertaken during an entry and search, including the strict regard for decency and order, and with regard for each person's rights to dignity, freedom, security and privacy.

Sections 180 to 184 of the CA relate to the adjudication of hearings before a companies' tribunal, the right to participate in such hearings, procedures to be followed and dealing with witnesses.

5.11 Conclusion

In respect of the guideline issued in 2011, it is argued that it was badly thought through and written, and if anything would rather serve to confuse someone attempting to utilise it, rather than actually clarify and guide any relevant considerations.

In respect of section 35(1) of the PSA, the guideline highlights the right which certain employees have in respect of blowing the whistle, but it fails in total to try and clarify who as employees are included and who are in fact excluded, such as for example people within the employment of the South African Secret Service and employees within education institutions wholly or partly funded by the State, excluding universities and technikons, which are explicitly excluded. Section 35(1) is in fact technical by nature, and most certainly should have suitably dealt with.

77 Section 176(1)(a) of the CA.
78 Section 176(1)(b) of the CA.

Simultaneously the bare duty imposed by the Public Servant's Code of Conduct is left without clarification in the whole.

With reference to the two categories of employees falling within the SANDF (civilians and members) are both covered in terms of the provisions of section 50 of the DA 2002, which would in effect mean that a civilian employee, thinking that he is covered by the remedies provided for in the PDA is not, due to the fact that his disclosure in fact amounted to an unlawful disclosure. This pivotal topic is in no manner broached in the guideline, nor are the offences, penalties and protections that are available to the members of the SANDF.

The guidelines point out a double duty that has been laid of the door of SAPS members and in no manner attempts to guide such a member through the various directives and their applicable sections.

The NEMA is also addressed within the guide, however, the guide in no way attempt to assist an employee who may utilise the NEMA provisions, especially in light of the fact that NEMA is applicable to employees and non-employees. The same is true of the portion in respect of WCPPA.

The relevant provisions of the PRECCA and FICA both place certain duties in respect of reporting irregularities as specified therein, with the wording clearly indicating that the employment relationship may come into play in this respect. Yet the guideline in no way deals with or even mentions these provisions.

Hucker[79] refers to the FICA and PRECCA, in respect of the duty to report, and opines that the wide scope of the aforementioned legislation and the application of it to almost all persons in both the public and private sectors may have serious implications within South African society.[80]

It is argued that the framework outside the PDA is wide and complex, further complicating the decisions and the potential peril an actual or potential whistle-blower may find him in. It took almost 10 years for the issuing of the guidelines, as provided for in terms of the PDA, and in this respect it is argued that it is of almost no use.

79 Hucker *The Bottom Line* (1) 1-4.
80 Hucker *The Bottom Line* (1) 3.

In respect of the CA, it is opined that the provisions pertaining to whistle-blowers is quite comprehensive, widening the scope and application of the PDA and whistle-blower protection in the RSA. The supporting powers in respect of whistle-blowers in respect of companies are also quite comprehensive.

CHAPTER 6: REMEDIES AVAILED TO WHISTLE-BLOWERS IN SOUTH AFRICA AND WITHIN THE CONTEXT OF THE PDA

6.1 Introduction

The preamble to the PDA clearly states that part of the purpose of the PDA is to ensure that employees disclose information regarding wrongdoing or suspected wrongdoing by their employer without fear of reprisals. It is argued that this is indeed the most imperative part of the PDA, as a prospective whistle-blower's considerations pertaining to self-preservation are inevitable, especially when seen in the context of the employment relationship, which by its very nature is unequal.

The protection afforded to such whistle-blowers is to be found in section 4 of the PDA, seen within the context created by section 3 of the PDA. It would be fair to state that protection availed, albeit indirectly, is that no contract of employment or agreement between the employer and employee that attempts to exclude or discourage the employee from blowing the whistle would have any effect.[1]

Section 3 of the PDA creates the context within which the whistle-blower falling within the ambit of the PDA would be entitled to avail himself or herself of the remedies provided for, namely within the context of his employment and occupation, and with reference specifically to *occupational detriment*.

Section 1 of the PDA defines *occupational detriment* within its context includes being:

- Subjected to disciplinary action of any nature;
- Dismissed, suspended, demoted, harassed or intimidated;
- Transferred against his will;
- Refused a transfer or promotion;
- Subjected to terms or conditions of employment or retirement which has been changed to his disadvantage;
- Refused a reference by his employer, or being given a negative reference from the employer;
- Denied appointment to employment, a profession or an office;

1 Section 2(3) of the PDA.

- Being threatened with any of the aforementioned;
- Otherwise negatively affected in respect of his employment, profession, office, employment opportunities and work security.

Raising the remedies available to the whistle-blower within the South African context, and more specifically within the PDA's context is by no means a new concern raised.

During June 2004, the South African Law Reform Commission published Discussion Paper 107, Project 123 in respect of Protected Disclosures, with the project leader appointed being Professor C. E. Hoexter.[2] The project entailed a comparative study in respect of the United Kingdom, New Zealand, the United States of America and Australia. The discussion paper highlighted the need for the urgent revision of the PDA, both with reference to the scope of the PDA and the remedies availed to the whistle-blower. Regrettably, apparently, the findings, recommendations and submissions made by the Commission were merely filed away, with not a backward glance being given thereto. And yet, currently,[3] we are confronted with a media headline announcing that the South African Police Service has been hacked, and the details of 16 000 whistle-blowers lain bare.[4]

Who the whistle-blower is or would be is not defined within the text of the PDA. What is defined is the employer, the employee and a disclosure, where after the PDA then section by section states what the requirements would be in order for a disclosure to be a protected disclosure in sections 5 to 9. It would as such seem, in an attempt to define a whistle-blower within the context of the PDA would amount to an employee who makes a disclosure that meets all the requirements as provided for in the PDA, meriting the qualification of that particular disclosure as a protected disclosure, in respect of his employer's conduct, actual or potential, as provided for in section1 of the PDA, and who as a result of the protected disclosure made shall be entitled to the remedies provided for in respect of occupational detriment.

2 Protected Disclosures, Discussion Paper 107, Project 123 http://salawreform.justice.gov.za/dpapers/dp107.pdf (Date of use: 23 May 2013).
3 Date of use 18 June 2013.
4 Roane Independent Online News (IOL) http://www.iol.co.za/news/crime-courts/saps-website-hacked-1.1520042 (Date of use: 23 May 2013).

6.2 The first remedy

The first remedy offered to a whistle-blower facing actual or potential *occupational detriment* is to be found in section 4(1) of the PDA, which provides:

> Any employee who has been subjected, is subjected or may be subjected, to an *occupational detriment* in breach of section 3, may –
>
> (a) approach any court having jurisdiction, including the Labour Court established by section 151 of the Labour Relations Act, 1995 (Act 66 of 1995), for appropriate relief; or
>
> (b) pursue any other process allowed or prescribed by law.

Within the context of the definition of *occupational detriment*, as set out above, it seems clear that for the most part thereof, *occupational detriment* relates to employment related circumstances, which would therefore bring the jurisdictional considerations relating to the LC and the LAC into play in the main.

However, the provisions including harassment and intimidation in the definition of *occupational detriment* into consideration, as well as the provisions of section 4(1)(*b*) of the PDA, serve as a catch-all provision. As has been seen in many matters, whistle-blowers sometimes face much more serious consequences than just labour related consequences, which can be multifarious in nature, such as for example defamation and even attempts made on their lives. As such, this remedy provides for all eventualities, even those remedies which fall outside the labour ambit, including those eventualities of both a civil and a criminal nature.

In determining which court would have jurisdiction in such circumstances, the normal considerations pertaining to the establishment of jurisdiction will be applicable, and as provided for.

Jurisdiction was defined in *Graaff-Reinet Municipality v Van Ryneveldt's Pass Irrigation Board*[5] as being:

> The power or competence which a particular court has to hear and determine an issue between parties brought before it.

Jurisdiction does not depend upon the substantive merits of the case. There are in fact various grounds determining jurisdiction, including, the geographical area, the persons, the causes of action and the relief sought, the monetary size of the claim,

5 *Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board* 1950 (2) SA 420 (A) at 424.

restrictions on the power of the parties to engage the jurisdiction of the court by consent, and restrictions on the competence to pronounce on the validity of a statutory enactment.[6]

Pete[7] suggest that in establishing within which jurisdiction a matter falls, depends on a two stage enquiry, with the first question being '*which general type?'* and thereafter, *'which particular one?'*. It has to be borne in mind that if the whistle-blower in his litigation, for example in civil matters, issues process out of the wrong court, in other words a court which lacks the necessary jurisdiction, his or her opponent will be able to special plea in abatement, which destroy the plaintiff or applicant's cause of action.

In criminal matters regard may be had to the provisions of section 110 of the Criminal Procedure Act 51 of 1977, which provides how matters may be dealt with when brought before the wrong criminal court.[8] Regard is also to be had to the provisions of sections 26 to 50 of the Magistrates' Courts Act 32 of 1944, which provides for the jurisdiction of the Magistrates' courts, and section 21 of the Superior Courts Act 10 of 2013 which provides for the jurisdiction of the High Courts. It should also be borne in mind that it is possible for more than one court to have jurisdiction over a matter, in which case the plaintiff as *dominus litis* has the right to choose. In litigating in a court other than the LC and the LAC, jurisdictional determinations may also be provided for by a specific piece of legislation, where applicable.

By way of example, reference may be had to the provisions of the Protection from Harassment Act 17 of 2011, which may very well be applicable within the context of the provisions of section 4(1) of the PDA.

---

6 Chapter VI of the Magistrates' Court Act 32 of 1944.

7 Pete *Civil Procedure: A Practical Guide* (2nd ed) 36.

8 As this in itself is a detailed topic for discussion this will not be dealt with within the context of this thesis. Examples to be found in this regard relates to the extradition of an accused to stand trial in a South African Court, which is regulated in the Extradition Act 67 of 1962. Other examples include:
The Protection of Constitutional Democracy against Terrorism and Related Activities Act 33 of 2004;
Section 90 of the Magistrates' Courts Act 32 of 1944;
Section 18 of the Aviation Act 74 of 1962;
Section 11 of the Protection of Information Act 84 of 1982; and
Sections 105 and 106 of the Defence Act 44 of 1957.

6.2.1 An example made with reference to the Protection from Harassment Act 17 of 2011

The provisions of the Protection from Harassment Act 17 of 2011 (hereinafter referred to as the "PFHA"), provides a poignant example of other relief that a whistle-blower or prospective whistle-blower may avail him or herself to in circumstances in which he or she is actually harassed or threatened with harassment as a consequence of having made a protected disclosure. The aim of the PFHA is to afford victims of harassment an effective remedy against harassment and to introduce measures which are aimed at enabling the relevant organs of state to give full effect to the provisions of the PFHA.

The provisions of the PFHA are based on the constitutional right of all people in South Africa to the right to equality, privacy, dignity, the right to freedom and security, which includes the right to be free from all forms of violence, be it from public or private sources.

6.2.1.1 What constitutes harassment?

In terms of the provisions of section 1 of the PFHA, harassment is defined as the respondent in the matter[9] directly or indirectly engages in conduct which he or she knows or reasonably ought to know:

- causes harm or even inspires the reasonable belief that harm may be caused to either the person complaining of the harassment (the complainant) or a person related to him or her by unreasonably:

  i. following, watching, pursuing or accosting of the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be;
  ii. engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or
  iii. sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving them where they will be found by, given to or brought to the attention of, the complainant or a related person; or

9 The PFHA is based upon application principles, as a result of which there is as such an applicant and a respondent, reflecting a civil nature, as opposed to a criminal nature.

- if the conduct amounts to sexual harassment of either the complainant or a person related to him or her.

Harm is defined in section 1 of the PFHA as including any mental, psychological, physical or economic harm. **Sexual harassment** is also defined in terms of the provisions of section 1 of the PFHA.[10]

6.2.1.2 Determined jurisdiction in respect of the PFHA

As already stated, the provisions of the PFHA fall neatly within the meaning of the provisions of section 4(1) of the PDA, and in circumstances in which such an application is brought by a whistle-blower, the jurisdiction is prescribed in terms of section 14 of the PFHA. In terms of section 14(1)(a) of the PFHA, any court within the area in which the complainant permanently or temporarily resides, carries on business or is employed, has jurisdiction to issue a protection order as provided for in this Act.

In terms of section 14(1)(b) of the PFHA, any court within the area in which the respondent permanently or temporarily resides, carries on business or is employed, has jurisdiction to issue a protection order as provided for in this Act.

There is no specific minimum period that is required in terms of the provisions of sections 14(1)(a) and (b) of the PFHA.[11] So too, any court within the area in which the cause of action arose has the necessary jurisdiction to issue a protection order as provided for in the PFHA. However, it needs to be noted that such applications can only be brought in the Magistrates' Courts, as section 1 of the PFHA defines a

10 "sexual harassment" means any-
   a) unwelcome sexual attention from a person who knows or ought reasonably to know that such attention is unwelcome:
   b) unwelcome explicit or implicit behaviour, suggestions, messages or remarks of a sexual nature that have the effect of offending, intimidating or humiliating the complainant or a related person in circumstances, which a reasonable person having regard to all the circumstances would have anticipated that the complainant or related person would be offended, humiliated or intimidated;
   c) implied or expressed promise of reward for complying with a sexually oriented request; or
   d) implied or expressed threat of reprisal or actual reprisal for refusal to comply with a sexually oriented request;

11 Section 14 (2) of the PFHA.

court as any magistrate's court for a district referred to in the Magistrate's Court Act 32 of 1994.

The provisions in respect of appeal and review as provided for in terms of the Magistrates' Courts Act 32 of 1944 and the Superior Courts Act 10 of 2013[12] apply to the proceedings in terms of the PFHA.[13]

6.2.1.3 The court's powers in terms of such a protection order

Section 10 of the PFHA provides for the protection that a court may afford to an applicant for such a protection order, whether an interim or final order. Thus, this is potentially also the protection which may be afforded to a whistle-blower as provided for by section 4(1) of the PDA.

This protection includes:

- Prohibiting the respondent from engaging in or attempting to harass the complainant;[14]
- Prohibiting the respondent from enlisting the assistance from another person to harass the complainant;[15]
- Prohibiting the respondent from committing any other act as may be specified in the protection order;[16]
- The court may impose any additional order which it deems necessary to protect and provide for the safety or well-being of either the complainant or a person related to the complainant, on the respondent in the matter;[17]
- The court may order a member of the SAPS to seize any weapon[18] in the possession or under the control of the respondent, as provided for in terms of section 12[19] of the PFHA;[20]

12 It is noted that's section 17 of the PFHA still refers to the Supreme Court Act 59 of 1959.
13 Section 17 of the PFHA.
14 Section 10(1)(a) of the PFHA.
15 Section 10(1)(b) of the PFHA.
16 Section 10(1)(c) of the PFHA.
17 Section 10(2) of the PFHA.
18 Section 1 of the PFHA defines a weapon as follows:
"weapon" means-
a) any firearm or any handgun or airgun or ammunition as defined in section 1(1) of the Firearms Control Act, 2000 (Act No. 60 of 2000); and
b) any object, other than that which is referred to in paragraph (a), which is likely to cause serious bodily injury if it were used to commit an assault.
19 Section12

- The court may order a member of the SAPS to accompany the complainant or related person to a specified location to assist with any arrangements regarding the collection of his or her personal property identified by the complainant in the application for a protection order;[21]
- The court may order the station commander of the relevant police station to investigate the complaint in order to establish the potential institution of criminal proceedings against the respondent;[22]
- The residential and work addresses of a complainant or a person related to the complainant must be omitted from the protection order which will be served on the respondent, unless the nature of the terms of the protection order make it necessary to include such an address.[23] For example, if the respondent is prohibited from coming within 100 metres of the complainant's residential address, such address would need to be included.
- The court may issue any necessary directions in order to ensure that the complainant or a related person's physical address is not disclosed in a way which could endanger the well-being or the safety of either the complainant or a person related to the complainant;[24]
- The court may not refuse to issue a protection order or to impose any condition or make any order which it is competent to make in terms of the provisions of section10 of the PFHA, merely on the grounds that there are other legal remedies available to the complainant;[25]

If the court is of the opinion that any of the provisions of the protection order it is requested to make, should in the interests of justice be dealt with in terms of any

---

The court may order a member of the South African Police Service to seize any weapon in the possession of or under the control of a respondent and direct the clerk of the court to refer a copy of the record of the evidence concerned to the National Commissioner of the South African Police Service for consideration in terms of the Firearms Control Act, 2000 (Act No. 60 of 2000).

20 Section 10 (3)(a)(i) of the PFHA.
21 Section 10 (3)(a)(ii) of the PFHA.
22 Section 10 (3)(b) of the PFHA.
23 Section 10 (4)(a) of the PFHA.
24 Section 10 (4)(b) of the PFHA.
25 Section 10 (5)(a) of the PFHA.
It has to be noted that the exception in this regard is in the circumstances in which the complainant is in possession of or in the process of applying for a protection order against harassment or stalking as provided for in the Domestic Violence Act 116 of 1998. However, it is not envisioned that this is likely to be the position of a whistle-blower being harassed, although it cannot be discounted entirely.

other law, that court must order that the provision in question remain in force for a limited period of time, in order to afford the complainant to seek an opportunity to seek appropriate relief in terms of the law in question.[26]

6.2.1.4 Offences in terms of the PFHA

Section 18 of the PFHA provides for offences that can be committed within the context of the PFHA in that if:

- A person contravenes a provision of an interim of final protection order granted[27] that person is guilty of an offence, and liable on conviction of said offence to a fine or imprisonment for a period not exceeding five years;[28]
- Any person who in an affidavit stating that the respondent has contravened a provision contained in a protection order (final or interim), makes a false statement in a material respect is guilty of an offence, and liable on conviction of said offence to a fine or imprisonment for a period not exceeding five years;[29]
- Any person who reveals the identity or residential or other physical address of the complainant or a related person in contravention of section 8(1)(b)[30] or publishes information in contravention of section 8(1)(c)[31] of the PFHA is guilty of an offence and may be liable on conviction of said offence to a fine or imprisonment for a period not exceeding two years;[32]
- Any person who either contravenes or fails to comply with the provisions of section 7(3) of the PFHA is guilty of an offence and may be liable on conviction of such offence to a fine or imprisonment not exceeding three

26 Section 10(5)(b) of the PFHA.
27 This could by way of example include the respondent or any other person assisting the respondent.
28 Section 18(1)(a) of the PFHA.
29 Section 18(1)(b) of the PFHA.
30 Section 8(1) The court may, of its own accord or at the request of the complainant or related person, if it is of the opinion that it would be in the interests of the administration of justice that the proceedings in question be held behind closed doors, direct that-
(a) …
(b) the identity or address of any person may not be revealed;
31 Section 8(1) The court may, of its own accord or at the request of the complainant or related person, if it is of the opinion that it would be in the interests of the administration of justice that the proceedings in question be held behind closed doors, direct that-
(a) …
(b) …
(c) no information relating to the proceedings be published in any manner whatsoever.
32 Section 18(2) of the PFHA.

months.[33] Section 7(3) of the PFHA provides that any person subpoenaed or warned to attend the proceedings, and who fails to attend the proceedings or remain in attendance at the proceedings in question, or fails to appear on the date and at the time and place that the proceedings were adjourned to or remain in attendance at the proceedings so adjourned, or who fails to produce a book, document or object specified in the subpoena, is guilty of an offence.

- So too, any electronic communications service provider[34] or an employee of such a service provider who fails to provide information within five ordinary court days from the time that a direction is served on it, to a court in terms of section 4(3)(a) of the PFHA or an extended period allowed by the court in terms of section 4(3)(h) is guilty of an offence;[35]
- Any electronic communications service provider or employee of such service provider who makes a false statement in an affidavit referred to in sections 4 (1)(b)[36], 4(3)(b)[37] or 4(4)(b)[38] in a material respect is guilty of an offence;[39]

---

33 Section 18(3) of the PFHA.

34 In terms of section 1 of the PFHA an electronic communications service provider is defined as follows:
"electronic communications service provider" means an entity or a person who is licensed or exempted from being licensed in terms of Chapter 3 of the Electronic Communications Act, 2005 (Act No. 36 of 2005). to provide an electronic communications service.

35 Section 18(4)(a)(i) of the PFHA.

36 Section 4(1)(b) provides as follows:
If an application for a protection order is made in terms of section 2 and the court is satisfied in terms of section 3(2) that a protection order must be issued as a result of the harassment of the complainant or a related person by means of electronic communications or electronic mail over an electronic communications system of an electronic communications service provider and the identity or address of the respondent is not known, the court may-
(a) …
(b) issue a direction in the prescribed form directing an electronic communications service provider to furnish the court in the prescribed manner by means of an affidavit in the prescribed form with-
(i) the electronic communications identity number from where the harassing electronic communications or electronic mail originated;
(ii) the name, surname, identity number and address of the respondent to whom the electronic communications identity number has been assigned;
(iii) any information which indicates that electronic communications or electronic mail were or were not sent from the electronic communications identity number of the respondent to the electronic communications identity number of the complainant; and
(iv) any other information that is available to an electronic communications service provider which may be of assistance to the court to identify the respondent or the electronic communications service provider which provides a service to the respondent.

37 Section 4(3)(b) provides as follows:
(b) An electronic communications service provider on which a direction is served, may in the prescribed manner by means of an affidavit in the prescribed form apply to the court for-

- Any electronic communications service provider or employee of such service provider who fails to comply with the provisions of section 4(6)[40] of the PFHA is guilty of an offence;
- Any electronic communications service provider or employee of such a service provider who is convicted of such an offence[41] is liable in the case of such service provider to a fine not exceeding R 10 000.00 (ten thousand Rand)[42] or in the case of an employee of such service provider to a fine or imprisonment for a period not exceeding six months[43];
- Any person, who in terms of the provisions of section 6(2)[44] of the PFHA, who is requested to provide his or her name and address or any other information to a member of the SAPS, and who fails to do so or who furnishes false or incorrect name, address or information, is guilty of an offence, and upon conviction may be liable to a fine or imprisonment not exceeding six months.[45]

(i) an extension of the period of five ordinary court days referred to in paragraph (a) for a further period of five ordinary court days on the grounds that the information cannot be provided timeously; or

(ii) the cancellation of the direction on the grounds that-

(aa) it does not provide an electronic communications service to either the respondent or complainant or related person: or

(bb) the requested information is not available in the records of the electronic communications service provider.

38 Section 4 (4)(*b*) provides as follows:

(4) After receipt of an application in terms of subsection (3)(b), the court-

*(*a) …

(b) may, in the prescribed manner, request such additional evidence by way of affidavit from the electronic communications service provider as it deems fit;

39 Section 18 (4)(a)(ii) of the PFHA.

40 Section 4(6) provides as follows:

(6) An electronic communications service provider must, at least 48 hours before providing the information referred to in subsection (1)(b) to the court, by means of an electronic communication, inform the respondent of the-

(a) information that is to be provided to the court;

(b) reference number of the direction; and

(c) name and address of the court.

41 As referred to in section 18(4)(a) of the PFHA.

42 Section 18(4)(b)(i) of the PFHA.

43 Section 18(4)(b)(ii) of the PFHA.

44 Section 6(2) provides as follows:

6(2) A member of the South African Police Service may, in the manner set out in the national instructions issued in terms of section 20(2), request the respondent to furnish such member with his or her full name and address and any other information which the member may require in order to identify or trace the respondent.

45 Section 18(5) of the PFHA.

6.2.2 The determination of jurisdiction in labour relations disputes arising from the provisions of the PDA

In terms of the provisions of section 4(1)(*a*) of the PDA, it is clear that the LC as established in terms of section 151 of the LRA also has jurisdiction in defined circumstances, and the whistle-blower may as such also approach the LC in order to seek appropriate relief. However, in this respect section 4(1) and the second remedy provided for in terms of section 4(2) of the PDA go hand in hand, as the pivotal distinction, determining the dispute resolution mechanism provided for in terms of the LRA will be applicable is determined by the distinction between an automatically unfair dismissal and an unfair labour practice. In order to attempt to clarify this aspect, the jurisdictional aspects that are relevant will be discussed in tandem with the second remedy availed to the whistle-blower in terms of the PDA hereunder.

6.3 The second remedy

The second remedy which is availed to the whistle-blower in terms of the PDA, relates to two discernible situations, as follows:

- Any dismissal which is in breach of section 3 of the PDA will be deemed to be an **automatically unfair dismissal** as contemplated in section 187 of the LRA, and any dispute about such a dismissal must follow the procedure set out in Chapter VIII of the LRA;[46] and

- Any other *occupational detriment* which is perpetrated in breach of section 3 of the PDA, it is deemed to be **an unfair labour practice** as contemplated in Part B of Schedule 7 of the LRA, and such a dispute must follow the procedure set out in that part of the LRA. An additional proviso in this respect is that if the matter fails to be resolved by way of conciliation, it may be referred to the LC for adjudication.[47]

46 Section 4(2)(a) of the PDA.
47 Section 4(2)(b) of the PDA.

6.3.1 The automatically unfair dismissal of a whistle-blower

In terms of section 4(2)(a) of the PDA, if a whistle-blower is dismissed, and as such is subjected to occupational detriment in this manner by the employer, on account of or partly on account of having made a protected disclosure, such a dismissal is deemed to be an **automatically unfair dismissal**, and as provided for in terms of section 187(1)(h) of the LRA.

If the whistle-blower is so dismissed, the procedure provided for in Chapter VIII of the LRA is followed. It also needs to be borne in mind that in these circumstances the employee (whistle-blower) must not only show that he or she was dismissed, but also that he was dismissed on account of or partly on account of having made a protected disclosure. It is then for the employer to show that the employee was not dismissed on account of or partly on account of having made a protected disclosure. If the employer is unable to do so, it will be an automatically unfair dismissal.[48] If there is a dispute about the fairness of the dismissal, the dismissed employee may refer the dispute in writing 30 days from the dismissal to a council, if the parties' dispute falls within the registered ambit of that council[49] or to the CCMA, if no council has jurisdiction[50].

The council or the CCMA (as the case may be) may on good cause shown permit the employee to refer the dispute after the aforementioned time limit has expired.[51] The council or CCMA (as the case may be) must attempt to resolve the dispute through conciliation.[52] If the council or CCMA (as the case may be) certifies that the dispute remains unresolved, or if 30 days have expired since the council or CCMA received the referral of the dispute and the dispute remains unresolved, the dispute must be arbitrated at the request of the employee if:

- The employee alleges that the reason for his dismissal relates to his conduct or capacity, unless paragraph (b)(iii) applies;

48 Section 192 of the LRA.
49 Section 191(1)(a)(i) of the LRA.
50 Section 191(1)(a)(ii) of the LRA.
51 Section 191(2) of the LRA.
52 Section 191(4) of the LRA.

- The employee alleges that the reason for his dismissal relates to the fact that the employer made the employee's continued employment unbearable, or that the employer provided the employee with materially less favourable conditions or circumstances within the employment, following a transfer effected in terms of section 197 or 197A, unless the employee alleges that his contract of employment was terminated for a reason provided in section 187; or
- The employee doesn't know what the reason for the dismissal was.[53]

Alternatively the employee *may* refer the dispute regarding the automatically unfair dismissal alleged to the LC for adjudication if the employee has alleged that the reason for dismissal is automatically unfair.[54] Such a referral of a dispute to the LC for adjudication must be made within 90 days after the council or the CCMA (as the case may be) has certified that the dispute remains unresolved.[55] However, despite any other provision in the LRA, the council or CCMA (as the case may be) must commence with arbitration immediately after certifying that the dispute remains unresolved, and in respect of which none of the parties have objected to the matter so being dealt with.[56]

In terms of the provisions of section 191(6) of the LRA, despite the provisions of sections 191(5)(a) or 191(5A) of the LRA the director of the CCMA must refer the dispute to the LC if the director decides on application made by any party to the dispute that it is appropriate to do so after considering the following factors:

- the reason for dismissal;
- whether there are questions of law raised by the dispute;
- the complexity of the dispute;
- whether there are conflicting arbitration awards that need to be resolved;
- considerations relating to the public interest.

When so considering the referral of the dispute to the LC, the director must give the parties, as well as the commissioner who attempted to conciliate the dispute an

53 Section 191(5)(a)(i) – (iii) of the LRA.
54 Section 191(5)(b)(i) of the LRA.
55 Section 191(11)(a) of the LRA.
56 Section 191(5A) of the LRA.

opportunity to make representations in this respect.[57] The director's decision in this regard is final and binding[58] and no person may apply to any court to review the director's decision until the dispute regarding the alleged automatically unfair dismissal has been arbitrated or adjudicated.[59]

6.3.2 An unfair labour practice in respect of a whistle-blower

As provided for in terms of section 4(2)(b) of the PDA, any other *occupational detriment* (beside dismissal) which is perpetrated by the employer on account, or partly on account of the whistle-blower having made a protected disclosure, is deemed to be an **unfair labour practice** as contemplated in Part B of Schedule 7 of the LRA.

Section 186(2) of the LRA defines an unfair labour practice as including:

- unfair conduct by the employer regarding the promotion, demotion, probation or training or benefits of an employee;
- unfair suspension of the employee;
- any other disciplinary action, short of dismissal of the employee;
- failure or refusal of the employer to reinstate a former employee in terms of an agreement; and
- an occupational detriment, besides dismissal, in contravention of the provisions of the PDA as a result of the employee in question having made a protected disclosure.

If there is a dispute about the an unfair labour practice, the employee alleging the unfair labour practice may refer the dispute in writing to a council, if the parties' dispute falls within the registered ambit of that council[60] or to the CCMA, if no council has jurisdiction.[61] The referral must be made within 90 days of the date of the alleged act or omission which allegedly constitutes the unfair labour practice, or if it is a later

57 Section 191(7) of the LRA.
58 Section 191(9) of the LRA.
59 Section 191(10) of the LRA.
60 Section 191(1)(a)(i) of the LRA.
61 Section 191(1)(a)(ii) of the LRA.

date than the aforementioned, then within 90 days of the date on which the employee became aware of the act or occurrence.[62]

The council or the CCMA (as the case may be) may on good cause shown permit the employee to refer the dispute after the aforementioned time limit has expired.[63] The council or CCMA (as the case may be) must also attempt to resolve the dispute through conciliation.[64] If the council of CCMA (as the case may be) certifies that the dispute remains unresolved, or if 30 days have expired since the council or CCMA received the referral of the dispute and the dispute remains unresolved, the dispute must be arbitrated at the request of the employee if the dispute relates to an unfair labour practice.[65]

Alternatively the employee *may* refer the dispute regarding the automatically unfair dismissal alleged to the LC for adjudication if the employee has alleged that the reason for dismissal is automatically unfair.[66] Such a referral of a dispute to the LC for adjudication must be made within 90 days after the council or the CCMA (as the case may be) has certified that the dispute remains unresolved.[67] Despite any other provision in the LRA, the council or CCMA (as the case may be) must commence with arbitration immediately after certifying that the dispute remains unresolved, and in respect of which none of the parties have objected to the matter so being dealt with.[68]

In terms of the provisions of section 191(6) of the LRA, despite the provisions of sections 191(5)(a) or 191 (5A) of the LRA the director of the CCMA must refer the dispute to the LC if the director decides on application made by any party to the dispute that it is appropriate to do so after considering the following factors:

- whether there are questions of law raised by the dispute;
- the complexity of the dispute;
- whether there are conflicting arbitration awards that need to be resolved;

62 Section 191(1)(b)(ii) of the LRA.
63 Section 191(2) of the LRA.
64 Section 191(4) of the LRA.
65 Section 191(5)(a)(iv) of the LRA.
66 Section 191(5)(b)(i) of the LRA.
67 Section 191(11)(a) of the LRA.
68 Section 191(5A) of the LRA.

- considerations relating to the public interest.

When so considering the referral of the dispute to the LC, the director must give the parties, as well as the commissioner who attempted to conciliate the dispute an opportunity to make representations in this respect.[69] The director's decision in this regard is final and binding[70] and no person may apply to any court to review the director's decision until the dispute regarding the alleged automatically unfair dismissal has been arbitrated or adjudicated.[71]

6.3.3 Remedies available for unfair dismissal and unfair labour practices

In terms of the provisions of section 193 of the LRA, read together with the remedies provided for by the PDA, certain remedies are made available to whistle-blowers regarding unfair labour practices perpetrated against them.

If it is found that a dismissal was unfair, the court or arbitrator may: order that the employer reinstate the employee as from a date not before the date of dismissal;[72] order that the employee be re-employed in the position that the employee occupied before the dismissal or in another position deemed to be reasonably suitable.[73] The LC or arbitrator must require the employer to reinstate the employee unless the employee does not wish to be reinstated or re-employed, the circumstances are of such a nature that it would be intolerable, it is not reasonably practicable, or the dismissal was found to be unfair based only on procedural unfairness.[74] Lastly, order the employer to pay compensation to the employee.[75]

Limits are placed on the compensation which may be ordered by the provisions of section 194 of the LRA. Where dismissal was found to be unfair either because the employer did not prove substantive or procedural fairness, the compensation must be just and equitable taking all circumstances into account, and may not exceed the equivalent of 12 months' remuneration, calculated at the employee's rate of

69 Section 191(7) of the LRA.
70 Section 191(9) of the LRA.
71 Section 191(10) of the LRA.
72 Section 193(a) of the LRA.
73 Section 193(1)(b) of the LRA.
74 Section 193(2)(a)-(d) of the LRA.
75 Section 193(1)(c) of the LRA.

remuneration as at the date of dismissal.[76] Should the dismissal be found to be automatically unfair, the compensation must be just and equitable taking all the circumstances into account, and may not exceed the equivalent of 24 months' remuneration, calculated at the employee's rate of remuneration as at the date of dismissal.[77] In respect of an unfair labour practice, the compensation awarded must be just and equitable considering all the circumstances, and may not exceed 12 months' remuneration.[78] It also needs to be noted that such compensation ordered, is so ordered in addition to any other amount which the employee is entitled to in terms of any law, collective agreement or contract of employment.[79]

6.3.4 An inquiry by an arbitrator

Section 188A of the LRA also needs to be considered within the context of the whistle-blower. An employer may with the consent of the relevant employee or in accordance with the provisions of a collective agreement request a council, an accredited agency or the CCMA to appoint an arbitrator in order for the arbitrator so appointed to conduct an inquiry into allegations about the conduct or capacity of an employee.[80]

Such an employee may only consent to such an inquiry after the employee has been advised of the allegations against him or her.[81] However, an employee earning more than the amount determined by the Minister from time to time in accordance with section 6(3) of the BCEA, may consent in a contract of employment to the holding of such an inquiry.[82]

The ruling by an arbitrator in such an inquiry has the same status as an arbitration award[83], and the arbitrator conducting the inquiry must in light of the evidence presented and with reference to the criteria of fairness provided for in the LRA rule as to what action should be taken against the relevant employee, if any[84].

---

76 Section 194(1) of the LRA.
77 Section 194(3) of the LRA.
78 Section 194(4) of the LRA
79 Section 195 of the LRA.
80 Section 188A(1) of the LRA.
81 Section 188A(4)(a) of the LRA.
82 Section 188A(4)(b) of the LRA.
83 Section 188A(8) of the LRA.
84 Section 188A(9) of the LRA.

Despite the provisions of section 188A(1), if an employee alleges in good faith that the holding of such an inquiry contravenes the PDA, that employee or the employer may require that an inquiry be conducted in terms of this section into allegations by the employer into the conduct or capacity of the employee involved.[85] Such an inquiry by an arbitrator and the suspension of the employee involved on full pay pending the outcome of the inquiry does not constitute an *occupational detriment* as contemplated and defined in the provisions of the PDA.[86]

6.4 The third remedy

The third remedy provided to a whistle-blower is to be found in terms of the provisions of section 4(3) of the PDA.

Such an employee who has made a protected disclosure and who reasonably belies that he or she may be adversely affected as a result of having made that protected disclosure, must at his or her request, and if in the circumstances it is reasonably practicable be transferred from the position he or she occupies at the time of making the disclosure to another position whether or not it is in the same division of the employer. Where the employer of the employee who made such a protected disclosure is an organ of state, it may also include him or her so being transferred to another organ of state. It is clear that the availability of this remedy will need to be determined on a case-by-case basis.

The PDA makes no provision for the way forward should such a transfer not be *reasonably practicable,* or alternatively if the employer should simply refuse. It has to be noted too that disputes pertaining to transfers are not specifically dealt with within the ambit of the LRA either.

There is further at the date hereof[87] no case law available in South Africa in this respect. Perhaps an additional consideration in dealing with this type of application is to be found in the thinking displayed in the *Media 24*[88] matter in which the SCA found that an employer has a common law duty to take reasonable care of employees'

85 Section 188A(11) of the LRA.
86 Section 188A(12) of the LRA.
87 May 2015.
88 *Media 24 Ltd & Another v Grobler* 2005 (26) ILJ 1007 (SCA).

safety, and that this obligation was not confined to the employer taking steps to protect employees merely from physical harm, but also psychological harm.

6.5 The fourth remedy

The fourth remedy which is provided to a whistle-blower is to be found in terms of the provisions of section 4(4) of the PDA. This provision provides that an employee who has made a protected disclosure has been transferred as provided for may not without his or her consent be subjected to terms and conditions of employment that are less favourable than the terms and conditions of employment that were applicable to him or her immediately before the transfer. It is clear that whether the terms and conditions are less favourable, will need to be determined on a case-by-case basis. It however needs to be pointed out that the fourth remedy is not so much a remedy as a prohibition, as relief is not provided for within the context of the provisions of section 4(4) of the PDA.

The terms and conditions of employment may be regulated by the BCEA, collective agreements, sectoral determinations, other legislation and the provisions contained within the contract of employment.

6.6 The duties of the employer and vicarious liability within this context – a fifth remedy?

The judgement of the SCA in *Media 24*[89] has no bearing on whistle-blowing, however, it does raise a question in respect of the liability of an employer, when seen both within the context of the duties of the employer, as well as vicarious liability, in respect of a whistle-blower and occupational detriment and more exacted upon such a whistle-blower as employee. The background to the matter is that the Supreme Court of Appeal, in 2005 dismissed appeals brought by Media 24 Limited and Gasant Samuels against orders made by Justice Nel in the Cape High Court on 19 March 2004 ordering them jointly and severally to pay R776 814 to Mrs. Grobler, who was a former secretary employed by Nasionale Ltd in Cape Town.

89 *Media 24 Ltd & Another v Grobler* 2005 (26) ILJ 1007 (SCA).

The court found that Samuels had sexually harassed Mrs. Grobler over a period of six months at the premises of Nasionale Tydskrifte and on one occasion near her flat, as a result of which she suffered chronic emotional problems which prevented her from working. The judge also found that Media 24 Limited, which had employed Gasant Samuels was vicariously liable for his conduct in sexually harassing Mrs. Grobler. On appeal the SCA upheld the finding by the trial court that Samuels had sexually harassed Mrs. Grobler. It left open the question as to whether Media 24 Limited was vicariously liable for the harassment because it found that Nasionale Tydskrifte Limited, for whose obligations it had assured liability, had negligently breached the legal duty it owed Mrs. Grobler to take reasonable steps to prevent her from being sexually harassed in her working environment. The question thus raised is whether an employer has a duty to ensure that occupational detriment, and even further detriment is not caused to a whistle-blower within its employ?

6.6.1 The basic duties of the employer

The various basic duties of the employer in relation to its employee arise out of the contract concluded between the parties, as well as out of the nature of the relationship between them within the employment relationship.

6.6.1a Vicarious liability

Vicarious liability relates to the employer being held liable for the wrongful acts of its employees,[90] and in the main relates to the law of damages in terms of which the pecuniary terms of the liability is then determined.[91]

This is a specialised, voluminous field of law, and as such in this thesis no attempt will be made to canvass it, even partially. However, having said that, it is argued that a fair statement would be to say that within an employment relationship, it is so that society expects someone with a certain title within the employment relationship to act in accordance with not only the title, but also the status and expectations connoted with such position.

90 Basson *Essential Labour Law* (5th ed) 52.
91 Potgieter *Law of Damages* (3rd ed) page v (Preface).

Millard[92] explores vicarious liability in detail, commenting on an apparent alarming trend in South Africa in holding especially government employees liable for wrongful and culpable acts. The start of such an inquiry is to be found in asking whether there has in fact been a wrongful and culpable act committed by the employee as alleged. In the event that it is found that the employee indeed commit such a delict, the relationship between the employee and employer becomes relevant.[93]

It would seem that upon consideration of the above, it would be possible for a whistle-blower to institute proceedings in respect of the vicarious liability of his employer should he have suffered detriment that goes wider than just occupation detriment as provided for in the PDA, and perhaps as considered within the provisions of section 4(1)(a) and (b) of the PDA.

The body of case law pertaining to vicarious liability is considerable, and in attempting to determine the precedents set in this respect by our courts, consideration could be had to cases such as *Viljoen v Smith*,[94] *Grobler v Naspers Bpk & Another,*[95] *Ntsabo v Real Security CC,*[96] *Mkhize v Martens*[97] (by way of example).

6.6.1b Further delictual considerations – common law

In respect of the provisions of section 4(1)(a) and (b) of the PDA, it is argued that it is within this realm that further considerations regard delictual liability in respect of the whistle-blower would come into play. For example, should the employer cause detriment to a whistle-blower as a result of his or her (the employer's) failure to carry out his obligations as provided for in the contract of employment, the employer would be in breach of the contract. This would give rise to the enforcement of contractual remedies.

Two examples which could potentially relate within the context of the whistle-blower are:

92 Millard 2012 *De Jure* 225-253.
93 Millard 2012 *De Jure* 226.
94 *Viljoen v Smith* 1997 (18) ILJ 61 (A).
95 *Grobler v Naspers Bpk & Another* 2004 (5) BLLR 455 (C).
96 *Ntsabo v Real Security CC* 2004 (1) BLLR 58 (LC).
97 *Mkhize v Martens* 1914 AD 382 390.

- the employer's duty to provide safe working conditions, as demonstrated in the *Media 24* matter;[98]
- the employer's duty of fair dealings with employees as introduced by the SCA in *Murray.*[99] This would be especially relevant in respect of certain employees within the military and intelligence environments not covered by the LRA.

> …the Supreme Court of Appeal introduced a new general and contractual obligation on employers, namely the duty of fair dealings with employees. The employee, a military policeman, claimed that he had been constructively dismissed by his employer (he resigned because his employer made continued employment impossible). If the employee had been covered by the LRA he would have had specific remedies in terms of the Act. But the LRA does not apply to members of the SA National Defence Force and he relied on purely contractual grounds to approach the High Courts. The Supreme Court of Appeal held that the employee was entitled to rely directly on his right to fair labour practices and the associated right to personal dignity, and of course, he could also rely on his contractual rights. The constitutionally extended common law relating to the contract of employment, said the Court, now imposes a duty on all employers (not only the military) to deal fairly with their employees (own emphasis).[100]

Considerations that apply within the same delictual context, which would in all probability therefore also apply within the realm of whistle-blowing, would certainly include the infringement of *fama* through defamation and malicious proceedings.

In certain circumstances the defamation of a natural person may result in monetary loss, such as cases concerning a right to goodwill, earning capacity or the creditworthiness of the person concerned. In such cases the loss of income or the loss of profit, by way of example, will be utilised in ascertaining the damages suffered. In this respect the courts have a wide discretion, with fairness being the central consideration.[101]

In fact, it is suggested that the remedies within this common law context in respect of a whistle-blower, may very well be said to extend to parties other than the whistle-blower. Take, for example, the instance in which a whistle-blower (and in the wider context of an informer outside the scope of the employment relationship) is killed, or dies or is injured as a result of the fact that blew the whistle. In such circumstances the law of damages provides for damages that may be claimed for loss of support

98 *Media 24 Ltd & Another v Grobler* 2005 (26) ILJ 1007 (SCA).
99 *Murray v Minister of Defence* 2008 (6) BLLR 513 (SCA).
100 Basson *Essential Labour Law* 47 and 48.
101 Potgieter *Law of Damages* 513.

caused by death or injury. The damages that may be claimed include medical costs, funeral costs and claims by the dependants of such persons.[102]

6.7 The insertion of section 200B in the LRA

Recently the Labour Relations Amendment Act 6 of 2014 inserted section 200B, which relates to the liability for an employer's obligations.

Section 200B(1) of the LRA provides that for the purposes of the LRA and any other *employment laws*, which would obviously include both the provisions of the BCEA and the PDA an 'employer' includes any one or more persons, who carry on associated or related activity or business '*by or through an employer if the intent or effect of their doing so is or has been to directly or indirectly defeat the purposes of this Act or any other employment law'.*

In terms of the provisions of section 200B(2) of the LRA provides that if more than one person is so held to be the employer of an employee, those people are jointly and severally liable for any failure to comply with the obligation of an employer of the LRA or any other employment laws, including the PDA and the BCEA.

6.8 Conclusion

When considering the remedies that may be available, the PDA itself in section 4(1) itself directs the whistle-blower to look wider than the ambit of that provided for in the PDA. The wording of the mentioned section makes it clear in that seeking a remedy the whistle-blowers reach expands beyond the boundaries of that available merely within the context of the employment relationship. His or her cause of action in seeking an appropriate remedy may fall within the labour context, criminal law or the civil law, with the remedies not ending to those availed to the whistle-blower; the family and dependant of the whistle-blower too may have a cause for action in search of an appropriate remedy depending on the circumstances of the case.

102 Potgieter *Law of Damages* 477 – 490.

CHAPTER 7: AN OVERVIEW OF SOUTH AFRICAN CASE LAW CONCERNING WHISTLE-BLOWERS

7.1 Introduction

As has been established, on occasion, the whistle-blower is viewed with absolute dissent, as disloyal at heart.

Hucker opines that it is as a result of upbringing, the values of which include loyalty and team spirit, which people are taught from an early age that one is never to inform on others members of a group, no matter what they have done, as this would amount to betrayal and an indication of low moral fibre.[1]

However, the LC's recent view expressed in respect of whistle-blowers, in *Ngobeni v Minister of Communications and another*[2] seems to underpin an attitude seemingly directly opposite to the above-mentioned sentiments, which no doubt, still linger.

Having established the remedies that have been provided for whistle-blowers in terms of section 4 of the PDA, and which indicates the breadth and width thereof, it is deemed expedient to consider South African case law in respect of whistle-blowing for two basic purposes. First of all it is necessary to determine what kinds of remedies have been afforded to whistle-blowers in practice, and secondly, to examine the tests determined by our courts in so-doing, in establishing whether those laying claim to the remedies provided actually qualify to do so based on their claims.

Further cases displaying jurisdictional issues are also mentioned under paragraph 7.4 hereunder.

1 Adv. Dion Hucker (for Grant Thornton). "Whistleblowing – is it the right thing or the only thing to do?" 2005 *The Bottom Line* (1) 1.
2 (2014) 35 ILJ 2506 (LC)

7.2 The body of case law

7.2.1 Grieve v Denel (Pty) Ltd[3]

In the *Grieve* case the applicant in the matter was employed at Swartklip as its safety and security manager. Denel is a private company with the state as its sole shareholder and managed by a board of directors appointed by the Minister for Public Enterprises. This matter concerned the division of Denel (Pty) Ltd which was styled as "Swartklip Products" (hereinafter referred to as "Swartklip"). The applicant averred that the general manager (Bedford) at Swartklip, had as a result of his management style, alienated a number of the employees, and that the employees had started organising themselves into what was termed 'concerned groups', although seemingly the specifics in respect of these groups could not be clarified or defined. It seemed as though the applicant and the members of the group had over a period of time accumulated information and 'evidence' in respect of Bedford, and alleged wrongdoing and poor management, with the intention of revealing the information and having Bedford removed from Swartklip.

On 23 October 2002, the applicant disclosed information to his immediate supervisor (Schultz) in an informal manner in respect of four matters purportedly relating to alleged unauthorised expenditure, nepotism and financial wrongdoing by Bedford and some associated with him. Following this, further meetings were held between the applicant and Schultz and on 24 October 2002 Van Der Merwe, who was the financial executive at Swartklip also attended. On 29 October 2002 Schultz called the applicant, stating that investigating the allegations that had been made would place him in a difficult position, and as such, should the applicant wish to pursue the allegations the applicant should take the matter directly to the board. The applicant was in the process of finalising a report he was compiling for this very purpose when he was called to a meeting with Schultz and Bedford in respect of another investigation pertaining to an explosion.

The applicant's report was submitted to the board on 19 November 2002, with the applicant being suspended the following day with full pay. He was charged with misconduct during early December 2002, with the disciplinary hearing being

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

postponed to 13 January 2003. During preparation for the hearing, both the applicant and his attorney discovered[4] the provisions of the PDA. An urgent application for interim relief was launched on 10 January 2003, in respect of which the relief sought was that the employer be interdicted from continuing with the pending disciplinary action against the applicant; the matter was set down by agreement on 16 January 2003 in the LC, where it was fully argued.

In respect of the jurisdiction, the court noted that would only have the necessary jurisdiction in the dispute once the conciliation process had run its course. However, the court was mindful of the fact that despite this, that the matter at hand was the type of case in which the court had the necessary power to order that the *status quo* be maintained or restored, pending the main dispute's determination. The court pointed out that in a matter such as the one at hand the test was not whether the court had the necessary jurisdiction to determine the main dispute, but whether it had jurisdiction in an application for an interim interdict, with reference to *Airoadexpress (Pty) Ltd v The Chairman, Local Transportation Board, Durban & others* 1986 (2) SA 663 (A), *National Gambling Board v Premier KwaZulu-Natal & others* 2002 (2) SA 175 (CC) at 713B.

In such a situation the court had to determine whether or not the applicant had a *prima facie* right to the relief sought, within the court's jurisdiction.[5]

When applying the test in respect of an interim interdict, the court, taking into account the facts of the matter before it, was satisfied that at a *prima facie*[6] level the applicant had established a causal link between the charges that had been brought against him and the fact that he had made disclosures. The court further noted that the applicant had no other remedy available, and in the court's view the balance of convenience favoured the granting of the interim interdict.

The interim interdict was granted to the applicant.

4 It has to be borne in mind that at this stage, the PDA was relatively new.
5 *Venter v Automobile Association of SA* (2002) 21 ILJ 675 (LC) at 677E-678B.
6 In other words, on the face of the facts placed before the court.

7.2.2 Communication Workers Union v Mobile Telephone Networks (Pty) Ltd[7]

In this matter an interim interdict had been granted on 16 April 2003, with a return day (*rule nisi)*.

In terms of the interim order that had been granted the Mobile Telephone Networks (hereinafter referred to as "MTN"), had been interdicted from proceeding with disciplinary action against the second applicant, until the finalisation of the application before the court. The relief sought by the applicants was that MTN be interdicted from proceeding with the disciplinary action, pending the adjudication of the unfair labour practice dispute that had been referred by the applicants to the CCMA on 16 April 2003. They also sought an order from the court in terms of which the suspension of the second applicant would be lifted, pending the final determination of the matter.

The second applicant at the time was employed by MTN as a supervisor in the business improvement unit. Until the beginning of 2003 a number of temporary staff members had been provided to the unit in the Gauteng Office by various employment agencies. The second applicant averred that in March 2003 it became apparent to him that there were departures from previous practice, in that supervisors were given lists of candidates to interview, with the most of the candidates on the lists being supplied by an agency known as Thlalefang. On 1 April 2003 at a meeting the second applicant raised the allegation he had regarding the alleged preferential treatment that was being afforded to Thlalefang. He was advised to refer the matter to the business risk unit. However, on 4 April 2003 the second applicant wrote and circulated an email to a group of people, blind copying a number of people including the chief executive officer and the commercial director; some of the recipients had been in attendance at the meeting on 1 April 2003. It was this email that the applicants averred constituted the protected disclosure.

In consequence on 11 April 2003 the second applicant was suspended and advised that he would have to attend a disciplinary hearing on 17 April 2003. The issue

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

before the court was whether the disclosure qualified as a protected disclosure as provided for in the PDA. The requirements for a final interdict require the applicant in a matter to establish a clear right, an injury actually committed or reasonably apprehended, as well as the absence of similar protection by any other ordinary remedy. The court stated that if a disclosure was made to an employer in terms of the provisions of section 6 of the PDA, there were a number of conditions to be satisfied before the disclosure would be held to be a protected disclosure. The conditions to be met would include *inter alia* that the disclosure was to be made by an employee, that the employee had reason to believe that the information disclosed shows or tends to show the type of conduct defined as a disclosure in the PDA, that the disclosure had been made in good faith, in accordance with the prescribed procedure and the like.

The court held that there had to be a demonstrable nexus between the disclosure made and the alleged occupational detriment.[8]

The court agreed with the observation of the court in the *Grieve* matter[9] that the PDA seeks to encourage a culture of whistle-blowing, however, the court also observed that the protection is not unconditional. In this regard the court stated that in circumstances in which an employee set out deliberately to embarrass or harass the employer, the requirement of good faith has not been met, and that the PDA did not provide protection for a whistle-blower whose disclosure was based on rumour or conjecture.[10]

In the matter at hand the court held that the disclosure did not qualify as a protected disclosure as the applicant was in fact expressing what amounted to a subjectively held opinion or accusation. As such in this matter the rule *nisi* was discharged.

7.2.3 H & M Ltd[11]

In this matter the applicant at the time of her dismissal had held the position of Human Resource Manager. On 20 September 2004 the applicant had been

8 *Communication Workers Union v Mobile Telephone Networks (Pty) Ltd* 2003 (24) ILJ 1670 (LC) para 19.
9 *Grieve v Denel* (Pty) Ltd 2003 (24) ILJ 551 (LC).
10 *Communication Workers Union v Mobile Telephone Networks (Pty) Ltd* 2003 (24) ILJ 1670 (LC) para 21.
11 *H & M Ltd* 2005 (26) ILJ 1737 (CCMA).

suspended and called to a disciplinary hearing on 12 October 2004. The charges she faced were included malicious intent to cause harm to the employer by abusing and divulging confidential information, fraudulent activities whilst holding a position of trust, the breach of her duty of good faith whilst in a position of trust and gross negligence.

The applicant's case was that the suspension and charges had originated as a result of a letter the applicant had sent to Mr. J, a 5% shareholder in the respondent, resident in Spain, on 8 September 2004, and the applicant averring that the letter had amounted to a protected disclosure in terms of the PDA. In other words, she was alleging occupational detriment as a result of a protected disclosure made.

On 9 October 2004 the applicant addressed a letter to the respondent in which she raised various concerns, offering to attend a hearing in terms of section 188A[12] of the LRA, contending as well that the charges were vague and embarrassing and seeking clarity in respect thereof, and further contending that her conduct was protected in terms of the provisions of the PDA. In respect of her suspension, the applicant had already submitted an alleged unfair labour practice dispute with the CCMA. The Commissioner in this matter referred to both *Grieve v Denel*[13] and *Communication Workers Union v Mobile Telephone Networks (Pty) Ltd*[14] noting *inter alia* that there were certain conditions to be met with before a disclosure could be said to be protected, and as provided for in terms of the provisions of section 6 of the PDA.

In respect of the nexus the Commissioner noted that the court "did not deem it necessary that the detriment be directly linked to the disclosure in the sense that an employee would be entitled to a remedy if and only if the detriment threatened or applied by the employer is so threatened or applied expressly for the making of a disclosure." [15] The Commissioner stated that this would permit unscrupulous

12 In terms of the provisions of section 188A, at the time an employer may, with the consent of the employee involved, request a council, an accredited agency or the Commission for Conciliation, Mediation and Arbitration, to conduct an arbitration pertaining to allegations about the conduct or capacity of that employee. This provision has subsequently been amended in terms of the Labour Relations Amendment Act 6 of 2014, and now relates to an inquiry by an arbitrator.

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

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

15 *H & M Ltd* 2005 (26) ILJ 1737 (CCMA) 1776.

employers to create pretexts upon which to affect occupational detriments and undermine the purpose of the PDA. However, the nexus needs to be demonstrable.

The Commissioner also referred to the parameters set out by the provisions of the PDA, within which the whistle-blower would need to stay to enjoy the protection offered, including the requirement that the disclosure had to be made in good faith, and may not be based on mere rumours or conjecture, but that the whistle-blower also needed to base his beliefs in respect of the disclosure on reasonable grounds regarding the substantial truth of the allegations. Taking cognisance of the requirements as provided for in the PDA, the Commissioner found that only allegations 2, 3 and 27 made by the applicant qualified as protected disclosures. The award granted equalled four months' remuneration.

7.2.4 Pedzinski v Andisa Securities (Pty) Ltd (formerly SCMB Securities (Pty) Ltd)[16]

The applicant in this matter had been dismissed on 24 April 2004, with the employer, the respondent in the case, citing operational requirements as being the reason for her dismissal. However, the applicant alleged that the retrenchment proceedings were a sham that the respondent had used to disguise the true reason for her dismissal. The applicant alleged that her dismissal was automatically unfair *inter alia* as a result of her having made a protected disclosure.

The applicant had been employed by the respondent, who was part of the Standard Bank Group, as a Compliance Manager. In this position she *inter alia* responsible for investigating insider trading and other irregularities regarding share trading.

The applicant had prepared a report regarding trading irregularities that was sent to her superior and to the Group's Compliance Department. One of the employees implicated was the applicant's superior's senior manager. The applicant's superior viewed the fact that he had not been consulted in respect of the report, as an act of insubordination on the part of the applicant. A few weeks later, the respondent decided that it needed to increase the staff component of the Compliance Department, however, even in the face of this the applicant was given a section 189

16 *Pedzinski v Andisa Securities (Pty) Ltd (formerly SCMB Securities (Pty) Ltd*) 2006 (27) ILJ 362 (LC).

letter, in which it was proposed that she work full-time, be allocated a suitable alternative position or be retrenched. At this stage the applicant was working half days as a result of a back condition she had developed. A counter-proposal that she submitted was rejected by the respondent and the applicant was dismissed.

The court was of the view that the disclosure made by the applicant fell squarely within the ambit of section 6 of the PDA. As such the applicant's dismissal was automatically unfair, and as a result of which the respondent was ordered to pay the applicant compensation equal to twenty four months' remuneration, as well as the applicant's costs.

7.2.5 *Tshishonga v Minister of Justice & Constitutional Development & Another*[17]

In this matter, following what the applicant averred was a protected disclosure as defined in the PDA, the applicant was suspended pending a disciplinary enquiry.

Tshishonga had been employed in 1978 in the department of justice (the department) in Venda as a Director-General; in 1994 he was appointed as a Deputy Director-General when various departments of justice were consolidated, and where after he was appointed as the Managing Director of the Masters' office business unit (hereinafter referred to as "the unit"). One of his duties were to address the rife instances of corruption regarding the administration of insolvent estates, and especially in the appointment of liquidators. A panel was to be establishes which would appoint such liquidators.

During 2002 Tshishonga was contacted by the former Minister of Justice, Dr Penwell Maduna, who informed Tshishonga that a friend of his, a certain Mr Enver Motala, would make contact with Tshishonga, as Motala was knowledgeable about liquidations. During approximately February 2002 Tshishonga and Motala met, however, to Tshishonga it seemed clear that Motala's aim was to influence him for his own benefit.

17 *Tshishonga v Minister of Justice & Constitutional Development & Another* 2007 (28) ILJ 195 (LC).

Also during February 2002 it appeared that two bodies of insolvency practitioners wanted to merge, and in respect of which they met under the chairmanship of Tshishonga. Before the meeting Motala had contacted Tshishonga, informing Tshishonga that the Minister wanted Motala to attend the meeting. Tshishonga was not pleased and told the erstwhile chairman of one of the merging associations, Dr Seriti, of his unhappiness. This report concerned Dr Seriti, and at the meeting he informed that it was not proper for Motala to attend; however, undeterred, Motala remained in attendance at the meeting.

On approximately 15 February 2002, the Minister contacted Tshishonga, informing him that he was unhappy with the manner in which liquidators were being appointed, instructing Tshishonga to arrange a staff meeting so that the Minister could address the staff members.

The meeting was duly arranged, and was also attended by Motala, as the only liquidator present. During the course of the meeting the Minister expressed his unhappiness with the manner in which Motala was being side-lined. Irene Mokgalabone, the chairperson for the panel responsible for appointing liquidators distributed a report she had prepared, explaining why Motala was not appointed.

During the course of the meeting, the Minister was informed of the procedure to be employed by a party who was unhappy, before that party would contact the Minister; according to Tshishonga, he believed that the issue relating to Motala had been resolved.

Whilst on leave in June 2002, Tshishonga was contacted by Koos Van Der Merwe, who was acting in Tshishonga's position during his leave, informing him that the Master of the High Court, Pietermaritzburg, had been instructed by the Minister to appoint Motala as the liquidator in the liquidation of the Retail Apparel Group (hereinafter referred to as "RAG"). Van Der Merwe wanted direction as to how he was to assist the Master of the High Court, Pietermaritzburg. Tshishonga told Van Der Merwe to engage with the department's legal advisors, who in turn would need to contact the Minister in order to advise him of the extent of his powers. He further told Van Der Merwe to contact the Master of the High Court, Pietermaritzburg, and advise him to obtain the Minister's instructions in writing, if it became apparent that the Minister's instructions went beyond his actual powers.

Upon his return the Master of the High Court, Pietermaritzburg had prepared a report regarding the Minister's instruction pertaining to RAG. RAG was liquidated during May 2002; and the four liquidators who had originally been appointed to liquidate RAG successfully challenged Motala's appointment in the High Court, KwaZulu-Natal, with the court confirming the legal opinion of the department's legal advisors in that the Minister did indeed not have the power to instruct the Master to appoint liquidators.

The Minster appealed to the SCA, which appeal was dismissed.[18] However, on approximately 12 September 2002, whilst the SCA's decision was still pending, the Minister instructed Tshishonga to convene a meeting including *inter alia* a certain Mr. Lategan, the Master of the High Court, Pietermaritzburg and Tshishonga.

During the meeting held, the Minister informed those in attendance that he was appointing Lategan as the acting Assistant Master in Pietermaritzburg, specifically to manage the appointment of liquidators in the RAG liquidation. The stated actions of the Minister surprised Tshishonga, and were in his mind unheard of. It has to be borne in mind that the liquidation of RAG was one of South Africa's biggest liquidations to date, involving claims of more than R1 billion.

Lategan appointed Motala as the fifth liquidator as soon as he became the Assistant Master in Pietermaritzburg, and it was later found that Lategan's relationship was untoward.

Rumblings were to be heard at the highest levels regarding the Minister and Motala's relationship.

On 28 January 2003 at approximately 21h00 the Minister telephonically contacted Tshishonga, stating that he was with a union who was angry as it averred that their interests were not being taken into account when liquidators were appointed; the Minister blamed Tshishonga, stating that Tshishonga had not assisted in the RAG liquidation, and spreading negative comments about the Minister, threatening that Tshishonga would be the first casualty. The Minister informed that with immediate effect he was removing Tshishonga as the unit's head, refusing to hear Tshishonga's side in respect of the allegations. After the ending of the call Tshishonga contacted

18 *Minister of Justice v Firstrand Bank Ltd and Others* 2003 (6) SA 636.

the Director-General, who expressed shocked, and who agreed that they should meet the next day.

At the meeting with the Director-General the next day, it was clear to Tshishonga that the Minister had already contacted the Director-General. Tshishonga insisted on the Minister providing reasons for removing him as the head of the unit, with the Director-General replying that no such reasons would be forthcoming. The Chief State Law Advisor, Enver Daniels was appointed on 4 February 2003 to take over Tshishonga's duties.

In the media it was reported that Tshishonga was making accusations as a result of having been reprimanded for poor work performance, with Tshishonga denying the allegations regarding his work performance.

After removing Tshishonga, the Minister stated that he still needed his expertise; however, Tshishonga was not given work within his new position.

Whilst Tshishonga had still been the head of the unit, the Director-General, upon his advice, had requested a forensic investigation regarding alleged corruption. During the first week of February 2003 Tshishonga was provided with the resultant report, which report had also been supplied to the Director-General, and following any action on the report by the Director-General, Tshishonga approached the office of the Public Protector during February 2003, leaving copies of the report with them.

When no action was taken by the Public Protector, Tshishonga approached the Auditor-General's offices, also receiving no response whatsoever.

Due to a lack of progress, on 6 October 2003 Tshishonga met with an investigative journalist, holding a press conference two days later, and after the Director-General had attempted to discourage him from engaging with the media. The consequences were grave.

On national television the Minister allegedly defamed Tshishonga, where after Tshishonga lodged a complaint of criminal defamation against the Minister, however, the Director pf Public Prosecutions refused to prosecute the matter, advising Tshishonga to institute a civil claim.

On 13 October Tshishonga was suspended for allegedly revealing sensitive issues about the Ministry, without following departmental protocol.

On 27 October 2003 Tshishonga was subpoenaed to testify at the RAG enquiry, and although he was not a relevant witness, and suspected other underhanded tactics at play, he attended the enquiry, at which he was examined in respect of the allegations he had made in the media. However, the questions he was being asked would be relevant to the disciplinary hearing pending against him.

He later received a message in accordance with which the Director-General had requested that Tshishonga return documents, and in respect of which Tshishonga sought a meeting with the Director-General in order to determine which documents he sought. The Director-General refused to meet with him, and on 14 November 2003 the Director-General obtained an interim interdict with a return date against Tshishonga, which interdicted him from disclosing privileged information or documents, calling for the return of all documentation which belonged to the department; the rule *nisi* was discharged on 16 November 2004.

On 5 December 2003, Tshishonga was charged with misconduct, where after he successfully challenged his suspension in the LC, which matter was unopposed.

On 28 January 2004 he was reinstated in his former position, pending arbitration of the dispute, however, the department refused to comply with the LC's order because of the alleged misconduct.

As a result he was on suspension until 20 July 2004, on which date an independent chairperson who conducted the disciplinary enquiry found him not guilty.

Tshishonga contacted the Director-General to re-enter his job, however, despite it all the Director-General refused to reinstate him; he insisted that the trust relationship had been destroyed, and that they should seek to reach a settlement, where after negotiations between them started, with Tshishonga's employment being terminated by agreement.

Hereafter, a claim for compensation arose from the provisions of the PDA. The court considered *inter alia* that Tshishonga was forced to terminate his employment, and that although he had been paid during his suspension and received a satisfactory settlement, he had been denied the dignity of employment. The court ruled that Tshishonga be paid the maximum of twelve months' remuneration, calculated at the rate payable to deputy directors-general as at the date of judgement. The respondents were also ordered to pay the Tshishonga's costs.

7.2.6 Minister of Justice and Constitutional Development & Another v Tshishonga[19]

As described above, the LC made an award to Tshishonga. On appeal in this matter it transpired that the only ground of appeal was that the LC had erred in fact and law in ordering the compensation, with the appellants contending that it was excessive. The LAC considered that the compensation was provided for in the PDA. As the respondent had been subjected to occupational detriment, which was found to be an unfair labour practice in terms of the PDA,[20] the award was to be made in terms of the provisions of section 194(4) of the LRA.

In considering the compensation awarded, the LAC considered the factors as listed by the SCA in the *Mogale*[21] matter namely, the seriousness of the defamation, the nature and extent of the publication, the reputation of the employee, and the motives and conduct of the appellants. Taking this into consideration within the context of the matter, the LAC found that the respondent should be granted a significant award. The LAC accordingly awarded Tshishonga R 277 000 in compensation (a reduced amount) and costs.

7.2.7 Sekgobela v State Information Technology Agency (Pty) Ltd[22]

Sekgobela had been a programme manager at the State Information Technology Agency (hereinafter referred to as "SITA"), alleging that he had raised certain irregularities that the Chief Executive Officer had failed to deal with, pertaining to the failure to comply with tender procedures, where after he had disclosed the improprieties to the Public Protector. Following his disclosure he was suspended and faced disciplinary procedure, including a charge pertaining to the fact that he had referred the matter to the Public Protector that was still being dealt with internally. He was subsequently dismissed.

The court concluded that Sekgobela had made a disclosure that fell within the ambit of a protected disclosure, as the SITA had failed to comply with a legal obligation.

---

19 *Minister of Justice & Constitutional Development & Another v Tshishonga* 2009 (30) ILJ 1799 (LAC).
20 Section 4(2) (*b*) of the PDA.
21 *Mogale & others v Seima* 2008 (5) SA 637 (SCA).
22 *Sekgobela v State Information Technology Agency (Pty) Ltd* 2008 (29) ILJ 1995 (LC).

In this matter the employee's dismissal was found to be automatically unfair, and that he had been a victim of occupational detriment because he had to dared to question the procedures followed by the SITA and his colleagues.[23] The court awarded the applicant compensation equal to twenty four months' salary with costs.

7.2.8 Theron v Minister of Correctional Services & Another[24]

In this application the applicant sought a *rule nisi,* an interim interdict and further relief on 4 December 2007.

The applicant had been responsible for providing medical care to prisoners at Pollsmoor prison for approximately 22 years, with the parties to the matter arguing that the applicant was an employee of both the Department of Correctional Services (hereinafter referred to as the "DCS") and the Department of Health (hereinafter referred to as the "DOH") for the purposes of the PDA.

For years there had been serious challenges in respect of the standard of health care available, as well as the circumstances under which the health care available was to be provided to the prisoners, and on various occasions throughout the years the applicant had raised these concerns with various officials in both the DCS and the DOH. During January 2007 the applicant has raised the concerns with the office of the Inspecting Judge of Prisons, and during April 2007 the applicant had raised the concerns with the Portfolio Committee on Correctional Services of Parliament. Both the office of the Inspecting Judge and the Portfolio Committee later issued reports that were highly critical of the health care available.

On 19 July 2007 the applicant was charged by the DOH with misconduct for having contacted the office of the Inspecting Judge, Justice N. C. Erasmus, and visiting the chairperson of the Portfolio Committee without informing the Area Commissioner.

The applicant launched an urgent application in order to interdict the DOH from continuing with the disciplinary action. However, the DOH agreed to an order interdicting the holding of the disciplinary proceedings; the charges against the applicant were later withdrawn, and a settlement reached pertaining to the unfair labour practice dispute that the applicant had referred to the Public Health and

23 At par 33.
24 *Theron v Minister of Correctional Services & Another* 2008 (29) ILJ 1275 (LC).

Welfare Sector Bargaining Council. When the applicant tried returning to work during September, he was advised that his services were no longer required at Pollsmoor, and which had later been confirmed in a letter. The applicant later managed to obtain a copy of the letter. As a consequence the applicant was placed by the DCS at Lotus River Day Community Health Care Centre, where the working conditions were considerably better than at Pollsmoor. However, the applicant regarded this as occupational detriment.

The court found that the applicant had established a right which was open to slight doubt, that the right so established was especially worthy of protection, that he had not suffered irreparable harm and that the balance of convenience favoured him slightly. The court exercised its in favour of granting the interim relief sought as the applicant's right had been infringed as a result of him having made a protected disclosure.[25]

7.2.9 Bargarette & others v Performing Arts Centre of the Free State & others[26]

In this matter the applicants were employed by the first respondent, the Provincial Arts Council of the Free State (hereinafter referred to as "PACOFS") as senior managers, with the three applicants being the CEO, Chief Financial Officer (hereinafter referred to as "CFO") and the Human Resources Manager. They approached the LC seeking an interdict.

At the time of bringing the application, the three applicants were on suspension with full pay, pending the outcome of the disciplinary enquiry that the PACOFS had instituted. Before bringing the current application, the applicants had previously brought two urgent applications. The first had been an urgent application in which they sought to interdict the PACOFS from proceeding with a disciplinary hearing which had been scheduled for 1 to 9 November 2007. The second urgent application had sought an order to have the disciplinary hearing scheduled for 5 November 2007 postponed. The *rule nisi* interdicting the proceedings on that day had been granted by the Orange Free State High Court.

---

25 *Theron v Minister of Correctional Services & Another* 2008 (29) ILJ 1275 (LC) 1290.

26 *Bargarette & Others v Performing Arts Centre of the Free State & others* 2008 (29) ILJ 2907 (LC).

The applicants had also, before filing the application now under consideration, referred three separate disputes to the CCMA. These three disputes concerned their alleged unfair suspension, unfair discrimination or victimisation, and *occupational detriment* exacted on them after they had made a protected disclosure which they had made regarding alleged irregularities pertaining to the appointment and payment of a service provider identified as JGL. After the CCMA had issued certificates that the dispute between the parties remained unresolved, in respect of the three matters referred to above, the applicants approached the court in this instance.

This matter centred on the pending disciplinary matters regarding the applicants. It is trite that it is the primary prerogative of the employer to determine the disciplinary process in the workplace, provided that the attendant procedure is fair.

In this respect the court held that the courts have held that they can and have intervened in a pending disciplinary hearing, however, that they would do so only in the most extraordinary of cases, for example where the constitutional rights of an employee were being disregarded, and by way of example with reference to *Police & Prisons Civil Rights Union v Minister of Correctional Services & others*[27]

The court pointed out that in cases which did not display the exceptional circumstances required for intervention, the employee had other remedies at his disposal, using *Mantzaris v University of Durban Westville & other* as example.[28]

The applicants' application was dismissed with costs.

7.2.10 Ramsammy v Wholesale & Retail Sector Education & Training Authority[29]

In this matter the applicant, who had been employed as an executive skills development manager at the respondent in the matter, had been dismissed after making what he alleged to have been a protected disclosure.

27 *Police & Prisons Civil Rights Union v Minister of Correctional Services & others* 1999 (20) ILJ 2416 (LC) at 2432-3 at paras 53 – 56).
28 *Mantzaris v University of Durban Westville & other* 2000 (21) ILJ 1818 (LC) at para 5.8
29 *Ramsammy v Wholesale & Retail Sector Education & Training Authority* 2009 (30) ILJ 1927 (LC).

An article had been published in the *Enterprise* magazine in March 2005 which was entitled “Women power”, *inter alia* featuring that Ms Ntombi Dludla held a BA degree in Industrial Psychology and Communication from the University of South Africa (hereinafter referred to as “UNISA”), that she was a member of the respondent’s management team and further that she had previously been employed by FABCOS Development Services. The article had incorrectly stated that she had the above-named BA degree, as she had two outstanding modules, which two modules she had completed during 2006, and with the BA degree having been conferred on her in 2006. The article had been published in March 2005, and she had only been appointed as an executive manager from 1 April 2005.

The respondent’s annual report for the period ending 31 March 2005 had held Ms Dludla to be the Executive Manager: Human Resources, even though her appointed had only been effective from the day after, on 1 April 2005. From April 2006 both the applicant in the matters and other employees had started raising concerns about human resource issues that they were unhappy with. One of these issues related to “preferential treatment” and concerns regarding Dludla’s advancement.

During July 2006 the applicant in the matter obtained a copy of Dludla’s academic record from UNISA, which showed that in April 2004 she still had four modules outstanding in respect of her BA degree. He also got a copy of the magazine article from Polly Modikoe, who was the executive manager: marketing and communications. Further to this, Modikoe provided the applicant with a copy of the respondent’s CEO’s profile, which showed that he had previously worked at FABCOS.

On 17 July 2006 the applicant sent an email to the CEO.

The CFO and the Chief Operating Officer (hereinafter referred to as “COO”) were appointed to investigate the allegations made, which investigation commenced on 2 August 2006. On 15 September 2006, after the commencement of the investigation, the applicant sent the email as set out above to all the directors and executive managers of the respondent. Further to this, and on the same day, he made three further disclosures to external parties, namely the Special Investigations Unit (hereinafter referred to as the “SIU”), the Public Protector and the Department of

Labour. The disclosures so made externally to the three above-named parties, very broadly stated that the respondent's CEO had engaged in fraud, mismanagement and maladministration. After this the respondent appointed Executive Committee (hereinafter referred to as "EXCO") members to investigate (hereinafter referred to as the "EXCO investigation").

The applicant was charged with insolence and allegations of fraud made against the CEO, and dismissed in 2007 as a result. What is pivotal to note in respect of the applicant's evidence rendered in the matter, is the following:

- The main part of his disclosure was in respect of the respondent's CEO's complicity in respect of the fraudulent *curriculum vitae* (hereinafter referred to as "CV"), in order to ensure that Dludla was promoted to an executive management position, which he referred to as "recruitment fraud";
- That he had not intended the email that he sent to be a protected disclosure as he had made in the ordinary course of his employment in respect of the human resources policy. He had raised the issues in confidence with the CEO, and he had understood that the complaint was aimed at the CEO more than it was at Dludla;
- The reason he had referred to "alleged" fraud in respect of the CV was because he had not been totally convinced that it in fact was fraudulent;
- The applicant's reason for not having co-operated with the EXCO investigation was that the members of EXCO who were undertaking the investigation had been implicated in allegations regarding financial mismanagement, which was concerning to him in respect of their actual impartiality and independence;
- When asked about the reason for making the external disclosures, he stated that it was because he wasn't "winning" in respect of the original investigation instituted.[30]

The court had regard to the applicant's counsel's submissions which included the following:

30 *Ramsammy v Wholesale & Retail Sector Education & Training Authority* 2009 (30) ILJ 1927 (LC) par 66.

- That the applicant had acted in good faith when he had sent the email to the CEO in confidence, especially as he was concerned about the reputational risk which could befall the respondent, as it had in respect of the previous CEO's fraudulent CV. He had made his disclosure in terms of the applicable protocol and procedure, and his refusal to participate in and cooperate with the investigations was justified;
- That in respect of the external disclosures made, he had intended to raise the same concerns as those raised in his email, and that in doing so he had relied on wording he had found on the Public Protector's website, and in doing so had indicated to these other bodies to share the information he had available.
- His complaint had not been against the respondent, but against the CEO and Dludla; he had never had the intention to embarrass the respondent.
- He believed that what he was reporting on was substantially true. All the bits of information that he had collected led to his belief that the CEO was complicit in concealing Dludla's qualifications, and that this was done in order to ensure her promotion.
- That the applicant met all the requirements of a protected disclosure.

As could be expected, the respondent's submissions differed from those of the applicant, and counsel for the respondent, submitted *inter alia* the following:

- That the process for determining whether a protected disclosure had been made was a four stage process, including the following –
    - An analysis of the information in order to determine whether it is a disclosure;
    - If it is, then the next question is whether the said disclosure is a protected disclosure;
    - To determine whether the employee was subjected to occupational detriment; and finally
    - What remedy should be awarded for such treatment.
- Counsel stated that it is not an enquiry about wrongdoing, but rather about whether the employee in question deserves protection.
- As a result of the pre-trial agreement, the court should only be encumbered with the first two stages of the four mentioned above.

- The applicant bears the evidentiary burden of proving that his disclosure is protected by the PDA.[31]
- In respect of the meaning of a disclosure, counsel provided the court with a full explanation with reference to jurisprudence, concluding that a disclosure should be interpreted as excluding "normal duty reports".

Counsel submitted that 'disclosure' in the PDA must bear its ordinary meaning, i.e. a 'revelation' or 'exposure' synonymous with whistle-blowing.

Mr. Myburgh implored the court to find that the meaning of 'disclosure' is at the very least ambiguous and should therefore be interpreted to mean conduct synonymous with whistleblowing.

In respect of what "information" would mean, the court referred to the *Tshishonga*[32] case in detail, stating as follows at paragraphs 51 – 52 that what would constitute information would include facts, which by its very nature starts with a suspicion, including inferences and opinion based on facts, which indicate that the suspicion is reasonable and sufficient enough to require investigation. However, 'smelling a rat' and unsubstantiated rumours do not constitute information.

The court also explored the meaning in respect of '*reason to believe'*, as contained in the definition of a disclosure, and quoted the *Tshishonga*[33] matter. Further to this, the argument considered the meaning of '*good faith'*. In this regard the court referred to the *Tshishonga* case, in which the argument had referred to the *Street v Unemployed Workers' Centre* 2004 (4) All ER 839 (CA) case in which the meaning of good faith within the context of a disclosure was discussed at paragraphs 203-206.

Further to this argument, the court identified a hierarchy of protection, at paragraph 54, provided for by the PDA identifying that the lowest level of protection is afforded

31 In this regard he referred to *Kroukamp v SA Airlink (Pty) Ltd* 2005 (26) ILJ 2153 (LAC), *Tshishonga v Minster of Justice & Constitutional Development & Another* 2007 (28) ILJ 195 (LC) and *Engineering Council of SA v City of Tshwane Metropolitan Municipality & another* 2008 (29) ILJ 899 (T).

32 *Tshishonga v Minster of Justice & Constitutional Development & Another* 2007 (28) ILJ 195 (LC).

33 *Tshishonga v Minster of Justice & Constitutional Development & Another* 2007 (28) ILJ 195 (LC) at para 185 – 192.

to a legal advisor, and the most stringent being afforded to public disclosures and those made to bodies not prescribed, such as disclosures made to the media.

It was highlighted in argument that the PDA encourages a culture in terms of which internal procedures and remedies are resorted to and exhausted before a disclosure is made public, the reason being that the employer should first be granted an opportunity by the employee to investigate the matter. Should an employee refuse to so engage on the issues with the employer it would be challenging to the employee to justify the requirement aligned with reasonable belief.

The importance of this highlighted approach is of such importance that the PDA sets a more substantive test in respect of external disclosures, as the reasonableness of the belief held must be linked to the information being substantially true. In this regard it was argued at paragraph 54 that the test is both subjective and objective; the test is subjective in nature as the employee who makes the disclosure holds the belief, but also objective in that the belief has to be reasonable, and that the determination of the reasonableness thereof is based on facts.

In the matter, the court eventually found that the applicant had not made a protected disclosure based *inter alia* on his refusal to cooperate in the investigations and his fabrication of evidence.

7.2.11 Young v Coega Development Corporation (Pty) Ltd[34]

The background facts to the matter include the common cause fact that Young had made a number of disclosures, pertaining to alleged impropriety in the Coega Development Corporation (hereinafter referred to as the "CDC"), which by their nature implicated the CEO. The applicant in the matter was an employee of the CDC, seated in the position of the CFO. The alleged improprieties included *inter alia* unbudgeted expenditure, in the amount of approximately R 150 million, which required board approval. Young had engaged with the CEO, forwarding to him a letter intended for the chairman of the board, giving the CEO an opportunity to comment of the content of the letter; the CEO did not comment thereon.

34 *Young v Coega Development Corporation (Pty) Ltd* [2009] 6 BLLR 597 (ECP).

In the letter Young had stated that in terms of the Treasury Regulations he had a duty to make the report. It transpired that Young's attorney had advised him that the transaction in question contravened the provisions of the Public Finance Management Act 1 of 1999, and as the CFO, he was duty bound to report the transaction.

Young had also discussed the contents of the letter with the chairperson of the Audit and Finance Committee and had provided the chairperson with a copy of the letter. This was later argued as constituting an even further disclosure.

The second disclosure which was common cause between the parties related to Value Added Tax (hereinafter referred to as "VAT") irregularities, pertaining to an irregular claim by the CEO's trust, which was not registered for VAT, for VAT regarding services which were rendered by the trust to the CDC. During October 2008 Young had addressed a communication to the CEO, raising the matter, and requesting the repayment of R 178 627.80, which was the amount involved; however, here too he received no response from the CEO. Young contended that the claim by the CEO's trust constituted an offence in terms of the Value Added Tax Act 89 of 1991, administered by SARS. The aforementioned amount was not repaid as requested, and as a result of which Young reported the matter telephonically to the chairman of the CDC's Human Resources Sub-Committee, a Mr. de Bruyn.

The third disclosure was in respect of the failure of the CEO's trust to make an income tax payment required relating to the services that the trust had rendered to CDC, and as a result of which CDC was subsequently required to pay approximately R1.2 million to SARS, which amount should have been deducted from the payments made by CDC to the CEO's trust. Young had reminded the CEO to make the payment, with CDC later claiming payment of the amount from the CEO; however, the CEO had repaid only a portion of the amount. During May 2008 the CEO had agreed to repay his indebtedness in nine equal instalments by way of post-dated cheques, and in respect of which he had only provided three post-dated cheques, of which only one cheque was honoured. The original indebtedness of the CEO had not been authorised by the board, nor were the terms of the repayment undertaken. Young informed De Bruyn of these circumstances by way of a letter during December 2008.

The CDC had instituted disciplinary action against the applicant in respect of the aforementioned disclosures, despite the applicant's objection through his attorneys who had indicated that the applicant would seek relief in terms of section 4(1) (*a*) of the PDA, in the form of an order barring the disciplinary action.

Young averred that the disciplinary action amounted to occupational detriment for the protected disclosures that he had made.

On 10 March 2009 the applicant instituted action in the High Court and the summons therein was served on the CDC. At the disciplinary hearing held on 16 March 2009 the applicant requested a postponement pending the outcome of the application to the High Court; however, the chairperson refused the request. It is noted that the chairperson did grant a postponement to launch the application on an urgent basis.

CDC was interdicted and restrained from proceeding with the disciplinary enquiry instituted against the applicant, pending the determination of the action instituted by the applicant in the High Court under case number 597/09.

7.2.12 Radebe & Another v Premier, Free State Province & Others[35]

The crux of the matter to be decided on was, whether the two applicants had made a protected disclosure on 9 December 2005, as contemplated in the PDA. On 9 December 2005 the two applicants had signed a document, requesting an investigation into various allegations pertaining to corruption, nepotism, fraud and fruitless and wasteful expenditure. The document was thereafter forwarded to the President of the Republic of South Africa, the National Minister of Education, the Premier of the Free State, the Member of Executive Council (hereinafter referred to as "MEC") for Education of the Free State, the Superintendent General for Education Free State, the Deputy Director General for Education Free State and the District Director. In the documents the applicants contended that the disclosure being made was a disclosure in terms of the PDA.

Upon receipt of the document, the National Minister for Education instructed that an investigation into the allegations be launched, and it was stated that the applicants

35 *Radebe & Another v Premier, Free State Province and Others* (JA61/09) [2012] ZALAC 15 (1 June 2012).

had refused to cooperate with the investigating team, as before their arrival, the State Attorney had issued a letter indicating that the allegations were malicious, baseless and defamatory, and according to the instructions by the State Attorney, the two applicants were to stop making such allegations. Their second reason in respect of their refusal to cooperate was based on the fact that the investigators were internal investigators, and they had requested independent investigators.

On 24 May 2006 the applicants were charged. Upon being served with the charges the applicants brought an application in the High Court, Orange Free State Provincial Division, wherein they sought an interdict against the disciplinary enquiry to be held. The basis of the application was that they were whistle-blowers in terms of the PDA, and that the said enquiry amounted to occupational detriment. However, the matter was dismissed with costs.

During the disciplinary enquiry the applicants also objected on the basis that they were whistle-blowers. The chairperson of the enquiry ruled that the matter had already been decided by the High Court, and he decided to proceed in the absence of the two applicants. Both applicants were found guilty of the second alternative charge to charge 1, which alleged that they had unjustifiably prejudiced the administration, discipline or efficiency of the district when they published and or communicated the defamatory statements. The sanction in respect of both applicants was demotion to the next lower rank, immediately effective. The applicants appealed in respect of the sanction, however, the outcome in respect of the first applicant was confirmed, and the sanction in respect of the second applicant was altered.

In respect of the employment relationship, the court held that the first applicant's employer was the Head of the Provincial Department of Education, which appeared to be the Superintendent General, whilst in respect of the second applicant the employer was deemed to be Thabong Primary School. The court stated that the MEC and the Minister did not qualify as employers within the context of the PDA when taking into account especially the provisions of sections 6 and 7 of the PDA, and that

the responsibility implicit in a position does not change a responsible party to an employer. [36]

The court also considered the requirement pertaining to the fact that the employees making the disclosure must have reason to believe that the information concerned shows or tends to show one or more of the irregularities provided for. Having regard to the *Vumba*[37] matter in which the Full Bench dealt with the phrase *reason to believe,* and taking cognisance of the fact that the decision in *Vumba* was quoted with apparent approval by the SCA in the *MTN*[38] matter.

The court held that should any of the elements required for a disclosure to be a protected disclosure be wanting, then the disclosure is not a disclosure in terms of the PDA, and all the protection offered therein is lost. The court in this regard also referred to the four stage approach highlighted in the *Tshishonga*[39] matter, namely an analysis of the information in order to determine whether it amounts to a disclosure, the determination of whether or not the disclosure is protected, whether the employee has been subjected to occupational detriment; and the appropriate remedy.

The court also referred to *Roos v Commissioner Stone No & others* 2007 (10) BLLR 972 (LC) in which the court, although dealing with reviews held that the PDA does not give employee any grounds for making unsubstantiated and belittling comments about its employer, and later to hide behind the PDA.[40]

In summary the court held that the alleged disclosure was in fact not a disclosure, that the complaints made included parties who did not fall within the ambit of an employer, that the conduct complained about did not show or tend to show anything untoward, and that the *bona fides* of the applicants were questionable.

The applicants' claims were dismissed.

---

36 *Radebe & Another v Mashoff, Premier of the Free State Province & Others* (JS140/08) [2009] ZALC 20 (17 February 2009) at para 43.
37 *Vumba Intertrade CC v Geometric Intertrade CC* 2001 SA 1068 (W).
38 *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd* 2007 (6) SA 620 (SCA).
39 *Tshishonga v Minster of Justice & Constitutional Development & Another* 2007 (28) ILJ 195 (LC).
40 *Radebe & Another v Mashoff, Premier of the Free State Province & Others* (JS140/08) [2009] ZALC 20 at para 67.

7.2.13 City of Tshwane Metropolitan Municipality v Engineering Council of South Africa and Another[41]

Mr. Weyers, the second respondent in the matter an electrical engineer, had been employed by the appellant since 1996, and had held the position of Managing Engineer: Power System Control (hereinafter referred to as "PSC") since 2003. In the last-mentioned position he was responsible for Tshwane's PSC centre, the primary function of which was to ensure that correct systems of configuration and safety measures were applied to the networks, in order to ensure the continuity, quality and safety of electrical supply within his sphere of responsibility.

On 31 August 2005 Weyers had addressed a letter to the Strategic Executive Officer (hereinafter referred to as "SEO") of the Electricity Department, copying the General Manager: Electricity Development and Energy Business, as well as the Municipal Manager, expressing concerns about the employment of the new system operators in the PSC. He also sent the letter to the Department of Labour and the Engineering Council. On 9 November 2005, Weyers was suspended, and the employer proceeded with disciplinary steps against him, and the remaining charge brought against him related to the copies of the letter sent to the SEO, the Department of Labour and the Engineering Council without authorisation or prior approval and knowledge of the Head of the Electricity Department.

Upon being found guilty on the charge he approached the Pretoria High Court, with the support of the Engineering Council, in order to obtain an order interdicting the appellant from imposing any disciplinary sanction upon him. The said order was indeed granted, and the appeal in this matter lay against that order, with the leave of the High Court.

When considering the circumstances that led to Weyers penning the letter, the court had regard to the fact that during 2005 there was a substantial staff shortage as a result of which employees were required to perform excessive and dangerous levels of overtime work. As a result Weyers was permitted to recruit some staff members.

41 *City of Tshwane Metropolitan Municipality v Engineering Council of South Africa and Another* [2010] 3 BLLR 229 SCA.
See also *Engineering Council of South Africa and Another v City of Tshwane Metropolitan Council and Another* [2008] 6 BLLR 571 (T).

The shortlists were compiled after testing of the candidates had been undertaken, however, the response from a Mr. Ratsiane was that the shortlists were unacceptable and a meeting was to be arranged. The problem was that all the candidates on the shortlist were white, and the existing foreman and operators were also white. In this respect Weyers had sent an email pointing out that the employment equity candidates lacked sufficient technical knowledge of the network, even after 10% had been added to their test scores.

Human Resources refused to allow Weyers to appoint white candidates, and to compound his challenges an internal communication was circulated stipulating that staff were not allowed to work more than 40 hours overtime per month, whilst some of Weyers' employees were working between 60 to 100 hours overtime as a result of the capacity constraints. The situation eventually led to Weyers seeking guidance from the Engineering Council on more than one occasion. On one occasion he was given advice by the Manager of Legal Services of the Council, advising him to report the situation to the Mayor of Tshwane, and that he was also obliged to report to the Engineering Council and the Department of Labour.

On 29 August Mr. Mahlangu simply shortlisted all the employment equity candidates who had scored between 32.2% and 2.22% in the test; Mahlangu was the General Manager: Electricity Management and Energy Business. Weyers stated that he could not sign the shortlist as it was in his mind contrary to his professional obligations to do so. In the circumstances, Weyers approached the Engineering Council for guidance, as he sought advice on what his professional duties were in his given circumstances. The Engineering Council advised him that it would be unprofessional besides amounting to misconduct on his side, if he were a party to the appointment of people who in his opinion were incompetent, and which could give rise to safety risks.

Following this advice, Weyers informed Mahlangu that if he continued with the process he would be obliged to write a letter to the Department of Labour in order to report the matter to them. The response from Mahlangu (un-rebutted) was "*You can write the letter. I don't care*." It was against these circumstances that Weyers had written the letter, which letter was also sent to the Department of Labour and the Engineering Council.

On 9 November 2005 Weyers was suspended and his employer instituted disciplinary proceedings against him; initially he faced various charges, all of which were abandoned by the employer, save the charge in respect of the letter sent, without the necessary authorisation or approval of the head of the Electricity Department.

Weyers was found guilty of the charge, where after he approached the High Court, Gauteng Division, with the support of the Engineering Council, for an order in terms of which his employer would be interdicted from imposing any disciplinary sanction upon him.

The High Court granted the order sought on the grounds that the letter sent to the parties amounted to a protected disclosure.

The employer then appealed against this order of the High Court to the SCA.

The SCA found that it was common cause between the parties that the systems operators perform work more dangerous to that performed by electricians, and as a result need to be more skilled than ordinary electricians.

The SCA stated that the PDA recognises that disclosures made by employees are often not welcomed by the employer, and in such circumstances seeks to protect the employee from reprisal exacted by the employer. The court pointed to the provisions of section 3 of the PDA which prohibits this type of reprisal in the form of occupational detriment, including taking disciplinary action against the employee who has made a protected disclosure.

The court was satisfied that both the letter and the circumstances culminating in the penning and sending of the letter related to serious concerns raised in respect of the actual or potential health and safety of not only employees of the municipality in question, but quite possibly that of external parties as well, as well as compliance with statutory obligations concerning safety. The SCA was satisfied that the letter in question indeed contained a disclosure of information regarding the conduct of those employees of the appellant who had taken responsibility for the selection of system operators, and accordingly the letter constituted a disclosure in terms of the PDA. The court accepted that Weyers had made the disclosure to his employer and that

no action had been taken thereon, other than '*to disregard his bona fide concerns*.' In light of this the court came to the conclusion that in fact the disclosure was also a protected disclosure. Accordingly the appeal was dismissed, with costs.

7.2.14 Randles v Chemical Specialities Ltd[42]

The applicant in this matter approached the LC for an urgent order interdicting the employer from proceeding with disciplinary action against him, pending the outcome of a dispute referred to the CCMA, and if conciliation failed, pending the outcome in the LC.

The application was essentially based on the assertion that Randles had made a protected disclosure in terms of the PDA and as a result was being subjected to occupational detriment on account or partly on account having made the protected disclosure in question.

Randles had started his employment with the respondent in April 2006, in the position of Group Legal Counsel, where after he accepted appointment as a Director of the Respondent.

During November 2007 the respondent was listed with the Johannesburg Stock Exchange. Towards the end of 2008 the Finance Director tendered his resignation, and whilst his resignation was pending the Finance Director issued a letter entitled "Matters for the attention of the Board". The letter highlighted concerns regarding *inter alia* the company's debtor book, bank facilities and securities, transactions questioned by employees, and a director's loan made to Mr. Wood.

During the first part of 2009 the relationship between Randles and Wood soured, with the raging dispute between them relating to the entitlement of Randles to a share entitlement in the company. In May 2009 Randles sent an email to Randles informing him of his intention to resign as a director. Randles resigned as a director, remaining as an employee. In his letter of resignation as a director Randles stated that it would be inappropriate to so resign without giving the board reasons for the resignation. One of his reasons given by Randles related to the share entitlement dispute that he and Wood had been entangled in, and with the other issues

42 *Randles v Chemical Specialities Ltd* 2010 (3) ILJ 2150 (LC).

highlighted including those pointed out by the erstwhile Finance Director.

On 2 July 2009 Randles instituted a civil claim in the High Court against Wood pertaining to the share entitlement dispute, and on 4 August 2009 Randles issued a 10 page document headed “to whom it may concern”, and which he sent to the company’s board. This document included various issues including those pointed out by the erstwhile Finance Director, and dealt with wide ranging concerns about the lack of corporate governance exercised within the company. Wood on the other hand had mandated an investigation of Randles.

On 4 January 2010 Randles was given a copy of a charge sheet reflecting two charges, and was suspended pending the disciplinary hearing instituted. Upon being suspended Randles was required to provide his computer password, which he did, where after the employer appointed a company to investigate the contents of Randles’ computer’s hard drive. On 20 January 2010 Randles was served with an amended charge sheet which included an additional charge of fraud and the abuse of the company’s computer. The disciplinary hearing was scheduled to commence on 22 January 2010, before which Randles had unsuccessfully applied for a postponement, where after on 21 January 2010, Randles’ attorneys launched this application.

In considering the good faith with which Randles had made the contentious disclosures the court held that his *bona fides* were to be seen in various factors including his various attempts to bring the discrepancies to the employer’s attention and the opportunity given to the employer to deal with the alleged discrepancies as required in terms of the provisions of section 9 of the PDA.

The court further held that being subjected to a disciplinary hearing, as Randles was, fulfilled the definition of occupational detriment, as provided for in section 1 of the PDA.

Considering all the facts of the matter the court was satisfied that the applicant had shown the existence of a *prima facie* right to the relief he sought, as well as meeting all the additional requirements for the interim relief sought. The company was interdicted from proceeding with any disciplinary action regarding the protected

disclosure made, pending the outcome of the dispute which had been referred to the CCMA.

7.2.15 Potgieter v Tubatse Ferrochrome and Others[43]

Tubatse Ferrochrome operates a mine and had employed Potgieter, who is a qualified engineer, on 16 January 1989. One of Potgieter's duties within his employment was to ensure that at the workplace, health and safety standards were maintained as required. During August 2006 Potgieter had sustained a fractured collarbone, whilst off duty, and in respect of which he had to undergo surgery, where after he was booked off work by a medical practitioner until 28 August 2006. Whilst on sick leave Potgieter's manager had contacted him, requesting that he work from home in light of the fact that another project superintendent had resigned; Potgieter agreed to work from home, where after the employer had a report, referred to as the Golder Report, which was prepared by an independent consulting company was delivered to him at his home. Potgieter's sick leave was extended a few times, where after his employer invited him to the workplace in order to discuss his sick leave; this discussion however, never took place.

On 3 October 2006 Potgieter received a letter from his employer, which informed him that his medical condition had been re-evaluated by a medical practitioner in his employer's employ, and that he was to return to work on what was termed "restricted duty" as from 4 October 2006. Potgieter did not return to work, and a similar letter was sent to him instructing him to return to duty the next day, which once again was not adhered to. Potgieter sent an email to the employer stating that the instruction regarding his return had not been adhered to in light of the fact that he had a valid medical certificate booking him off until 15 October 2006.

On 6 October 2006 the employer sent an email to Potgieter informing him that he had failed to obey a valid instruction, where after he was served with a notice of a disciplinary hearing, and charged with failing to obey a reasonable instruction, being absent without permission and insubordination.

Potgieter was found guilty on all charges and dismissed. After his dismissal but

43 *Potgieter v Tubatse Ferrochrome and Others* [2012] 5 BLLR 509 (LC).

before the hearing of his appeal Potgieter released a report to the media, and in respect of which an article was published in the *Highland Panorama.* In the publication Potgieter alleged that his employer did not have the necessary measures in place in respect of the water pollution that its mining activities caused. After his dismissal Potgieter referred an unfair dismissal dispute to the Metal and Engineering Industries Bargaining Council, with the commissioner arbitrating the matter finding that Potgieter's dismissal had been procedurally and substantively unfair, and that Potgieter's reinstatement would be impracticable; in light of this the commissioner awarded him the maximum compensation. The reason for the commissioner finding that reinstatement would be impractical as the employment relationship had been irretrievably damaged as a result of the disclosure of the Gerber report to the media after his dismissal. Potgieter's contention was that the disclosure was a protected disclosure in terms of the PDA; the commissioner disagreed, stating that it was highly improbable that Potgieter had made the disclosure in good faith as required by the PDA, and that the disclosure had been vindictive aimed at embarrassing and humiliating the employer.

Potgieter applied to the LC for a review of the commissioner's award, praying that the commissioner's award be set aside and replaced by an order reinstating him to his previous position.

The LC dismissed Potgieter's review application, finding that the commissioner's decision was reasonable, especially in light of the fact that Potgieter had not led any evidence to show that he had made a protected disclosure, or that the disclosure had been made in good faith.

7.2.16 Potgieter v Tubatse Ferrochrome & others[44]

The approach and decision of the LAC in this matter is significant, as it is the first South African case in which the court considered whistle-blower related legislation beside the PDA.

Potgieter took LC's decision on appeal to the LAC; there was no cross-appeal, with the two main issues relating to the granting of the remedy of compensation and the

44 *Potgieter v Tubatse Ferrochrome & others* (2014) 35 *ILJ* 2419 (LAC).

costs order granted by the LC in favour of the employer.

The LAC acknowledged[45] that the encouraging of a culture of whistle-blowing is a constitutional imperative which lies at the core of the fundamental principles directed at the achievement of a just society based on democratic values, and that this constitutional imperative is in fact in compliance with South Africa's international obligations in accordance with the provisions of Article 33 of the UNCAC.[46]

The LAC further referred to the case of *Guja v Moldova*[47] which was decided in the European Court of Human Rights, and which held that whistle-blowing constitutes the exercise of a person's internationally protected right of freedom of expression ,as provided for in terms of Article 10 of the UNCAC as well.[48]

The LAC referred to Potgieter's assertion that his disclosure made was also protected in terms of the provisions in NEMA, and with specific reference to sections 28(1) and, before its amendment 31 in 2009.[49] In terms of the provisions of section 31(1) of NEMA (before its amendment), it provided that no person was civilly or criminally liable or could be dismissed, disciplined, prejudiced or harassed as a result of having made a disclosure of any information if the person in good faith and on reasonable grounds believed at the time of making the disclosure that he or she was disclosing evidence of an environmental risk, and if the disclosure was made in accordance with the provisions of section 31(5) of NEMA.

The court pointed out that NEMA's protection reached further than the protection of only whistle-blowing employees, and those whistle-blowers who had blown the whistle in the media were also protected in terms of the provisions of section 31 thereof.[50]

It was stated that Potgieter in his evidence during the arbitration of his dismissal had stated that it was his duty to disclose some of his employer's acts and omissions relating to compliance with the provisions of NEMA, and that this evidence had not

45 At par 14.
46 See paragraph 3.4 of Chapter 3.
47 Guja v Moldova, application no 14277/04 (at para 70) February 2008.
48 At par 15.
49 At par 19.
50 At par 21.

been challenged.[51]

The LAC stated that this evidence showed good faith on the part of Potgieter, and that it was clear from the evidence given at the arbitration that he had made the disclosure as he feared criminal sanctions, he had previously made reports to his employer and he regarded the release of the report as being in the public interest.[52]

Whilst it was acknowledged that due regard has to be had to reputational damage which could ensue to the employer if sensitive information was made public, the mere finding that such disclosure would render the employment relationship untenable, would seriously damage the very protection that the legal framework aimed at protecting whistle-blowers, endeavoured to uphold. The court stated that it is an accepted principle that in certain circumstances the public interest may outweigh the interests of protecting an organisation's reputation.[53]

The court found that when the evidence was viewed in its totality it has been demonstrated that Potgieter made a disclosure in good faith, and fell within the category of a protected disclosure.[54]

The appeal was upheld, and Potgieter's retrospective reinstatement was ordered.

7.2.17 Charlton v Parliament of the Republic of South Africa[55]

In this matter Charlton had been the Chief Financial Officer to Parliament from 1 May 2002, initially on a 3 year fixed term contract, and thereafter permanently appointed as from 1 March 2004, holding his position until his purported dismissal on 13 January 2006. During approximately 2002, December, Charlton had informed the then Secretary of Parliament, Mr. Mfenyana of an alleged improper travel claim that had been submitted by a member of Parliament. With Mr. Mfenyana's approval, Charlton had investigated the matter further, where after in April 2003, Charlton had submitted a written report to Parliament pertaining to *prima facie* evidence of fraud that had been perpetrated together with certain travel agents, and in relation to travel claims.

---

51 At par 23.
52 At par 25.
53 At par 31.
54 At par 36.
55 *Charlton and Parliament of the Republic of South Africa* (C367/06) [2007] ZALC 47.

Charlton remained involved in respect of the investigations, making various oral and written reports to Parliament and the senior presiding officers, informing them of the processes followed and the emerging details of the alleged fraud. The South African Police Service, the Scorpions and the National Prosecuting Authority were also involved in the investigation, of what was later referred to as "Travel Gate" scandal. According to Charlton he enjoyed Parliament's support in respect of the investigation, which had identified fraud in the amount of R13 million, perpetrated over a period of approximately 15 months.

However, after the April 2004 elections the previous senior presiding officers left and Mr. Dingani replaced Mr. Mfenyaya as the Secretary. According to Charlton, as of the time of the appointment of Dingani, Parliamentary support in respect of the investigation declined substantially, even when Charlton reported to Dingani that further investigation had uncovered further fraud on Parliament, increasing the amount involved to approximately R35.7 million, and implicating prominent (then) current and former members and office bearers of Parliament. According to Charlton, Dingani frustrated the proper investigation of the allegations, by not making available appropriate resources in this regard. In fact, it is alleged by Charlton that during the period August 2004 until the date of his dismissal in 2006, Parliament failed to take appropriate action in respect of the alleged fraud.

On 18 November 2005, Charlton was suspended by Parliament, where after a disciplinary hearing in respect of the various allegations pertaining to misconduct was conducted against him during the period 12 to 21 December 2005. Following the disciplinary enquiry, Charlton's dismissal was recommended, and on 13 January 2006 Dingani accepted the recommendation and dismissed Charlton. Charlton challenged his dismissal in the LC, *inter alia* on the basis that his dismissal was automatically unfair in terms of section 187(1)(*h*) of the LRA as he had been dismissed for having made protected disclosures as envisaged in terms of the PDA (first cause of action).

The respondent averred that the members of Parliament hold constitutional positions as a result of which no contract of employment arises, and that they are free agents owing no allegiance to Parliament. Whilst the applicant's case was that the members of Parliament are employees for the purposes of the PDA, and not necessarily as

defined in the LRA.

The court noted in this regard that parliamentary staff perform the work of parliament, and if there were no members of parliament the staff would not have any work to do, as a result of which it follows that the members of parliament proved work to parliamentary staff to perform. In other words members of parliament permit the staff to assist in the carrying on of parliamentary business.[56]

The court found that Parliament was indeed an employer for the purposes of the PDA. Further to this submissions were made by the respondents relating to Parliamentary privilege. The court stated that it did not regard this argument as relevant, as the applicant was not suing the members in their individual capacity. The court stated that the crux of the respondents' case depended on the assertions that members of Parliament do not follow within the scope of the PDA, whilst the members of Parliament could act as whistle-blowers without enjoying the protection availed in the PDA.[57]

In considering whether the PDA applies to members of Parliament, the court held that these assertions made a mockery of the PDA as it would make no sense for the very people who enacted the PDA to claim that its provisions did not apply to them. The court further held that in finding that the provisions of the PDA apply to the members of Parliament such an interpretation would not violate the purposes of the PDA or the relevant constitutional principles,[58] and would accord with the purpose of the PDA in eliminating corruption.[59]

The court held that Charlton was indeed protected by the PDA, as to hold otherwise "... would deal a blow to government intentions and would be a national embarrassment".

Following this the respondent took the matter on appeal to the LAC.[60] The LAC

56 *Charlton v Parliament of the Republic of South Africa* (C367/06) [2007] ZALC 47 (11 June 2007).
57 *Charlton v Parliament of the Republic of South Africa* (C367/06) [2007] ZALC 47 (11 June 2007) par 41.
58 *Charlton v Parliament of the Republic of South Africa* (C367/06) [2007] ZALC 47 (11 June 2007) para 44-46.
59 *Charlton v Parliament of the Republic of South Africa* (C367/06) [2007] ZALC 47 (11 June 2007) par 51.
60 *Charlton v Parliament of the Republic of South Africa* 2012 (1) SA 472 (LAC).

found that:

- The LC had made a final determination on the first exception in respect of the fact that parliamentarians are both employers and employees for the purposes of the PDA. As this decision was final in effect, the decision in this regard was indeed appealable.
- With regard to the second exception relating to jurisdiction, the LAC held that in dismissing the exception the LC had made a finding that it was therefore also appealable.
- That members of parliament are not employees for the purposes of the PDA, as to subject them to the provisions of the PDA may frustrate the democratic process and that they ought to be totally independent.
- The court found further that Parliament is not an employer.
- In respect of jurisdiction, the court held that once apparent to the LC that the matter should have been referred to arbitration, the matter in the LC should have been stayed and so referred for arbitration.

The LAC upheld the appeal. The proceedings were stayed in terms of section 158 (2)(*a*) of the LRA and the dispute referred to arbitration under the auspices of the CCMA. In turn, Charlton turned to the SCA for relief.[61] The SCA held that it is established law that the dismissal of an exception raised is generally not appealable, with exceptions in respect of exceptions to jurisdiction. The SCA stated that the reason for this being that the order (in respect of the exception) is not final, as there is nothing that prevents the aggrieved party in the matter from raising and arguing the same issue during the trial.

7.2.18 Arbuthnot v SA Municipal Workers' Union Provident Fund[62]

Arbuthnot had been employed by the respondent during June 2007 as a paralegal officer. The respondent had requested an opinion from counsel pertaining to the potential liability of the trustees.

The applicant in the matter had earlier raised concerns regarding the discharge of

61 *Charlton v Parliament of the Republic of South Africa* [2011] 12 BLLR 1143 (SCA).
62 *Arbuthnot v SA Municipal Workers Union Provident Fund* (JS575/09) [2011] ZALCJHB 166 (15 September 2011).

the duties by the trustees in respect of the fund with the fund's principal officer. When the opinion requested from counsel was received, the applicant's worst fears were realised, and in her mind the opinion was so damning that she was concerned that the trustees of the fund would attempt to suppress it in order to ensure that the potential liability totalling approximately R150 million did not become public. As a result the employee emailed a copy of the opinion to the national benefit officer of SAMWU.

She was later confronted about leaking the opinion, which she at first denied, but was later forced to admit when presented with a copy of her email. The applicant was subjected to a disciplinary hearing and was found guilty of insubordination, dishonesty and disloyalty, and subsequently dismissed. In the LC the employee contended that her dismissal had been unfair, as the reason for her dismissal had been that she had made a protected disclosure in terms of the PDA.

The court was satisfied that at the time at which the applicant had emailed the opinion, she reasonably believed the opinion to be substantially true in respect of the breach of the fiduciary duty owed by the fund's trustees.

The court also found that her protected disclosure made had indeed constituted the main reason for her dismissal, with the result that her dismissal was automatically unfair for the purposes of section 187 of the LRA. The applicant was awarded the equivalent of 12 months' remuneration and costs.

7.2.19 South African Municipal Workers Union National Fund v Arbuthnot[63]

This was an appeal against the judgment of the LC as discussed above.

The court first turned to the question as to whether Arbuthnot had believed the information disclosed was substantially true. The appellant had argued that what was required was that the information disclosed must be objectively true, and that the discloser must subjectively believe that the information is true; thus attempting to divide the concept of reasonable belief into two elements that required fulfilment.

63 *South African Municipal Workers Union National Fund v Arbuthnot* (JA73/11) [2014] ZALAC 23 (5 June 2014).

The court stated that this argument was “misconceived” as what was required was the reasonableness of the belief pertaining to the truth of the information, as opposed to the reasonableness of the information.[64] The requirement regarding the reasonableness of the belief did not require the demonstration of the correctness of the information in question. In this regard the court referred to the explanation in this regard rendered in the *Radebe* matter (*supra*). The court held that the LC had correctly concluded that the respondent had reasonably believed that the information disclosed was substantially true.[65] Hereafter the court turned to the question as to whether the discloser made the disclosure in good faith.

In this respect the appellant averred that Arbuthnot had acted in bad faith.

It was important to note that at the time, Arbuthnot was on a final written warning, dated 16 September 2008, for having divulged information and having disregarded the rules and instructions from her superior.[66] The relevant letter had clearly demonstrated the respondent’s attitude in respect of undermining her superior, and yet only two weeks thereafter she sent the disclosure in question to the National Benefits Officer of SAMWU, a Mr. Odendaal.[67]

The appellant argued that after she had been dismissed the respondent had grabbed at the provisions of the PDA. In the court’s view[68] good faith entailed the absence of ulterior motive, revenge and malice in making a disclosure within the context of the PDA. Hereafter, the court turned to the question as to whether it had been reasonable for Arbuthnot to have made the disclosure. The court was of the view that Arbuthnot had acted prematurely and could not just adopt the attitude that nothing would be done by the employer had it been disclosed to the employer.[69]

It could be inferred that it had been unreasonable for her to make the disclosure as she had, and as such that the disclosure was indeed not a protected disclosure, and in the premises her dismissal had not been automatically unfair.

64 At par 15.
65 At par 17.
66 At par 20.
67 At par 21.
68 At par 23.
69 At par 27.

7.2.20 Malan v Johannesburg Philharmonic Orchestra[70]

This was an appeal against a judgement in the LC, in terms of which the LC had dismissed the appellant's application to have his dismissal declared automatically unfair, with costs. The appellant claimed that he had been subjected to occupational detriment as a result of having made a protected disclosure, pleading in the alternative that his dismissal had been substantively and procedurally unfair.

The appellant had been employed on a fixed term contract basis by the employer, the Johannesburg Philharmonic Orchestra, which is a non-profit (section 21) company.

The circumstances that led to concerns escalating in respect of the financial activities of the respondent started during 2007 when employees' salaries were fractured and paid late, intensifying when the appellant had attended the Annual General Meeting (hereinafter referred to as the "AGM") on 5 December 2008. The appellant had formed the opinion that he needed access to the respondent's financial statements in order to establish how the funds were being utilised. In this regard the appellant arranged a meeting with the respondent's auditor. After the appellant's meeting with the auditor regarding the financial statements, he sent an anonymous letter from a friend's email address to the auditor in the matter. The auditor assumed correctly that it had been sent by the appellant.

After having sent this correspondence the appellant was charged and brought before a disciplinary hearing, in respect of attempting to acquire company information in a fraudulent way and bringing the company into disrepute.

On 20 March 2009 the appellant addressed correspondence to his colleagues, in which he related the background information to them. In this correspondence he sought their assistance. To this end he distributed the correspondence by placing the letters on the music stands in the orchestra pit before a performance. According to the appellant, in this manner he had distributed his letter to between 40 and 45 musicians, some of whom where employees of the respondent and others who were not.

---

70 *Malan v Johannesburg Philharmonic Orchestra* (JA61/11) [2013] ZALAC 24 (12 September 2013).

On 24 March 2009, at the start of the disciplinary hearing, he was faced with two additional charges, namely:

1. Bringing the employer into disrepute with other employees and third parties;
2. Breach of duty of good faith.

Subsequently, at the disciplinary hearing the appellant was found guilty and dismissed in consequence. Both his internal appeal and conciliation in this regard failed, where after he referred the matter to the LC, citing an automatically unfair dismissal. With regard to the LC, the court found that within the context of the PDA, that in respect of the appellant's letters distributed, that he had made a disclosure in respect of information tending to show actual or likely impropriety in respect of contractual obligations owed to the employees by the respondent.

The LC then went on to consider whether the disclosures made also qualified as protected disclosures. The LC held that on the evidence, and in respect of the first disclosure, it seemed clear that the appellant was genuinely concerned about the financial health of the respondent, and had tried to raise his concerns in this regard with the various parties, and that in doing so he had done so in good faith and in the belief that the information was substantively true. However, in respect of the second disclosure the court held that he had acted in self-interest, and in respect of the disciplinary hearing that he wished to have postponed.

The LC subsequently found that the disclosures were not protected, and as such went on to try and establish whether his dismissal had been for an unfair reason as provided for in terms of section 188(1)(*a*) of the LRA. In respect of the substantive fairness of the LC found that the appellant was indeed guilty of having brought the employer into disrepute with employees and external parties

The LAC states in this regard at paragraph 25 that the LC that a number of the allegations made were untrue and defamatory.

In respect of the procedural fairness, the conduct of the disciplinary hearing was held to have been procedurally fair, especially in light of the fact that the appellant had not sought further postponement, but relied solely on his first request for postponement.

The LAC deemed it unnecessary to deal with the questions as to whether the

appellant had made the disclosures in good faith or for personal gain, or whether he believed that the allegations were substantively true. For the LAC the first issue to be determined was whether the disclosures made by the appellant were protected by the provisions of section 9(2)(c)[71], and in respect of which the appellant argued that he had discharged this duty, when he had made the disclosures to Jurisch and Roberts.

The court found that during the discussions with Jurisch and Roberts, the appellant imparted or disclosed no information that was new to anyone. In fact, the appellant had asked about the financial health of the company, he was conducting an investigation. Further to this, the appellant had not led any evidence showing that either Jurisch or Roberts were unwilling to remedy the situation, or that they meant to victimise the appellant in light of the conversations. As such, the court held, as the LC had, that no disclosures were made during these conversations. As there was no disclosure, they could not be protected. The same was said in respect of the two letters authored by the appellant.

As such, the appeal was dismissed with costs.

7.2.21 Independent Municipal and Allied Trade Union obo Ngxila-Radebe v Ekurhuleni Metropolitan Municipality and Another[72]

The matter at hand was brought as an urgent application for relief in terms of section 158 (1)(*a*) of the LRA, brought by IMATU on behalf of Gloria Ngxila-Radebe (the applicant), seeking an order declaring that the disciplinary hearing against the applicant be declared as occupational detriment as defined in terms of the PDA. It further sought an order in terms of which the Ekurhuleni Metropolitan Municipality (first respondent) be interdicted from subjecting the applicant to further occupational detriment. The Notice of Motion reflected that final relief was sought by the applicant, however, it emanated during argument that in the alternative the applicant sought an interim interdict pending the finalisation of the proceedings instituted in terms of the

71 Which provides that a disclosure is protected when an employee making the disclosure had previously made a disclosure of substantially the same information to his employer, and in respect of which no action had been taken by the employer after a reasonable period of time.

72 *Independent Municipal and Allied Trade Union Obo Ngxila-Radebe v Ekurhuleni Metropolitan Municipality and Another* (J1029/2010) [2010] ZALC 289 (1 July 2010).

LRA. The application was opposed by the first respondent on the basis that the applicant had not satisfied the legal requirements regarding the PDA, and in particular that she had not demonstrated a clear right in respect of the relief sought.

Essentially the most of the facts before the court were common cause, and in particular that the applicant had made disclosures regarding irregularities pertaining to a contract entered into with Microsoft. It transpired that because of the applicant's disclosures there had been delays which affected the necessary payment and the fluctuation of the Rand Dollar rate, and as a result of which, a further R6 000 000.00 had become payable in respect of interest; this formed the essence of the charges brought against the applicant.

In this matter the first respondent argued that the applicant had fundamentally misconstrued the protection afforded to employees by the PDA, and that she was not being disciplined as a result of having made a disclosure. It was averred that she saw the PDA as a free pass to misconduct. The court expressed its consensus with the approach in *Grieve v Denel* stated by that court[73] in which it stated that should an employee so be subjected to occupational detriment, the employee is entitled to approach the LC for appropriate relief. However it pointed out that the employee was entitled to interim relief since conciliation is a prerequisite before the LC is empowered to grant final relief. The court also set out the usual approach to a dispute of facts that may arise based on the documentation[74] in an application.

The court noted that the respondent had wisely decided not to dispute the fact that protected disclosures had been made by the applicant in the matter.[75]

The court remarked that it could not be argued that the disclosures had been made in good faith by the applicant[76]; in fact, the disclosures made by the applicant had ultimately led to the payments being properly authorised.[77] The court found that there was a link between the disclosures made and the disciplinary action instituted

73 At paragraph 9.
74 Which will be dealt with under a separate heading in this regard.
75 At paragraph 34.
76 At paragraph 37.
77 At paragraph 38.

against the applicant[78] and that the first respondent blamed the applicant for the additional costs incurred, which delay was caused by her disclosures.

The court was persuaded that the applicant would suffer occupational detriment should she be subjected to the disciplinary hearing, and ordered that the first respondent be interdicted from proceeding with the disciplinary hearing pending the outcome of the dispute being referred to the South African Local Government Bargaining Council within 10 days of the granting of the order, and if the conciliation could not resolve the dispute, then pending the dispute being adjudicated on by the LC. The first respondent was also ordered to pay the costs of the application.[79]

7.2.22 Xakaza v Ekurhuleni Metropolitan Municipality and Others[80]

In this matter the applicant sought a final order declaring that he had suffered occupational detriment as a result of having made protected disclosures as defined by the PDA. Previously the applicant had sought to interdict the first respondent, the Municipality, from continuing with disciplinary proceedings against him, however, that application had been struck from the roll on 17 August 2011 due to a lack of urgency.

The applicant had been employed by the first respondent as an area development planner since 2006. During 2008 the first respondent had mandated an independent audit to be undertaken by an independent company, PASCO Risk Management (Pty) Ltd (PASCO), in order to investigate irregularities regarding the alienation of land that had previously belonged to the first respondent. PASCO had prepared various reports finding evidence of potential involvement in irregularities perpetrated by councillors of the first respondent. The applicant in the matter alleged that in the performance of his duties as the area development planner he had become aware of certain irregularities regarding the establishment of the township called Meyersdal Nature Estate (MNE) extensions 7 to 12. Further to this the applicant asserted that the PASCO had revealed *prima facie* corruption, fraud and other irregularities committed by officials of the first respondent, also in respect of MNE.

78 At paragraph 41.
79 At paragraph 45.
80 *Xakaza v Ekurhuleni Metropolitan Municipality and Others* (JS281/11) [2013] ZALCJHB 22 (21 February 2013).

The applicant stated that he had made disclosures in this respect during an interview, and by way of affidavit, which had been attached to the PASCO investigation report. According to the assertions of the applicant the section 101 certificate[81] had been issued after the Registrar had been misled regarding the compliance of the applications, and further that a section 82 certificate[82] had also been issued in contravention of the applicable Ordinance's provisions.[83]

The applicant averred that he had raised the same concerns at a meeting during October 2009, and that as a result of his disclosures made to PASCO he had suffered various actions constituting occupational detriment. The first respondent averred that the applicant in the current matter had been responsible for the issuance of the section 82 certificates, but that he had done everything in his power to prevent the issuance of the section 82 certificate, and as a result of which the developer instituted legal action against the first respondent for R67 million. However, the applicant still refused to comply, where after the first respondent had attempted to transfer him, and when this failed, suspended him and instituted legal action against him. It was during the applicant's absence from the office, during his suspension, that the first respondent claims that new information was uncovered in respect of the applicant, including the following:

- That he was moonlighting as a town planner without the employer's permission;
- That the applicant had failed to disclose a relationship with a potential contractor;
- That he had purported to act as an Area Manager whilst he was not; and
- Manipulating certain town-planning documents which had been submitted by developers and which resulted in unnecessary delays.

81 A section 101 of the Town Planning and Townships Ordinance Act 15 of 1986 entitles the Registrar of Deeds to endorse or register plans and diagrams with the relative title deeds lodged by an applicant provided that he shall not accept such documents for endorsement or registration until such time as he is advised by the authorised local authority that an applicant has complied with such conditions as the local authority may require to be fulfilled.

82 Section 82 of the Town Planning and Townships Ordinance Act 15 of 1986.

83 Section 82 prohibits registration of certain deeds of transfer by the Registrar and in particular section 82 (1) (ii) (cc) requires a local authority to certify that it will within 3 months of the date of the certificate be able to provide the *erf* with such services as it may deem necessary.

The first respondent went on to deny that the Registrar had been misled and there had not been compliance with section 82 as required, and further that it had taken cognisance of the applicant's opinions at the various stages, which views were found to be incorrect. The first respondent further averred that the applicant had not established the requirements of the PDA in respect of protected disclosures, that his disclosures had rather amounted to the mere expression of an opinion held, as well as an indication that he had refused to comply with instructions that he regarded as being contrary to his view and that the information contained in his disclosures were substantially true. The first respondent also contended that the applicant's actions had been motivated by malice.

Another point raised by the first respondent relates to the contention that the papers upon which the application was founded contained a wide range of disputes between the parties, which should all have been foreseen by the applicant, and that action proceedings should have been instituted as opposed to application proceedings. In this respect the court noted that there were clear disputes of fact in the case, as a result of which action proceedings should have been utilised as opposed to motion proceedings. However, in light of the applicant having preferred motion proceedings, the court would make a finding based on the motion proceedings[84].

> In a decision of the *National Director of Public Prosecutions v Zuma*[85], Harms DP said the following:
> 'Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise in the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (NDPP), together with the facts alleged by the latter, justifies such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers…'(own emphasis)
>
> Mr Hulley argued that the *Plascon- Evan*[86] rule applies regardless who bears the onus. I agree with this proposition...
> Whilst there are disputes of fact it is clear that the crisp issue in this case revolves around the applicant's interpretation of sections 82 and 101 of the Ordinance, which ultimately is a legal issue. These are the provisions of the Ordinance which the applicant alleges were infringed.

84 At par 48 to 51.
85 *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at paragraph 26
86 *Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd* 1984 (3) SA 623 at 634H-635C

Hereafter the court turned to the provisions of the PDA, and what the applicant needed to demonstrate in order to satisfy the court that he deserved the protection afforded by the PDA. In this regard the court held that:

- It was not disputed that the applicant was an employee of the first respondent;
- It was not clear what disclosure had been made to PASCO by the applicant. In this regard the court noted that it was not sufficient to merely annex an affidavit to the application that lacked sufficient particularity in respect of the requirements of the PDA, and that specific reference had to be made to the relevant portions. The court noted that the applicant had been unable to show that the PASCO reports had contained any information supplied by him. The court stated that the first respondent had been able to show that the information contained in the reports were known, and as such could not constitute a disclosure. Further to this various persons in the first respondent were interviewed, gave information which was indicative of irregularities, and were not disciplined.[87]
- The court noted that it had failed to find any disclosed information as alleged by the applicant that disclosed or tended to disclose any form of criminal conduct or misconduct as envisioned by the PDA.[88]
- There was also no link to be found between the alleged disclosure and the occupational detriment referred to, and that the first respondent had been able to demonstrate that the charges against the applicant were 'genuine'.[89]
- The applicant had also failed to show that he had reason to believe that the information contained in his disclosure alleged was substantially true; rather his beliefs in this regard had been proven to be both factually and legally incorrect on various occasions, and he was made aware of this.[90]

In light of these considerations, the application was dismissed with costs.

87 At par 56.
88 At par 64.
89 At par 65.
90 At par 69.

7.2.23 Lowies v University of Johannesburg[91]

Dr Adolf Lowies (the applicant) approached the LC for relief based on the allegation that he had been subjected to occupational detriment after having made a protected disclosure in terms of the PDA, and thus that his dismissal was automatically unfair.

The applicant had disclosed information relating to the performance of private work on the University of Johannesburg's (the respondent) premises on Saturdays by other psychologists in the employment of the respondent.

During his employ in November 2008, the applicant had had discussions with Ms Trudie Le Roux (hereinafter referred to as "Le Roux") also within the employment of the respondent, regarding the appointment of supervisors to intern psychologists, with the applicant indicating that he would be interested in such appointment. Le Roux required such an applicant's registration number with the Health Professions Council of South Africa (hereinafter referred to as "HPCSA").

On 26 November 2008 the applicant had sent his application in this regard via email to Le Roux, indicating his registration number held with the HPCSA as an educational and counselling psychologist. Hereafter the applicant was allocated as supervisor to a counselling intern psychologist. However, the applicant was not registered as a counselling psychologist with the HPCSA, and as such was not permitted to act as such a supervisor. One Professor Pretorius became aware of this and confronted the applicant in this regard, where after the applicant sent an explanation and apology to both Pretorius and Le Roux in respect of the earlier email sent. However, this explanation and apology was not accepted by either recipients, and the respondent instituted an investigation into the applicant's registration with the HPCSA. The investigation revealed that the applicant had been registered as an educational psychologist on 10 February 1995, that he was not registered as a counselling psychologist, that his name had been removed from the register of psychologists on 3 September 2002 due to his failure to pay his annual fees, and where after his name was restored on 15 April 2005.

On 19 January 2009 the applicant was charged in a disciplinary hearing with charges relating to misconduct. The applicant was found guilty of misrepresentation and

91 *Lowies v University of Johannesburg* (JS1062/2009) [2013] ZALCJHB 284 (30 April 2013).

gross dishonesty, with dismissal being recommended as the appropriate sanction. During the disciplinary hearing and even in the appeal thereof afterwards, no mention was made that the applicant was being subjected to occupational detriment on account of having made a protected disclosure. The appeal was refused, and in the petition to the Vice-Chancellor, for the first time, it was submitted on behalf of the applicant that he had been charged with misconduct after he had started questioning private work done by colleagues during official working hours, and that the applicant was in fact a whistle-blower. However, the petition was refused and the applicant was dismissed on 8 June 2009, where after the applicant referred a dispute to the CCMA.

The court noted[92] that on the applicant's own version of events the Saturday work practices complained of had already been stopped by 9 September 2008, when he lodged the complaint that was said to constitute the protected disclosure, and further, that he had relied on rumour and hearsay in this respect. The court referred to the 4 stage approach[93] set out in *Tshishonga v Minister of Justice and Constitutional Development and another*[94].

Further to this the court noted that the applicant had claimed that he had disclosed corrupt and fraudulent activities perpetrated at the respondent's place of work, however, that the applicant had not adduced any evidence in this respect.[95] In fact, the court noted that he had conceded that he had no idea of what happened to the money generated by the Saturday work, which in no way contributed to his allegations levelled. The court was not convinced that the applicant had made out a case as a whistle-blower, but for completeness sake referred to the conditions to be satisfied by the whistle-blower in accordance with the PDA. The court found that the disclosure that did not amount to a protected disclosure was not made in order to remedy any alleged wrongs, nor was it made in good faith, and further that there was no causal between the disclosure and the subsequent disciplinary action. The applicant's dismissal was held to have been fair.

92 At par 33.
93 At par 39.
94 *Tshishonga v Minister of Justice and Constitutional Development and another* [2007] (4) SA 135 (LC); [2007] 28 ILJ 195 (LC) at paragraph 176.
95 At par 40.

7.2.24 Palace Group Investments (Pty) Limited and Another v Mackie[96]

This related to an appeal against the judgment and order granted by the LC, and in terms of which on an urgent basis an interdict was granted, ordering that the disciplinary action against Alexander Michael Mackie (hereinafter referred to as "Mackie") be stayed, pending the outcome of a dispute regarding an unfair labour practice. Mackie was employed by Palace Group Investments (Pty) Limited (first appellant) as the Group Risk and Internal Manager.

The second appellant had received a facsimile on 10 February 2012 which was a copy of a Notice of Motion which appeared to have been issued by the North Gauteng High Court[97] on 9 February 2012. Mackie appeared to be the applicant in that application in the High Court, and the relief sought was the provisional liquidation of the second appellant, alternatively that the second appellant be placed under business rescue. The Notice of Motion had not been served in accordance with the provisions of High Court Rule 4, just faxed to the second appellant, and was not accompanied by a founding affidavit as required in terms of the High Court Rules.

It was common cause that on 9 February 2012 Mackie had provided the appellants' landlord with a copy of the Notice of Motion in question, where after the appellants' landlord indicated that they intended on refusing them further access to the premises. On 21 February 2012 an unsigned affidavit to the liquidation application was sent to the appellants' attorney of record, however, no annexures were annexed as they were said to be too voluminous. Further to this Mackie never set the application down for hearing. On 19 July 2012 the appellants issued a notice of the contemplated suspension of Mackie, and in terms of which he would later be afforded an opportunity of making representations pertaining to his contemplated suspension. Mackie was suspended with full payment and issued with a notice to attend a disciplinary hearing in terms of which he was charged with 6 charges of misconduct. On 10 August 2012 Mackie lodged an unfair labour dispute to the CCMA, alleging that the disciplinary proceedings against him constituted occupational detriment as provided for in terms of the PDA.

96 *Palace Group Investments (Pty) Ltd and Another v Mackie* (JA52/12) [2013] ZALAC 27 (28 May 2013)

97 Now the Gauteng Division.

At the start of the disciplinary hearing on 15 August 2012 Mackie launched an urgent application against the two appellants, in which he sought to interdict the disciplinary hearing, pending the outcome of the dispute referred to the CCMA. On 28 August 2012 the court *a quo* handed down judgment, granting an interim interdict ordering that the disciplinary hearing be stayed pending the outcome of the dispute referred to the CCMA, further ordering the appellants to pay the costs of the urgent application. It was against this decision that the appellants approached the current court.

Mackie's case in the urgent application had been that he had made a protected disclosure in the liquidation application, and as a result of which disciplinary proceedings had been instituted against him. The court noted that a copy of the liquidation application had been attached to the urgent application, but here too without any annexures.[98] The court stated that the question to be considered was whether the court *a quo* was justified in granting the interim interdict.

Hereafter the court went on consider that in application proceedings are based on the facts set out in the affidavits supporting the application, and that such an applicant's case must be made out in the affidavits with sufficient particularity to enable the opposing party to respond thereto. In this regard the court noted that the respondent's case was that he was entitled to the protection under the PDA as a result of the protected disclosure he made in the liquidation application.[99] The court analysed the provisions of the PDA stating that the starting point was to establish whether Mackie had *prima facie* established a right which was capable of the protection afforded by the PDA; thus whether the information disclosed by him in the liquidation application qualified as a protected disclosure. This called for an analysis of the information provided in the affidavit supporting the liquidation application. The court opined that such an analysis of the founding documentation did not amount to a protected disclosure, and further that the allegations had not been made in good faith. The application was dismissed with costs.

98 At par 8.
99 At par 14.

7.2.25 Magagane v MTN SA (Pty) Ltd & Another[100]

The applicant, Magagane, was employed by the first respondent (hereinafter referred to as "MTN") as a senior legal advisor until her dismissal on 31 July 2011. In this matter, Magagane claimed that she had automatically unfairly dismissed on account of having made a protected disclosure, and alternatively that her retrenchment was substantively and procedurally unfair.

Magagane sought reinstatement or alternatively maximum compensation together with an order that she be allowed to exercise certain share rights. During March 2010 Magagane became aware of certain invoices that had been issued by Nozuko Nxusani Attorneys (hereinafter referred to as "NNA") to MTN, and which had been authorised by a certain Madzonga for payment. Magagane viewed the invoices as being irregular. In November 2010 one Sehoole was appointed as a Vice President within MTN, reportedly a very senior position; Sehoole and Magagane were distant relatives. During November 2010 at Magagane's request Sehoole met her at her home, at which time she handed to Sehoole a string of invoices from NNA, airing her concerns in this regard; she confided in Sehoole as she trusted him. A week thereafter Sehoole asked Magagane to meet him at PriceWaterhouseCoopers, who are MTN's external auditors, and for whom Sehoole had worked before. Sehoole had asked a PriceWaterhouseCoopers employee to look into the invoices, where after he was advised that the invoices seemed on the face thereof to be irregular.

In the meantime, due to internal restructuring within MTN Magagane underwent the interviews in respect of the optimal restructuring of her division, and by own admission did not fare well. On 10 June 2011 she was handed a letter of retrenchment; she was invited to make representations by 13 June 2011 in this regard to the employer. On 14 June 2011, without having made any representations Magagane referred a dispute to the CCMA for conciliation, stating therein too that she believed her retrenchment to have been a reprisal for having made a protected disclosure; MTN did nothing to address her concerns in this regard. Magagane was asked to leave MTN on 21 June 2011, and paid until 31 June 2011 (which was also in dispute). On 22 August PriceWaterhouseCoopers submitted a draft forensic report

100 *Magagane v MTN SA (Pty) Ltd and another (JS834/11) [2013] ZALCJHB 77 (17 May 2013).*

regarding the NNA invoices, and as a result of which Madzonga received a written warning.

Various positions opened at MTN in the meantime, and the applicant was not invited to apply for any as a result of the alleged trouble she had caused, and which had led to her being asked to leave earlier. On 1 October 2011 she commenced with new employment obtained.

In determining the question as to whether Magagane had made a protected disclosure the court noted that an employee was required to make a disclosure in good faith, and substantially in accordance with the procedures provided by the employer as prescribed or authorised.[101] The respondents had contended that the disclosure had not been made to the hotline and as such did not enjoy protection, especially since she then reported the matter to Sehoole, who further failed to follow the proper procedures. In this regard the court that in circumstances in which an employer has a hotline and the employee nevertheless decides to make a confidential report to a director of her employer, and is then requested to cooperate with auditors in the resultant investigation, and does so on a confidential basis it can certainly not be argued that the disclosure is not protected as it did not comply with prescribed procedures. It was found that the applicant had as such made a protected disclosure.[102]

The next question considered by the court was whether Magagane had been dismissed as a result of having made the protected disclosure. The court, in considering all the evidence and contentions was of the view that MTN had acquitted itself of the onus of proving that Magagane had not been dismissed as a result of the protected disclosure made, and rather that her dismissal would have occurred whether or not she had made the protected disclosure; as such the required causal link was not formed, and as such her dismissal was not automatically unfair.

101 At par 70.
102 At par 71 and 72.

7.2.26 Van Alphen v Rheinmetall Denel Munition (Pty) Ltd[103]

The applicant in the matter sought to interdict a disciplinary hearing that was instituted against her, on the basis that it constituted occupational detriment as a result of her having made a protected disclosure. The applicant had raised complaints regarding the alleged failure of her employer, the respondent in the application, to deal with customer complaints, and further that certain employees and senior managers were not doing their jobs and that the Quality Assurance Department (hereinafter referred to as "QAD") was in chaos in the extreme. The court discussed the requirements pertaining to obtaining a final interdict, and stating that the case at hand concerned two pivotal considerations, namely whether the applicant had made a protected disclosure; and if the court found that she in fact did, there could be no doubt that a disciplinary hearing would be occupational detriment.[104] The court went on to consider the PDA before considering whether the applicant had shown that she had a clear right.

The court considered that the applicant had to show that she had made a disclosure regarding an impropriety, as envisioned in the PDA.[105] The court stated that performance and extreme chaos in a department did not in its mind meet this test, stating that it agreed that the PDA should be given a wider interpretation, as opposed to a narrow interpretation, in order to encourage a culture of whistle-blowing. However, having said this, the legislature could surely not have intended complaints concerning alleged poor work performance, the quality of systems and a lack of concern regarding customer complaints to fall within the PDA's ambit of protection. The court differentiated this case from *City of Tshwane, Radebe and Tshishonga.*[106]

Hereafter, the court turned to the question of irreparable harm that may be suffered by the applicant. It held that she would have an opportunity to state her side of the story at the disciplinary hearing, and that it was unlikely that she would at worst be issued with a final written warning should she be found guilty of the misconduct. The

103 *Van Alphen v Rheinmetall Denel Munition (Pty) Ltd* (C418/2013) [2013] ZALCCT 21 (21 June 2013).
104 At par 7.
105 At par 38.
106 At par 39 and 40.

court further pointed out that both the LC and the LAC had made it clear that they would only interfere in exceptional circumstances to intervene in pending disciplinary proceedings, and a genuine protected disclosure would merit such interference.[107] The court held that the applicant had failed to show such exceptional circumstances. Further to this the applicant had not referred the dispute to the CCMA for conciliation, which was prescribed by the PDA read with the LRA as a first step, and further yet that the applicant could have applied for interim relief pending the conciliation of the matter. The application was dismissed.

7.2.27 Mattheus v Octagon Marketing (Pty) Ltd[108]

Mattheus had launched an urgent application in the LC, Johannesburg for an interim order to interdict the respondent from proceeding with a disciplinary hearing against him, pending the outcome of a dispute relating to the PDA. The background to the matter revealed that Mattheus had been employed by the respondent as the Group Finance Director since April 2007. On 2 October 2013 Mattheus was given notice to attend a disciplinary hearing, and Mattheus contended that this constituted occupational detriment for the purposes of the PDA. The court set out the material facts in this regard tracing the foundation of the applicant's claim to a report which he had prepared during March 2013, and which was to be presented to the employer's board. The report included allegations regarding financial mismanagement, unauthorised expenditure, travel, bribery and fraud.[109]

During the period between May and early October 2013 there had been a number of communications and meetings between the afore-mentioned, with Ngwenya having expressed his unhappiness in June 2013 regarding the fact that Mattheus had gone over his head directly to the chairman. During July 2013 Ngwenya informed Mattheus that as far as he was concerned the relationship of trust and confidence between them had broken down, which led to Mattheus meeting with the respondent's attorney. Mattheus regarded the outcome of this meeting as a suspension and he referred an unfair labour dispute to the CCMA. On 2 October 2013 Mattheus was issued with a notice of a disciplinary hearing, setting forth four

107 At par 42.
108 *Mattheus v Octagon Marketing (Pty) Ltd* (J2264/13) [2013] ZALCJHB 317 (17 September 2013).
109 At par 3.

charges of misconduct relating to financial misconduct, serious misconduct and the like.

It was noted that the respondent opposed the application on various grounds including the allegation that Mattheus did not make a *bona fide* protected disclosure, especially based on the consideration that the report that had been prepared, that the report had not exposed any criminal activities and that the report had been unsigned. The court remarked that these submissions held no merit; in that *inter alia* the PDA does not prescribe a format for disclosures to be made, nor do they need they be signed.[110] Further to this the court remarked that at least some of the matters contained in the report in question fell into one or more of the categories of conduct pertaining to disclosures that merit protection, and that the truth of these assertions had not been contested.

So too it was not contested that the charges brought against Mattheus were only levelled after Ngwenya had asserted that there had been a breakdown of trust between him and Mattheus. The approach was that the matter had to be objectively determined on the facts. The court held that it was satisfied that the respondent's version did not cast significant doubt on the version of Mattheus, and that the charges had in fact been contrived as a result of the disclosures made by him, and as such the respondent was interdicted from pursuing the disciplinary charges until the outcome of the dispute had been resolved.[111] The respondent was ordered to pay Mattheus' costs.

7.2.28 Solidarity obo Roos v South African Police Service and Others[112]

The applicant in this matter, Colonel J. J. H. Roos (hereinafter referred to as "Roos"), had claimed that he had been removed from his position as the head of Internal Audit of the Crime Intelligence Division (hereinafter referred to as "CID") of the South African Police Service (hereinafter referred to as "SAPS"), and thereafter appointed as the head of a unit which was still to be established, and to be known as Inspection and Evaluation. He averred that this had been in consequence of him having made a

110 At par 9.
111 At par 15.
112 *Solidarity obo Roos v South African Police Service and others* (JS1043/12) [2014] ZALCJHB 131 (22 April 2014).

number of disclosures regarding fraud and corruption that had been committed in respect of the Secret Service Account of Crime Intelligence. Roos stated that he had made these disclosures during the period of 2004 to 2009, and that he had made the disclosures to both his superiors and to the Directorate of Special Operations (the Scorpions), and that his transfer amounted to occupational detriment as provided for in terms of the PDA. As such he claimed that these actions by the employer amounted to unfair labour practices in terms of the LRA.

The court noted that two of the respondent's key witnesses, namely Mdluli and Mphego had not made themselves available to the respondent to testify despite various different approaches and various postponements of the matter in order to obtain their cooperation. As a result of this, the court stated that the respondents were unable to dispute the merits of Roos' claim that he had been subjected to occupational detriment as a result of having made protected disclosures.[113] As a consequence, the only issue to be decided by the court was to determine the remedies. In the evaluation of the suitable remedy, the court took into account the following factors:

- That the disclosures made by Roos were central to his official functions and duties;
- The disclosures concerned serious corruption and fraud implicating very senior officers;
- That the applicant had conducted himself with scrupulous discretion in the manner in which he dealt with the disclosures;
- That the disclosures made by the applicant lay at the core of his functions and duties, and that the disclosures were in regard to serious allegations of corruption and fraud which implicated very senior officers in the Crime Intelligence Divisions. In doing so, the applicant had conducted himself with discretion which could not be faulted, remaining obedient to his superiors.

- The inertia with which the superiors reacted was disturbing, and that they simply allowed the prejudicial measures taken against Roos to continue.

113 At par 4.

The order made by the court in this matter was the most comprehensive thus far in respect of a whistle-blower, and reads[114]:

> In light of the above, noting that the respondents have conceded the merits of the applicant's claim and the points of agreement reached between the parties on the form that an order should take in relation to the applicant's return to useful employment, the following order is made:
> 66.1 For the avoidance of doubt it is recorded that:
> 66.1.1 Colonel JJH Roos ('Roos') is currently on the staff of the South African Police Services (Crime Intelligence) in the position of Colonel and is drawing benefits as such.
> 66.1.2 Nothing in this order shall affect –
> 66.1.2.1 his status as such;
> 66.1.2.2 his rank as Colonel;
> 66.1.2.3 his remuneration (that is, his basic salary and fringe benefits), which shall remain in full force and effect.
> 66.2 Nothing in this order shall entail the displacement of any person from his or her position in Crime Intelligence specifically, or in the South African Police Service generally.
> 66.3 The respondents are obliged –
> 66.3.1 to redeploy Roos preferably in the Internal Audit section of Crime Intelligence or failing that in an internal audit unit of the South African Police Service and to provide him with work of a comparable nature to that which he performed prior to his transfer to Inspection and Evaluation;
> 66.3.2 to give preference to Roos in any application for appointment or promotion in a post reasonably acceptable to him within the said Department or in any other Department in which his skills can properly be deployed, as soon as such a post becomes available.
> 66.4 The respondents must pay Roos compensation under s 194 (4) of the LRA in the amount of R 156,250-00 (one hundred and fifty six thousand, two hundred and fifty rands) within 14 days of the date of this judgment.
> 66.5 The respondent must pay the applicant's costs of suit, including the costs occasioned by the employment of two counsel.

7.2.29 *Motingoe v The Head of The Department of The Northern Cape Department of Roads And Public Works And Others*[115]

The applicant (Motingoe) held the position of Director and Head of Legal Services of the Northern Cape Department of Roads and Public Works (the Department), and sought relief in that the disciplinary hearing that had been scheduled for 20 and 24 January 2014 be suspended pending the final determination of an unfair labour practice dispute which had been submitted.

Motingoe had referred three disputes to the General Public Service Sectoral Bargaining Council, and in the alternative to the LC. Two of the disputes alleged that

114 At par 66.
115 *Motingoe v The Head of The Department Of The Northern Cape Department Of Roads And Public Works And Others* (C18/2014) [2014] ZALCCT 6 (4 March 2014).

his suspension by the first respondent, the department, and the holding of the scheduled disciplinary hearing amounted to occupational detriment as provided for in the PDA. At the date of the hearing of the application at hand there had already been an attempt at conciliation, with the parties awaiting the certificate of non-resolution regarding the disputes. The applicant asserted that part of his functions related to the department's supply chain management, including legal vetting within the supply chain management context. The tender process which had given rise to the application at hand pertained to the procurement of professional engineering services for the repair at Theekloof Pass, a key mountain pass in the Western Cape Province. Motingoe alleged that the tender evaluation report, as well as the minutes of the bid and bid adjudication committees contained irregularities, which he reported to the department's CFO in a memorandum dated 29 May 2013. Motingoe averred that the content of the said memorandum amounted to a protected disclosure in terms of the PDA. Motingoe submitted that no legitimate award could have been made, based on the serious irregularities that he had reported on.

During July 2013 the first respondent appointed a legal advisor to his office without notifying Motingoe, and during October 2013 a certain Mr. Osman (hereinafter referred to as "Osman") was appointed in order to investigate alleged management issues within Legal Services, which Motingoe saw as a continuation of a pattern of harassment. Motingoe informed Osman that he construed the investigation as a thinly disguised ploy to divert attention from the corruption in which the first respondent was involved and that he was using his subordinates to undermine the authority in his unit. On 1 November 2013 Motingoe sent an email to the second applicant, attempting once again to secure a meeting. On 21 November 2013 a heated meeting took place, but in terms of which it seemed to be common cause that the first respondent told Motingoe that Motingoe was trying to blackmail him in respect of the irregularities. Motingoe was suspended on 22 November 2013; with the reason given being that he was suspected of serious misconduct by disclosing departmental information to a third party, which letter of suspension was signed by the second respondent. The court viewed it as noteworthy that in respect of the application at hand no affidavit had been filed by the second respondent.
On 26 November 2013 Motingoe was served with a notice summoning him to appear at a disciplinary hearing, however, the charges did not relate to the disclosure of

information at all. It was clear from the answering papers that the first respondent disagreed with Motingoe regarding the vetting function.[116]

The court went further in defining the steps relevant as determining[117]:

- Whether the respondent had put enough information before the court of first instance to enable it to determine whether a *prima facie* right to the protection availed in the PDA had been established, which includes determining whether a disclosure had been made; and
- If the information indeed constitutes a disclosure, whether the disclosure also falls within the realm of a protected disclosure; and
- Whether the person having made the protected disclosure was being subjected to occupational detriment as a result.

Amongst the factors to be considered was whether failure to intervene would lead to a grave injustice and whether such justice might be ascertained by another manner, and public interest considerations. Based on the circumstances of the case the court held that it was in the interests of justice that the interim relief applied for by Motingoe be granted.[118]

7.2.30 IMATU & Another v City Of Matlosana Local Municipalilty[119]

The first applicant (hereinafter referred to as "IMATU"[120]) and the second applicant, Mr. Abraham Gerhardus Strydom (hereinafter referred to as "Strydom") brought the application in order to obtain an interdict against a decision that had been taken by the first respondent, the City of Matlosana Local Municipality (hereinafter referred to as "the Municipality"), to institute disciplinary action against Strydom.

The application brought centred on two issues, namely that:

116 At par 15.
117 At par 21.
118 At par 26.
119 *Imatu & Another v City Of Matlosana Local Municipalilty* (J620/14) [2014] ZALCJHB 122 (10 April 2014).
120 Independent Municipal and Allied Trade Union

1. The decision to institute disciplinary action against Strydom was invalid as the Council that had deliberated on the matter had not had a sufficient quorum; and
2. That the decision to take the disciplinary action against Strydom constituted "occupational detriment" as defined by the PDA.

For the purposes of this thesis only point 2 above will be focused on.

Strydom contended that during the first part of 2013 he had assisted Warrant Officer Jaco Van Den Berg (hereinafter referred to as "Van Den Berg") who is part of the Hawks in the SAPS, in the investigation of allegations relating to tender fraud at the Municipality. In this respect various communications were made with Van Den Berg regarding the Director of Infrastructure of the Municipality, Mr. Motsemme. Thirteen charges were brought against Strydom, of which none related to his communication with Van Den Berg. Based on this consideration the court found that the information conveyed by Strydom to Van Den Berg constituted a protected disclosure as required in terms of the PDA. Central to the decision before the court was the consideration that Strydom was not being charged with communicating with Van Den Berg. The court saw the question to be answered as being whether the disciplinary action undertaken against Strydom was so undertaken in whole or part as a result of him having made the protected disclosure referred to *supra*, and which required an examination of the degree of nexus between the protected disclosures and the decision taken to charge Strydom in respect of the disciplinary hearing. The court considered a practical approach to include consideration of factors such as[121]:

- The timing of the disciplinary enquiry;
- The reasons forwarded by the employer relating to the decisions taken to institute such disciplinary action;
- The nature of the disclosure that had been made;
- The person/s responsible employed by the employer for making such decisions regarding the disciplinary hearing.

The court considered the matter based on the available facts in light of the above-mentioned factors, surmising that there was not a sufficient nexus, and as such the

121 At par 77.

disciplinary action instituted did not amount to "occupational detriment" against Strydom.

7.2.31 Beaurain v Martin N. O. and Others[122]

The applicant in the matter, Mr. Johan Beaurain (hereinafter referred to as "Beaurain") worked at the Groote Schuur Hospital as an electrician and had been employed in that position since 2006; Beaurain had published both photographs and complaints on Facebook regarding the state of the toilets at the hospital, including allegations that health of both the patients and the staff members was being compromised as the dirty air in question was being circulated through the hospital via the air conditioning system. Beaurain was instructed to stop, which he did not adhere to, where after he was dismissed. Beaurain averred that his disclosures were protected in terms of the provisions of the PDA, as a result of which his dismissal was automatically unfair in terms of section 187 (1)(*f*) of the LRA.

The court concluded that whistle-blowing should be encouraged[123], but on the facts before the court, the applicant did not qualify for the protection offered by the PDA, and as a result of which the application was dismissed.

7.3 A checklist devised

From the case law, the following checklist can be derived in respect of the whistle-blower. The aforementioned checklist has been attached hereto as annexure A for convenience sake.

7.4 Case law dealing with jurisdictional considerations

To date there has been a marked confusion regarding which court in actual fact has jurisdiction in various matters. The intention of the legislature in passing the LRA was to create a specialist court which was to give effect to the general intention of the LRA, namely, the resolution of labour disputes. The LC is a superior court with the same status as the High Court in respect of matters falling within its jurisdiction,[124]

122 *Beaurain v Martin N. O. and Others* (C16/2012) [2014] ZALCCT 23 (27 May 2014).
123 At par 40.
124 Unlike its predecessor, the Industrial Court.

and has exclusive jurisdiction in respect of all matters to be determined in terms of the LRA or any other law.

The High Court has concurrent jurisdiction in certain specified instances which seems to highlight the intention to exclude the High Court's jurisdiction otherwise. In *Langeveldt v Vryburg Transitional Local Council & others*[125] the majority of the Labour Appeal Court expressed concern about the confusion which existed in employment and labour matters, and the jurisdiction of the various courts to adjudicate such matters. It seems that this already confusing situation, and as indicated by case law,[126] has been compacted even further by the wide berth of section 4(1)(*a*) of the PDA.

Various cases have dealt with jurisdictional considerations regarding whistle-blowing cases.

Reference in this regard can be had to the contents of Chapter 6 above, which deals with jurisdiction within the context of the PDA.

What follows hereunder relates to the cases dealing with the jurisdictional considerations.

7.4.1 Tsika v Buffalo City Municipality[127]

In the *Tsika* case the Constitutional Court concluded with a summary of the law as it stood in 2009, regarding the jurisdiction of the High Court in labour and employment matters. All matters in which the cause of action is covered by the LRA and for which the LRA provides a remedy fall within the jurisdiction of the LC and outside the jurisdiction of the High Court:

---

125 *Langeveldt v Vryburg Transitional Local Council & others* 2001 (22) ILJ 1116 (LAC).

126 See for example, *Coin Security Group (Pty) Ltd v SA National Union for Security Officers and Other Workers & Others* (1998)19 ILJ 43 (C), *Independent Municipal & Allied Trade Union v Northern Pretoria Metropolitan Substructure & Others* (1999) 20 ILJ 1018 (T), *Jacot-Guillarmod v Provincial Government, Gauteng & Others* (1999) 20 ILJ 1689 (T), *Runeli v Minister of Home Affairs & Others* (2000) 21 ILJ 910 (TK), *Franks v University of the North* (2001) 22 ILJ 1158 (LC), *Ampofo & Others v Members of the Executive Council for Education, Arts, Culture, Sports & Recreation: Northern Province & another* (2001) 22 ILJ 1975 (T), *Eskom Ltd v National Union of Mineworkers* (2001) 22 ILJ 618 (W), *Manyathi v MEC for Transport, KwaZulu-Natal & another* (2002) 23 ILJ 273 (N), *Jones & another v Telkom SA Ltd & others* (2006) 27 ILJ 911 (T), *Tsika v Buffalo City Municipality* (2009) 30 ILJ 73 (CC), *Gcaba v Minister of Safety and Security & Others* 2010 (1) SA 238 (CC), and *Kriel v Legal Aid Board & Others* 2010 (2) SA 282 (SCA).

127 *Tsika v Buffalo City Municipality* 2009 (30) ILJ 173 (CC).

- Employees of statutory institutions are not allowed to bring actions in the High Court under the Promotion of Administrative Justice Act 3 of 2000 or by way of application for common law review in respect of matters covered by the LRA.
- Employees may not bypass the LRA dispute-resolution procedures and approach the High Court with claims based on their constitutional rights to fair labour practices.
- The High Court and civil courts retain their common law jurisdiction to entertain claims for damages arising from alleged breaches of contracts of employment and the acts or omissions of either party after the termination of employment, and in such matters the LC has concurrent jurisdiction.

7.4.2 Young v Coega Development Corporation (Pty) Ltd[128]

In the *Young* case the respondent contended that the High Court did not have jurisdiction to issue the declaratory order, and averred that this fell exclusively within the jurisdiction of the LC. The court held that the respondent had lost sight of the words "any court having jurisdiction, including the Labour Court*".*[129] The court held further that the respondent's averment was not supported by case law. It referred to the case of *Jordan v MEC for Finance, Eastern Cape & Another*[130] in which it was held that "a matter pertaining to occupational detriment or an allegation of occupational detriment is not limited to the exclusive jurisdiction of the Labour Court"*.*[131] The application for substantive relief was granted as sought.

7.4.3 City of Tshwane Metropolitan Municipality v Engineering Council of South Africa & Another[132]

In this matter the question arose as to whether the matter fell exclusively within the jurisdiction of the LC. The SCA held that there was nothing in section 4 of the PDA or the LRA to indicate an intention to deprive the High Court of its inherent jurisdiction. The SCA held further in relation to the argument of the employer that the LC had primary jurisdiction in PDA cases that this was indeed contrary to the language and structure of section 4, which provides that employees may resort to any court having

128 *Young v Coega Development Corporation (Pty) Ltd* 2009 (6) SA 118 (ECP).
129 Section 4(1)(*a*) of the PDA.
130 *Jordan v MEC for Finance, Eastern Cape & Another* 2007 JOL 19802 (CK).
131 *Jordan v MEC for Finance, Eastern Cape & Another* 2007 JOL 19802 (CK) [13] and [14].
132 *City of Tshwane Metropolitan Municipality v Engineering Council of South Africa & Another* 2010 (2) SA 333 (SCA).

jurisdiction, including the LC. The court held that the fact that the LC was mentioned in section 4 of the PDA did not mean that employees had to resort to it. Accordingly, the appeal was dismissed.

7.5 Additional general considerations by legal practitioners in whistle-blower cases

Reading the case law to date, there are three general considerations that seem to appear from time to time in the judgments rendered, and which apply to civil litigation in general in South Africa, namely:

1. Cases brought before the courts as urgent matters;
2. Whether interim or final relief is to be sought;
3. A foreseeable material dispute of facts.

The legal practitioner dealing with a matter regarding an alleged whistle-blower needs to give thorough consideration to these three aspects in order to sure that the relief sought is not defeated on one of the three technical aspects referred to *supra.*

7.5.1 Urgent matters

It is imperative that an urgent application actually be urgent, as a lack of urgency will result in the matter being struck off the roll, where after the applicant will need to set it down on the normal motion roll; an adverse costs order must also follow. See for example *Govender v Minister of Defence.*[133] High Court Rule 6 (12) (*b*) clearly requires that the reasons upon which an applicant bases his urgency to be set forth explicitly in the founding affidavit supporting the notice of motion.

It has also been held that the applicant in an urgent matter cannot create his own urgency; such a matter will also be struck off the urgent roll.[134]

133 (C695/09) [2009] ZALC 106
134 *Schweizer Reneke Vleis Mkpv (Edms) Bpk v Die Minister van Landbou en Andere* 1971 (1) PH F11 (T)

7.5.2 Interim or final relief

In approaching a court for relief, practitioners should assess whether final or interim relief ought to be sought. This consideration plays a pivotal role as the requirements for the two types of relief differ, and applying for the incorrect relief too could defeat the application brought; see for example the court's remarks in this regard in *Van Alphen v Rheinmetall Denel Munition (Pty) Ltd*[135]at paragraphs 29 and 30. This finds applicability in a great number of whistle-blower cases, as the whistle-blower will often turn to the courts to interdict the employer from continuing with a disciplinary hearing which is then averred to constitute the source of occupational detriment.

The requirements to be met in respect of final relief in the form of an interdict are:

- That the applicant is able to demonstrate a clear right, in other words confirming that the right exists in law and thereafter proving that the right exists in fact;
- That there has been an injury actually committed or an injury reasonably apprehended. In this respect the applicant will need to demonstrate that a *reasonable person*[136] (man) confronted with the same set of facts would expect that injury would result therefrom;[137]
- That there is no other satisfactory remedy available to the applicant in the given circumstances.

The requirements to be met in respect of interim relief in the form of an interim interdict are:

- That the applicant is able to demonstrate a *prima facie* right; in other words the applicant is able to show that the asserted right exists, even though it may be open to a measure of doubt as a result of the respondent's denials.[138]
- That the applicant is able to demonstrate that he harbours a well-grounded apprehension of irreparable harm if the interim relief is not granted and the final relief is granted; irreparable harm within this context does not mean harm

135 (C418/2013) [2013] ZALCCT 21.
136 *Mears v African Platinum Mines Ltd and Others* (1) 1922 WLD 48
137 *Free State Gold Areas Ltd v Merriespruit (Orange Free State) Gold Mining Co Ltd and Another* 1961 (2) SA 505 (W) at 518A
138 *Setlogelo v Setlogelo* 1914 AD 221 at 227.

that is absolutely irreparable, but also includes harm that would be difficult to repair.

- That the balance of convenience favours the granting of the interim relief sought; here the court will weigh the convenience in respect of the relevant parties to the matter.
- That the applicant is able to demonstrate that there is no other satisfactory remedy available to him within those particular circumstances.

As should be clear from the above, the requirements in seeking interim relief are less stringent than that relevant in seeking final relief.

7.5.3 A material dispute of facts

In *Independent Municipal and Allied Trade Union obo Ngxila-Radebe v Ekhuruleni Metropolitan Municipality and Another*[139] and *Xakaza v Ekhuruleni Metropolitan Municipality and Others*[140] the courts referred to disputes as to material facts, which plays a pivotal role in deciding whether to proceed by way of action or application proceedings, and when in application proceedings a legal practitioner should raise a request to have a matter referred to either trial or oral evidence.

In this regard, sight should not be lost of the provisions of High Court Rule 6 (5)(*g)*.

The most basic difference between action and application proceedings is that action proceedings are instituted by way of summons, whilst application proceedings are instituted by way of notice of motion supported by a founding and supporting affidavits. In effect this means that action proceedings are conducted as a trial in which witnesses testify and are cross-examined and or re-examined, whilst in application proceedings, usually, no oral evidence is led as all the evidence is contained in the relevant affidavits with the necessary annexures and the practitioners argue the matter on the papers.

Matters in which a material dispute of facts is foreseen which will not be capable of resolution on the papers should be brought by way of action proceedings. However, as indicated supra, High Court Rule 6 (5)(*g*) provides a court with various alternatives

139 (J1029/2010) [2010] ZALC 289.
140 (JS281/11) [2013] ZALCJHB 22.

should the wrong form of proceedings have been brought, of which notably one such option is to strike the matter from the role.

Legal practitioners would be well advised to heed the test espoused in the Room Hire case[141] according to which guidance was given in determining whether a dispute of fact constitutes a material dispute which would merit oral evidence in its resolution.

7.6 The remedies provided

Those applicants who had been successful in the above-named matters were awarded the following kinds of relief by the courts in question:

Remedy	**Case**
Four months' remuneration	*H & M Ltd*
Interim interdict	*Grieve v Denel*
Interim interdict	*Theron v Minister of Correctional Services & Another*
Interim interdict	*Young v Coega Corporation (Pty) Ltd*
Interim interdict	*Randles v Chemical Specialities*
Interim interdict	*Ngxila-Radebe v Ekhuruleni Metropolitan Municipality & another*
Interim interdict	*Motingoe v The Head of the Department of the Northern Cape Department of Roads and Public Works and another*
Interim interdict and costs	*Mattheus v Octagon Marketing (Pty) Ltd*
R 277 000.00 (a reduced amount) and costs	*Minister of Justice & Constitutional Development v Tshishonga*
Redeployment Preferential treatment in respect of promotion opportunities Provision of comparable work Compensation to the value of R 156 250.00 Costs	*Roos v SAPS and others*
Twenty four months' remuneration and costs	*Pedzinski v Andisa Securities (Pty) Ltd*
Twenty four months' remuneration and costs	*Sekgobela v SITA*
Retrospective reinstatement	*Potgieter v Tubatse Ferrochrome*

It is worth noting that in most of the matters in which the applicants that sought the protection offered by the PDA were unsuccessful, their applications or actions were

141 *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T).

dismissed with costs.

'Costs' within this context has reference to legal costs related to the fees of any legal practitioner that has acted on behalf of the party. According to Theophilopoulus *et al* at page 402[142] the opposing parties in a matter are responsible for the payment of their attorney's fees, including the payment of money disbursed by the attorney, including the briefing of counsel. In the usual course, in civil matters, the parties will claim an order for costs from the opposing party in order to cover the costs paid in this manner to their own attorney.[143]

Theophilopoulus *et al* at page 402-403 refers to the fact that the court has a wide discretion in respect of costs, and that it is expected of the court to consider costs and exercise its discretion in this regard in accordance with the well-established principles.

- It would serve both employees and employers well, to take note of these principles in respect of costs: A successful party may be deprived of costs if there is good reason for this;
- Matters that are separate and distinct usually carry their own costs;
- Judgement on the merits is usually a prerequisite for a costs order, but orders made in respect of interlocutory procedures may include an appropriate costs order;
- Small or partial success may carry an appropriate award of costs.
- A successful application for the granting of an indulgence does not carry a costs order;
- A party who unnecessarily causes costs must bear those costs; thus a successful party may be ordered to pay the losing party's costs in respect of proceedings that the successful party himself or herself caused;
- In exceptional circumstances a party may be ordered to pay costs on a more punitive scale than would normally have applied, for example on an attorney-and-client scale instead of party-and-party scale.

142 Theophilopoulos C, Van Heerden C M, Boraine A *Fundamental Principles of Civil Procedure* (LexisNexis Durban 2012)

143 As opposed to criminal matters.

7.7 Suspension of the whistle-blower

It would have been noted that a great deal of the case law deals with the suspension of employees claiming to have been subjected to the suspension as a result of a protected disclosure made.

In terms of section 186 (2)(*b*) of the LRA provides that the unfair suspension of an employee, or any other unfair action by the employer short of dismissal amounts to an unfair labour practice, and simultaneously falls within the definition of *occupational detriment* as defined in terms of the PDA. This in turn brings such action by the employer against an employee on account of or partly on account of having made a protected disclosure, under the provisions of section 4 (2)(*b*) of the PDA, as discussed under paragraph 6.3.2 in Chapter 6 *supra.*

Such suspensions would include so-called precautionary and punitive suspensions..

In *Mogothle v Premier of North West Province & another*[144] the court held that the suspension of an employee pending a disciplinary hearing regarding alleged misconduct can be equated to arrest, and as such it should only be used in circumstances in which there is a reasonable apprehension that the employee concerned will interfere with the on-going investigation or pose some other kind of threat. In *Country Fair v CCMA & others*[145] and *South African Breweries Ltd (Beer Division) v Woolfrey & others*[146] the LC has held that in appropriate circumstances suspension of an employee without pay can be a fair sanction as an alternative to dismissal of the employee. However, clearly each case has to be considered on its own merits in determining whether or not it is justified, with suspension never being used as a tactic against a whistle-blower.

7.8 Conclusion

Bearing the above in mind it should be absolutely clear that the pivotal considerations upon which the approach of our courts is based, is the manner in which the whistle-blower approaches the subject and circumstances pertaining to his concern. The whistle-blower is expected to come to court with clean hands, and to

144 [2009] 4 BLLR 331 (LC).
145 [1998] 6 BLLR 577 (LC).
146 [1999] 5 BLLR 525 (LC).

act in the utmost good faith, having followed the letter of the PDA, without which the relief sought, will not be granted. The courts have constantly measured the whistle-blower's right to attain the desired relief provided for in terms of the provisions of the PDA according to the following central factors:

1. That the applicant must be an employee;
2. The applicant must have reason to believe that the information he/she discloses fall within the definition of section 1 of the PDA, in other words that the information discloses or tends to disclose some form of criminal conduct or misconduct;
3. That the disclosure must be made in good faith;
4. Where there is a prescribed procedure or an authorised procedure for making such disclosure the employee must so make the disclosure; where there is no such procedure the disclosure must be made to the employer; and
5. There must be some link or nexus between the disclosure and the occupational detriment alleged.

In preparation for such a matter practitioners in turn should evaluate the urgency of the matter (where applicable), whether a likely material dispute of fact will arise and whether final or interim relief should be sought on behalf of the litigant.

CHAPTER 8: THE WHISTLE-BLOWER IN SOUTH AFRICA'S POSITION MEASURED

8.1 Introduction

In Chapter 1 of this research, under paragraph 1.4, certain hypothetical points of departure were made in respect of whistle-blowing. The relevant points of departure in this regard are as follows:

- Legislation regulating the responsible disclosure of wrongdoing by either an individual, individuals or an organisation, including public interest matters, crime and corruption will promote public confidence, ethical citizenship, good governance, accountability and transparency.

  The premise of this stance is demonstrated within the context of Chapters 3 and 4 of this study. It is argued that the government of the RSA has recognised this stance by including the right to whistle-blowing, albeit indirectly, as a constitutional imperative, and more directly by inclusion and the emphasis placed on whistle-blowing in the long term strategic direction of the country, as reflected in the NDP. This is further underscored by the clear positioning in this respect, as reflected by the MACC, ACF and the agreement reflected in the respective conventions enjoined in.

- One of the most important tools in fighting wrongdoing, crime and corruption is the legislation providing appropriate protection and remedies to the person or persons speaking out against wrongdoing, crime and corruption, in the public interest. This is due to the fact that whistle-blowing is a detection mechanism.

  In this respect note is taken of the fact that there are various pieces of legislation that has been enacted by the government of the RSA, that aim at implementing this position. A concern that will be engaged on a little later though is the seemingly haphazard manner in which this has been approached. The most applicable chapters in this regard are Chapters 3, 4 and 5.

- Without legislation providing appropriate protection and remedies to the person or persons so speaking out, the said person or persons are much less likely to “blow the whistle” on such wrongdoing, crime and corruption;

  Chapter 2 of the study addresses this proposition.

- In South Africa such protection and remedies are provided to whistle-blowers in terms of the provisions of the PDA.

  This proposition is partly correct, in that it is one of the various legislative mechanisms available to a whistle-blower in the RSA, applying only within the narrow sense of the understanding of the terms whistle-blower and whistle-blowing, in that it applies to a formal employment relationship, to the exclusion of independent contractors. The remedies provided also only reflect within the narrow formal employment relationship, having no specific regard to wider protection in terms of the whistle-blower. This statement is enforced and underlined by the fact that only occupational detriment is recognised in the PDA. It is however noteworthy that this is an oversimplification, especially in circumstances in which an employer could be held vicariously liable in respect of negative actions perpetrated against a whistle-blower, and falling outside the sphere of mere occupational detriment.

- The protection and remedies provided are effective enough to ensure that people wishing to blow the whistle for public interest’s sake will do so without fear of reprisal;

  This will be clearly explored and concluded on at the end of the study, as this is argued to be the most pivotal of considerations.

- The South African PDA is a world-class piece of legislation, that when compared to the protection and remedies availed to whistle-blowers in England, Australia, and New Zealand compares favourably in this regard.

  This will be clearly explored and concluded on within the text of this chapter, as this is argued to be the most pivotal of considerations.

Having said this, the South African position will now be measured in respect of the sixteen established comparative elements, in order to be compared in the chapters to follow with the other chosen countries.

8.2 The whistle-blower in South Africa's position measured

Taking into account best practice pertaining to whistle-blowing, the template utilised below, designed by the author and as discussed under paragraph 1.7 in Chapter 1 *supra,* is utilised in measuring the whistle-blower in South Africa's position.

In this respect it has to be noted that the measurement cannot take place in respect of the PDA only, as this is only part of the legislative framework pertaining to whistle-blowers as has been demonstrated.

Measurable 1:	Definition of a protected disclosure includes all *bona fide* disclosures against various types of unlawful acts including serious human rights violations, life, liberty and health.			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
SA				
In relation to the PDA: Reference to the definition of a protected disclosure makes it clear that the measureable is aimed at the PDA within this context.	X	x[1]	Section 1 of the PDA (a) that a criminal offence has been committed, is being committed or is likely to be committed; (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject; (c) that a miscarriage of justice has occurred, is occurring or is likely to occur; (d) that the health or safety of an individual has been, is being or is likely to be damaged; (e) unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000; or (f) that any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately	One also needs to take cognisance that the ambit of section 1 defining a protected disclosure has seemingly been widened in the following ways: Section 1(i)(*a)* and (*b)* of the Financial Services Law General Amendment Act 45 of 2013, in that a disclosure also relates to the disclosure of information: (a) regarding any conduct of a pension fund, an administrator or a board member, principal officer, deputy principal officer, valuator, officer or employee of a pension fund or administrator; and

1 The 'no' in this regard recognises that more than mere good faith is required before the disclosure will potentially enjoy protection.

			concealed.	(b) relating to the affairs of the pension fund which may prejudice the fund or its members. What is important to note in respect of the afore-mentioned, is that it obviously, by its very content widens the issues beyond occupational detriment and the employment relationship, thus casting the net wider than just the PDA. Further to this, it would seem that section 31(4) of the NEMA also in effected widens the ambit in respect of the type of conduct that may form the subject of a protected disclosure, in relation to an environmental risk. However, it may in certain circumstances also fall within the ambit of section 1(b), regarding the failure to meet a legal obligation, should the environmental risk concerned pertain simultaneously to a legal obligation. It is argued that the provisions of section 159 (3)

				of the CA do not widen the definition, in that although it is tailored for the company environment, it can still be aligned with the definition of a protected disclosure as provided for in terms of the PDA. A matter of concern is pointed out in respect of concerns relating to ethical and policy related matters, which do not fall within the ambit of section 1 of the PDA, and as such, which remain unprotected *in toto.* See paragraph 4.5.2 in Chapter 4
Measurable 2:	Covers public and private sector whistle-blowers, including armed forces and special forces.			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
SA				
In relation to the PDA: The reference to public and private sector whistle-blowers, as well as the reference to the armed forces and special forces is indicative that the measurable applies within the	x	x	Section 2(1)(a) of the PDA The objects of the PDA are: (a) to protect an employee, <u>whether in the private or public sector,</u> from being subjected to an occupational detriment on account of having made a protected disclosure.	Although it is true that the PDA covers both private and public sector whistle-blowers, the following is recognised: • independent contractors are excluded from the protection offered by the provisions of the PDA; • it is at this point unsure what the

employment relationship.				practical position of those excluded in terms of section 8(1)(*a*) from the definition of an employee in the Public Service Act would be, as discussed under paragraph 5.3. - This includes the exclusion of the employees or the South African National Academy of Intelligence (established in terms of the Intelligence Services Act 38 of 1994); - This includes the exclusion of the employees of the South African Secret Service, and the National Intelligence Agency (now known as the State Security Agency); - This also includes the exclusion of the employees of a private company incorporated in terms of the CA, namely Electronic Communications Security (Pty) Ltd, known as Comsec. Section 5 of the Electronic Communications Security (Pty) Ltd Act 68 of 2002 provides that a provision of the CA does not apply to Comsec where the Minister of

				Trade and Industry has issued a declaration under section 6 thereof. Whether such a declaration has been issued is unknown. • The guideline issued regarding the PDA also clearly states that employees in the SAPS, SANDF, DCS, State Educational Institutions, the National Intelligence Agency (now the State Security Agency) and the South African Secret Service are covered in so far as it is not contrary to the laws governing their employment. This is discussed in Chapter 5. However, it is argued that there is a double bar in this respect, as the most of these employees sign an oath of secrecy upon employment, which would in respect of whistle-blowing, in all probability, fall within the parameters of section (e)(i) in respect of the definition of a 'protected disclosure'. • It has to be borne in mind that section 159 of the CA gives much wider

				protection (including both employees and suppliers) within the public sector, including state owned companies.
Measurable 3:	Provides for various legal issues as set out below:			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
Employment laws	x		PDA and the LRA	The entire PDA is focussed on the protection of a whistle-blower employee. However, note is taken of the fact that as it currently stands, it is applicable in respect of the narrow employment relationship excluding independent contractors from the ambit of its protection offered. The LRA compliments the provisions of the PDA, such as for example the provisions of section 191, section 158, section 188A and section 192 of the LRA.
Criminal law	X		PDA[2] For example, section (a) of the definition of a *disclosure*	

2 All persons within the RSA have this right, subject to *locus standi*, jurisdiction and cause of action in any event.

			clearly envisages the potential of criminal law coming into play in appropriate circumstances Section 4(1)(*a*) and (*b) of* the PDA Criminal Procedure in general	This section envisages that a whistle-blower, within the employment relationship, who has, is or may be subjected to occupational detriment by his employer on account of having made or wishing to make a protected disclosure, may approach *any* court having jurisdiction and pursue any process allowed or prescribed by law. This would as such include criminal law. However, it is argued that the protection of a whistle-blower goes further than that prescribed as such. Any person in South Africa, including a whistle-blower in the wider sense, may invoke the criminal procedure/ process in appropriate

				circumstances, and provided he has *locus standi*[3], jurisdiction and a recognised cause of action as defined in terms of criminal law and the required elements, in relation to the matter.
Civil law	X		PDA[4] Section 4(1)(*a*) and (*b) of* the PDA	This section envisages that a whistle-blower, within the employment relationship, who has, is or may be subjected to occupational detriment by his employer on account of having made or wishing to make a protected disclosure, may approach *any* court having jurisdiction and pursue any process allowed or prescribed by law. This would as such include civil law. However, it is argued that the protection of a whistle-blower goes further than that prescribed as such. Any person in South Africa, including a whistle-blower in the wider sense, may invoke the civil

3 *Locus standi* refers to a person's right to sue or be sued, the right to institute action or to have action instituted against him, i.e. to have legal standing. Two factors need to be considered in determining whether a person has *locus standi* or not, namely, does he have a direct and substantial interest in the matter, and does he have legal capacity to act. For a more comprehensive discussion in this regard see for example Pete *et al Civil Procedure, A Practical Guide* 13 – 34, and Theophilipoulos *et al Fundamental Principles of Civil Procedure* 101 – 112.

4 All persons within the RSA have this right, subject to *locus standi*, jurisdiction and cause of action in any event.

			Civil law in general	procedure/ process in appropriate circumstances, and provided he has *locus standi*, jurisdiction and a recognised cause of action in relation to the matter.
Media law	X		PDA[5] Section 4(1)(*a*) and (*b) of* the PDA	This section envisages that a whistle-blower, within the employment relationship, who has, is or may be subjected to occupational detriment by his employer on account of having made or wishing to make a protected disclosure, may approach *any* court having jurisdiction and pursue any process allowed or prescribed by law. This would as such include media law, which is a subject in its own right, including considerations such as film, multimedia, music, publishing, and including practical implications falling within the spheres of labour law, international law, intellectual property rights, copyright and the like. It is however argued that within the context of the whistle-blower, it could come into play in

5 All persons within the RSA have this right, subject to *locus standi*, jurisdiction and cause of action in any event.

				respect of the publication of aspects of a matter, involving the breach of the whistle-blower's right to privacy, defamation and *crimen iniuria*, thus placing it within the spheres of civil and criminal law.
Specific anti-corruption measures	X		PRECCA Section 34	Section 34 places a duty on specified persons, including employees to report specified offences including theft, extortion fraud and the like. Failure to comply with this duty is guilty of a criminal offence. Section 34 refers to 'any person'.
Interim interdicts	X		PDA[6] Section 4(1)(*a*) and (*b) of* the PDA *Grieve v Denel* – interim interdict granted against the employer *Theron v Minister of Correctional Services & Another* – interim interdict was granted against the employer In *Bargrarette & others v PACOFS* an interim interdict was	In such a situation the court will grant an interim interdict if the applicant has a *prima facie* right to the relief sought in a court which has the jurisdiction to deal with it. In this matter the court found that the applicants had failed to meet the requirements of an

6 All persons within the RSA have this right, subject to *locus standi*, jurisdiction and cause of action in any event.

			denied.	interdict. See Chapter 7
			Young v CDC – the employer was interdicted and restrained in proceeding with the disciplinary enquiry instituted against the employee, pending the determination of the action instituted against the employer in the HC.	See Chapter 7
			Randles v Chemical Specialities Ltd – the employer was interdicted from proceeding with a disciplinary enquiry regarding the protected disclosure made by the employee, pending the outcome of the dispute which had been referred to the CCMA.	See Chapter 7 Also see the content of Chapter 6 in this regard

				(for example paragraph 6.2.2.2b)
Final interdicts	X		PDA[7] Section 4(1)(*a*) and (*b) of* the PDA	A final interdict has not yet been reported in case law, however, section 4(1)(*a*) and (*b)* does allow for this. Cognisance in this regard should also be taken of the content of Chapter 6 in this regard. The basic difference in respect of whether an interim or a final interdict is granted lies within the allegations proved.[8] According to Pete *et al at page 404, 'An interdict*

7 All persons within the RSA have this right, subject to *locus standi*, jurisdiction and cause of action in any event.

8 Pete *et al Civil Procedure, A Practical Guide* succinctly establish the difference between obtaining an interim interdict as opposed to a final interdict at page 404: 'If, when you approach the court to enforce your right, you are able to establish clearly your right (i.e. the court is prepared to hold that you have a clear right), then the court may be prepared to grant you a final interdict (i.e. a final order enforcing your right). If however, when you approach the court you are only able to advance *prima facie* proof of your right (i.e. you are able only to satisfy the court that you have a right on the face of it), then the court will only be prepared to grant you an interim interdict. An interim interdict (also called a temporary interdict or an interlocutory interdict, will serve to enforce your right for a limited period until it can be established whether or not your prima facie right, is in fact, a clear right (i.e. you have clearly established your right).'
It is pointed out by Pete *et al* at page 405 (fn 160) that the term 'interlocutory interdict' should only be used when referring to interdicts which are sought as part of pending procedures.
Pete *et al* discuss the requirements in more detail at pages 405 -415.

				is a court order which either orders a person to refrain from performing some act, or orders a person to perform a particular act.'
Compensation for pain and suffering[9]	X		PDA[10] Section 4(1)(*a*) and (*b) of* the PDA For a whistle-blower who is not an employee, the principles of the law of damages.	Such action will fall within the ambit of civil law, and more specifically within the private law sphere of damages.[11]
Loss of earnings[12]	X		PDA[13] Section 4(1)(*a*) and (*b) of* the PDA	Such action will fall within the ambit of civil law,

9 Potgieter *et al Law of Damages* 109: 'By this is meant all pain, physical and mental suffering and discomfort caused by bodily injury, emotional shock, or the medical treatment necessitated by the injuries. Of importance here is the pain actually experienced by the plaintiff irrespective of whether he or she is more or less sensitive than the average person.'
In this regard it may in passing also be noted that damages may be claimed for psychiatric injury (shock), disfigurement, loss of the amenities of life and a shortened life expectation.

10 All persons within the RSA have this right, subject to *locus standi*, jurisdiction and cause of action in any event.

11 Potgieter *et al Law of Damages* 1, state that: 'The law of damages is that part of the law which indicates how the existence and extent of damage as well as the proper amount of damages or satisfaction are to be determined in the case of *delict*, breach of contract and other legal principles providing for the payment of damages.'
At page 6 Potgieter *et al Law of Damages* elaborate on the principles in respect of delictual remedies. Due to the scope and specialisation involved within this field of law, this study will in no manner attempt to elaborate hereon.

12 This has relation to the loss of earnings and even earning capacity as a result of the injury. See Chapter 14, for example, of Potgieter *et al Law of Damages* in this regard for a comprehensive discussion.

13 All persons within the RSA have this right, subject to *locus standi*, jurisdiction and cause of action in any event.

			For a whistle-blower who is not an employee, the principles of the law of damages.	and more specifically within the private law sphere of damages.
Loss of status	X		PDA[14] Section 4(1)(*a*) and (*b) of* the PDA For a whistle-blower who is not an employee, the principles of the law of damages.	Such action will fall within the ambit of civil law, and more specifically within the private law sphere of damages. Examples in this regard within the sphere of private law would be injury to the personality in *iniuria* affecting the body[15], defamation[16] and insult[17]. However, such action may also fall to the realm of criminal law, in respect of *crimen inuiria.* They aspects may go hand-in-hand with media law.

14 All persons within the RSA have this right, subject to *locus standi*, jurisdiction and cause of action in any event.

15 Potgieter *et al Law of Damages* at 119: 'Psychological or mental harm is usually brought about by an assault through the causing of fear and emotional shock (causing psychological lesion or psychiatric injury).'

16 Potgieter *et al Law of Damages* 120: 'Injury to personality caused by defamation has some special characteristics. In reality, the element of loss should be the fact that the plaintiff's good name or reputation in the community has in fact been impaired.

17 Potgieter *et al Law of Damages* 122: 'A person's dignity includes his or her (subjective) feelings of dignity or self-respect. These feelings may be violated by any conduct that actually insults a person.'

Mediation[18]	X		PDA[19] and the LRA Section 4(1)(*a*) and (*b) of* the PDA	This section envisages that a whistle-blower, within the employment relationship, who has, is or may be subjected to occupational detriment by his employer on account of having made or wishing to make a protected disclosure, may approach *any* court having jurisdiction and pursue any process allowed or prescribed by law. This would as such include mediation and arbitration, whether in terms of the LRA or pursued privately. In terms of section 112 of the LRA, the CCMA was established *inter alia* to provide simple procedure for the resolution of labour disputes through statutory conciliation, mediation and arbitration, such as that envisaged in terms of

18 Pete *et al Civil Procedure, A Practical Guide* 585 define mediation as: 'An ADR (alternative dispute resolution) process which requires the intervention of a neutral third party (the mediator) to assist the parties to reach a mutually acceptable resolution to their dispute'. And further that Med-Arb is: 'A hybrid ADR procedure where mediation culminates in arbitration.'
Pete *et al Civil Procedure, A Practical Guide* 578 define arbitration as: 'Non-formal dispute-resolution mechanism where the arbitrator fulfils a role similar to that of a judge in that he hears oral evidence and argument, or considers written evidence, and finally makes a decision (called an 'award')'.

19 All persons within the RSA have this right, subject to *locus standi*, jurisdiction and cause of action in any event.

			Section 112 of the LRA – establishment of the CCMA and the related purpose. Section 188A of the LRA – Agreement with reference to pre-dismissal arbitration	section 191 of the LRA. (Chapter 6) In terms of section 188A(1) of the LRA an employer may with the consent of the employee request a council, an accredited agency or the CCMA to conduct an arbitration into allegations relating to the conduct or capacity of the relevant employee. In terms of section 188A(9) of the LRA such arbitrator must then, having considered evidence presented and the criteria of fairness as provided for in the LRA, direct what action (if any) should be taken against the employee in question.
Legal costs[20]	X		General principles of law	The PDA does not specifically provides for costs, but the principles relating to costs are well entrenched in our law. See Chapter 7

20 All persons within the RSA have this right in respect of litigation in any event.

Measurable 4:	Appropriate incentives offered to private and public sectors to put appropriate whistle-blower measures in place			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
SA		x		There is no evidence in this respect.
Measurable 5:	Independent oversight body			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
SA		x		There is no evidence in this respect.
Measurable 6:	Ensuring that disclosures are timeously and properly investigated			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
SA		x		There is no evidence in this respect.
Measurable 7:	Ensuring that the identity of the whistle-blower is protected			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
SA				
In relation to the PDA		x	PDA	There is no provision providing for the protection of the identity of a whistle-blower.
Falling outside the PDA		x	Section 4 and 6 of the WCPPA	Section 4 sets out the information that is required from a party reporting a matter to the

				Public Protector, including full names, physical address, telephone number, email address etc. Section 6 deals with confidentiality. Should a complainant wish to remain anonymous, the Public Protector may decline to investigate the matter.
	X		In criminal proceedings, privilege in respect of the informer/ informant. Principles of the law of evidence. Section 202 of the CPA.	See the discussion in Chapter 5 under paragraph 5.9.2
Measurable 8:	Protect anyone who makes use of internal whistle-blower procedures in good faith from any retaliation			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
SA				
In relation to the PDA		x		The PDA only offers protection to employees, and subject to the other measurables as discussed above relating to the reporting channels, the matter that the whistle is blown on and the like.

Measurable 9:	Prohibition of interference with a disclosure by a whistle-blower			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
SA				
In relation to the PDA		x		No evidence to be presented in this regard.
Falling outside the PDA	X		Section 184 and 185 of the CPA	See paragraph 5.9.2.2 (bottom) in this regard. Section 184 provides for dealing with witnesses who are about to abscond, and in this regard a warrant of arrest may be issued in respect of the witness. Section 185 provides for the detention of witnesses whose safety is in danger, who may abscond or who may be tampered with, or if it is deemed in the interests of the witness or the administration of justice that such witness be detained in custody.
Measurable 10:	In relevant circumstances, external whistle-blowers are protected			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
SA				

In relation to the PDA		x	Section 1 of the PDA	Only an employee is protected in relation to his employment relationship with the employer in respect of occupational detriment.
Falling outside the PDA	x		Sections 31(4), (5), (7) and (8) of NEMA in respect of environmental risk.	Notwithstanding the provisions of any law, no person is civilly or criminally liable or may be dismissed, disciplined, prejudiced or harassed on account of having disclosed information in good faith, and as provided for in terms of section 31(5) of the NEMA, regarding environmental risk.
		x	Section 34 of PRECCA	Section 34 places a duty on specified persons, including employees to report specified offences including theft, extortion fraud and the like. Failure to comply with this duty is guilty of a criminal offence. Section 34 refers to 'any person'. Yet there are no provisions relating to the protection of such persons.
	X		Section 38(1) of FICA	This section provides that no criminal or civil action lies against a person who has made a report as required in terms of section 29 of FICA in good faith.

	X		The establishment of the OWP and the WPA.	
		x	WCPPA	The WCPPA makes no provision for the protection of complainants.
	x		Section 159(3) (a) of the CA Section 159(4) of the CA	Note should be taken that the persons to whom a protected disclosure can be made are wider than that provided for in terms of section 5-9 of the PDA. Both employees and specified external parties such as a trade union and a supplier have qualified privilege in respect of a disclosure made, and are immune from civil, criminal and administrative liability in respect of that disclosure.
Measurable 11:	Whistle-blowers acting in good faith when blowing the whistle are protected even if it turns out later that the allegations were unfounded.			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
SA				The case law as discussed in Chapter 7 is very clear in this regard.

In relation to the PDA		x	Section 1: 'disclosure' defined. This section starts off with – …made by an employee who has reason to believe that the information concerned shows or tends to show that the conduct contained in the disclosure conforms to that within the definition of a disclosure. Section 2(1)(c) of the PDA (c) to provide for procedures in terms of which an employee can, in a responsible manner, disclose information regarding improprieties by his or her employer.	See the case law discussed in Chapter 7 in this regard, and in which it becomes apparent that conjecture, speculation and rumour (by way of example) is not acceptable to invoke protection.
Falling outside the PDA		x	Section 31(4) of NEMA	NEMA reflects no provision in this regard, but does provide that the disclosure made in good faith must be reasonably believed by the whistle-blower.
	X		Section 38(1) of FICA	This section provides that no criminal or civil action lies against a person having made the report as required in terms of section 29 of FICA, who has complied in good faith.

Measurable 12:	Enforcement mechanism to investigate the whistle-blower's allegations			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
SA				
In relation to the PDA		x		There is no evidence in this respect.
Falling outside the PDA		x		There is no evidence in this respect. Having said this, it is noted that 176 – 179 of the CA provides for the powers needed in order to support investigations and inspections in relation to disclosures. However, there are no provisions in respect of the enforcement of such investigations.
Measurable 13:	Appropriate protection provided for accusations made in bad faith			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
SA				
In relation to the PDA		x	The case law as discussed in Chapter 7 Sections 6, 7, 8 and 9 of the PDA require that the disclosure (accusations) must be made in good faith in order for the whistle-blower to be protected.	The only disclosure that need not be made in good faith, is a disclosure made in terms of section 5 of the PDA, a disclosure to a legal adviser. (as discussed in paragraph 4.5.3 of Chapter 4)

Falling outside the PDA		x	Section 31(4) of NEMA	Disclosures regarding environmental risk made in terms of NEMA also need to be made in good faith.
	X		Sections 203 and 204 of the CPA	This relates to those circumstances in which a person has been complicit in criminal conduct. Should a person who may need to testify in respect of conduct in which he himself may have been complicit, he may be able to rely on the privilege against self-incrimination as provided for in terms of section 203 of the CPA, in that he may not be compelled to answer questions which may expose him to criminal charges. The provisions of section 204 go hand-in-hand with the provisions of section 203, and relate to the potential protection (indemnity from prosecution) that such accomplice may enjoy should he turn state witness.

Measurable 14:	Burden of proof should rest with the employer to prove that the alleged action/ omission wasn't in reprisal due to protected disclosure made			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
SA The reference to the 'employer' in this regard, infers that it is applicable within the employment relationship; as such the narrower sense.	X	x	Section 192 of the LRA	This is not specifically provided for in the PDA. However, if the reprisal referred to is in relation to dismissal (as occupational detriment), the provisions of section 192 relating to the onus in respect of dismissal disputes comes into play, in respect of which the employee must prove the dismissal, and the employer must prove that the dismissal in question was fair (substantially and procedurally).
			Tshishonga case Ramsammy case PDA	The onus is on the whistle-blower to prove that he has made a disclosure that is protected. This would then as a matter of course require of him to prove: • that a disclosure was actually made as defined in terms of section 1 of the PDA, and as widened by the provisions of section 1(i)(a) and (b) of the Financial Services Law General Amendment Act 45 of 2013;

				• that the disclosure was made in accordance with the provisions of sections 5 – 9 of the PDA (in accordance with the correct or authorised procedure/channel); • that it was made in good faith; • that the employee reasonably believed that it was substantially true, and not for personal gain; • that there is a demonstrable nexus between the disclosure made and the alleged occupational detriment; and • if not made to the employer, that he had reason to believe that if the disclosure was made to the employer he will suffer an occupational detriment or that the same information was disclosed to the employer previously with no action taken in a reasonable period, or that it is exceptionally serious.
	x		Section 159(6) of the CA	Creates a rebuttable presumption in that it is presumed that the threat or conduct described in section 159(5) of the CA has occurred, as a result of a potential or actual disclosure that a

				person is entitled to make or has made. The presumption can be rebutted if the person who engaged in the conduct or threat can show satisfactory evidence in support of another reason for engaging in the conduct or the making of the threat.
Measurable 15:	The impact and implementation of the legislation measured at regular intervals			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
SA	X	x		There are sporadic independent studies, but not at regular intervals.
Measurable 16:	Facilitation by the law of acceptance, participation in whistle-blowing and public awareness of whistle-blowing			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
SA				
In respect of the PDA		x		There is no evidence in this regard, even bearing in mind the guideline published by the Minister of Labour in 2011.
Falling outside the PDA	X		Section 159(7) of the CA	This section places a duty on companies, including state owned companies to directly or

				indirectly establish and maintain a system by which to receive disclosures confidentially and to act on them, and further, to routinely publicise the availability of that system, to all those who may make a disclosure and provided for in terms of section 159 (5) of the CA.

TABLE 2: EVALUATION OF SOUTH AFRICA

8.3 Conclusion

An overview of the PDA reveals the following basic structure:

- **Section 1:** the definitions;
- **Section 2:** the objects and the applications of the PDA;
- **Section 3:** an employee making a protected disclosure may not be subjected to occupational detriment;
- **Section 4:** the remedies availed;
- **Sections 5 – 8:** to whom protected disclosures may be made;
- **Section 9:** the general protected disclosure;
- **Section 10:** the regulations that should and or may be made in respect of making a protected disclosure;
- **Section 11:** the short-title of the PDA and its commencement.

It is clear from the above table utilised for measurement, that the protection and remedies offered to the whistle-blower within an employment relationship, as defined, are comprehensive, however, when looking at the remedies actually provided by the PDA as contained in section 4 thereof one notes the following:

- remedies in respect of dismissal and occupational detriment are (already) to be found in the LRA[1]; however in this regard it does provide that an employee may not be subjected to occupational detriment for having made or intending to make a protected disclosure; and
- the actual catch-all is the provision providing that a whistle-blower may approach any court with jurisdiction[2] and '*pursue any other process allowed or prescribed by law'*[3]; and
- the whistle-blower must if reasonably possible and practicable be transferred, with the terms and conditions of such transfer, not taking place without his written consent, not being less favourable than those applicable immediately before his transfer.[4]

1 Section 4(2) of the PDA.
2 Section 4(1)(*a*) of the PDA.
3 Section 4(1)(*b*) of the PDA.
4 Section 4(3) and (4) of the PDA.

Looking critically at the provisions of the PDA (being the main legislation protecting whistle-blowers in South Africa) in respect of the remedies offered it seems as though it makes the practice of subjecting a whistle-blower to occupational detriment addressable in terms of already existing rights and remedies available to employees. Further to this it provides for the transfer of a whistle-blower, as above-mentioned. The catch-all provided in section 4(1)(*b*) merely serves to provide remedies available to any person within South Africa, with the added burden of the whistle-blower having to ensure, assert and prove within such other process that he is in fact a whistle-blower and has made a protected disclosure in good faith.

In light of this it is argued that the remedies availed to a whistle-blower in terms of the PDA are too general in nature to ascribe any praise for the PDA. It seems rather disappointingly, to be mainly concerned with setting the tests against which whistle-blowers are to be measured, hoops they have to jump through, before they are afforded protection potentially already available to anyone in South Africa, excluding the provision in respect of potential transfer. Interestingly, within this context, the preamble of the PDA does not recognise that whistle-blowers need to be protected by availing appropriate and effective protection and or remedies apart from stating that every employer is responsible for taking all necessary steps in order to ensure that employees are not subjected to occupational detriment by way of reprisal.

No accordant responsibility is assigned within the provisions of the PDA.

It is argued that the PDA fails in actually meeting the objectives set in section 1(*a*) and (*b).* In fact, it would seem, especially taking into account the technicalities that the courts have attempted resolving, and that whistle-blowers have faced in their legal battles, that the PDA in its generality in respect of remedies, and the responsibilities placed on the shoulders of the whistle-blower in respect thereof, has unfairly tipped the bulk of the onus on the whistle-blower. The only provision in this respect placing any kind of requirement on the employer within this context is that no employer may subject a whistle-blower employee to occupational detriment[5], which onus of proof too lies on the whistle-blower employee. No consequences are provided for in respect of an employer who does subject a whistle-blower employee to occupational detriment in contravention of the PDA. It would seem that the playing

5 Section 3 of the PDA.

field in in no manner equal, with the scale being tipped against the whistle-blower employee.

CHAPTER 9: THE POSITION OF THE WHISTLE-BLOWER IN NEW ZEALAND

9.1 Introduction

The main legislation governing the protection of a whistle-blower in New Zealand is the Protected Disclosures Act 7 of 2000 (hereinafter referred to as the 'PDA NZ'), assented to on 3 April 2000, and which came into force on 1 January 2001, with the act being administered by the State Services Commission. Various amendments were effected during 2012. According to the New Zealand government, the purpose of the PDA NZ is as follows to promote the public interest by facilitating both disclosures and the investigation of serious wrongdoing in or by an organisation, and by ensuring protection for the disclosing employee.[1]

The office of the Ombudsman has published a guide in respect of the PDA NZ, entitled 'Making a protected disclosure – "blowing the whistle"'.[2]

9.2 The role of the Ombudsman

The role of the Ombudsman in respect of whistle-blowing is as including the provision of information and guidance lent to people who want or who have made a protected disclosure, as well as being one of the listed authorities to whom a disclosure may be made.[3]

Section 6B of the PDA NZ elaborates on the role to be fulfilled by the Ombudsman, by providing that:

- The Ombudsman may provide both information and guidance to employees, thus including former employees, pertaining to any matter regarding the PDA NZ, either in response to a request made to the Ombudsman, or at the Ombudsman's discretion.
- Should an employee notify the Ombudsman's Offices orally or in writing that he has made a disclosure, or is considering making a disclosure as provided

1 State Service Commission http://www.ssc.govt.nz/node/8521 (Date of use: 23 March 2014).
2 Office of the Ombudsman http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/441/original/making_a_protected_disclosure_blowing_the_whistle_pdf?1349214579 (Date of use: 23 March 2014).
3 Anonymous http://www.ombudsman.parliament.nz/what-we-do/protecting-your-rights/protected-disclosures-whistle-blowing (Date of use: 10 April 2014).

for in terms of the PDA NZ, the Ombudsman shall provide both information and guidance to that employee in respect of the following considerations:

- the kinds of disclosures that are protected under this Act;
- the manner in which, and the person to whom, information may be disclosed under this Act;
- the broad role of each authority referred to in paragraph (a) (i) to (x) of the definition of appropriate authority in section 3(1);
- the protections and remedies available under this Act and the Human Rights Act 1993 if the disclosure of information in accordance with this Act leads to victimisation of the person making the disclosure;
- how particular information disclosed to an appropriate authority may be referred to another appropriate authority under this Act.

Section 6C of the PDA NZ also provides that the Ombudsman for the purposes of the Act may request the following information from an organisation:

- information concerning whether the organisation has established and published internal procedures for receiving and dealing with information about serious wrongdoing; and
- a copy of those procedures; and
- information about how those procedures operate.

However, these powers are relatively limited as an organisation is not required to comply with such a request made by the Ombudsman, unless it is a public sector organisation.[4]

Section 11 of the PDA NZ specifically provides for public sector organisations to establish internal procedures in respect of whistle-blowers, providing that each such public sector organisation must have in operation internal procedures, appropriate to that organisation, for the receiving and dealing with information pertaining to serious wrongdoing in or by that organisation, and requires that the said internal procedures must comply with the principles of natural justice. In addition thereto the internal procedures must identify the persons within the organisation to whom disclosures

4 Section 6C(2) of the PDA NZ.

may be made, and include reference to the effect of the provisions of sections 8 to 10.Information in respect of the information so required, including adequate information of how to use the internal procedures must be published widely within the organisation, and republished at regular intervals.[5]

9.2.1 Functions and the powers of the Ombudsman in respect of whistle-blowing

Section 13 of the Ombudsman Act 9 of 1975[6] sets out the functions of the Ombudsman; section 13(3) clearly confers the power of investigation in respect of whistle-blowing, providing that an Ombudsman make any investigation, whether as a result of a complaint or by own decision, and in respect of an investigation resulting from a complaint it may also investigate any decision, recommendation, act or omission related thereto.

Section 22 of the same Act provides detailed procedures to be followed after an investigation has been completed, especially in cases in which the act or omission that was the subject of the investigation appears to have been contrary to the law, unreasonable, unjust, oppressive, improperly discriminatory or wrong and the like. In matters in which the Ombudsman opines that the matter should be referred to the appropriate authorities for further consideration,[7] that an omission should be rectified,[8] a decision should be cancelled or varied,[9] that a practice or a law should be altered,[10] that reasons should be given for a decision,[11] or that any other step should be taken,[12] the Ombudsman is obliged to report his opinion and the reasons therefore to the appropriate organisation or department. In doing so the Ombudsman may also make such recommendations as he thinks fit.[13] Further to this, in such a case, may request the relevant organisation or department to notify him within a

5 Section 11(3) of the PDA NZ.
6 Parliamentary Counsel Office "Ombudsman Act 1975" New Zealand Legislation http://www.legislation.govt.nz/act/public/1975/0009/latest/DLM430984.html?search=qs_act%40bill%40regulation%40deemedreg_inspector-general+intelligence+and+security+act+1996_resel_25_h&p=1&sr=1 (Date of use: 10 April 2014)
7 Section 22(3)(a) of the Ombudsman Act 9 of 1975.
8 Section 22(3)(b) of the Ombudsman Act 9 of 1975.
9 Section 22(3)(c) of the Ombudsman Act 9 of 1975.
10 Section 22(3)(d) and (e) of the Ombudsman Act 9 of 1975.
11 Section 22(3)(f) of the Ombudsman Act 9 of 1975.
12 Section 22(3)(g) of the Ombudsman Act 9 of 1975.
13 Section 22(3) of the Ombudsman Act 9 of 1975.

specified time of the steps it proposes to take to give effect to any recommendations so made.

Should no action be taken, which to the Ombudsman seems adequate and appropriate, within a reasonable time, the Ombudsman in his discretion may send a copy of the report and the relevant recommendations to the Prime Minister, and may thereafter send a copy of the report to the House of Representatives.[14] However, it is clear that before such drastic measures are taken, the relevant department or organisation must be afforded an opportunity to comment on the findings and the recommendations contained in the report. This requirement is bolstered by the provisions of section 22(7) which provide that the Ombudsman shall not make any comment that is adverse to a person in such report, unless the relevant person has been afforded an opportunity to be heard.

Section 24 of the Act requires the Ombudsman to inform a complainant in a matter of the outcomes of the investigation launched. Section 25 creates a powerful basis in respect of the Ombudsmen and their functions, by providing that no proceedings of an Ombudsman shall be held as being 'bad' just as a result of the form thereof. Further to this, except on grounds of a lack of jurisdiction, no proceedings or decision of an Ombudsman can be challenged, reviewed, quashed or called into question by a court.

The provisions of section 25 are further underpinned by the provisions of section 26 of the Act, which provides the Ombudsmen with privilege, in that no civil or criminal proceedings shall lie against an Ombudsman or against any person holding office or appointed under the Chief Ombudsman in respect of anything he has done, reported on or said in the course of the exercise or intended exercise of his functions, unless it is shown that he acted in bad faith.[15] Neither shall an Ombudsman or any person holding office or appointed under the Chief Ombudsman be called to give evidence in any court, or in any proceedings of a legal or judicial nature, in respect of a matter that came to his knowledge during the exercise of his functions.[16] Anything said, any information supplied and any document, paper or thing produced by any person

14 Section 22(4) of the Ombudsman Act 9 of 1975.
15 Section 26(1)(*a*) of the Ombudsman Act 9 of 1975.
16 Section 26(1)(*b*) of the Ombudsman Act 9 of 1975.

during the course of an investigation or inquiry by or during proceedings before an Ombudsman in terms of the PDA NZ is also privileged.[17]

In conducting investigations falling within its jurisdiction, the Ombudsman has been afforded the power of entry to premises in terms of the provisions of section 27. In this regard the Ombudsman is authorised to enter any premises at any time, occupied by a department or organisation named or specified in Schedule 1, and inspect the premises, and subject to the provisions of sections 19 and 20 to carry out inspections on such premises that falls within its jurisdiction.[18]

Schedule 1 specifies the following various organisations and departments.

This provision is however, slightly tempered by the provisions of section 27(2), which provides that before entering such premises the Ombudsman shall notify the relevant chief executive of the organisation or department. The reading of the said provision makes it clear that all that is required is notification, as opposed to permission. Further to this, section 27(3) of the Ombudsman Act 9 of 1975 provides that the Attorney-General may from time to time exclude this power of entry as provided for in respect of any specified or class of premises, if he is satisfied that this power may prejudice the security, defence or the international relations of New Zealand.

Section 19 relates to evidence, subject to the provisions of section 20.[19] The Ombudsman is empowered to require any person who in his opinion is able to give

17 Section 26(3) of the Ombudsman Act 9 of 1975.

18 Section 27(1) of the Ombudsman Act 9 of 1975.

19 **20 Disclosure of certain matters not to be required**

(1) Where the Attorney-General certifies that the giving of any information or the answering of any question or the production of any document or paper or thing—

(a) might prejudice the security, defence, or international relations of New Zealand (including New Zealand's relations with the government of any other country or with any international organisation), or the investigation or detection of offences; or

(b) might involve the disclosure of the deliberations of Cabinet; or

(c) might involve the disclosure of proceedings of Cabinet, or of any committee of Cabinet, relating to matters of a secret or confidential nature, and would be injurious to the public interest—

(1) an Ombudsman shall not require the information or answer to be given or, as the case may be, the document or paper or thing to be produced.

(2) Subject to the provisions of subsection (1), the rule of law which authorises or requires the withholding of any document or paper, or the refusal to answer any question, on the ground that the disclosure of the document or paper or the answering of the question would be injurious to the public

any information relating to a matter that is being investigated by the Ombudsman, to furnish information, documents or things, which are in the possession or under the control of such person.[20] In this respect, the Ombudsman has the power to summon before him, and examine on oath any person who is an officer, member or employee of a department or organisation named or specified in Schedule 1[21], a complainant[22] or any other person who in the Ombudsman's opinion is able to provide information required, with the prior approval of the Attorney-General[23]. As the examination of such person is performed on oath, it is deemed to constitute a judicial proceeding, and if such person perjures himself, he may be prosecuted in this regard.[24]

In gathering the required evidence, even employees bound by an oath of secrecy are required to render the required information to the Ombudsman, even if such compliance would otherwise be in breach of the obligation of secrecy or non-disclosure, and will not be regarded as a breach of such obligation of secrecy or non-disclosure.[25] No person who has complied with such requirement relating to evidence by the Ombudsman will be liable to prosecution by reason thereof.[26]

In terms of section 15 of the PDA NZ the Ombudsman may elect to refer a complaint to another appropriate authority, a Minister of the Crown or elect to investigate the allegations itself. So too the Ombudsman is authorised to take over investigations or to investigate in conjunction with a public sector organisation in certain circumstances,[27] or review and guide investigations by public organisations.[28]

9.3 The Protected Disclosures Act 7 of 2000

9.3.1 The Purpose of the PDA NZ

The purpose of the PDA NZ is set out in section 5 thereof is to promote the public interest by facilitating both the disclosure and investigation regarding matters of

---

interest shall not apply in respect of any investigation by or proceedings before an Ombudsman.

20 Section 19(1) of the Ombudsman Act 9 of 1975.
21 Section 19(2)(*a*) of the Ombudsman Act 9 of 1975.
22 Section 19(2)(*b*) of the Ombudsman Act 9 of 1975.
23 Section 19(2)(*c*) of the Ombudsman Act 9 of 1975.
24 Section 19(2) of the Ombudsman Act 9 of 1975.
25 Section 19(3) and (4) of the Ombudsman Act 9 of 1975.
26 Section 19(7) of the Ombudsman Act 9 of 1975.
27 Section 15A of the PDA NZ.
28 Section 15B of the PDA NZ.

serious wrongdoing by or in an organisation, and protecting employees who make disclosures regarding serious wrongdoing in accordance with the provisions of the PDA NZ.

In terms of the purpose of the PDA NZ, it would seem that its provisions are also applicable in respect of the employment relationship. However, the definition of an employee makes it clear that the provisions go beyond the employment relationship as included in the definition of an employee is a *former* employee.

9.3.2 Who qualifies as an "employee"?

It is noted that the PDA NZ does not define who the employer[29] would be within the context of whistle-blowing; however, section 3 thereof defines an employee as including:

- former employees;
- a homeworker as defined in section 5 of the Employment Relations Act, 2000;
- a seconded person;
- a person engaged or contracted under a service contract to perform work for the organisation;
- person concerned in the management of the organisation, including a member of the board or governing board of the organisation;
- a member of the Armed Forces in the New Zealand Defence Force;
- a volunteer in the organisation.

Section 5 of the Employment Relations Act 24 of 2000[30] (hereinafter referred to as "ERA"), defines a **homeworker** as including a person who:

- is engaged, employed or contracted by another person to perform work for that person in a dwellinghouse, excluding work on that house or its fixtures, fittings or furniture; and

29 Section 5 of the ERA defines an employer as: a person employing any employee or employees; and includes a person engaging or employing a homeworker.

30 Parliamentary Counsel Office "New Zealand Legislation" http://www.llegislation.govt.nz/act/public/2000/0024/latest/DLM58317.html (Date of use: 23 March 2014).

- is in substance so employed or engaged, even in circumstances in which the contract between them is that of a vendor and a purchaser.

In respect of the definition of an employee, the use of the word '**organisation'** is apparent. An organisation is defined in section 3 of the PDA NZ as including a body of persons, whether incorporated or unincorporated, and whether it falls within the public or private sphere, and includes a body of persons existing of one employer and one or more employees.

A **public sector organisation** is defined in terms of section 3 of the PDA NZ as including:

- an organisation which has been named in Schedule 1 of the Ombudsmen Act, 1975;
- an organisation which has been named in Schedule 1 of the Official Information Act, 1982;
- a local authority or public body which has been named in Schedule 1 of the Local Government Official Information and Meetings Act, 1987;
- the Office of the Clerk of the House of Representatives;
- Parliamentary Service;
- An intelligence and security agency; and
- A council-controlled organisation, falling within the provisions of section 6 of the Local Government Act, 2002.

9.3.2.1 The protection of employees within the international relations and intelligence services

The PDA NZ specifically provides for the protection of employees falling within the sensitive employment areas such as international relations and the intelligence services, in sections 12 - 14. Section 12 provides for **special rules,** in that the internal procedures of intelligence and security agencies must:

- Provide that the people to whom a disclosure may be made must be persons holding the appropriate security clearance and be authorised to have access to the relevant information;

- Specify that the only appropriate authority to whom such information may be disclosed is the Inspector-General of Intelligence and Security;
- Invite an employee who is considering disclosing, or who has so disclosed information under the PDA NZ, to seek information and guidance from the Inspector-General of Intelligence and Security, as opposed to the Ombudsman; and
- Specify that no disclosure may be made to the Ombudsman or a Minister of the Crown, other than the Minister responsible for the relevant intelligence and security agency or the Prime Minister.

Employees falling within the intelligence and security agencies are bound by the following special rules in respect of making a disclosure that is to be a protected disclosure:

- The disclosure is to be made to an identified person within the area of the Inspector-General of Intelligence and Security; and
- Should they wish to make a disclosure, or are considering making a disclosure and need guidance in the making thereof, they are required to engage the Inspector-General of Intelligence and Security Services as opposed to the Ombudsman.

Section 3 of the PDA NZ states that an **intelligence and security agency** has the meaning given to it in terms of section 2(1) of the Inspector-General of Intelligence and Security Act 1996,[31] and which section provides that an intelligence and security agency means the New Zealand Security Intelligence Service, the Government Communications Security Bureau and any other agency which has been declared to be a security and intelligence agency for the purposes of the PDA NZ.

Section 13 of the PDA NZ relates to information within the international relations sphere, providing that the internal procedures of the Department of the Prime Minister and the Cabinet, the Minister of Foreign Affairs and Trade, the Ministry of Defence and the New Zealand Defence Force must, in so far as they relate to the

31 Parliamentary Counsel Office. http://www.legislation.govt.nz/act/public/1996/0047/latest/DLM392290.html (Date of use: 10 April 2014).

disclosure of information pertaining to the international relations of the Government of New Zealand, or intelligence and security matters must:

- Provide for specific persons to whom such disclosures may be made. These identified individuals must hold appropriate security clearance, and be authorised to have access to the information in question; and
- Specifically state that the only appropriate authority to which information may be disclosed is the Ombudsman; and
- Invite an employee who is considering making a disclosure or who has made such a disclosure to enlist the assistance or guidance of the Ombudsman; and
- State that no disclosure may be made to a Minister of the Crown, other than in the case of a disclosure relating to international relations to either the Prime Minister or the Minister responsible for foreign affairs and trade, or in the case of a disclosure which relates to intelligence or security matters, to either the Prime Minister or the Minister responsible for an intelligence or security agency.

Section 14 provides that neither the Inspector-General of Intelligence and Security, nor an Ombudsman may disclose information disclosed in accordance with the provisions of sections 12 or 13, except as provided for in terms of the Inspector-General of Intelligence and Security Act 1996 or the Ombudsman Act 9 of 1975; an example of this to be found in section 21 of the Ombudsman Act 9 of 1975.

9.3.3 Protection afforded reaches wider that the primary whistle-blower

The protection afforded by sections 17 to 19[32] apply with all necessary modifications to a person who volunteers **supporting information**, as though the volunteered supporting information were a protected disclosure.[33] Such a volunteer could thus be seen as a secondary or co-whistle-blower. Such a person is described in the Act as being a person who volunteers supporting information, with that person:

32 See paragraph 9.2.6 below.
33 Section 19A(1) of the PDA NZ.

- Providing information in support of a protected disclosure made by another person (the primary whistle-blower) to either the primary whistle-blower or to the person investigating the disclosure made;[34] and
- Is also an employee in the organisation in respect of which the protected disclosure was made;[35] and
- Whose intention is to provide the supporting information in order for the serious wrongdoing to be investigated.[36]

A secondary whistle-blower will not qualify for the protection afforded in accordance with the provisions of sections 17 to 19 if he only provides the supporting information after being required to do so or after being approached by the investigator in the matter.[37]

9.3.4 What qualifies as a protected disclosure?

Disclosures made, which qualify as a protected disclosure, are defined in terms of section 6 of the PDA NZ, and which provides that an employee of an organisation may disclose information in accordance with this Act if:

- the information pertains to serious wrongdoing in or by that organisation; and
- the concerned employee believes on reasonable grounds that the information is true or likely to be true; and
- the employee wishes to disclose the information in order for the allegations to be investigated; and
- the employee wants the disclosure to be protected.

It would seem that within the provisions of section 6, the intention and motivation of the would be whistle-blower enjoys the focus, as he or she needs to believe that the information about the alleged serious wrongdoing based on reasonable grounds is true or likely true, and that he or she wishes to disclose the information in order for the allegation to be investigated, with the disclosure being a protected disclosure. Any disclosure made in this way is said to be a protected disclosure.[38] Exclusions of

34 Section 19A(2)(a) of the PDA NZ.
35 Section 19A(2)(b) of the PDA NZ.
36 Section 19A(2)(c) of the PDA NZ.
37 Section 19A(3) of the PDA NZ.
38 Section 6(2) of the PDA NZ.

which note must be taken is the fact that false allegations[39] and the disclosure of information subject to legal professional privilege[40] do not enjoy protection as protected disclosures in terms of the provisions of the PDA NZ.

What constitutes serious wrongdoing is defined in section 3 as including:

- the unlawful, corrupt or irregular use of either the funds or resources of an organisation in the public sphere;
- an act or omission or type of conduct which entails a serious risk to the public health and safety, or the environment;
- an act or omission or type of conduct which entails a serious risk to the maintenance of law;
- an act or omission or type of conduct which amounts to an offence, an act or omission or type of conduct perpetrated by a public official and which amounts to oppressive, improperly discriminatory, grossly negligent or gross mismanagement.

The section makes it clear that the above-mentioned will constitutes such serious wrongdoing, whether or not it took place before or after the commencement of the PDA NZ.

Section 6(3) deals with information so disclosed by an employee, who is mistaken in his belief in respect of the serious wrongdoing, and provides that in circumstances in which an employee discloses information about conduct which amounts to serious wrongdoing in or by the relevant organisation, on reasonable grounds, but it later transpires that the employee was erroneous in his belief, the information so disclosed is still to be treated as complying with the provisions of subsection (1)(a) for the purposes of protection of the PDA NZ, and by section 66(1)(a) of the Human Rights Act, 1993.

It seems that the mistaken belief will still demonstrably need to be based on a reasonable belief. No protection is offered in respect of disclosures made mistakenly that are not based on reasonable belief that was made in bad faith or maliciously.

39 Section 20 of the PDA NZ.
40 Section 22 of the PDA NZ.

This position is underpinned by the provisions of section 66(2) of the Human Rights Act 1993[41] (hereinafter referred to as the "HRA").

Section 66(1)(*a*) of the Act, deals with victimisation, and provides that it is unlawful for any person to treat another less favourably on the grounds that that person, a relative or associate of that person:

- intends to make a protected disclosure; or
- has made a protected disclosure or has encouraged another to make a protected disclosure; or
- has given information or evidence in respect of the investigation of a protected disclosure made; or
- has refused to act in a manner that contravenes the PDA NZ; or
- has otherwise done anything whether under or by reference to the PDA NZ.

In terms of section 6(4) of the PDA NZ, the provisions of section 6 are subject to that of section 6A,[42] relating to technical failure to comply with the PDA NZ, and which provides that the disclosure of information is not prevented from being a protected disclosure as provided for in the PDA NZ just because of:

- A technical failure to comply with the provisions of sections 7 to 10, if the employee has materially complied with the provisions of section 6; or
- The employee's failure to expressly refer to the name of the PDA NZ when making the disclosure.

In other words, a whistle-blower's disclosure will not be defeated and be left unprotected due to:

- the fact that the employee simply did not mention that he is making the relevant disclosure in terms of the PDA NZ; or
- because of non-compliance with the provisions of sections 7 to 10 of the PDA NZ, in other words for example:

41 Parliamentary Counsel Office "Human Rights Act 1993" New Zealand Legislation http://www.legislation.govt.nz/act.public/1993/0082/latest/DLM304212.html (Date of use: 10 April 2014).

42 Which section was inserted into the Act on 6 May 2009.

a. failure to disclose the information in accordance with the internal procedures established and published by the employer for the making of a protected disclosure;[43]
b. failing to make the disclosure to the head of the organisation in respect of the circumstances set out in section 8 of the PDA NZ;
c. failing to make the disclosure to an appropriate authority in respect of the circumstances set out in section 9 of the PDA NZ;
d. failing to make the disclosure to a Minister of the Crown or the Ombudsman in the circumstances set out in the provisions of section 10 of the PDA NZ.

The technical failure referred to in section 6A relates to the provisions of sections 7 to 10 of the PDA NZ.

- Section 7 deals with disclosures to be made in accordance with internal procedures;
- Section 8 deals with disclosures that may be made to the head of an organisation in certain circumstances;
- Section 9 deals with disclosures that may be made to an appropriate authority in certain circumstances; and
- Section 10 deals with disclosures that may be made to a Minister of the Crown or the Ombudsman in certain circumstances.

All the above-mentioned sections are subject to the provisions of sections 12 to 14, and very clearly indicate the desired hierarchy in respect of making a disclosure.

Section 7 provides that an employee must disclose information in the manner provided for by the internal procedures that have been established and published in the relevant organisation for receiving and dealing with information about alleged serious wrongdoing. Section 7 is subject to the provisions of sections 12 to 14.

Section 8 provides that a disclosure may be made to the head or deputy head of the organisation in circumstances in which:

43 Section 7 of the PDA NZ.

- There are no established and published procedures for receiving and dealing with information about serious wrongdoing;
- The employee making the disclosure believes on reasonable grounds that the person to whom the serious wrongdoing is to be reported is or may be involved in the alleged serious wrongdoing; or
- The employee making the disclosure on reasonable grounds believes that the person to whom the wrongdoing should be reported in accordance with the relevant internal procedures is related to or associated with the person who is believed to be involved in the serious wrongdoing, and as such is not the appropriate person to who the disclosure should be made.

Section 8 too, is subject to the provisions of sections 12 to 14.

In accordance with the provisions of section 9 a disclosure may be made to an appropriate authority in circumstances in which the employee making the disclosure on reasonable grounds believes that:

- the head of the organisation in question is or may be involved in the alleged serious misconduct disclosed;
- immediate reference to an appropriate authority is justified as a result of the urgency of the matter, or other exceptional circumstances that justify this; or
- there has been no action or recommended action in respect of the matter to which the disclosure relates within 20 working days after the date on which the disclosure was made.

This section too is subject to the provisions of sections 12 to 14.

Section 10 provides that a disclosure of information may be made to a Minister of the Crown or an Ombudsman in circumstances in which:

- substantially the same disclosure has already been made in accordance with the provisions of sections 7, 8 or 9, and the employee believes on reasonable grounds that the person or appropriate authority in question, and to whom the disclosure was made:
    - has decided not to investigate the matter; or

    - has decided to investigate the matter, but within a reasonable time progress with the investigation has not been made; or
    - has investigated the matter, but has not recommended any action or taken any action in respect of the matter; and
- continues to believe on reasonable grounds, that the information disclosed is true or likely to be true.

A disclosure under the provisions of section 10 may only be made to an Ombudsman if:

- The disclosure is in respect of a public sector organisation, and it has not already been made to an Ombudsman in accordance with the provisions of section 9; or
- The disclosure is not in respect of a public sector organisation, and the disclosure is made with the objective of allowing the Ombudsman to act in accordance with the provisions of section 15 or 16.

This section too is subject to the provisions of sections 12 to 14.

9.3.4.1 Making the disclosure to an appropriate authority

As may have been noted from the above, disclosures may as defined above, be made to an *appropriate authority.* What would constitute an appropriate authority has been defined in section 3(1)(*a*) – (*d*) of the PDA NZ, however, it is argued that this does not constitute a *numerous clausus,* as it specifically states that the definition does not intend limiting the meaning of the term of an *appropriate authority.* The definition given caters for both the public and private sectors, and includes:

- the Commissioner of Police;
- the Controller and Auditor-General;
- the Director of the Serious Fraud Office;
- the Inspector-General of Intelligence and Security;
- the Ombudsman;
- the Parliamentary Commissioner for the Environment;
- the Independent Police Conduct Authority;
- the Solicitor General;

- the State Services Commissioner;
- the Health and Disability Commissioner;
- the Head of every public sector organisation;
- certain private sector bodies;

For mere convenience sake, the roles of the appropriate authorities referred to in this section, will be briefly considered; however, the Ombudsman is excluded due to previous elaboration. The **Commissioner of Police** has reference to the head of the New Zealand Police, and described as the chief executive of the Police, appointed by the Governor General and accountable to the Minister of Police for the administration of the police services, whilst independently performing the mandate.[44]

The role of the **Controller and Auditor-General** is defined as being an office of Parliament, being described as independent in fulfilling the relevant mandate.[45]

The role of the **Serious Fraud Office** as a specialised government department includes the investigation of serious instances of fraud. [46]

The responsibilities of the **New Zealand Security Intelligence Service** (hereinafter referred to as the "NZSIS"), and related to the reference to the Inspector-General of Intelligence and Security, and includes *inter alia* gathering and evaluating intelligence related to matters of security, advising the government in relation to security matters.[47]

The functions and the powers of the **Parliamentary Commissioner for the Environment** includes in the main functions provided for in terms of the provisions of the Environment Act, 1986.[48]

---

44 Anonymous http://www.police.govt.nz/about-us/structure/commissioners-executive-commanders (Date of use: 24 May 2014).

45 The Role of Controller and Auditor-General, http://www.oag.govt.nz/about-us/cag-role (Date of use: 24 May 2014).

46 Serious Fraud Office: Our Role and Purpose, https://www.sfo.govt.nz/about (Date of use: 24 May 2014).

47 Responsibilities: New Zealand Security Intelligence Service, http://www.nzsis.govt.nz/about-us/our-purpose/ (Date of use: 24 May 2014).

48 Parliamentary Commissioner for the Environment: Functions and Powers, http://www.pce.parliament.nz/about-us/functions-and-powers/ (Date of use: 24 May 2014).

The role of the **Independent Police Conduct Authority** (hereinafter referred to as "IPCA") is defined as being an independent body established by Parliament, with the central function of keeping watch over the Police.[49]

The information pertaining to the **Solicitor-General** is to be found on the official webpage of the **Crown Law Office,** explaining their role which includes in the main the administration of law.[50]

The role of the **State Services Commission** (hereinafter referred to as the "SCC"), includes the employment of public servants, protecting the public service from political interference, and ensuring the political neutrality of the public service.[51]

The role of the **Health and Disability Commissioner** (hereinafter referred to as the "HDC"), and relating to the Health and Disability Commissioner, includes ensuring that the rights of consumers are upheld, and that any complaints regarding the health and disability services are dealt with fairly and efficiently. [52]

Section 16 of the PDA NZ provides for the circumstances in which an appropriate authority may refer a disclosure from the one to the other. Circumstances in which an appropriate authority to whom a protected disclosure has been made believes, after having consulted with another appropriate authority, that the other appropriate authority would more conveniently and suitably investigate the matter, may so refer the information to the other appropriate authority.[53] Such other appropriate authority is required to promptly inform the whistle-blower that the matter has so been referred[54]. When such a protected disclosure is referred from one appropriate authority to another, the protected disclosure does not lose its status as a protected

49 Independent Police Conduct Authority: About us, http://www.ipca.govt.nz/Site/about/default.aspx (Date of use: 24 May 2014).
50 Crown Law Office: About us, http://www.crownlaw.govt.nz/pagepub/docs/about/officers.asp (Date of use: 24 May 2014).
51 State Services Commission: The Role of the SCC, http://www.ssc.govt.nz/sscer (Date of use: 24 May 2014).
52 Health and Disability Commission: The Commissioner, http://www.hdc.org.nz/about-us/the-commissioner (Date of use: 24 May 2014).
53 Section 16(1) of the PDA NZ.
54 Section 16(2) of the PDA NZ.

disclosure as a result of the referral[55] and further to this there is nothing that prevents a protected disclosure from being so transferred more than once.[56]

9.3.5 The protection offered by the PDA NZ

Sections 17 to 19 offer protection to both the primary and secondary whistle-blowers in respect of three categories, namely, personal grievances, immunity from criminal and civil proceedings and confidentiality. Within this context reference will be made to 'the authority'. This has reference to the Employment Relations Authority established by section 156 of the ERA, and with the powers of the authority being provided for in terms of section 157 of the ERA. The authority is an investigative body, responsible for the resolution of employment relationship problems, by establishing the facts and making determinations in accordance with the substantial merits of the case, and without regard to technicalities.[57] In fulfilling its role, the authority must comply with the principles of natural justice,[58] aim to promote good faith behaviour,[59] support successful employment relationships[60] and generally further the objectives of the ERA.[61] The authority must also act as it thinks fit, and in good conscience, and may not do anything that is inconsistent with the ERA, any regulations made under ERA or the employment agreement.[62]

It would seem that the authority is comparable with South Africa's CCMA.

Section 186 of the ERA provides for the establishment of the Employment Court.[63] The jurisdiction of the Employment Court is provided for in terms of section 187 of the ERA, which provides that the court has exclusive jurisdiction to hear and determine

55 Section 16(3) of the PDA NZ.
56 Section 16(4) of the PDA NZ.
57 Section 157(1) of the ERA.
58 Section 157(2)(a) of the ERA.
59 Section 157(2)(b) of the ERA.
60 Section 157(2)(c) of the ERA.
61 Section 157(2)(d) of the ERA.
62 Section 157(3) of the ERA.
63 **Section 186 Employment Court**
(1) This section establishes a court of record, called the Employment Court, which, in addition to the jurisdiction and powers specially conferred on it by this Act or any other Act, has all the powers inherent in a court of record.
(2) The court established by subsection (1) is declared to be the same court as the Employment Court established by section 103 of the Employment Contracts Act 1991.

inter alia elections under section 179[64], whether heard under ERA or another Act which confers the necessary jurisdiction; any actions instituted for the recovery of penalties under the provisions of ERA; matters which has been referred to it by the Authority in terms of the provisions of section 177[65] and the like.

It is opined that the Employment Court is similar to the South African LC.

9.3.5.1 Personal grievance

Section 17(1) of the PDA NZ provides that where an employee makes a protected disclosure as provided for in the PDA NZ, and who claims to have suffered retaliatory action from his or her employer or former employer. Should that retaliatory action in question consist of or include dismissal then that employee may have a personal grievance as provided for in section 103 (1) (*a*) of the Employment Relations Act 2000.[66] Alternatively, should the retaliatory action in question consist of action other than dismissal, or such other action in addition to dismissal, then that employee may have a personal grievance as provided for in section 103 (1) (*b*) of the Employment Relations Act 2000.[67] In terms of the provisions of section 17(2) of the PDA NZ, section 17(1) only applies to employees within the meaning of the ERA.

Section 6 of the ERA defines an employee and includes *inter alia* the following:

- A person of any age who has been employed to perform work for hire in terms of a contract of service;
- A homeworker;
- Excluding a volunteer, persons engaged in film production work (actor, stunt performer, extra, singer, dancer, entertainer and the like). Note that the exclusion does not apply to such persons involved in film production work if

64 **Section 179 Challenges to determinations of Authority**
(1) A party to a matter before the Authority who is dissatisfied with the determination of the Authority or any part of that determination may elect to have the matter heard by the court.

65 **Section 177 Referral of question of law**
(1) The Authority may, where a question of law arises during an investigation,—
(a) refer that question of law to the court for its opinion; and
(b) delay the investigation until it receives the court's opinion on that question.

66 Section 17(1)(*a*) of the PDA NZ.

67 Section 17(1)(b) of the PDA NZ.

such person is a party to a contract of employment which states that he is an employee.

A court may also upon application declare a person as being an employee, subject to the provisions of section 6 (6).

9.3.5.1a A personal grievance in terms of section 103(1)(a) of the ERA

In respect of section 17(1)(*a*) of the PDA NZ should the retaliation against a whistle-blower (primary or secondary) include dismissal, he has because of the unjustifiable dismissal a potential claim in terms of section 103(1) of ERA, and Part 9 of the ERA is applicable.

Part 9 of the ERA is entitled 'Personal grievances, disputes, and enforcement', with the objective of this part of the ERA being provided in terms of the provisions of section 101, and which is aimed at resolving employment relationship in an alternative dispute resolution fashion.

9.3.5.1a (i) The test of justification

In determining a personal grievance, in this case dismissal suffered by the whistle-blower, ERA prescribes a test of justification, which is said to be an objective test.[68] The test to be utilised is to measure the employer's conduct lies in determining whether, taking cognisance of all the circumstances, at the time of the dismissal, what a fair and reasonable employer would have done.[69] In applying this test, the authority or court involved must consider the following factors:[70]

- whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
- whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

68 Section 103A(1) of the ERA.
69 Section 103A(2) of the ERA.
70 Section 103A(3) of the ERA.

- whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
- whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

In addition to the factors mentioned above, the authority or court may take into consideration any other factor that it may think appropriate.[71] ERA also provides that the authority or court involved must not hold a dismissal unjustifiable just because of defects in the process that was followed by the employer, if the defects were minor and did not result in the employee being treated unfairly.[72]

9.3.5.1a (ii) Raising a personal grievance the only way

In terms of the provisions of section 113 of the ERA, an employee who has been dismissed, and who wishes to challenge the dismissal or any aspect of the dismissal for any reason, in any court, that challenge may only be brought in the authority under Part 9 as a personal grievance.[73] This in no manner prevents an action under Part 9 brought in order for the employee in question to recover wages pertaining to a period of notice or an alleged period of notice,[74] wages or other money relating to the employment prior to the dismissal of the employee,[75] or other money payable on dismissal.[76]

9.3.5.1a (iii) How a personal grievance is to be raised

Section 114 of the ERA provides for the manner in which a personal grievance is to be raised by a whistle-blower dismissed. Such a grievance is to be raised with the employer within 90 days, which period starts running on the date on which the dismissal occurred or alternatively on the date the dismissal came to the dismissed whistle-blower's notice, whichever date is the later, unless the employer in question

71 Section 103A(4) of the ERA.
72 Section 103A(5) of the ERA.
73 Section 113(1) of the ERA.
74 Section 113(2)(a) of the ERA.
75 Section 113(2)(b) of the ERA.
76 Section 113(2)(c) of the ERA.

consents to the personal grievance being raised after the expiry of such period.[77] Should the employer refuse to consent to the personal grievance being raised after the expiry of the aforesaid experience, the employee may apply to the authority for leave to do so.[78] When such an application is launched the authority is required to give the employer a chance to be heard, and may so grant leave to the employee, subject to such conditions as it may think fit, if the authority is satisfied that:

- the delay in this regard was caused by exceptional circumstances, which may include one or more of the circumstances provided for in terms of section 115;[79] or
- considers it just to grant the application.[80]

For the purposes of section 114(4)(a), the circumstances provided for in section 115, include circumstances in which the employee:

- has been affected or traumatised in such a manner by the matter that he was unable to properly consider raising a grievance within the prescribed time period;[81] or
- made reasonable arrangements to have the grievance raised on his behalf by another, and that other person failed to do so within the prescribed period;[82] or
- the employment agreement applicable to that employee did not contain an explanation of the procedure to be followed in the resolution of employment relationship challenges as required by section 54[83] or section 65[84];[85] or
- in circumstances in which the employer failed to provide reasons for the dismissal in question, and as obliged in terms of section 120(1)[86].[87]

77 Section 114(1) of the ERA.
78 Section 114(3) of the ERA.
79 Section 114(4)(a) of the ERA.
80 Section 114(4)(b) of the ERA.
81 Section 115(a) of the ERA.
82 Section 115(b) of the ERA.
83 Section 54 relates to the form and contents required in respect of a collective agreement.
84 Section 65 relates to the terms and conditions of employment that are required in circumstances in which no collective agreement applies.
85 Section 115(c) of the ERA.
86 **Section 120 - Statement of reasons for dismissal**
(1) Where an employee is dismissed, that employee may, within 60 days after the dismissal or within 60 days after the employee has become aware of the dismissal, whichever is the later, request the employer to provide a statement in writing of the reasons for the dismissal.

Where the authority grants the leave sought by the employee, it must direct that the employer and the employee use mediation in order to attempt to resolve the grievance between them.[88] No personal grievance may be commenced with where the cause of action in respect of the relevant grievance, is older than three years.[89] A grievance is held to have been raised as soon as the employee dismissed has made, or takes reasonable steps to make either the employer or a representative of the employer aware that he (the employee) alleges such a personal grievance that he wishes the employer to attend to.[90] The employee who has so been dismissed may within 60 days of his dismissal or within a 60 day period in which the dismissal comes to his knowledge (whichever is the later) request the employer to provide him with a written statement in which the employer sets out the reasons for his dismissal.[91] The employer is obliged to provide such statement within 14 days after the date on which it was received.[92] Any statement that is made and any information provided in the course of raising a personal grievance or attempting to resolve such a personal grievance is absolutely privileged.[93]

9.3.5.1a (iv) Remedies availed in respect of personal grievances

The remedies that are potentially afforded to a dismissed whistle-blower are provided for in section 123 of the ERA, of which any one or more may be awarded, and which include the following:

- The reinstatement of the dismissed employee in either his previous position or his placement in another position which is no less advantageous that that he was in when he was dismissed;[94]

  It is noted in this regard that reinstatement will be awarded in circumstances in which it reasonable and practicable to do so.[95]

---

(2) Every employer to whom a request is made under subsection (1) must, within 14 days after the day on which the request is received, provide the statement to the person who made the request.

87 Section 115(d) of the ERA.
88 Section 114(5) of the ERA.
89 Section 114(6) of the ERA.
90 Section 114(2) of the ERA.
91 Section 120(1) of the ERA.
92 Section 120(2) of the ERA.
93 Section 121 of the ERA.
94 Section 123(1)(*a*) of the ERA.

Further to this, where the authority of the court provides the remedy of reinstatement to the dismissed whistle-blower, he must so be reinstated immediately or on such date that is specified by the authority or the court, and such reinstatement will be of full force and effect, regardless of any challenge or appeal in this regard, and such reinstatement will remain in full force pending the outcome of such proceedings, unless otherwise ordered.[96]

In terms of the provisions of section 127 of the ERA, the authority may, on the application of the dismissed employee, make an order for the interim reinstatement of the employee, pending the hearing of the personal grievance.[97]

The authority may at any time vary or rescind such an order made in respect of interim reinstatement.[98] So too a court may grant an interim injunction reinstating the employee so dismissed, whilst dealing with the proceedings pertaining to the personal grievance in question.[99]

- The reimbursement of an amount equal to the whole or part of any wages or other money lost by the employee as a result of the personal grievance (in other words as a result of his dismissal);[100]

Section 128 of the ERA provides specifically for such reimbursement of the dismissed whistle-blower as follows:

This section applies where the Authority or the court determines, in respect of any employee,—

- that the employee has a personal grievance; and
- that the employee has lost remuneration as a result of the personal grievance.

95 Section 125(2) of the ERA.
96 Section 126 of the ERA.
97 Section 127(1) of the ERA.
98 Section 127(6) of the ERA.
99 Section 127(7) of the ERA.
100 Section 123(1)(b) of the ERA.

If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.
Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.

Section 130 of the ERA provides for matters relating to wages and the records, section 131which provides for arrears in respect of wages, and section 132 which provides for the consequences for an employer's failure to keep or produce records in respect of wages and time records.

- Payment of compensation to the employee[101], including compensation for:
  (i) humiliation, loss of dignity, and injury to the feelings of the employee;[102] and
  (ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen.[103]

The ERA in respect of the payment of this compensation provides that the employer may be ordered to pay the amount off in instalments, but only if the employer's financial circumstances require this.[104]

- Should the authority or court presiding over the matter find that any workplace conduct or practices are a significant factor in respect of the personal grievance, it may make recommendations to the employer in this regard, and that the employer should take to avoid such personal grievances arising again in future.[105]

101 Section 123(1)(c) of the ERA.
102 Section 123(1)(c)(i) of the ERA.
103 Section 123(1)(c)(ii) of the ERA.
104 Section 123(2) of the ERA.
105 Section 123(1)(c) of the ERA.

- Should the authority or court also find that the employee who has raised the personal grievance was sexually or racially harassed in his employment with the relevant employer, it will also make recommendations to the employer:

    (i) concerning the action the employer should take in respect of the person who made the request or was guilty of the harassing behaviour, which action may include the transfer of that person, the taking of disciplinary action against that person, or the taking of rehabilitative action in respect of that person;[106]

    (ii) about any other action that it is necessary for the employer to take to prevent further harassment of the employee concerned or any other employee.[107]

In determining the relief that may be accorded to a whistle-blower who has been dismissed as a result of his protected disclosure made, the authority or the court will take the whistle-blower's behaviour into account. In this determination the authority or court presiding over the matter will:

- Consider the extent to which the actions of the whistle-blower contributed towards the situation that gave rise to the dismissal;[108] as well as
- Whether the actions in question require a reduction of the remedies that would otherwise have been accorded.[109]

9.3.5.1b Personal grievance in respect of section 103(1)(b) of the ERA

Section 17(1)(*b*) of the PDA NZ provides that where an employee makes a protected disclosure as provided for in the PDA NZ, and who claims to have suffered retaliatory action from either his employer or former employer, then that employee if that retaliatory action consists of action other than dismissal or includes an action in addition to dismissal, may have a personal grievance, for the purposes of paragraph (b) of section 103(1) of the ERA, because of a claim described in that paragraph, and Part 9 of that Act applies accordingly.

106 Section 123(1)(d)(i) of the ERA.
107 Section 123(1)(d)(ii) of the ERA.
108 Section 124(a) of the ERA.
109 Section 124(b) of the ERA.

Section 103(1) (*b*) of the ERA provides that for the purposes of ERA a personal grievance includes any grievance that an employee may have against the employer or previous employer as a result of a claim that the employee's employment or one or more of the conditions of the employee's employment is, are or was affected as a result of unjustifiable action taken by the employer, to the employee's detriment.

Thus the whistle-blower, besides being dismissed as a result of having made the protected disclosure is also protected against all disadvantages in respect of his employment caused by some unjustifiable action perpetrated by the employer. What would constitute such unjustifiable action would be determined in exactly the same manner as that discussed under paragraph 9.5.6.1a (i) *supra*, and as provided for in terms of section 103A of the ERA. The personal grievance is to be raised in the same manner as discussed under paragraph 9.2.6.1a (iii) *supra*, and as provided for in terms of sections 114 and 115 of the ERA. In attempting to resolve or address the personal grievance within this context, any statement made or information given in this context too, are absolutely privileged.[110] The technicalities that may come into play in alleging that the employee has been subjected to a manner of unjustifiable disadvantage with reference to his employment are dealt with within the provisions of section 122 of the ERA which provides that nothing in Part 9 of the ERA or in any employment agreement prevents a finding that a personal grievance is of a kind other than the kind alleged.

The remedies availed to the employee who has lodged the personal grievance within this context are the same as those discussed under paragraph 9.2.6.1a (iv) *supra*, excluding reinstatement in circumstances in which he has not been dismissed.

9.3.5.2 Immunity from civil and criminal proceedings

Section 18 of the PDA NZ provides for immunity of a primary and a secondary whistle-blower from civil and criminal proceedings, as well as disciplinary proceedings by reason of having made the protected disclosure or having referred the relevant information to the appropriate authority. This immunity applies to the whistle-blower despite any prohibition of or restriction on the disclosure of information under any legislation, contract, oath or practice.

110 Section 121 of the ERA.

9.3.5.3 Confidentiality

Section 19 of the PDA NZ provides for the protection of the identity of the whistle-blower in defined circumstances. The person to whom the protected disclosure is made or to whom the protected disclosure is referred is enjoined to use his 'best endeavours' in dealing with the matter, not to disclose any information that might identify the whistle-blower, unless:

- The whistle-blower consents in writing to the disclosure of the information that may identify him;[111] or
- The person who has knowledge of the whistle-blower's identity or information that could lead to his identification reasonably believes that the identifying information is essential:
    - In respect of the effective investigation of the allegations which constitute the protected disclosure;[112] or
    - Regarding the prevention of serious risk to public health or safety, or the environment;[113] or
    - In respect of the principles of natural justice.[114]

Further to this, a request which is made using the Official Information Act 1982 or the Local Government Official Information and Meetings Act 1987[115], may be refused on the basis of being contrary to the provisions of the PDA NZ, if it might identify the relevant whistle-blower, unless such request is made by a constable who is investigating an offence.[116] The Official Information Act 1982's purpose is stated as being as including the following:[117]

- To progressively increase the availability of information to the people of New Zealand, in order to:
    - Enable more effective participation in the making and administration of laws and policies;

111 Section 19(1)(a) of the PDA NZ.
112 Section 19(1)(a)(i) of the PDA NZ.
113 Section 19(1)(a)(ii) of the PDA NZ.
114 Section 19(1)(a)(iii) of the PDA NZ.
115 Parliamentray Counsel Office "Local Government Official Information and Meetings Act 174 of 1987" http://www.legislation.govt.nz/act/public/1987/0174/latest/DLM122242.html (Date of use: 12 April 2014)
116 Section 19(2) of the PDA NZ.
117 Section 4 of the Official Information Act 1982.

    - Promote accountability of the Ministers of the Crown and officials;
- To provide proper access to official information by a person, in respect of such information that relates to that person;
- To protect official information in a manner that is consistent with public interest and the preservation of privacy.

The Official Information Act 1982 is based on the principle of availability. The question of whether official information is to be made available will be determined in accordance with the objectives of the Act, and the principle that information shall be made available unless there is a good reason for withholding the information requested.[118] Section 6 provides for conclusive reasons for withholding official information, in respect of the principle of availability. Two such conclusive reasons are that if the making available of the requested information would be likely to prejudice the maintenance of the law, including the prevention, investigation, detection of offences, and the right to a fair trial,[119] or endanger the safety of any person.[120]

Section 9 provides for 'other' reasons for withholding official information, when considered on the basis on the principle of availability as expressed in terms of section 5 of the Act. Section 9 provides that in circumstances in which this section applies, good reason for the withholding of official information exists, for the purpose of the provisions of section 5, unless, considering the circumstances of a particular case it is so that the withholding of the information is outweighed by other considerations which makes it advantageous in the public interest, to make that information available.[121]

Section 9(2)(ba) is especially noteworthy within the context of protected disclosures, as its provisions will be applicable (withholding the information requested), in circumstances in which it is necessary to protect information that is subject to confidentiality or in circumstances in which a person has or could be forced to provide in terms of the provisions of any legislation, and in circumstances in which

118 Section 5 of the Official Information Act 1982.
119 Section 6(c) of the Official Information Act 1982.
120 Section 6(d) of the Official Information Act 1982.
121 Section 9(1) of the Official Information Act 1982.

the availing of the information would be likely to prejudice the supply of similar information or information from the same source or the public interest.

In respect of the Local Government Official Information and Meetings Act 1987, the purpose thereof is reflected by the provisions of section 4, which provides that the main objectives of the Act are to:

- Provide for the availability of official information held by a local authority, to the public, and to promote the open and public transaction of business at meetings of the local authorities;[122]
- Provide proper access to each person, regarding official information relating to that person;[123] and
- To protect official information to the extent that it is consistent with public interest and the preservation of personal privacy.[124]

The Local Government Official Information and Meetings Act 1987 is based on the principle of availability. The question of whether official information is to be made available will be determined in accordance with the objectives of the Act, and the principle that information shall be made available unless there is a good reason for withholding the information requested.[125] Conclusive reasons for withholding information requested, in accordance with the principle of availability are stated as being the circumstances in which the making available of the relevant information would be likely to prejudice the maintenance of the law, including for example the prevention, investigation, detection of offences, and the right to a fair trial,[126] or endanger the safety of any person.[127]

Section 26 further deals with reasons for the refusal of personal information, and more specifically section 26(1)(c) provides that the disclosure of information or of information identifying the person the supplied the information would breach an express or implied promise which was made to the person who supplied the

122 Section 4(a) of the Local Government Official Information and Meetings Act 1987.
123 Section 4(b) of the Local Government Official Information and Meetings Act 1987.
124 Section 4(c) of the Local Government Official Information and Meetings Act 1987.
125 Section 5 of the Local Government Official Information and Meetings Act 1987.
126 Section 6(a) of the Local Government Official Information and Meetings Act 1987.
127 Section 6(b) of the Local Government Official Information and Meetings Act 1987.

information and which was to the effect that the information or the identity of the person would be held in confidence.

The Ombudsman may provide both information and guidance to organisations and employees regarding the circumstances in which whistle-blowers may anonymously make the relevant protected disclosure.[128] The Ombudsman may also provide both advice and assistance to organisations and other person regarding the obligation to protect the identity of the whistle-blower, as provided for in terms of section 19(1) of the PDA NZ.

9.4 Conclusion

The main piece of legislation aimed at the protection of whistle-blowers in New Zealand is the PDA NZ, supplemented as has been deemed necessary by way of reference by other legislation in respect of definitions, restrictions, and functions., such as for example the ERA and HRA.

The purpose of the PDA NZ is two-fold, namely to facilitate the disclosure and investigation of matters of serious wrongdoing by organisations, and the protection of whistle-blowers within this context. A significant role in the protection of whistle-blowers has been allocated to the Ombudsman, which has been vested with the necessary privilege, in respect of *inter alia* oversight regarding the establishment and implementation of the necessary procedures within the private and public organisation sphere, powers of investigation (either at own volition or as a result of a complaint made), and the referral to an alternative appropriate authority such as the SFO, SCC, NZSIS, and the HDC.

The list of individuals to whom the protection in terms of the PDA NZ is extended is not limited only to an employee, but also includes former employees, homeworkers, seconded employees, contract employees, management employees, members of the defence force and armed forces, and volunteer workers, in the employment of public and private organisations with one or more employees. Further to this, specific protection is provided for employees falling within sensitive employment areas such as international relations and the intelligence services. The protection offered also

128 Section 19(3)(a) of the PDA NZ.

expands further, in terms of the provisions of sections 17 to 19 of the PDA NZ, to a person who volunteers supporting information. In this respect it is specifically noted that reference is not made to an employee or a former employee, but a person. The protection offered is specifically held not to be defeated as a result of a whistle-blower not meeting technical requirements pertaining to the procedures to be followed, provided for in the PDA NZ (sections 7 – 10).

The protection offered to whistle-blowers in terms of the provisions of sections 17 to 19 of the PDA NZ, can be categorised into three main categories, namely personal grievances, immunity from criminal and civil proceedings, and confidentiality.

CHAPTER 10: THE WHISTLE-BLOWER IN NEW ZEALAND'S POSITION MEASURED

10.1 Introduction

As indicated the main piece of legislation aimed at the protection of whistle-blowers in New Zealand is the PDA NZ, supplemented as has been deemed necessary by way of reference by other legislation in respect of definitions, restrictions, and functions., such as for example the ERA and HRA. The purpose of the PDA NZ is two-fold, namely to facilitate the disclosure and investigation of matters of serious wrongdoing by organisations, and the protection of whistle-blowers within this context.

Liyanarachchi and Newdick[1] submit sentiments in respect of the importance and the recognition of the importance of whistle-blowers and protecting whistle-blowers in New Zealand especially in light of the assertion that silence is not in the public interest. [2]

The New Zealand Institute of Chartered Accountants has stated that in the main the importance of the whistle-blower may also be attributed to their *inter alia:*

- Their intimate knowledge and understanding of the relevant organisation's processes and activities;
- Serious wrongdoing impacts significantly on employee welfare, providing the employees with a powerful incentive to blow the whistle; and
- That whistle-blowers may act as a deterrent to potential wrongdoers. [3]

A 2012 survey regarding the attitudes held towards whistle-blowers was reported on by Rob Stock. The findings of the survey included that New Zealand's whistle-blower protection is far from clear to the population and not well-known with approximately 8 in 10 people being unaware of the protection afforded to whistle-blowers and the

---

1 Liyanarachchi and Newdick 2009 *Journal of Business Ethics* http://ecampus.nmit.ac.nz/moodle/file.php/4599/Whistleblowing/Liyanarachchi_Newdick_-The_Impact_of_Moral_Reasoning_and_Retaliation_on_Whistle-Blowing_New_Zealand_Evidence_2009.pdf (Date of use: 24 May 2014).

2 King A "Hansard and Journals New Zealand Parliament" 2007 http://www.parliament.nz/en-NZ/PB/Debates/Debates/9/7/c/48HansD_20071018_00000926-Protected-Disclosures-Amendment-Bill-First.htm. (Date of use: 24 May 2014).

3 Institute of Chartered Accountants of New Zealand (ICANZ presently NZICA): 2003, Improving Corporate Reporting: A Shared Responsibility, Report for the Minister of Commerce (ICANZ, Wellington, New Zealand).

circumstances in which such protection would be afforded. Further to this it was found that it was unknown that the Office of the Ombudsman is able to take anonymous complaints disclosed.[4]

As such it would seem that there is nothing extraordinarily different in respect of the rationale behind the protection of whistle-blowers in New Zealand, or even the sentiments regarding whistle-blowing and whistle-blowers.

10.2 The whistle-blower in New Zealand's position measured

Under this heading, the relevant provisions of the PDA NZ, and other related legislation will be analysed and measured in accordance with the table set out in Chapter 1 hereof.

4 Stock 2012, http://www.stuff.co.nz/the-press/news/7965398/NZs-attitudes-to-whistleblowers (Date of use: 24 May 2014).

Measurable 1:	Definition of a protected disclosure includes all *bona fide* disclosures against various types of unlawful acts including serious human rights violations, life, liberty and health.			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
New Zealand	x		Section 6 of the PDA NZ, supplemented by the definition of "serious wrongdoing" in section 3 of the PDA NZ	It is noted that human rights violations, life and liberty are not specifically listed within the text of section 6; however, it is opined that the definition as per section 3 could potentially cover all the categories within this measurement point. It is noted that section 6 makes it clear that it relates only to employees.
Measurable 2:	Covers public and private sector whistle-blowers, including armed forces and special forces.			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
New Zealand	x		Definition of an "organisation" in section 3 of the PDA NZ makes it clear that whistle-blowers in both the public – and private sectors are afforded the relevant protection availed. The definition of an "employee" within section 3 of the PDA NZ. The definition of "public sector organisation" within section 3 of the PDA NZ.	 This definition includes members of the armed forces. This definition includes both the intelligence and security agency.

Measurable 3:	Provides for various legal issues as set out below:			
Country/ Territory New Zealand	*Yes*	*No*	*Evidence*	*Comment/Other*
Employment laws	x		Section 17 of the PDA NZ	This relates to dismissal in retaliation for blowing the whistle, retaliatory action other than dismissal or in addition to dismissal. In these circumstances the whistle-blowers is enjoined to bring a personal grievance as provided for in terms of section 113 of the ERA. It is to be noted that section 17 only applies to employees within the meaning of the ERA, and as set out under paragraph 9.2.6.1 in Chapter 9.
Criminal law	x		Section 18 of the PDA NZ Section 66(1)(*a*) of the HRA	This section gives the whistle-blower immunity in respect of criminal proceedings. This section makes it unlawful for any person to treat or threaten to treat a whistle-blower less favourably as a result of blowing or intending to blow the whistle.
Civil law	x		Section 18 of the PDA NZ	This section gives the whistle-blower immunity in respect of civil proceedings.

Media law		x	There is no evidence in this regard	
Specific anti-corruption measures		x	There is no evidence in this regard	
Interim interdicts	x		Section 127(7) of the ERA	The Employment Court may grant an interim injunction reinstating the whistle-blower dismissed, whilst dealing with the proceedings pertaining to the personal grievance.
Final interdicts		x	There is no evidence in this regard	
Compensation for pain and suffering	x		Section 123(1)(*c*)(i) of the ERA Section 123(1)(*c*)(ii) of the ERA	The Employment Court may also order compensation to the whistle-blower, including compensation for humiliation, loss of dignity and injury to feelings. The ERA goes further by providing for compensation in respect of loss of any benefit, whether or not of a monetary kind which the employee might reasonably have been expected to obtain if the personal grievance had not arisen.
Loss of earnings	x		Section 128 of the ERA	In terms of this section the Employment Court may, when the relevant employee has lost remuneration as a result of the personal

				grievance (whistle-blowing within this context) lost remuneration order the employer to pay such remuneration, or even a sum greater than that lost.
Loss of status[1]	x		Section 123 of ERA Section 127 of the ERA	A dismissed whistle-blower may be reinstated by the Employment Court either in his previous position or placement in another position which is no less advantageous than that from which he was dismissed, but only where reasonable or practicable to do so. The Employment Court may on application of the dismissed whistle-blower make an order for the interim reinstatement of him or her, pending the hearing of the personal grievance. Such order may be varied or rescinded.
Mediation	x		Section 114(5) of the ERA	Where the Employment Court grants leave in respect of a personal grievance, it must direct that the employer and the employee use mediation in order to attempt to resolve

1 In this respect, status is interpreted as meaning status as an employee.

			Sections 114(2) and (6) of the ERA are also relevant in this respect.	the grievance between them.
Legal costs		x	There is no evidence in this regard	
Measurable 4:	Appropriate incentives offered to private and public sectors to put appropriate whistle-blower measures in place			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
New Zealand		x	There is no evidence in this regard	
Measurable 5:	Independent oversight body			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
New Zealand		x	There is no evidence in this regard	Although there is no independent oversight body established in this regard, the pivotal role played by the Ombudsman in theory, as described in Chapter 9 hereof.
Measurable 6:	Ensuring that disclosures are timeously and properly investigated			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
New Zealand		x	There is no evidence in this regard	
Measurable 7:	Ensuring that the identity of the whistle-blower is protected			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
New Zealand	x		Section 19 of the PDA NZ	Subject to certain exceptions, such as 19 (2) of the PDA NZ, coupled with the relevant provisions of the Official Information Act 1982, and the Local Government Official

				Information and Meetings Act 1987. See paragraph 9.2.6.4 of Chapter 9.
Measurable 8:	Protect anyone who makes use of internal whistle-blower procedures in good faith from any retaliation			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
New Zealand	x	x[2]	Section 6(3) of the PDA NZ Section 22 of the PDA NZ	In terms of this section, even a whistle-blower who blows the whistle in good faith on reasonable grounds, but who thereafter finds that his reasonable belief was mistaken, is still protected. Within this context note must be taken of the provisions of section 22 of the PDA NZ, which provides that nothing in the PDA NZ authorises a person to disclose information protected by legal professional privilege, and that the disclosure of such information is not a protected disclosure in terms of the provisions of the PDA NZ.
Measurable 9:	Prohibition of interference with a disclosure by a whistle-blower			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
New Zealand	x		Section 66(1)(*a*) of the HRA	In terms of this section it is unlawful for any person to treat or threaten to treat any

2 The 'no' portion of this answer refers to the 'no person' reference therein. It is noted that the protection is only afforded in this respect of employees.

				person less favourably as a result of blowing the whistle or intending to blow the whistle.
Measurable 10:	In relevant circumstances, external whistle-blowers are protected			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
New Zealand		x	There is no evidence in this regard	The relief availed is in respect of the employment relationship and as provided by the Employment Court by way of a personal grievance.
Measurable 11:	Whistle-blowers acting in good faith when blowing the whistle are protected even if it turns out later that the allegations were unfounded.			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
New Zealand	x		Section 6(3) of the PDA NZ	In terms of this section, even a whistle-blower who blows the whistle in good faith on reasonable grounds, but who thereafter finds that his reasonable belief was mistaken, is still protected.
Measurable 12:	Enforcement mechanism to investigate the whistle-blower's allegations			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
New Zealand		x	There is no evidence in this regard	In respect of the Ombudsman it is noted that in section 22 (4) of the Ombudsman Act 9 of 1975, the Ombudsman has been vested with a discretion. Should no action

				be taken, which to the Ombudsman seems adequate and appropriate within a reasonable time, the Ombudsman may send a copy of its report and the relevant recommendations to the Prime Minister, and thereafter to the House of Representatives.
Measurable 13:	Appropriate protection provided for accusations made in bad faith			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
New Zealand		x	Section 6(3) of the PDA NZ Section 66(2) of the HRA Section 20 of the PDA NZ	Disclosures made in bad faith are not protected. This position is underpinned by this provision. In terms of this section, the protection conferred by the PDA NZ and section 66(1)(*a*) of the HRA do not apply in circumstances where the whistle-blower knowingly makes false allegations or otherwise acts in bad faith.
Measurable 14:	Burden of proof should rest with the employer to prove that the alleged action/ omission wasn't in reprisal due to protected disclosure made			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*

New Zealand		x	There is no evidence in this respect.	
Measurable 15:	The impact and implementation of the legislation measured at regular intervals			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
New Zealand		x	There is no evidence in this respect.	
Measurable 16:	Facilitation by the law of acceptance, participation in whistle-blowing and public awareness of whistle-blowing			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
New Zealand		x	There is no evidence in this respect.	

TABLE 3: EVALUATION OF NEW ZEALAND

10.3 Conclusion

As with the PDA, the full extent of the definitions and provisions of the PDA NZ do not vest only within the pages of its text, but overlap with other legislation such as the ERA, the HRA, and the like.

However, what is clear is the fact that the main focus of the legislation is on the employment relationship, the employee as the whistle-blower and compensation and relief in respect of the employment relationship.

CHAPTER 11: THE POSITION OF THE WHISTLE-BLOWER IN AUSTRALIA

11.1 Introduction

Brown has asserted that whistle-blowing is of vital importance to ensuring in ensuring integrity and accountability in the public sector, which, according to him will not realise unless there is a sound legislative structure in place facilitating and protecting such public interest disclosures. Brown further refers to the many pieces of whistle-blowing legislation in Australia, with strengths in some that other jurisdictions should pay careful attention to, and weaknesses in all the Australian whistle-blowing legislation that need to be addressed, perhaps by way of common answers.[1]

The position of the Australian whistle-blower would be dependent on where, geographically speaking, he would find himself, when blowing the whistle, with, as pointed out by Brown various remedies and principles applicable. The following whistle-blower legislation is currently available in Australia:

Description	**Territory**
Whistleblowers Protection Act 1993	South Australia
Whistleblowers Protection Act 1994	Queensland
Protected Disclosures Act 1994	New South Wales
Public Interest Disclosure Act 2013	Commonwealth
Public Interest Disclosure Act 2012[2]	Australian Capital Territory
Protected Disclosure Act 2012[3]	Victoria
Public Interest Disclosure Act 2002	Tasmania
Public Interest Disclosure Act 2003	Western Australia

1 Brown http://www.griffith.edu.au/_data/assets/pdf_file/0015/151314/full-paper.pdf (Date of use: 26 May 2014).
2 Public Interest Disclosure Act 1994 repealed.
3 Whistleblowers Protection Act 2001 repealed.

TABLE 4: AUSTRALIAN WHISTLE-BLOWER LEGISLATION

Due to the magnitude of the available legislation, it was decided to focus on only the Protected Disclosure Act 85 of 2012, version 2, incorporating amendments as at 11 February 2013 (hereinafter referred to as the "PDA A").

The Whistleblowers Protection Act 2012 (Victoria) commenced on 10 February 2013, replacing the Whistleblowers Protection Act 2001 (Victoria), significantly broadening the scope and processes previously provided for.

Orifici and Webster welcomed the new PDA A, as part of the integrity reforms in Victoria [4], which reforms included the Independent Broad-based Anti-corruption Commission (hereinafter referred to as "IBAC"), which was declared as the head of the new integrity regime, incorporating the Victorian Inspectorate (VI), which oversees IBAC and the Ombudsman, the IBAC Committee, which is responsible for monitoring IBAC's activities and examines IBAC's reports, and the Accountability and Oversight Parliamentary Committee, which has oversight of the Freedom of Information Commissioner and the Victorian Ombudsman.

The making of a protected disclosure in terms of the PDA A is very structured, and can be said to fall into three distinct stages, namely the making of the disclosure, the assessment and determination of the disclosure, and the investigation of the allegations relating to a protected disclosure. It is clear from the text of the PDA A that only a limited number of bodies are permitted to receive disclosures made in terms of the Act, and in turn these public bodies in assessing to ascertain whether a disclosure is a protected disclosure, they are not required to reach a conclusion on this point. They are required to notify the IBAC if they are of opinion that a disclosure may be a protected disclosure. It is in fact the IBAC's role to determine whether a disclosure made is a protected disclosure.

Hereafter should such a determination have been made, IBAC can investigate the protected disclosure complaint should it relate to serious corrupt conduct, or it may

4 Orifici and Webster T A new whistle at work, http://www.liv.asn.au/Mobile/Home/Law-Institute-Journal/Article?NodeID=509756&NodeParentID=509746 (Date of use: 27 May 2014).

be referred to the Chief Police Commissioner, the Victoria Inspectorate or the Ombudsman for investigation of the allegations.

Part 6 of the PDA A provides remedies and protective measures for whistle-blowers against whom retaliatory action is, has or may be taken, which is detrimental in nature.

11.2 The purpose of the PDA A

The purpose of the PDA A is espoused in section 1 thereof as:

- Encouraging and facilitating disclosures of improper conduct by public officer, public bodies and other persons;
- Encouraging and facilitating disclosures of detrimental action which has been taken in reprisal for a person having made a disclosure in terms of the PDA A; and
- Providing protection for persons who make the disclosures[5] as well as persons who may suffer detrimental action in reprisal for such disclosures; and
- Providing for the confidentiality of both the content of the disclosure and the identity of the person who has made the disclosure.

11.3 The information that may be disclosed in accordance with the PDA A

Division 1, sections 9 to 11 of the PDA A provide for the types of information that may be disclosed, in order to qualify as a protected disclosure. The conduct forming the subject of the disclosure may have taken place before the commencement of the PDA A[6], but may not relate to the conduct or actions of any of the following:

- A Public Interest Monitor;[7]

  According to section 3 of the PDA A, the meaning of a Public Interest Monitor, is the same as that accorded to it in terms of section 4 of the Public Interest Monitor Act 2011.[8] In terms of the provisions of section 4 the Public Interest Monitor

5 Section 1(b)(i) of the PDA A.
6 Section 9(2) of the PDA A.
7 Section 9(3)(a) of the PDA A.
8 According to section 1 of the Public Interest Monitoring Act of 2011, the main purposes of this Act are: (a) to establish the offices of Principal Public Interest Monitor and Deputy Public

includes the Principal Public Interest Monitor or a Deputy Public Interest Monitor and the Office of the Special Investigations Monitor.[9]

- The Special Investigations Monitor;[10]
- The Victorian Inspectorate;[11]

In terms of section 3 of the PDA A, the Victorian Inspectorate has the same meaning as that accorded it in terms of section 3(1) of the Victorian Inspectorate Act 2011.

At this point it is deemed necessary to elaborate on the interconnectedness between the Victorian Inspectorate and other agencies which also play a role within the context of the PDA A, such as the Independent Broad-based Anti-Corruption Commission, the Public Interest Monitor and the like, as they are all role players within the context of the Victorian integrity system. A useful starting point in this respect is section 11 of the Victorian Inspectorate Act 2011 (hereinafter referred to as the "VIA").

The Victorian Inspectorate has, *inter alia,* the following functions:

- Monitor the compliance of the Independent Broad-based Anti-corruption Commission (hereinafter referred to as "IBAC")[12] and IBAC personnel;[13]
- Oversee the performance of the IBAC's functions under the PDA A;[14]
- Receive complaints in accordance with the VIA about the conduct of IBAC and IBAC personnel;[15]
- Investigate and evaluate the conduct of IBAC and IBAC personnel in the preform or purported performance of their functions and their duties;[16]

Interest Monitors; and (b) to confer functions on those Public Interest Monitors under this Act and under: (i) the **Major Crime (Investigative Powers) Act 2004** ; and (ii) the **Surveillance Devices Act 1999** ; and (iii) the **Telecommunications (Interception) (State Provisions) Act 1988**; and (iv) the **Terrorism (Community Protection) Act 2003** .

9 According to section 3 of the PDA A, the Special Investigations Monitor has the same meaning as that appointed under section 5 of the Major Crime (Special Investigations Monitor) Act 2004

10 Section 9(3)(c) of the PDA A.

11 Section 9(3)(d) of the PDA A.

12 As established in terms of section 12 of the Independent Broad-based Anti-corruption Commission Act of 2011 (hereinafter referred to as the "IBAC Act").

13 Section 11(2)(a) of the VIA.

14 Section 11(2)(b) of the VIA.

15 Section 11(2)(d) of the VIA.

- Monitor the interaction between IBAC and other integrity bodies, in order to ensure compliance with the relevant laws;[17]
- Compliance, audit and reporting function in respect of the performance of the Public Interest Monitor;[18]
- Monitor the exercise of coercive powers by Victorian Auditor General Office (hereinafter referred to as "VARGO") Officers [19] as well as specified compliance[20] in respect of the Audit Act 1994;
- Receive complaints in respect of VARGO officers' conduct[21], and to investigate and assess such reported conduct;[22] and
- In respect of Ombudsman Officers, it has the following functions –
    - To monitor the exercise of coercive powers by Ombudsman officers, as well as compliance with the procedural fairness requirements in the performance of their duties and functions[23] including the conduct of enquiries, investigations and the like;
- The Victorian Inspectorate must inspect the relevant records of the Public Interest Monitor once annually.[24]

- A Victorian Inspectorate Officer;[25]
- A court.[26]

Excluding the above-mentioned, a natural person may disclose information that shows or tends to show that:

- A person, public officer or a public body has engaged, is engaging or intends to engage in improper conduct;[27] or that

16 Section 11(2)(e) of the VIA.
17 Section 11(2)(f) of the VIA.
18 Section 11(2)(g) and (h) of the VIA.
19 Section 11(3)(a)(i) of the VIA.
20 Section 11(3)(a)(ii) of the VIA.
21 Section 11(3)(b) of the VIA.
22 Section 11(3)(c) of the VIA.
23 Section 11(4)(a)(i) and (ii) of the VIA.
24 Section 13(2) of the VIA.
25 Section 9(3)(e) of the PDA A.
26 Section 9(3)(f) of the PDA A.
27 Section 9(1)(a)(i) of the PDA A.

- A public officer or a public body has taken, is taking or intends to take detrimental action against a person that is in contravention of section 45 of the PDA A;[28]

11.3.1 Improper conduct defined

The meaning of 'improper conduct' is defined in terms of the provisions of section 4 of the PDA A, and for the purposes of the Act includes corrupt conduct;[29]

In terms of the provisions of section 3 of the PDA A, corrupt conduct bears the same meaning as it does in terms of section 4 of the IBAC Act, and which provides that corrupt conduct includes conduct by:

- Any person which negatively affects the honest performance of the functions held by a public officer or public body;
- A public officer or public body which involves the dishonest performance of his, her or its public functions;
- A public officer or public body which involves knowingly and recklessly breaching public trust;
- A public officer or public body and which involves the misuse of information or material obtained in the course of his, her or its public functions, and which would, if proved, beyond a reasonable doubt constitute an offence.

Such corrupt conduct would include conduct for the purposes of the Act even if it occurred outside Victoria and Australia.

However, conduct which is specifically excluded from the provisions of the PDA A, in terms of the provisions of section 4 (3) is the conduct of any person that may be considered by the Court of Disputed Returns in relation to a petition under Part 8 of the Electoral Act 2002.

11.3.2 Detrimental action defined

Detrimental action is defined by section 3 of the PDA A and includes action which causes injury, loss, damage, intimidation, harassment, discrimination, disadvantage

28 Section 9(1)(a)(ii) of the PDA A.
29 Section 4(1)(a) of the PDA A.

in respect of employment, career, profession, trade or business, and would include the taking of disciplinary action.

11.3.3 Identification of the alleged perpetrator

In terms of the provisions of section 10 of the PDA A, a disclosure may be made, even in circumstances in which the whistle-blower cannot identify the person or the body to whom the disclosure relates; in other words, if the alleged wrongdoer is unknown to the whistle-blower.

11.3.4 Disclosures under other Acts

In terms of the provisions of section 11 of the PDA A, a disclosure or a notification made in terms of other legislation, may still be a disclosure made in terms of the provisions of the PDA A.

11.4 To whom and how the disclosure is to be made

In terms of the provisions of Division 2 of the PDA A, it is specified how and to whom disclosures must be made.

A disclosure must be made in accordance with prescribed procedure[30], and despite any provision contrary to that of the PDA A, with the exclusion of the Charter of Human Rights and Responsibilities Act 2006, a disclosure may be made orally, in writing and anonymously.[31] Disclosures, within the prescribed circumstances may be made to IBAC[32] or the Victorian Inspectorate[33], the Ombudsman[34], a member of police personnel other than the Chief Commissioner of the Police or IBAC[35] where it concerns a member of the police, and disclosures relating to a member of Parliament or Ministers of the Crown are to be made to the Speaker of the Legislative Assembly or IBAC, depending on the standing of the Minister in question.[36]

30 Section 12(1) of the PDA A.
31 Section 12(2) of the PDA A.
32 Section 14 of the PDA A.
33 Section 15 of the PDA A.
34 Section 16 of the PDA A.
35 Section 18 of the PDA A.
36 Section 19 of the PDA A.

11.5 Disclosures to which the protected disclosures scheme does not apply

Division 3 of the PDA A provides for disclosures to which the protected disclosure scheme does not apply. A disclosure made will not be a protected disclosure if at the time that it is made, the person making the disclosure expressly states in writing that the disclosure so made is not a disclosure made for the purposes of the PDA A.[37]

Further to this, a disclosure that has been made by an officer or employee of an investigative entity, made in the performance of his functions or duties under the legislation in terms of which the investigative entity is authorised to investigate protected disclosures, will not amount to a protected disclosure, unless:

- at the time at which the said disclosure is made, the person making the disclosure expressly states in writing that he is making the disclosure for the purposes of the PDA A;[38] and
- the disclosure so made is otherwise made in accordance with the provisions of Division 2 of the PDA A.[39]

11.6 Notification of and the assessment of disclosures

The PDA A requires that in set circumstances, for example the IBAC and the Victorian Inspectorate has to be notified that a disclosure has been made, and in respect of which it is then required to assess the disclosure so made and make a determination as to whether it indeed qualifies as a protected disclosure or not. A note has been incorporated into the Act, under section 26 which states that the protection afforded in terms of Part 6 of the PDA A applies to a protected disclosure whether or not the IBAC has determined that the disclosure is a protected disclosure. The same note has been incorporated under section 31, and in respect of the Victorian Inspectorate.

Should the IBAC determine that a disclosure that has been made is a protected disclosure, it is required to deal with the disclosure in accordance with the IBAC Act[40]

37 Section 20(1) of the PDA A.
38 Section 20(2)(a) of the PDA A.
39 Section 20(2)(b) of the PDA A.
40 Section 32 of the PDA A.

and if the Victorian Inspectorate makes such a determination, it is required to deal with the disclosure in accordance with the VIA[41]

11.7 Related disclosures made

If the person who made the protected disclosure complaint which was made to an investigating entity, makes a related disclosure, it is taken to be part of the (initial) protected disclosure complaint[42], and is required to be investigated as such.[43] If another person, in other words someone other than the initial whistle-blower makes a related disclosure to an investigating entity, the investigating entity is required to notify the related disclosure to the IBAC for assessment, and only if the investigating entity considers that the related disclosure is in fact a protected disclosure.[44]

11.8 Protection of the person making the protected disclosure

The protection of the whistle-blower is dealt with under Part 6 of the PDA A. Part 6 is said to apply to a protected disclosure made from the time that the disclosure has been made, whether or not the entity to whom the disclosure has been made notifies the IBAC and whether or not the IBAC or the Victorian Inspectorate has determined that the disclosure is indeed a protected disclosure complaint.[45] For the purposes of Part 6, any further information provided which is related to a protected disclosure made previously, is to be treated as if it were a protected disclosure.[46] This applies to the information disclosed, whether it is disclosed either orally or in writing to the entity to which the protected disclosure was made, the IBAC, the Victorian Inspectorate or an investigating entity that is investigating the protected disclosure made.[47]

11.8.1 Immunity from liability

The person who makes the protected disclosure is not subject to any civil or criminal liability, or any liability arising by way of an administrative process, including disciplinary action, for having made the protected disclosure.[48] However, a person

41 Section 33 of the PDA A.
42 Section 35(a) of the PDA A.
43 Section 35(c) of the PDA A.
44 Section 36 of the PDA A.
45 Section 38(1) of the PDA A.
46 Section 38(2) of the PDA A.
47 Section 38(3) of the PDA A.
48 Section 39(1) of the PDA A.

making a disclosure will not enjoy the afore-mentioned immunity if the person who in making the disclosure contravenes section 72(1) or (2) in relation to the information disclosed.[49]

Section 72 refers to the fact that it is an offence to make a false disclosure or to provide false further information. Should a person provide false or misleading information, in a material particular, intending that the information so provided be acted on as a protected disclosure, 120 penalty units or 12 months imprisonment, or both, may be imposed.[50] If a person provides further information relating to a protected disclosure made by him or her, knowing that further information to be false or misleading in a material particular provided, 120 penalty units or 12 months imprisonment, or both, may be imposed.[51]

However, confidentiality provisions do not apply within this context.

11.8.2 Confidentiality provisions do not apply

Without limiting the provisions of section 39 as afore-mentioned, a person who makes a protected disclosure:

- does not by doing so commit an offence under section 95 of the Constitution Act 1975 or a provision of any other Act which imposes a duty to maintain confidentiality with respect to a matter or any other restriction pertaining to the disclosure of confidential information;[52] or
- breach an obligation pertaining to an oath, a rule of law, practice or under an agreement which requires that person to maintain confidentiality or which otherwise restricts the disclosure of information in respect of the relevant matter.[53]

However, once again, the afore-mentioned protection afforded does not apply in circumstances in which the person discloses false information or further information, and thereby contravenes section 72(1) and (2) of the PDA A.

---

49 Section 39(2) of the PDA A.
50 Section 72(1) of the PDA A.
51 Section 72(2) of the PDA A.
52 Section 40(1)(a) of the PDA A.
53 Section 40(1)(b) of the PDA A.

Section 95 of the Constitution Act 1975 (as referred to above) provides that a person employed, temporarily or permanently in any position in the service of the State of Victoria will not:

- Comment publicly on the administration of any department in the State of Victoria;
- Use any information accessed as a result of his employment or association with the public service, except in the performance of his official duties;
- Use or attempt to use, whether directly or indirectly, any influence relating to his salary or position of him or anyone else in the public service.

The provisions of section 95 apply to every person employed in the public service, notwithstanding the fact that that person may not be subjected to the Public Administration Act 2004 or the Education and Training Reform Act 2006 or the Transport (Compliance and Miscellaneous) Act 1983 or the Transport Integration Act 2010 or the Police Regulation Act 1958. However, the provisions do not apply to officers in the service of Parliament.

11.8.3 Protection from defamation action

Should a person who has made a protected disclosure be summoned regarding a case of defamation, in respect of the information which forms part of the protected disclosure, there is a defence of absolute privilege in respect of having made a protected disclosure which has been created.[54]

The afore-mentioned protection afforded does not apply in circumstances in which the person discloses false information or further information, and thereby contravenes section 72(1) and (2) of the PDA A.[55]

11.8.4 Liability for own conduct

It is important that a potential whistle-blower within this context take note of the fact that despite anything to the contrary under Part 6 of the PDA A, the person's liability

54 Section 41(1) of the PDA A.
55 Section 41(2) of the PDA A.

for his own conduct is not affected by the person's disclosure of that conduct under the PDA A.[56]

11.8.5 Detrimental action taken in reprisal for a protected disclosure

It will be deemed that a person takes detrimental action against another in reprisal for a protected disclosure, in the following circumstances:

- where the person takes or threatens to take detrimental action against the other because of, or in the belief that the other person or anyone else –
    - has made or intends to make the disclosure in question;[57] or
    - has cooperated or intends to cooperate with any investigation pertaining to the disclosure.[58]
- For any of the above-mentioned reasons, the person incites or allows someone else to take or threaten to take detrimental action against the person.[59]

The person does not take detrimental action against another in reprisal for a protected disclosure, if in so making the disclosure the person has contravened section 72(1) or (2) of the PDA.[60] A person, who takes detrimental action against another person, does not take detrimental action in respect of a protected disclosure, as referred to above [61] if there is a substantial reason for the person taking the relevant action, excluding for the purposes of section 45 of the PDA A.[62]

Section 45 of the PDA relates to protection from reprisal, and provides that a person is not permitted to take detrimental action against another person in reprisal for a protected disclosure which has been made. The penalty for doing so is 240 penalty units or 2 years imprisonment or both.[63]

56 Section 42 of the PDA A.
57 Section 43(1)(a)(i) of the PDA A.
58 Section 43(1)(a)(ii) of the PDA A.
59 Section 43(1)(b) of the PDA A.
60 Section 43(2) of the PDA A.
61 In respect of the provisions of section 43(1)(*a*) of the PDA A.
62 Section 43(3) of the PDA A.
63 Section 45(1) of the PDA A.

11.8.6 Management action is not prevented

The protection afforded to the whistle-blower under Part 6 of the PDA A, is said not to be intended to prevent a manager from taking management action in relation to an employee who has made a protected disclosure.[64] As such, a manager may take management action that qualifies as detrimental action in relation to an employee who has made a protected disclosure but, only if the fact that the person has so made a protected disclosure is not a substantial reason for the manager taking the relevant action.[65]

11.8.7 Protection from reprisal

A person is not permitted to take any detrimental action against a person in reprisal for having made a protected disclosure; the penalty for such action is 240 penalty units or 2 years imprisonment or both.[66] If a person is convicted or found guilty of an offence in respect of section 45, and as afore-mentioned, the court may in addition to the imposition of the prescribed penalty order that within a specified time, the offender pay to the person against whom the detrimental action in question was taken, damages that the court considers appropriate, in order to compensate the person for any injury, loss or damage which has been suffered.[67] In this regard, and without limiting the court's discretion when making an order in respect of compensation for injury, loss or damage[68], the court may also take into account any remedy that has already been granted under section 47 (damages) or section 49 (injunction or order), in relation to the same conduct.[69]

If the employer of a person or someone within the course of employment or while acting as an agent for the employer is convicted or found guilty of contravening section 45, in relation to detrimental action taken against the employee, the court may in addition to imposing the penalty provided for under section 45, and in addition

64 Section 44(1) of the PDA A.
65 Section 44(2) of the PDA A.
66 Section 45(1) of the PDA A.
67 Section 46(1) of the PDA A.
68 As provided for in terms of section 46(1) of the PDA A.
69 Section 46(3) of the PDA A.

to any damages ordered in terms of section 46(1), also order that the employer reinstate or re-employ the person in his former position or a similar position.[70]

11.8.8 An order for damages or reinstatement

A person, who takes detrimental action against another, in reprisal for a protected disclosure, is liable in damages for any injury, loss or damage to the other person and such damages may be recovered in proceedings as for a tort in any court of competent jurisdiction.[71] The term 'tort' is foreign to South African law, and is defined as a civil infraction in respect of which an innocent party may claim damages.

> A tort is an old French word meaning a wrong. Australian law is derived from English common law and knowledge of English history is essential for an understanding of this subject.
> There is today a distinction between a tort and a crime. A tort is where an individual suffers a wrong or injury (such as personal injuries from an accident) the courts may assist that person – the plaintiff - to obtain redress or compensation. A crime is a wrong committed against the community (robbery or murder) and the courts will determine a proper punishment for that the guilty person – that is the criminal law. Criminal law is public law, tort law is private law.
> A person who has by negligence caused harm to another person has committed a tort. The injured party (the plaintiff) may sue for compensation or damages. A person who commits murder is prosecuted by the community and is punished for that crime.[72]

A tort is comparable to action in South African civil proceedings, in respect of a civil wrong alleged in accordance with our substantive law provisions, and as opposed to a crime. Any remedy that may be granted by a court in respect of a tort, including exemplary damages may be granted by a court in proceedings brought under section 47 of the PDA A.[73] Exemplary damages referred to above, are comparative in respect of punitive damages in South African law, and is defined as follows:

> **exemplary damages** n. often called punitive damages, these are damages requested and/or awarded in a lawsuit when the defendant's wilful [sic] acts were malicious, violent, oppressive, fraudulent, wanton, or grossly reckless.[74]

The right of a complainant to bring proceedings for damages in no manner affects any right or remedy available to the complainant, arising from detrimental action.[75]

---

70 Section 46(2) of the PDA A.
71 Sections 47(1) and (2) of the PDA A.
72 Anonymous, Law Vision Pty Ltd, The law of torts, 2008 http://www.lawvision.com.au/uploads/PDFs/Tort%20Law%20.pdf (Date of use: 27 May 2014).
73 Section 47(3) of the PDA A.
74 Anonymous, The Free Dictionary by Farlex, Exemplary Damages, http://legal-dictionary.thefreedictionary.com/exemplary+damages (Date of use: 27 May 2014).

11.8.9 Vicarious liability of public bodies

Section 48 of the PDA A provides for remedies in respect of the vicarious liability of public bodies, and as such, it is first necessary to determine what qualifies as a public body. Section 6 of the PDA A defines a public body as a public body within the ambit of section 6 of the Independent Broadbased Anti-corruption Commission Act 2011, the IBAC or any other body or entity prescribed for the purpose of section 6.

In terms of the provisions of section 6 of the IBAC Act, and as referred to in section 6 of the PDA A, a public body includes a public sector body falling within the ambit of the provisions of section 4(1) of the Public Administration Act 2004, a body established by or under an Act for a public purpose, including a university so established, the Electoral Boundaries Commission established in terms of the Electoral Boundaries Commission Act 1982, a Council, a body performing a public function on behalf of the State, and any other body prescribed for the purposes of the definition provided in section 6.

Should a person in the course of his employment with, or whilst acting as an agent of a public body take detrimental action against another person in reprisal for a protected disclosure in contravention of the provisions of the PDA A:

- The public body, employee or agent are held to be jointly and severally civilly liable for the detrimental action so taken;[76] and
- Further to this, proceedings in respect of damages for reprisal, as provided for in terms of section 47 may be taken against both or either.[77]

A defence is provided to such a public body, if proceedings under section 47 in respect of damages for reprisal is undertaken against it, in that if it is able to prove *on a balance of probabilities* that it took reasonable precautions to prevent the employee or agent, from taking such detrimental action.[78] In this respect, Orifici and Webster[79] opine that in a proceeding brought against a public body, it is a defence if the public

---

75 Section 47(4) of the PDA A.
76 Section 48(1)(a) of the PDA A.
77 Section 48(1)(b) of the PDA A.
78 Section 48(2) of the PDA A.
79 Orifici and Webster "A new whistle at work" *Law Institute Journal* 87 (11) 2013 Victoria, Australia http://www.liv.asn.au/Mobile/Home/Law-Institute-Journal/Article?NodeID=509756&NodeParentID=509746 (Date of use: 27 May 2014)

body is able to prove on a balance of probabilities, that it took reasonable precautions with a view to preventing an employee or agent for taking detrimental action against another, by way of reprisal, for a protected disclosure made.
Orifici and Webster note that what constitutes reasonable precautions is not defined, but would in the ordinary course include the implementation and communication of policies, regular and formal training of employees and agents, and the monitoring of compliance with the relevant policies.

11.8.10 Injunction or order

Section 49 of the PDA A provides for injunctions and orders. An injunction is defined by Stewart[80] as orders made by the courts, restraining or requiring performance of a specific act, in order to give effect to the applicant's legal rights, and typically either restrain or require certain action or conduct; described as either prohibitive or mandatory injunctions.

It is also defined as a court order in terms of which a person is prohibited from or mandated to perform a specific act.[81]

It therefore seems to be comparable with the interdict in South African law.

If upon an application for an order or an injunction[82] the Supreme Court is satisfied that a person has taken or intends to take detrimental action against another in reprisal for a protected disclosure made, the court may order the person who took the detrimental action to remedy that action, or grant an injunction in any terms that the court considers appropriate.[83]

---

80 Stewart C, Injunctions, http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&ved=0CFIQFjAF&url=http%3A%2F%2Fsydney.edu.au%2Flec%2Fsubjects%2Fequity%2FSummer%25202011-12%2FInjunctiions.pptx&ei=nnSEU9_bJuaV7Aap6IGwBQ&usg=AFQjCNFT4sBV6fhxVxhg6_sWFakTbRiB1w&sig2=7oe4LSK458UOKEqYgxcCkg&bvm=bv.67720277,d.ZGU (Date of use: 27 May 2014).

81 Anonymous, The Free Dictionary by Farlex, Injunction, http://legal-dictionary.thefreedictionary.com/injunction (Date of use: 27 May 2014).

82 As provided for in terms of section 50 of the PDA A.

83 Section 49(1) of the PDA A.

11.8.11 The transfer of an employee

An employee of a public service body or a public entity who has made a protected disclosure, and who on reasonable grounds believes that detrimental action will be taken, is being taken or has been taken against him in contravention of the provisions of section 45, may request a transfer in accordance with the provisions of section 51 of the PDA A.[84] Should such an employee request such a transfer, a public service body Head may transfer such employee to duties within another public service body, public entity or a different area of the same public service body on such terms and conditions of employment that considered overall, are not less favourable.[85]

An employee may only so be transferred:

- if the employee requests or consents to the transfer;[86] and
- the public service body or entity Head has reasonable grounds to suspect that detrimental action will be, is being or has been taken against the relevant employee in contravention of section 45 of the PDA A;[87] and
- the public service body or entity Head considers that the transfer of the relevant employee will avoid, reduce or eliminate the risk of detrimental action being taken against the relevant employee;[88] and
- the public service body or entity Head to which the proposed transfer is to be made consent thereto.[89]

11.9 Confidentiality of disclosures

11.9.1 The disclosure of the content of an assessable disclosure

Part 7 of the PDA A provides for the confidentially in respect of protected disclosures made. In terms of its provisions, the content of an assessable disclosure may not be disclosed.[90] An assessable disclosure is defined in section 3 of the PDA A.[91] The

84 Section 51(1) of the PDA A.
85 Section 51(2).
86 Section 51(4)(a) of the PDA A.
87 Section 51(4)(b) of the PDA A.
88 Section 51(4)(c) of the PDA A.
89 Section 51(4)(d) of the PDA A.
90 Section 52(1) of the PDA A.
91 Section 3 of the PDA A: ***assessable disclosure*** means—
a) a disclosure that, under section 21(2), must be notified to the IBAC; or

penalty in respect of disclosing the content of an assessable disclosure in the case of a natural person is 120 penalty units or 12 months imprisonment or both[92] and 600 penalty units in the case of a body corporate.[93]

11.9.2 The identity of the person making the assessable disclosure

Neither a person nor a body is permitted to disclose information that is likely to lead to the identification of the person who has made an assessable disclosure, in other words the whistle-blower.

The penalty for doing so in the case of a natural person is 120 penalty units[94] or 12 months imprisonment or both and 600 penalty units in the case of a body corporate.[95]

Exceptions in this respect are provided for in section 53(2) of the PDA A. Section 54 provides for further circumstances in which the information may be disclosed.

11.9.3 Circumstances in which information may be disclosed

In circumstances provided for in terms of section 54(2) of the PDA A, a person or body may disclose the content or information pertaining to the content of an assessable disclosure, or information likely to lead to the identification of the person who made the said assessable disclosure.[96] Such disclosure may be made in the following circumstances:

- where it is necessary for the purpose of the exercise of functions under the PDA A;[97]

---

b) a disclosure that, under section 21(3), may be notified to the IBAC; or
c) a disclosure that, under section 36(2), must be notified to the IBAC; or
d) a disclosure made in accordance with Division 2 of Part 2 directly to the IBAC; or
e) a disclosure made in accordance with Division 2 of Part 2 to the Victorian Inspectorate under section 17; or
f) a police complaint disclosure that, under section 22, must be notified to the IBAC; or
g) a police complaint disclosure made directly to the IBAC;

92 Section 52(2) of the PDA A.
93 Section 52(2) of the PDA A.
94 Penalty units are the manner in which the amount payable in respect of a fine is calculated, and is set and determined in accordance with the provisions of the Monetary Units Act 2004 (Victoria).
95 Section 53(1) of the PDA A.
96 Section 5 (1) of the PDA A.
97 Section 54(2)(a) of the PDA A.

- by an investigating entity or an officer of the investigating entity, where it is necessary for the exercising of its functions in terms of the provisions of the IBAC Act, the VIA, the Ombudsman Act 1973 or Part IVB of the Police Regulation Act 1958;[98]
- for the purpose of proceeding in respect of an offence against a relevant Act[99] or section 19 of the Evidence (Miscellaneous Provisions) Act 1958[100], arising from an investigation by the Ombudsman;[101]
- for the purpose of a disciplinary process or action that has been instituted in respect of conduct that could constitute an offence against the relevant Act or section 19 of the Evidence (Miscellaneous Provisions) Act 1958, arising from an investigation by the Ombudsman;[102]
- for the purposes of obtaining legal advice or representation in relation to a witness summons, a confidentiality notice, a notice cancelling a confidentiality notice or an order extending a confidentiality notice or in relation to the person's rights, liabilities, obligations and privileges under the relevant Act[103] and by an Australian legal practitioner and an interpreter that may in this regard be involved[104]

98 Section 54(2)(b) of the PDA A.

99 Within this context, section 54(3) defines a relevant Act as follows –
a) this Act; or
b) the **Independent Broad-based Anticorruption Commission Act 2011**; or
c) the **Victorian Inspectorate Act 2011**; or
d) the **Ombudsman Act 1973**; or
e) Part IVB of the **Police Regulation Act 1958**;

100 **19 Penalty for non-attendance, refusing to give evidence etc.**
Every person who—
(a) being served as aforesaid with a summons to attend the commission fails without reasonable excuse to attend or to produce any documents in his custody possession or control which he is required by the summons to produce; or
(b) happening to be present before the commission and being required so to do refuses to be sworn or without lawful excuse refuses or fails to answer any question touching the subject-matter of inquiry or to produce any document— shall be guilty of an offence against this Act and liable to be dealt with in accordance with section 20

101 Section 54(2)(c) of the PDA A.

102 Section 54(2)(d) of the PDA A.

103 Section 54(2)(e) of the PDA A.

104 Section 54(2)(f) and (g) of the PDA A.

11.9.4 The disclosure of advice

Beside the confidentiality provisions as discussed above, the PDA A also protects certain advice given in respect of protected disclosures, and as provided for in section 74 thereof. In terms of the provisions of section 74:

- A person who is advised by an entity under section 24(2),[105] 25(2)[106] or 37(1)[107] that a disclosure or related disclosure made by the relevant person to the entity has been notified to the IBAC for the purposes of assessment, may not disclose this, except in circumstances provided for in terms of section 74(5) of the PDA A.
    - Contravention of this section carries a penalty of 60 penalty units or 6 months imprisonment or both.[108]
- A person who has been advised by the IBAC or the Victorian Inspectorate under section 28(1) that a disclosure made by the person has been determined to be a protected disclosure complaint, may not disclose this, except in circumstances provided for in terms of section 74(5) of the PDA A.
    - Contravention of this section carries a penalty of 60 penalty units or 6 months imprisonment or both.[109]
- A person who receives information as referred to above in respect of notification or determination, may not disclose this, except in circumstances provided for in terms of section 74(5) of the PDA A.
    - Contravention of this section carries a penalty of 60 penalty units or 6 months imprisonment or both.[110]

---

105 This section applies if a disclosure is made to an entity other than a Presiding Officer. More specifically, section 24(2) provides that – If the entity notifies the disclosure to the IBAC under section 21(2) or 22(2), the entity must advise the person who made the disclosure that the disclosure has been notified to the IBAC for assessment under this Act.

106 This section applies in circumstances in which a disclosure is made to a Presiding Officer. More specifically section 25(2) provides that – If the Presiding Officer notifies the disclosure to the IBAC under section 21(3), the Presiding Officer may advise the person who made the disclosure that the disclosure has been notified to the IBAC for assessment under this Act.

107 Section 37(1) pertains to related disclosures notified to the IBAC, and more specifically provides – If a related disclosure is notified to the IBAC by an investigating entity under section 36 (2), the investigating entity must advise the person who made the related disclosure that the related disclosure has been notified to the IBAC for assessment under this Act.
Section 36(2) provides that despite the provisions of section 21, the investigating entity must notify the related disclosure to the IBAC for assessment under Part 3, if, and only if, the investigating entity considers that the related disclosure is a protected disclosure.

108 Section 74(1) of the PDA A.

109 Section 74(2) of the PDA A.

- Another person who receives such information in respect of notification and determination may not disclose this, except in circumstances provided for in terms of section 74(5) of the PDA A.
    - Contravention of this section carries a penalty of 60 penalty units or 6 months imprisonment or both.[111]

Section 74(5) specifies the circumstances in which such information may be imparted as being the following:

- Disclosure, where it is necessary for the purpose of obtaining any relevant information, a document or a thing to comply with a witness summons[112], a confidentiality notice[113], a notice cancelling a confidentiality notice or an order extending a confidentiality notice or in order to comply with section 74(5) of the PDA A,[114] including circumstances in which the person involved –
    - Does not have sufficient knowledge of the English language to understand the nature of a witness summons, a confidentiality notice, a notice cancelling a confidentiality notice or an order extending a confidentiality notice. Here it extends to the interpreter used.[115]
    - If the person is under 18 years of age, it extends to his parent, guardian or independent person;[116]
    - If the person is illiterate or has a mental, physical or other type of impairment which prevents him from understanding the nature of a

---

110 Section 74(3) of the PDA A.
111 Section 74(4) of the PDA A.
112 A witness summons is defined in terms of section 74(6) as follows –
witness summons means—
(a) a witness summons issued by the IBAC under section 82F(1) of the **Independent Broad-based Anticorruption Commission Act 2011**; or
(b) a witness summons issued by the Victorian Inspectorate under section 33E(1) of the **Victorian Inspectorate Act 2011**; or
(c) a witness summons issued by the Ombudsman under section 17 of the **Evidence (Miscellaneous Provisions) Act 1958**.
113 A confidentiality notice is defined in terms of section 74(6) as follows –
confidentiality notice means—
(a) a confidentiality notice issued by the IBAC under section 33C(1) of the **Independent Broad-based Anticorruption Commission Act 2011**; or
(b) a confidentiality notice issued by the Victorian Inspectorate under section 28E(1) of the **Victorian Inspectorate Act 2011**; or
(c) a confidentiality notice issued by the Ombudsman under section 26C(1) of the **Ombudsman Act 1973**;
114 Section 74(5)(a) of the PDA A.
115 Section 74(5)(a)(i) of the PDA A.
116 Section 74(5)(a)(ii) of the PDA A.

witness summons, a confidentiality notice, a notice cancelling a confidentiality notice or an order extending a confidentiality notice. Here it extends to the independent person who assists;[117]

An exception in this regard also applies to circumstances of disclosure for the purposes of obtaining legal advice or representation in relation to:

- a witness summons, a confidentiality notice, a notice cancelling a confidentiality notice or an order extending a confidentiality notice or compliance with section 74(5) of the PDA;[118]
- the person's liabilities, privileges and obligations within the context of the PDA A.[119]

Further exceptions in this regard relate to the following:

- disclosure by an Australian legal practitioner who receives a disclosure in circumstances as described above, and provided for in terms of section 74(5)(*b*) of the PDA A, for the purposes of complying with a legal duty of disclosure or a professional obligation which arises as a result of his professional relationship with his client;[120]
- disclosure for the purpose of making a complaint to the IBAC[121] or the Victorian Inspectorate[122];
- disclosure for the purposes of complying with a witness summons served on the person by either IBAC or the Victorian Inspectorate;[123]
- disclosure of information that has already been published in a report by IBAC or has otherwise been made public;[124]
- disclosure to a person's spouse or domestic partner;[125]
- disclosure to a person's employer, manager or both the employer and manager;[126]

117 Section 74(5)(a)(iii) of the PDA A.
118 Section 74(5)(b)(i) of the PDA A.
119 Section 74(5)(b)(ii) of the PDA A.
120 Section 74(5)(c) of the PDA A.
121 Section 74(5)(d)(i) of the PDA A.
122 Section 74(5)(d)(ii) of the PDA A.
123 Section 74(5)(e) of the PDA A.
124 Section 74(5)(f) of the PDA A.
125 Section 74(5)(g) of the PDA A.

- disclosure that is otherwise authorised or required to be made by or under a relevant Act or the PDA A.[127]

11.10 Guidelines, procedures and education in respect of the PDA A

Part 9 of the PDA A provides for guidelines, procedures and education in respect of its content, providing *inter alia* that:

- the IBAC is responsible for issuing guidelines consistent with the PDA A and related regulations in respect of the facilitation of the making of disclosures to entities, the handling of disclosures and related notifications and for the protection of persons from detrimental action in contravention of section 45 of the PDA A;[128]
- the IBAC is responsible for issuing guidelines consistent with the PDA A and related regulations in respect of the management of the welfare of any person who has made a protected disclosure, and any person affected by a protected disclosure whether as a witness or the person who is the subject of the investigation;[129]

In doing so the IBAC must ensure that its guidelines are readily available to the public, and relevant entities and their members, officers and employees, and each member of the police.[130] Section 60 of the PDA A provides for structured review of the procedures to be developed, by IBAC. So too, with reference to the procedures developed in terms of section 58 of the PDA A, IBAC is empowered to make recommendations as it deems fit, and should the IBAC deem that insufficient steps have been taken by the entity is this respect, may after considering any comments in this regard by the entity, send a copy of the recommendations so made to the relevant Minister.[131],[132]

---

126 Section 74(5)(h) of the PDA A.
127 Section 74(5)(i) of the PDA A.
128 Section 57(1) of the PDA A.
129 Section 57(2) of the PDA A.
130 Section 57(3) of the PDA A.
131 In this regard section 61(3) defines relevant Minister as follows –
a) in relation to a public body—the Minister responsible for that public body;
b) in relation to a public officer—the Minister responsible for that public officer.
132 Section 62(1) and (2) of the PDA A.

11.11 Reports in respect of the PDA A

Part 10 of the PDA A requires that information relating to the obligations, functions and the like provided for by the PDA A be addressed in the annual reports of the IBAC,[133] the Victorian Inspectorate,[134] other investigating entities[135] and bodies that are not investigating bodies.[136]

11.12 Conclusion

The PDA A is comprehensive,[137] with references to other pieces of legislation, and bearing in mind that many concepts used therein are left undefined, including such as for example 'employee', being one of the most basic concepts herein. However, at the same time, the comprehensive nature thereof, it is argued, certainly does not lend itself to being user-friendly, combined with the highly technical nature of the provisions and the concepts. It is hoped that the prescribed guidelines envisioned will go a far way in addressing these potential difficulties.

At its core the PDA A envisions a basic three phase process in respect of the making of a protected disclosure, namely, the receipt of the disclosure, the assessment thereof in order to determine whether the disclosure is in fact a protected disclosure, and the investigation of the allegations contained in the protected disclosure.

The PDA A underpins the seriousness with which it views acts of retaliation undertaken against a whistle-blower, on account of having blown the whistle, affording varied methods of protection in this respect, including for example immunity from liability in respect of civil, criminal and disciplinary action, confidentiality in respect of the information contained in the disclosure and the name of the whistle-blower, protection from defamation action, damages, reinstatement and the like.

133 Section 67(1) of the PDA A.
134 Section 68 of the PDA A.
135 Section 69 of the PDA A.
136 Section 70 of the PDA A.
137 Also bearing in mind that the text thereof comprises 189 pages.

CHAPTER 12: THE POSITION OF THE WHISTLE-BLOWER IN AUSTRALIA – VICTORIA, MEASURED

12.1 Introduction

Within the context of this study, due to the proliferation of the whistle-blower legislation in Australia, it was chosen to include and analyse only the PDA A, applicable in Victoria, Australia, incorporating amendments as at 11 February 2013, and which repealed the Whistleblower Protection Act 2001 in its entirety.

The PDA A is comprehensive, interrelated with many other pieces of legislation, and at its core it envisions a basic three phase process in respect of the making of a protected disclosure, namely, the receipt of the disclosure, the assessment thereof in order to determine whether the disclosure is in fact a protected disclosure, and the investigation of the allegations contained in the protected disclosure.

As mentioned, the PDA A underpins the seriousness with which it views acts of retaliation undertaken against a whistle-blower, on account of having blown the whistle, affording varied methods of protection in this respect, including for example immunity from liability in respect of civil, criminal and disciplinary action, confidentiality in respect of the information contained in the disclosure and the name of the whistle-blower, protection from defamation action, damages, reinstatement and the like.

The PDA A's implementation and regulation is in the main overseen by the IBAC, more specifically in respect of the public sector. IBAC within this context is described as having the primary purpose of strengthening the integrity of the Victorian public sector, and in so-doing strengthening the community's trust in public sector accountability. So too IBAC is the first anti-corruption body in Victoria responsible for identifying and preventing serious corruption across the public sector, including Parliament and the judiciary.[1]

1 Anonymous http://www.ibac.vic.gov.au/ (Date of use: 27 May 2014).

IBAC also plays an important role in respect of the education of the public sector as a whole as well as the community concerning the detrimental effect of corruption and how it can be prevented.

12.2 The whistle-blower in Victoria, Australia's position measured

Under this heading, the relevant provisions of the PDA A, and other related legislation will be analysed and measured in accordance with the table set out in Chapter 1 hereof.

Measurable 1:	Definition of a protected disclosure includes all *bona fide* disclosures against various types of unlawful acts including serious human rights violations, life, liberty and health.			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
Victoria, Australia		x	'natural person' Section 9(1)(a)(i) of the PDA A	The PDA A provides that a **natural person** may disclose information that shows or tends to show that a person, a public officer or a public body has, is or will engage in improper conduct or that a **public officer or a public body** has, is or will take detrimental action against a person that is in contravention of section 45 of the PDA A.
			Section 4 of the PDA A	The concept of improper conduct is defined in terms of section 4 of the PDA, and relates to corruption.
			Section 3 of the PDA A	The concept of detrimental action is defined in terms of section 3 of the PDA A, and includes – a) Action causing injury, loss or damage; b) Intimidation or harassment; c) Discrimination, disadvantage or adverse treatment in relation to a

			Section 72 of the PDA A	person's employment, career, profession, trade or business, including the taking of disciplinary action. It is clear that the focus of the PDA A is the eradication of corruption, and does not include irregularities not falling within the definition of corruption, in other words within the 'normal' employment relationship. It is not required that the disclosure made needs to be made in good faith; however, supplying false information or false further information is an offence.
Measurable 2:	Covers public and private sector whistle-blowers, including armed forces and special forces.			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
Victoria, Australia	x	x	'natural person' Section 9(1)(a)(i) of the PDA A	The PDA A provides that a **natural person** may disclose information that shows or tends to show that a person, a public officer or a public body has, is or will engage in <u>improper conduct</u> or that a **public officer or a public body** has, is or will take

				detrimental action against a person that is in contravention of section 45 of the PDA A. However, it is to be noted that whilst it does indeed goes wider than just public and private sector employees, indeed including any natural person, it must be borne in mind that it relates to corruption and related activities in this respect, and as provided for in terms of sections 3 and 4 of the PDA A. The special – and armed forces are neither specifically included nor excluded, and as such from this it may be inferred that they are included unless specifically excluded. However, having said this, it must be borne in mind that information disclosed may not relate to the actions or conduct of the Public Interest Monitor[1], the office of the Special Investigations Monitor[2], the Special

1 Section 9(3)(*a*) of the PDA A.
2 Section 9(3)(*b*) of the PDA A.

				Investigations Monitor [3] and the Victorian Inspectorate [4], the Victorian Inspectorate Office[5] and the courts[6]. No clarification is given in respect of the text of the PDA A how disclosures in this respect may be made.
Measurable 3:	Provides for various legal issues as set out below:			
Country/ Territory Victoria, Australia	*Yes*	*No*	*Evidence*	*Comment/Other*
In this respect, it must be borne in mind that the protected disclosures are only applicable within the realm of corruption and related activities as defined in terms of 'improper conduct'.[7]				
Employment laws	x		Section 39(1) of the PDA A Subject to the provisions of section 72 of the PDA A	The person who makes the protected disclosure is not subject to any liability arising by way of an administrative process, including disciplinary action, for having made such a disclosure. It is an offence to make a false disclosure or to provide false further information, and the

3 Section 9(3)(*c*) of the PDA A.
4 Section 9(3)(*d*) of the PDA A.
5 Section 9(3)(*e*) of the PDA A.
6 Section 9(3)(*f*) of the PDA A.
7 Section 4 of the PDA A.

				immunity is thereby lost.
			Section 45 and 46 of the PDA	If a person, included if the employer of a person or someone in the course of employment or while acting as an agent for the employer is convicted of an offence in respect of section 45[8], the court may in addition to the imposition of the prescribed penalty order and in addition to any damages ordered in terms of section 46(1), also order that the employer reinstate or re-employ the person in his former position or a similar position.[9]
			Section 51 of the PDA A	A whistle-blower employee may in certain circumstances, as provided for in terms of section 51, be transferred.
Criminal law	x		Section 39(1) of the PDA A	The person who makes the protected disclosure is not subject to any criminal liability for having made such a disclosure.

8 In terms of section 45, a person may not take any detrimental action against a person in reprisal for having made a protected disclosure; doing so is a criminal offence which carries a penalty of 240 penalty units or 2 years imprisonment or both.

9 Section 46(2) of the PDA A.

			Subject to section 72 of the PDA A Section 45 of the PDA A	It is an offence to make a false disclosure or to provide false further information, and the immunity is thereby lost. In terms of section 45, a person may not take any detrimental action against a person in reprisal for having made a protected disclosure; doing so is a criminal offence which carries a penalty of 240 penalty units or 2 years imprisonment or both. However, there are also civil law remedies attached hereto as discussed below.
Civil law	x		Section 39(1) of the PDA A Subject to section 72 of the PDA A Section 41 of the PDA A	The person who makes the protected disclosure is not subject to any civil liability for having made such a disclosure. It is an offence to make a false disclosure or to provide false further information, and the immunity is thereby lost. Having made a protected disclosure, should the person be summoned to defend a case of defamation, in respect of information

				which forms part of the protected disclosure, there is a defence of absolute privilege in this respect as a result of having made the protected disclosure.
			Subject to section 72 of the PDA	Section 41(2) specifically provides that as it is an offence to make a false disclosure or to provide false further information, such privilege will thereby be lost.
			Section 45 and 46 of the PDA A	If a person is convicted of an offence in respect of section 45[10], the court may in addition to the imposition of the prescribed penalty order that within a specified time, the offender pay to the person against whom the detrimental action was taken, damages that the court considers appropriate, in order to compensate the person for injury, loss or damage.[11] So too, a person who takes detrimental

10 In terms of section 45, a person may not take any detrimental action against a person in reprisal for having made a protected disclosure; doing so is a criminal offence which carries a penalty of 240 penalty units or 2 years imprisonment or both.

11 Section 46(1) of the PDA A.

			Section 47 of the PDA A	action against another, in reprisal for a protected disclosure, is liable in damages for any injury, loss or damage to the other person, and such damages may be recovered in proceedings as for a tort in any court of competent jurisdiction.
Media law	x		No evidence in this respect	
Specific anti-corruption measures	x		Sections 3 and 4 of the PDA A	The provisions of the entire PDA A are focussed on anti-corruption efforts in strengthening the integrity system.
Interim interdicts	x		Section 49	Provides for injunctions and orders. If upon an application for an order or an injunction the Supreme Court is satisfied that a person has taken or intends to take detrimental action against another in reprisal for a protected disclosure made, the court may order the person who took the detrimental action, to remedy that action, or grant an injunction in any terms that the court considers appropriate.
Final interdicts			See above under interim interdicts	

Compensation for pain and suffering	x		Section 45 and 46 of the PDA A	If a person is convicted of an offence in respect of section 45[12], the court may in addition to the imposition of the prescribed penalty order that within a specified time, the offender pay to the person against whom the detrimental action was taken, damages that the court considers appropriate, in order to compensate the person for injury, loss or damage.[13]
			Section 47 of the PDA A	So too, a person who takes detrimental action against another, in reprisal for a protected disclosure, is liable in damages for any injury, loss or damage to the other person, and such damages may be recovered in proceedings as for a tort in any court of competent jurisdiction.
			Section 48 of the PDA A	Section 48 provides for vicarious liability of public bodies, and in respect of detrimental action taken against a person in reprisal for

12 In terms of section 45, a person may not take any detrimental action against a person in reprisal for having made a protected disclosure; doing so is a criminal offence which carries a penalty of 240 penalty units or 2 years imprisonment or both.

13 Section 46(1) of the PDA A.

				a protected disclosure made. In terms of section 48 the public body, employee or agent are held to be severally civilly liable for the detrimental action so taken.
Loss of earnings	x		As above, in terms of damages	
Loss of status	x		As above, in terms of damages	
Mediation		x	No evidence in this respect	
Legal costs		x	No evidence in this respect	
Measurable 4:	Appropriate incentives offered to private and public sectors to put appropriate whistle-blower measures in place			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
Victoria, Australia	x		Section 48 of the PDA	The vicarious liability provisions are appreciated as an appropriate incentive in respect of putting appropriate whistle-blower measures in place; especially when seen in light of the defence that may be raised by such public body if appropriate measures have been put in place and as provided for by section 48(3).
Measurable 5:	Independent oversight body			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
Victoria, Australia	x		PDA A	The main body to whom all disclosures made need to be sent for determination as a

				protected disclosure is the IBAC. All disclosures in respect of the IBAC are sent for determination to the Victorian Inspectorate. As such there is a double layer of independent bodies, including a watchdog for the watchdog.
Measurable 6:	Ensuring that disclosures are timeously and properly investigated			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
Victoria, Australia	x		Part 3 of the PDA A: Notification and assessment of disclosures	
Measurable 7:	Ensuring that the identity of the whistle-blower is protected			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
Victoria, Australia	x		Part 7, section 53 of the PDA A provides for confidentiality subject to the exceptions in section 54	Neither a person nor a body may disclose information that is likely to lead to the identification of the whistle-blower. The penalty for doing so in the case of a natural person is 120 penalty units or 12 months imprisonment or both and 600 penalty units in the case of a body corporate.
Measurable 8:	Protect anyone who makes use of internal whistle-blower procedures in good faith from any retaliation			

Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
Victoria, Australia		x	The mechanisms are more complex in this regard, as there are independent bodies to which the disclosures are to be made; the system is not centred in the usual manner. Good faith is also not a requirement; honesty is.	However, anyone [any natural person] who makes a protected disclosure complaint in accordance with the prescribed procedures, honestly, including a person who provides relevant information to such disclosure is protected from retaliation in the form of detrimental action.
Measurable 9:	Prohibition of interference[14] with a disclosure by a whistle-blower			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
Victoria, Australia	x		Section 45 of the PDA A	It is an offence to take detrimental action against a whistle-blower for having made a protected disclosure, carrying a penalty of 240 penalty units or 2 years imprisonment or both.
Measurable 10:	In relevant circumstances, external whistle-blowers are protected			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
Victoria, Australia	x		Part 6	The protection is not limited to the employment relationship, and protected disclosures may be made by any natural person.
Measurable 11:	Whistle-blowers acting in good faith when blowing the whistle are protected even if it turns out later that the			

14 In this respect interference will be viewed in the context of reprisal being taken against the whistle-blower for having made a protected disclosure.

	allegations were unfounded.			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
Victoria, Australia	x		There is no evidence in this respect	
Measurable 12:	Enforcement mechanism to investigate the whistle-blower's allegations			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
Victoria, Australia	x		IBAC and Victorian Inspectorate	See chapter 11
Measurable 13:	Appropriate protection provided for accusations made in bad faith			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
Victoria, Australia	x		Section 72 of the PDA A	Section 72 provides that a person who knowingly provides false or misleading information in terms of the PDA A in respect of a material particular, with the intention that the information be acted on as a protected disclosure, is guilty of an offence which carries the following penalty: 120 penalty units or 12 months imprisonment or both.[15] So too a person who provides further information, relating to a protected disclosure made, knowing it to be false or misleading in a material particular is guilty of

15 Section 72(1) of the PDA A.

				an offence, and which offence carries the same penalty as aforementioned.[16]
			Section 73 of the PDA A	In terms of the provisions of section 73 a person who claims that a matter is the subject of a protected disclosure knowing that claim to be false, is guilty of an offence, and which offence carries the same penalty as aforementioned.[17] So too, a person will be guilty of an offence if he claims that a matter is the subject of a disclosure that the IBAC or the Victorian Inspectorate has determined to be a protected disclosure complaint, knowing the claim to be false. This offence too carries the same penalty as aforementioned.[18]
Measurable 14:	Burden of proof should rest with the employer to prove that the alleged action/ omission wasn't in reprisal due to protected disclosure made			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
Victoria, Australia		x	No evidence in this respect	

16 Section 72(2) of the PDA A.
17 Section 73(1) of the PDA A.
18 Section 73(2) of the PDA A.

Measurable 15:	The impact and implementation of the legislation measured at regular intervals			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
Victoria, Australia	x		Part 10 of the PDA A	Part 10 of the PDA requires that information relating to the obligations, functions and the like provided for by the PDA A be addressed in the annual reports of the IBAC[19], the Victorian Inspectorate[20], other investigating entities[21] and bodies that are not investigating bodies[22].
Measurable 16:	Facilitation by the law of acceptance, participation in whistle-blowing and public awareness of whistle-blowing			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
Victoria, Australia	x		Part 9 of the PDA A	Division 1 of Part 9 deals with guidelines and procedures. The IBAC must issue guidelines consistent with the PDA A, and any regulations made in respect of the PDA A for procedures, in order to – a) Facilitate the making of disclosures;[23] b) Provide for the handling of those

19 Section 67(1) of the PDA A.
20 Section 68 of the PDA A.
21 Section 69 of the PDA A.
22 Section 70 of the PDA A.
23 Section 57(1)(a) of the PDA A.

				disclosures, and where appropriate, the notification of those disclosures to IBAC as provided for by sections 21(2) and 36(2);[24] c) Facilitate the protection of persons from detrimental action in contravention of section 45.[25] The IBAC is also required to issue guidelines in respect of the management of the welfare of – a) Any person who has made a protected disclosure;[26] and b) Any person affected by a protected disclosure, whether as a witness in the investigation of the disclosure or as a person who the protected disclosure has been made about.[27] The IBAC has to ensure that such guidelines are readily available to the public,

24 Section 57(1)(b) of the PDA A.
25 Section 57(1)(c) of the PDA A.
26 Section 57(2)(a) of the PDA A.
27 Section 57(2)(b) of the PDA A.

				each entity that is required to establish procedures in terms of section 58, each member, officer or employee of such an entity and each member of police personnel.[28] In terms of the provisions of section 58 of the PDA an entity that may receive a disclosure must establish procedures that facilitate the making of disclosures, as well as the handling of disclosures. In terms of the provisions of section 60 of the PDA A, the IBAC is permitted to give advice to the public sector regarding any matter which has been included in a guideline issued by IBAC under Part 9.

TABLE 5: EVALUATION OF AUSTRALIA: VICTORIA

28 Section 57(3)(a)-(d) of the PDA A.

12.3 Conclusion

The PDA A is relatively technical, with many cross-references to additional legislation, although the protection offered in terms of the provisions of Part 6 thereof is largely dependent only upon the text of the PDA A, and the simplest part of the text.

The PDA A does not provide protection in respect of ‘normal’ irregularities within the employment relationship, and in respect of which retaliation is undertaken against the whistle-blower for having blown the whistle.

Its main focus is the strengthening of the system of integrity of the public sector, and specifically within the sphere of corruption and the related activities.

The remedies availed to the whistle-blowers within this context are wide and appropriate, simultaneously ensuring a structured approach, facilitation, education, awareness and the measurement of related impact.

CHAPTER13: THE POSITION OF THE WHISTLE-BLOWER IN THE UNITED KINGDOM

13.1 Introduction

Evans opines that for some, blowing the whistle is simply an act of disagreement or dissent, however, it is emphasised that it is consequential to distinguish whistle-blowing from other broad negatives, such as complaining, litigating or arguing. Rather it is a specific form of dissent, with its own particular characteristic, stemming from the practice of the English policemen who blow a whistle when observing a crime, thereby also alerting the general public to the wrongdoing.[1]

The main piece of legislation that regulates whistle-blowing in the United Kingdom is the Public Interest Disclosure Act 1998 (hereinafter referred to as "PIDA"), and which has been inserted after part IV of the Employment Rights Act 1996.[2]

Lewis and Uys state that the expanding interest in whistle-blowing in the UK before PIDA came into operation can be explained by way of reference to various factors including *inter alia* financial scandals, health and safety disasters and the work done by the Committee on Standards in Public Life.[3]

13.2 The purpose of the PIDA

The purpose of PIDA is captured in the preamble of the PIDA as being to protect people who make certain disclosures of information in the public interest, in order to allow for such individuals to bring action in respect of victimisation, and for related purposes.

13.3 What comprises a protected disclosure?

In terms of the provisions of section 43A, a protected disclosure is a qualifying disclosure[4], which is made by a worker as provided for in terms of section 43C-H.

1 Evans 2008 *Innovation: the European Journal of Social Science Research* 267-279.
2 An Act to consolidate enactments relating to employment rights.
3 Lewis and Uys 2007 *Managerial Law* (49)(3) 76-92.
4 As defined in section 43B of the PIDA.

A qualifying disclosure means the disclosure of information, which in the reasonable belief of the worker making the disclosure tends to show one or more of the following has taken place, will take place or is taking place:

- A criminal offence;[5]
- That a person is likely to fail to comply with any legal obligation to which he is subject;[6]
- That a miscarriage of justice has occurred;[7]
- That the health, safety of an individual is endangered;[8]
- That the environment is damaged;[9]
- That there is information tending to show any matter falling within any of the afore-mentioned is deliberately being concealed.[10]

Sections 43B(1)(a) to (e) of the PIDA are verbatim identical to the provisions of the definition of a 'disclosure' ((a) – (e)) as defined in section 1 of the PDA.[11]

The term "relevant failure" in relation to a qualifying disclosure applies to the circumstances[12] as set out above.[13]

For the purposes of making a qualifying disclosure as set out above, it is immaterial whether the relevant failure took place in the United Kingdom or elsewhere, and whether the applicable law is that of the United Kingdom or another country.[14]

However, the disclosure of information does not amount to a protected disclosure if the person making the disclosure commits an offence by doing so[15], such as for

5 Section 43B(1)(a) of the PIDA.
6 Section 43B(1)(b) of the PIDA.
7 Section 43B(1)(c) of the PIDA.
8 Section 43B(1)(d) of the PIDA.
9 Section 43B(1)(e) of the PIDA.
10 Section 43B(1)(f) of the PIDA.
11 The only difference is the PDA's reference to unfair discrimination referred to in paragraph (f), and a slight difference in wording between section 43B(1)(f) of the PIDA and paragraph (g) of the definition of a disclosure in section 1 of the PDA.
12 Sections 43B(1)(a) – (f) of the PIDA.
13 Section 43B(5) of the PIDA.
14 The same provision in the South African context is made in the definition of 'impropriety' in section 1 of the PDA.
15 Section 43B(3) of the PIDA.

example, if the person has taken an oath of secrecy within the work environment, and contravenes the oath of secrecy.[16]

The disclosure of information to which legal professional privilege attaches is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.[17]

A qualifying disclosure that is made in accordance with the provisions of section 43C, qualifies as such a qualifying disclosure if the worker:

- Makes the disclosure in good faith;
- To his employer; or
- In circumstances in which the employee believes reasonably that the relevant failure relates either solely or mainly to –
    - a person other than his employer; or
    - to any issue or matter for which a person other than his employer bears a legal burden to that other person.

Thus a qualifying disclosure entails going wider than just making a disclosure in respect of the employee's direct employer, and in respect of just the employment relationship. Should an employer have a procedure in place which authorises its employees making a qualified disclosure to someone other than the employer, in other words making the qualified disclosure externally, and the worker makes such qualified disclosure in accordance with such authorised procedure, it is treated as a qualifying disclosure.[18]

In respect of employment in terms of which in terms of the worker's employment he ordinarily works outside Great Britain, Part IVA (protected disclosures) and section 47B do not apply to such an employment relationship.[19]

---

16 This provision of the PIDA is in essence the same as that reflected in the definition of a 'protected disclosure' in section 1 of the PDA, paragraph (e)(i) thereof.

17 Section 43B(4) of the PIDA.
It is noted that this provision is in essence the same as that provided as being excluded from qualifying as a protected disclosure in terms of the definition of a protected disclosure in section 1 paragraph (e)(ii).

18 Section 43C(2) of the PIDA. It is noted that the provisions of this section are in essence similar to that of the provisions of section 6(2) of the PDA.

19 Provision 12 of the PIDA.

13.3.1 Defining the worker and the employer

Section 43K defines the concepts of 'worker' and 'employer' for the purposes of the PIDA. The definition of who would qualify as a worker for the purposes of PIDA is extended when compared to the definition assigned to the concept of a 'worker' in terms of section 230(3) of the Employment Rights Act 1996[20], and includes a person who is not a worker as defined in terms of section 230(3), but who:

- works or has worked for a person after being introduced or supplied to such person by a third person and in circumstances in which the work he did wasn't determined by him, but by the person for whom he did or does the work or the third person. In respect of this situation the employer would be the person who substantially determines or determined the terms on which the employee was engaged.
- either contracts or contracted with a person in respect of the other person's business for the performance of work in a place not under the control of that business's management;
- who works or worked by providing general medical, general dental, general ophthalmic or pharmaceutical services in terms of arrangements made by the Health Authority[21] or by a Health Board.[22] In respect of these employees, the employer would be the relevant Health Authority or Board referred to.
- who either is or was provided with work after a training course or training programme or together with training for employment, or both, otherwise than being under a contract of employment and otherwise than by an educational establishment regarding a course run by that establishment. Within this context the employer would be the person providing the work experience or

20 In this Act "worker" (except in the phrases "shop worker" and "betting worker")means an individual who has entered into or works under (or, where the employment has ceased, worked under)
(a) a contract of employment, or
(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker's contract shall be construed accordingly.

21 Under section 29, 35, 38 or 41 of the National Health Service Act 1977.

22 Under section 19, 25, 26 or 27 of the National Health Service (Scotland) Act 1978.

training. An educational establishment is defined as including a university, college or other educational establishment.[23]

In terms of section 230(3) a worker includes[24] a person who has entered into or who works under, or worked under a contract of employment or any other contract in whichever form, in terms of which that person undertook to do or perform work or services personally for another party to the contract, and whose status is not that of a client or a customer.

13.4 To whom a qualifying disclosure may be made

Sections 43C – F specifies to whom qualifying disclosures may be made, and which includes a disclosure to an employer or other responsible person[25], disclosure to a legal adviser[26], disclosure to a Minister of the Crown[27], disclosure to a prescribed person[28] and other disclosures[29].

13.4.1 Disclosure to the employer or to another responsible person

This has been dealt with under paragraph 13.3 above, and will not be repeated here.

13.4.2 Disclosure made to a legal adviser

A disclosure will be protected as a qualifying disclosure where it is made in the course of obtaining legal advice.[30] In this regard it is noted that the disclosure made need not be made *bona fide* as is required in respect of the other relevant provisions.[31]

13.4.3 Disclosure made to a Minister of the Crown

A disclosure will qualify as a qualifying disclosure where the worker's employer is an individual who has been appointed under any enactment by a Minister of the Crown

23 Section 43K(3) of the PIDA.
24 Excluding the phrases "shop worker" and "betting worker".
25 Section 43C of the PIDA.
26 Section 43D of the PIDA.
27 Section 43E of the PIDA.
28 Section 43F of the PIDA.
29 Section 43G of the PIDA.
30 Section 43D of the PIDA.
31 It is noted that the provisions of section 43D are similar in essence to that of section 5 of the PDA. So too, in respect of PIDA a disclosure made to a legal adviser need not be made in good faith.

or a body whose members are appointed under any enactment by a Minister of the Crown, and the disclosure is made in good faith to a Minister of the Crown.[32]

13.4.4 Disclosure made to a prescribed person

A worker making a disclosure will make a qualifying disclosure if the worker makes the disclosure in good faith, to a person who has been prescribed by an order made by the Secretary of State for the purposes of section 43F, and the person making the disclosure reasonably believes that the failure in question falls within the ambit of matters prescribed[33] and that the allegations are substantially true.

13.4.5 Disclosures made in other cases

In this regard a qualifying disclosure will be made in accordance with the requirements of section 43G if:

- The worker makes the disclosure *bona fide*;[34]
- Reasonably believes that the information he is disclosing, and related allegations are substantially true;[35]
- He does not make the disclosure for purposes of personal gain;[36]
  In determining whether a disclosure was made for personal gain, no regard shall be had to any reward which is payable by or any enactment.[37]
- Any of the provisions of section 43G (2) are met;[38] and
  The conditions referred to in this respect are as follows:
    - At the time that the disclosure is made, the worker reasonably believes that his employer will subject him to detriment if he makes a disclosure to his employer or to a prescribed person in terms of section 43F;[39]

32 Section 43E of the PIDA.
33 Section 43F(1)(b)(i) of the PIDA.
34 Section 43G(1)(a) of the PIDA.
This section of the PIDA is in essence the same as the provisions of section 9(1) of the PDA.
35 Section 43G(1)(b) of the PIDA.
This section of the PIDA is in essence the same as the provisions of section 9(1)(a) of the PDA.
36 Section 43G(1)(c) of the PIDA.
This section of the PIDA is in essence the same as the provisions of section 9(1)(b) of the PDA.
37 Section 43L(2) of the PIDA.
38 Section 43G(1)(d) of the PIDA.
This section of the PIDA is in essence the same as the provisions of section 9(1)(*b*)(i) of the PDA.
39 Section 43G(2)(a) of the PIDA.

- Where no person has been prescribed in terms of section 43F, with reference to the relevant failure, the worker reasonably believes that it is likely that the evidence pertaining to the relevant failure will be destroyed or concealed if he makes the disclosure to his employer;[40]
- The worker has already made a disclosure of substantially the same information to the employer or prescribed person.[41]

- In all the circumstances of the case in question it is reasonable for him to make the disclosure.[42]

  In order to decide whether in the circumstances of the case it was reasonable for the worker to make the disclosure, the following factors are to be considered in terms of section 43G(3):

- The identity of the person to whom the disclosure was made;[43]
- The seriousness of the relevant failure;[44]
- Whether the relevant failure so disclosed is continuing or likely to continue;[45]
- Whether by making the disclosure, it is made in breach of a duty of confidentiality which is owed by the employer to another person;[46]
- Where the worker has already made a disclosure of substantially the same information to the employer or prescribed person, whether any action was taken in this respect, or whether one could reasonably have expected action to have been taken;[47]

This section of the PIDA is in essence the same as the provisions of section 9(2)(a) of the PDA, with the main difference being that the PIDA refers to detriment and the PDA refers to occupational detriment.

40 Section 43G(2)(b) of the PIDA.
This section of the PIDA is in essence the same as the provisions of 9(2)(b) of the PDA.

41 Section 43G(2)(c) of the PIDA.
This section of the PIDA is in essence the same as the provisions of section 9(2)(c) of the PDA, with the difference that the PIDA does not provide that no action was taken within a reasonable time after the disclosure was made, as the PDA provides.

42 Section 43G(1)(e) of the PIDA.
This section of the PIDA is in essence the same as the provisions of section 9(1)(b)(ii) of the PDA.

43 Section 43G(3)(a) of the PIDA.
This section of the PIDA is in essence the same as the provisions of section 9(3)(a) of the PDA.

44 Section 43G(3)(b) of the PIDA.
This section of the PIDA is in essence the same as the provisions of section 9(3)(b) of the PDA.

45 Section 43G(3)(c) of the PIDA.
This section of the PIDA is in essence the same as the provisions of section 9(3)(c) of the PDA.

46 Section 43G(3)(d) of the PIDA.
This section of the PIDA is in essence the same as the provisions of section 9(3)(d) of the PDA.

47 Section 43G(3)(e) of the PIDA.
This section of the PIDA is in essence the same as the provisions of section 9(3)(e) of the PDA.

- Where the worker has already made a disclosure of substantially the same information to the employer, whether in making the disclosure to the employer, the worker complied with any procedure authorised was used by the worker.[48]

For the purposes of section 43G ('disclosure in other cases') a subsequent disclosure made may be regarded as being a disclosure of substantially the same information as that disclosed in a previous disclosure to his employer or a prescribed person, even in circumstances in which the subsequent disclosure extends to information about action taken or not taken by any person in consequence of the previous disclosure.[49]

13.4.6 Disclosure of an exceptionally serious nature

What would qualify as a disclosure of an exceptionally serious nature is not defined, and as such it is assumed that this qualification will be left open to the evaluation and decision on a case by case basis. A qualifying disclosure will be made in accordance with section 43H (of an exceptionally serious nature) if:

- The worker makes the disclosure *bona fide*;
- Reasonably believes that the information disclosed and the related allegations are substantially true;
- The disclosure hasn't been made for personal gain;
  In determining whether a disclosure was made for personal gain, no regard shall be had to any reward which is payable by or any enactment.
- The relevant failure is of an exceptionally serious nature; and
- In all the circumstances of the case it was reasonable for the disclosure to be made;
  In determining in respect of this consideration whether it was reasonable regard shall be had in particular to the person to whom the disclosure has been made.

48 Section 43G(3)(f) of the PIDA.
This section of the PIDA is in essence the same as the provisions of section 9(3)(f) of the PDA.

49 Section 43G(4) of the PIDA.
This section of the PIDA is in essence exactly the same as the provisions of section 9(4) of the PDA.

Although importance is obviously assigned to whom the disclosure in this context is made, no guidance is given in respect of who the disclosure is to be made.

13.4.7 The position in respect of contractual duties of confidentiality

Section 43J provides that any provision in an agreement entered into between a worker and the employer is void in so far as it attempts to preclude the worker from making a protected disclosure.[50]

13.5 Remedies provided by the PIDA

In terms of the provisions of the PIDA a worker has the right not to be subjected to any detriment by an act or deliberate omission, by the employer, and which is imposed as a result of having made a protected disclosure.[51]

13.5.1 Presentation of a complaint to an employment tribunal and related remedies and positions

A worker who is so subjected to detriment in contravention of section 47B (as afore-mentioned), may present a complaint to an employment tribunal, that he has been subjected to such detriment.[52] If such a complaint is to be made and thereafter considered by the employment tribunal, it must be presented before the end of the period of three (3) months, which calculation begins with the date of the act or failure (omission) to which the complaint in question relates, or where there has been a series of acts or failures, from the date of the last of them.[53] However, the tribunal may hear such complaint outside the time limits set out above, if the tribunal considers such further period to be reasonable; where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the three month period.[54] Where such a tribunal finds that such relevant complaint[55] is well-founded the tribunal has to make a declaration to that effect, and may thereafter

50 It is noted that this section is in essence similar to the provisions of section 2(3) of the PDA.
51 Section 47B(1) of the PIDA.
This section of the PIDA is in essence the same as the provisions of section 3 of the PDA.
52 Section 49(1A) of the Employment Rights Act 1996.
53 Section 48(2) of the Employment Rights Act 1996.
54 Section 48(3) of the Employment Rights Act 1996.
55 As provided for in terms of section 49 of the Employment Rights Act 1996.

make an award for compensation, which is to be paid by the employer to the complainant in respect of the act or ommission to which the complaint relates.[56]

In respect of such an award of compensation, subject to sections 49(5A) and (6) of the Employment Rights Act 1996, the amount of the compensation awarded shall be such as the tribunal considering the matter deems to be both just and equitable in the circumstances, taking into account the infringment to which the complaint relates and any loss that is attributable to the relevant act or omission.[57] The loss referred to, in determining the compensation to be awarded, shall be taken to include the following considerations:

- Any expense that has been reasonably incurred by the complainant as a consequence of the act or omission in question;[58] and
- The loss of any benefit which he may reasonably be expected to have had if it were not for the act or omission in question having been perpetrated.[59]

Further to this, in ascertaining the loss suffered by the complainant in question, the tribunal shall apply the same rule concerning the duty that a person has to mitigate his loss as applies to damages recoverable under the common law of England, Wales or Scotland, as the case may be.[60] Should the tribunal make a finding that the act or the omission to which the complaint relates was in any manner caused or contributed to by the complainant's actions, the amount of compensation shall be reduced proportionally, as may be considered to be just and equitable in the given circumstances.[61] Where a complaint is made by a worker subjected to detriment, and the detriment to which the worker has been subjected to is the termination of his contract and the contract is not a contract of employment, any compensation awarded by the tribunal may not exceed the compensation that would be payable under Chapter II of Part X if the worker had been an employee and had been dismissed for the reason specified in section 103A.[62]

56 Section 49(1) of the Employment Rights Act 1996.
57 Section 49(2) of the Employment Rights Act 1996.
58 Section 49(3)(a) of the Employment Rights Act 1996.
59 Section 49(3)(b) of the Employment Rights Act 1996.
60 Section 49(4) of the Employment Rights Act 1996.
61 Section 49(5) of the Employment Rights Act 1996.
62 Section 49(6)(a) of the Employment Rights Act 1996.

13.5.2 Unfair dismissal

Provision 5 of the PIDA provides for the insertion of section 103A into the Employment Rights Act 1996, pertaining to protected disclosures and providing that an employee who has been dismissed shall be regarded as having been unfairly dismissed for the purposes of the relevant part of the Employment Rights Act 1996, if the reason, or more than one reason or the principal reason for the said dismissal is that the employee had made a protected disclosure.[63]

13.5.3 Redundancy

In terms of provision 6 of the PIDA, section (6A) has been inserted under section 105 (6) of the Employment Rights Act 1996, pertaining to protected disclosures and providing that if the reason, or one or more of the reasons or the principal reason for which an employee has been selected for redundancy was that the employee had made a protected disclosure, such dismissal may be regarded as an unfair dismissal.

13.6 Unfair dismissal in terms of Employment Rights Act 1996 and as a remedy

13.6.1 A general introduction to unfair dismissals in terms of the Employment Rights Act 1996

Part X of the Employment Rights Act 1996 holds the relevant provisions in respect of unfair dismissals.[64] In terms of section 94(1) of the Employment Rights Act 1996, an employee has the right not to be dismissed unfairly by his employer. It is noted that in terms of the provisions of section 110(1) of the Employment Rights Act 1996, in circumstances in which a dismissal procedures agreement is in force, the provisions of section 94 do not apply.

Within this context an employee is dismissed by his employer if:

63 This provision is comparable to the provisions of section 4(2)(a) of the PDA.

64 It would seem that the manner in which remedies regarding protected disclosures are approached in respect of unfair dismissals is comparable to the manner in which it is dealt with in terms of the PDA.

- The contract in terms of which he is employed is terminated by the employer, with or without notice being given;[65]
- If the employee is employed under a limited-term contract, and the contract terminates as a result of the limiting event, and without being renewed under the same contract;[66]
- The employee terminates the contract in respect of which he is employed, with or without giving notice, in circumstances in which he is so entitled to terminate without giving notice as a result of the employer's conduct;[67]

Further to this, an employee shall be considered to have been dismissed by his employer for the purposes of Part X relating to unfair dismissals, where:

- The employer gives the employee notice of the termination of his contract;[68] and
- When such notice is given, it is at an earlier date than the date on which the employer's notice is due to expire;[69] and the reason for the dismissal is 'to be taken to be the reason for which the employer's notice is given'.[70]

Section 98 of the Employment Relations Act 1996 relates to the **fairness** of the dismissal in question, and providing that in determining for the purposes of Part X whether or not a dismissal was fair or unfair, it is <u>for the employer to show</u> that:

- The reason, or if more than one reason, the principal reason for the dismissal;[71] and
    - That it is a reason provided for in section 98(2)[72] or some other substantial reason justifying the dismissal of an employee holding the position that the dismissed employee had held.[73] A reason falls within the ambit of section 98(2) of the Employment Rights Act 1996 if:

65 Section 95(1)(a) of the Employment Rights Act 1996.
66 Section 95(1)(b) of the Employment Rights Act 1996.
67 Section 95(1)(c) of the Employment Rights Act 1996.
68 Section 95(2)(a) of the Employment Rights Act 1996.
69 Section 95(2)(b) of the Employment Rights Act 1996.
70 Section 95(2) of the Employment Rights Act 1996.
71 Section 98(1)(a) of the Employment Rights Act 1996.
72 Dealt with below.
73 Section 98(1)(a) of the Employment Rights Act 1996.

- It relates to the capability or the qualifications of the employee, and for the work being performed by the employee, and for which the employee had been employed to do;[74]
- It relates to the retirement of the employee;[75]
- That the employee was redundant;[76] or
- That the employee could not continue to work in the position in question without contravention, on the part of the employee or the employer, of a duty or a restriction imposed under an act;[77]

In a case[78] where the employer has succeeded in fulfilling the onus it has in terms of section 98 (1), the determination of the question as to whether the dismissal of the employee was fair or unfair, whilst having regard to the reasons shown by the employer will depend on whether in the given circumstances the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee[79] and this shall be determined in accordance with the substantial merits of the matter[80] (own emphasis).

Section 94 does not apply to the dismissal of an employee unless that employee has been continuously employed for a period of less than one year,[81] however, this exclusion of the right in respect of the right not to be unfairly dismissed is not applicable to whistle-blowers.[82]

---

74 Section 98(2)(a) of the Employment Rights Act 1996. In terms of the provisions of section 98(3) of the Employment Rights Act 1996, in subsection in subsection (2)(a)—
(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

75 Section 98(2)(ba) of the Employment Rights Act 1996.

76 Section 98(2)(c) of the Employment Rights Act 1996.

77 Section 98(2)(d) of the Employment Rights Act 1996.

78 Other than a case provided for in terms of section 98(3A) which relates to retirement, and which provides as follows:
Section 98(3A) In any case where the employer has fulfilled the requirements of subsection (1) by showing that the reason (or the principal reason) for the dismissal is retirement of the employee, the question whether the dismissal is fair or unfair shall be determined in accordance with section 98ZG

79 Section 98(4)(a) of the Employment Rights Act 1996.

80 Section 98(4)(b) of the Employment Rights Act 1996.

81 Section 108(1) of the Employment Rights Act 1996.

82 Section 108(3)(ff) of the Employment Rights Act 1996.

More specifically, Chapter II of the Employment Rights Act 1996 provides the remedies for unfair dismissals.

13.6.2 Remedies for unfair dismissal

The first remedy provided for is that a complaint may be presented to an employment tribunal against the employer by an employee alleging unfair dismissal.[83] Such a complaint has to be presented to an employment tribunal before the end of a period of three (3) months, which is to be calculated from the effective date of the termination or within such further period as an employment tribunal considers reasonable, and in circumstances in which it is satisfied that it was not reasonably practicable for the relevant employee to have presented the complaint within the three month period.[84]

13.6.2.1 Orders and compensation

Should an employment tribunal find that a complaint lodged in terms of the provisions of section 111 is well-founded the tribunal shall explain to the complainant what kinds of orders may be made[85] and ask him whether he wishes the tribunal to make such an order.[86] Should the complainant express that he so wishes the tribunal may make such an order in respect of section 113.[87]

The orders that may be made by the tribunal in terms of section 113 are:

- An order for **reinstatement** of the employee in accordance with section 114.[88] An order for reinstatement is described as an order that the employer shall treat the complainant in all respects as if he had not been dismissed at all,[89] and on making such an order there are a number of related matters that the employment tribunal is required to specify, including :

- any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had

83 Section 111(1) of the Employment Rights Act 1996.
84 Section 111(2) of the Employment Rights Act 1996.
85 In terms of the provisions of section 113 of the Employment Rights Act 1996.
86 Section 112(1) and (2) of the Employment Rights Act 1996.
87 Section 112(3) of the Employment Rights Act 1996.
88 Section 113(a) of the Employment Rights Act 1996.
89 Section 114(1) of the Employment Rights Act 1996.

but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of reinstatement,[90]

- any rights and privileges (including seniority and pension rights) which must be restored to the employee, and
- the date by which the order must be complied with.[91]

Further to this, if the complainant would have benefitted from any improvement in the terms and conditions of his employment if it had not been for his unfair dismissal, the order for reinstatement will require the employee to be treated as benefitting from such improvement which would otherwise have been implemented or which would have accrued.[92] The employee can alternatively request an order for re-engagement in accordance with the provisions of section 115,[93] which order is an order on such terms as the tribunal may decide.[94] In making such an order for re-engagement the tribunal is required to determine the terms on which the re-engagement is to take place, including the identity of the employer[95], the nature of the employment[96], remuneration[97], any amount that may be payable by the employer[98], any rights and privileges which must be restored to the employee[99] and the date by which the order must be complied with.[100] In making a decision in respect of the discretion that an

90 Section 114(4) provides as follows:
(4) In calculating for the purposes of subsection (2)(a) any amount payable by the employer, the tribunal shall take into account, so as to reduce the employer's liability, any sums received by the complainant in respect of the period between the date of termination of employment and the date of reinstatement by way of— (a)wages in lieu of notice or ex gratia payments paid by the employer, or (b)remuneration paid in respect of employment with another employer, and such other benefits as the tribunal thinks appropriate in the circumstances.

91 Section 114(2)(a) to (c) of the Employment Rights Act 1996.

92 Section 114(3) of the Employment Rights Act 1996.

93 Section 113(b) of the Employment Rights Act 1996.

94 Section 115(1) of the Employment Rights Act 1996.

95 Section 115(2)(a) of the Employment Rights Act 1996.

96 Section 115(2)(b) of the Employment Rights Act 1996.

97 Section 115(2)(c) of the Employment Rights Act 1996.
Section 115(3) provides as follows in respect of the calculation of an amount to be paid:
Section 115(3) In calculating for the purposes of subsection (2)(d) any amount payable by the employer, the tribunal shall take into account, so as to reduce the employer's liability, any sums received by the complainant in respect of the period between the date of termination of employment and the date of re-engagement by way of—
(a) wages in lieu of notice or ex gratia payments paid by the employer, or
(b) remuneration paid in respect of employment with another employer, and such other benefits as the tribunal thinks appropriate in the circumstances.

98 Section 115(2)(d) of the Employment Rights Act 1996.

99 Section 115(2)(e) of the Employment Rights Act 1996.

100 Section 115(2)(f) of the Employment Rights Act 1996.

employment tribunal has under section 113 as to an order for reinstatement or re-engagement, the employment tribunal is required to first consider reinstatement, and in considering it shall take into account whether the complainant wants to be reinstated[101], whether such an order is practicable for the employer[102] and where the complainant to some extent contributed to or caused the dismissal, whether it would be just to order such reinstatement.[103] Should the tribunal decide not to make an order for reinstatement, it will consider whether to make an order for re-engagement, and if so, on what terms the re-engagement should take place,[104] taking into account any wishes in this regard expressed by the complainant[105], whether it is practicable for the employer[106] and whether such order would be just where the complainant caused or contributed to the dismissal.[107]

In terms of sections 116(4) and (5):[108]

- excluding cases in which the tribunal considers contributory fault under the provisions of subsection (3)(c) it will if it orders re-engagement, do so on such terms that are as favourable as an order for reinstatement of the person, where reasonably practicable;
- in circumstances in which the employer has hired a permanent replacement in the position of the employee dismissed, the tribunal will not consider for the purpose of the provisions of subsections (1)(b) or 3 (c) whether it is practicably possible for the employer to comply with an order reinstating or re-engaging the dismissed employee.

---

101 Section 116(1)(a) of the Employment Rights Act 1996.
102 Section 116(1)(b) of the Employment Rights Act 1996.
103 Section 116(1)(c) of the Employment Rights Act 1996.
104 Section 116(2) of the Employment Rights Act 1996.
105 Section 116(3)(a) of the Employment Rights Act 1996.
106 Section 116(3)(b) of the Employment Rights Act 1996.
107 Section 116(3)(c) of the Employment Rights Act 1996.
108 In terms of section 116(6):
Subsection (5) does not apply where the employer shows—
(a) that it was not practicable for him to arrange for the dismissed employee's work to be done without engaging a permanent replacement, or
(b) that—
(i) he engaged the replacement after the lapse of a reasonable period, without having heard from the dismissed employee that he wished to be reinstated or re-engaged, and
(ii) when the employer engaged the replacement it was no longer reasonable for him to arrange for the dismissed employee's work to be done except by a permanent replacement.

Alternatively in circumstances in which an order is not made under section 113, the tribunal shall make an award for compensation for unfair dismissal, which award will be calculated in accordance with section118, to be paid by the employer to the employee.[109] Section 118 provides for compensation, and in terms of which, in circumstances in which an employment tribunal makes an award for compensation for an unfair dismissal under section 112(4)[110] or section 117(3)(a)[111] the award may consist of the following: a basic award;[112] and a compensatory award.[113]

Section 117 of the Employment Rights Act 1996, provides for the enforcement of an order and compensation.

13.6.2.2 The provision of interim relief pending the determination of a complaint

If an employee who presents a complaint to an employment tribunal alleges in the complaint that he has been unfairly dismissed as a result of having made a protected disclosure the employee may apply to the tribunal for interim relief.[114] However, it is specified that such tribunal will not entertain such an application for such interim relief unless it is submitted to the tribunal before the end of a period of seven (7) days immediately following the effective date of the termination of the employment.[115]

Section 129 of the Employment Rights Act 1996 provides for the procedures for such application, whilst section 131 provides for an application for the variation and revocation of an order made in terms of section 129, which application may be made at any time.

---

109 Section 112(4) of the Employment Rights Act 1996.
110 Section 112(4) If no order is made under section 113, the tribunal shall make an award of compensation for unfair dismissal (calculated in accordance with sections 118 to be paid by the employer to the employee.
111 Section 117(3)(*a*) : Subject to subsections (1) and (2), if an order under section 113 is made but the complainant is not reinstated or re-engaged in accordance with the order, the tribunal shall make — (a) an award of compensation for unfair dismissal (calculated in accordance with sections 118 to 126)
112 Section 118(1)(a) of the Employment Rights Act 1996, and calculated in accordance with sections 119 to 122 and 126 of the Employment Rights Act 1996.
113 Section 118(1)(b) of the Employment Rights Act 1996, and calculated in accordance with sections 123, 124,124A and 126 of the Employment Rights Act 1996.
114 Section 128(1)(a)(i) of the Employment Rights Act 1996.
115 Section 128(2) of the Employment Rights Act 1996.

Section 132 of the Employment Rights Act 1996 provides for the consequences of failure to comply with an order made under sections 129(5) or (7) for the reinstatement or re-engagement of the relevant employee.

The employment tribunal is required to determine the application for such interim relief as soon as is practicable after having received the application for interim relief.[116]

13.7 The PIDA and the PDA

The commonalities in respect of the main body of the PIDA and the PDA is unmistakable, and has been referred to in the footnotes above, however, it is deemed to be of such import as to be highlighted in terms of the content of this paragraph as follows:

116 Section 128(3) of the Employment Rights Act 1996.

#	**Description**	**PDA Provision**	**Similar PIDA provision**
1	Description of a *disclosure*	Section 1, definition of 'disclosure' paragraphs (*a*) to (*e*)	Section 43B(1)(*a*) to (*e*)
2	Description of a *disclosure*	Section 1, definition of 'disclosure' paragraph (*g*)	Section 43B(1)(*f*)
3	Description of a *protected disclosure*	Section 1, definition of 'protected disclosure' paragraphs (*e*) (i) and (ii)	Sections 43B(3) and (4)
4	Provisions in contracts or agreements attempting to exclude the measures protecting whistle-blowers	Section 2(3)	Section 43J
5	Employees making a protected disclosure not to be subjected to occupational detriment	Section 3	Section 47B(1)
6	Remedies availed in terms of labour law in respect of dismissals deemed unfair or alleged to be unfair (In respect of approach adopted)	Section 4(2)	The insertion of section 103A into the Employment Rights Act 1996, in terms of provision 5 of the PIDA, and the consequent application of Part X of the Employment Rights Act 1996
7	Protected disclosure to a legal adviser	Section 5	Section 43D
8	Protected disclosure to an employer	Section 6(2)	Section 43C(2)
9	Protected disclosure to a member of Cabinet or Executive Council (SA) and a Minister of the Crown (UK)	Section 7	Section 43E
10	Protected disclosure to certain persons or bodies identified	Section 8	Section 43F

11	General protected disclosure	Section 9(1)	Section 43G(1)(a)
		Section 9(1)(a)	Section 43G(1)(b)
		Section 9(1)(b)	Section 43G(1)(c)
		Section 9(1)(b)(i)	Section 43G(1)(d)
		Section 9(1)(b)(ii)	Section 43G(1)(e)
		Section 9(2)(a)	Section 43G(2)(a)
		Section 9(2)(b)	Section 43G(2)(b)
		Section 9(2)(c)	Section 43G(2)(c)
		Section 9(2)(d)	Section 43H[1]
		Section 9(3)	Section 43G(3)
		Section 9(3)(a)	Section 43G(3)(a)
		Section 9(3)(b)	Section 43G(3)(b)
		Section 9(3)(c)	Section 43G(3)(c)
		Section 9(3)(d)	Section 43G(3)(d)
		Section 9(3)(e)	Section 43G(3)(e)
		Section 9(3)(f)	Section 43G(3)(f)
		Section 9(4)	Section 43G(4)

TABLE 6: SIMILARITIES BETWEEN THE PIDA AND THE PDA

1 To a lesser extent.

13.8 Conclusion

In respect of the protection of whistle-blowers, there are many similarities between the PIDA and the PDA.

In the main the PIDA requires a qualifying (protected) disclosure to be made in good faith, except when it is made to a legal advisor, to an employer, or in circumstances in which the whistle-blowing employee reasonably believes that the relevant failure relates to a person other than his employer or to an issue or a matter for which a person other than his employer bears the legal burden, to such other person. In this respect it would thus seem that the whistle may be blown on matters falling outside the scope of the employment relationship. However, it would seem that no protection or remedies are availed to such a whistle-blower either in terms of the PIDA or the Employment Relations Act 1996, which leaves such whistle-blower potentially vulnerable.

It would seem that the approach in respect of the blowing of the whistle within the employment relationship, the provisions are aimed at internal reporting first, with external reporting being allowed where the employer has put authorised procedures in place in terms of which such disclosure may be made externally. Under defined circumstances such disclosures may be made to other parties such as another responsible person, a Minister of the Crown, and prescribed person and the like. In circumstances in which a worker is subjected to detriment in contravention of section 47B; in other words for having made a qualifying disclosure the worker is entitled to present a complaint to an employment tribunal. Where an employment tribunal finds that such complaint is well-founded it makes a declaration to that effect and may make an award for compensation. Should an employee be dismissed unfairly for having made such qualifying disclosure, Part X of the Employment Rights Act 1996 is activated. The onus is then on the employer to show that the employee was not dismissed for an unfair reason as alleged.

Chapter II of the Employment Rights Act 1996 provides for the remedies in respect of an unfair dismissal including orders for reinstatement, re-engagement, compensation and interim relief, similar to that of the PDA.

CHAPTER 14: THE POSITION OF THE WHISTLE-BLOWER IN THE UNITED KINGDOM, MEASURED

14.1 Introduction

Lewis and Uys[1] explain that there are various factors which contributed to the increased interest in whistle-blowing in the UK, prior to the enactment of PIDA, including by way of example a number of financial scandals and health and safety related disasters, the work done on the topic by the Committee on Standards in Public Life and the like.

In the previous chapter it was concluded that in the main the PIDA requires a qualifying (protected) disclosure to be made in good faith, except when it is made to a legal advisor, to an employer, or in circumstances in which the whistle-blowing employee reasonably believes that the relevant failure relates to a person other than his employer or to an issue or a matter for which a person other than his employer bears the legal burden, to such other person. In this respect it would thus seem that the whistle may be blown on matters falling outside the scope of the employment relationship. However, it would seem that no protection or remedies are availed to such a whistle-blower either in terms of the PIDA or the Employment Relations Act 1996, which leaves such whistle-blower potentially vulnerable.

It seems that the approach in respect of the blowing of the whistle within the employment relationship, the provisions are aimed at internal reporting first, with external reporting being allowed where the employer has put authorised procedures in terms of which such disclosure may be made externally. Under defined circumstances such disclosures may be made to other parties such as another responsible person, a Minister of the Crown, and prescribed person and the like. In circumstances in which a worker is subjected to detriment in contravention of section 47B, in other words for having made a qualifying disclosure the worker is entitled to present a complaint to an employment tribunal.

Where an employment tribunal finds that such complaint is well-founded it makes a declaration to that effect and may make an award for compensation. Should an employee be dismissed unfairly for having made such qualifying disclosure, Part X of

1 Lewis and Uys 2007 *Managerial Law* (49)(3) 77.

the Employment Rights Act 1996 is activated. The onus is then on the employer to show that the employee was not dismissed for an unfair reason as alleged.

Chapter II of the Employment Rights Act 1996 provides for the remedies in respect of an unfair dismissal including orders for reinstatement, re-engagement, compensation and interim relief.

14.2 The whistle-blower in the United Kingdom's position measured

The impact of the PIDA is commented on by Lewis[2] in which, in the main, the following points serve to be highlighted:

- In *Miklaszewicz v. Stolt Ltd* [2002] IRLR 344 it was held that in its application of the remedies offered by the PIDA, it was immaterial as to whether the disclosure had been made before or after the PIDA had come into effect;[3]
- In *Parkins v. Sodexho Ltd* [2002] IRLR 109 it was underpinned that in circumstances in which there was a failure to comply with a legal obligation contained in the worker's own contract of employment, disclosure in this regard could still amount to a qualifying disclosure;[4]
- In *Darnton v. University of Surrey* [2003] IRLR 333 the Employment Appeal Tribunal had held that in deciding whether the relevant worker had held a reasonable belief as required by PIDA, determining the factual accuracy of the allegations contained in the disclosure would be important and with the reasonable belief being based on how the worker understood the facts to be;[5]
- In *Kraus v. Penna plc* [2004] IRLR 260 the Employment Appeal Tribunal had found that a whistle-blowing worker would not be afforded protection in terms of the PIDA in circumstances in which the employer was not under a legal obligation, even if the worker believed the employer had been under the legal obligation alleged. In this respect however the Appeal Court held that the Kraus case had been wrongly decided;[6]
- In *Street v. Derbyshire Unemployed Workers Centre* [2004] IRLR 687 the Court of Appeal decided that in deciding such matters the employment

2 Lewis and Uys 2007 *Managerial Law* (49)(3) 77.
3 Lewis and Uys 2007 *Managerial Law* (49)(3) 80.
4 Lewis and Uys 2007 *Managerial Law* (49)(3) 81.
5 Lewis and Uys 2007 *Managerial Law* (49)(3) 81.
6 Lewis and Uys 2007 *Managerial Law* (49)(3) 81.

tribunals should determine the predominant or dominant reason for the disclosure having been made. In this matter the complainant's disclosure had not been protected as it was found that the dominant reason for her having made it was personal antagonism in respect of her manager.[7]

- Similarly in *Lucas v. Chichester Diocesan Housing Association Ltd* (EAT 0713/04) the Employment Appeal Tribunal recommended that in such cases in which a personal motive or agenda was alleged to play a role on the part of the complainant, this was to be alleged by the employer and put to the complainant;[8]

Lewis makes pivotal points in respect of the motives with which the whistle is blown,[9] stating that there are principled objections to looking at an employee's motive within the context of whistle-blowing. These objections include the consideration that such a view may deter important disclosures from being made and that in circumstances in which the whistle-blower reasonably believes the truth of the information, the motive behind the disclosure is irrelevant.

As set out within the content of Chapter 1, it now becomes necessary to measure the PIDA in accordance with the points of measurement provided for in this respect.

7 Lewis and Uys 2007 *Managerial Law* (49)(3) 81.
8 Lewis and Uys 2007 *Managerial Law* (49)(3) 81.
9 Lewis and Uys 2007 *Managerial Law* (49)(3) 81-82.

Measurable 1:	Definition of a protected disclosure includes all *bona fide* disclosures against various types of unlawful acts including serious human rights violations, life, liberty and health.			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
UK	x		Section 43C-G of the PIDA Sections 43B(1), (3) and (4) of the PIDA Section 43H	Good faith is required in respect of all disclosures made as provided for within the text of PIDA, excluding the disclosures made to a legal adviser, and a reasonable belief in respect of the information being disclosed is also required. The types of conduct relates to those as provided for in section 43B(1) of the PIDA, taking into account the provisions of sections 43B(3) and (4). Also relevant in this respect is section 43H, relating to disclosures relating to exceptionally serious failures.
Measurable 2:	Covers public and private sector whistle-blowers, including armed forces and special forces.			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
UK	x	x	Section 230(3) of the Employment Rights Act 1996 and as widened by the provisions of section 43K of the PIDA	It is argued that in terms of the definitions supplied both public and private sector employees could potentially enjoy the protection availed. However, no special mention is made of the

				armed forces and special force members.
Measurable 3:	Provides for various legal issues as set out below:			
Country/ Territory UK	*Yes*	*No*	*Evidence*	*Comment/Other*
Employment laws	x		Section 47B (1) of the PIDA Section 49(1A) of the Employment Rights Act 1996 Section 48(2) of the Employment Rights Act 1996 Section 48(3) of the Employment Rights Act 1996 Section 49 of the Employment Rights Act 1996 Section 105(6A) of the Employment Rights Act 1996 Section 94(1) of the Employment Rights Act 1996 Section 110(1) of the Employment Rights Act 1996 Section 95(1) and (2) of the Employment Rights Act 1996 Section 98 of the Employment Rights Act 1996 Section 111 of the Employment Rights Act 1996 Section 112 of the Employment Rights Act 1996 Section 113 of the Employment Rights Act 1996 Section 114 of the Employment Rights Act 1996 Section 115 of the Employment Rights Act 1996 Section 116 of the Employment Rights Act 1996 Section 118 of the Employment Rights Act 1996 Section Sections 119 to 122 and 126 of the	The protection availed to the whistle-blower within the context of the PIDA is specifically aimed at the potential consequences within the employment relationship. However, as pointed out under paragraph 13.8 of Chapter 13, there is a concern in respect of the provisions of sections 43C(1)(*b*)(i) and (ii) of the PIDA, in respect of which a disclosure may be made if the whistle-blowing employee reasonably believes that the relevant failure relates to a person **other than** his employer. It is wholly unclear what relevant protection is availed to such employee, as it would seem that the detriment may then in all likely hood fall outside the scope of the employment relationship. No remedy in the PIDA provides for such a

			Employment Rights Act 1996 Sections 128 and 129 of the Employment Rights Act 1996 Section 132 of the Employment Rights Act 1996	circumstance.
Criminal law		x	There is no evidence in this respect	
Civil law		x	There is no evidence in this respect	
Media law		x	There is no evidence in this respect	
Specific anti-corruption measures		x	There is no evidence in this respect	
Interim interdicts		x	There is no evidence in this respect	However, having said this, it is noted that the provisions of section 128 of the Employment Rights Act 1996 does provide for the employment tribunal to whom a complaint has been submitted, does have the power to providing for interim relief for the whistle-blower.
Final interdicts		x	There is no evidence in this respect	
Compensation for pain and suffering		x	There is no evidence in this respect	
Loss of earnings	x		Sections 49(5A) and 6 of the Employment Rights Act 1996 Section 49(2) of the Employment Rights Act 1996 Section 49(3) (*a*) and (*b*) of the Employment Rights	An award of compensation Any reasonable expense incurred by the

			Act 1996 Sections 49 (4), (5) and (6) (*a*) of the Employment Rights Act 1996	complainant as a consequence of the act or omission in question, and the loss of any benefit which the complainant may reasonably be expected to have had if it were not for the act or the omission in question having been perpetrated.
Loss of status	x		Section 114 of the Employment Rights Act 1996	Reinstatement of the whistle-blower
Mediation	x	x	Section 115 of the Employment Rights Act 1996	The reason for the partial yes in this respect is that mediation is not specifically referred to in the text of the PIDA, however, in terms of the remedies availed an employment tribunal may in defined circumstances order re-engagement between the complainant and the employer, which could conceivably include a level of mediation.
Legal costs	x		Section 49(3)(*a*) of the Employment Rights Act 1996	Any reasonable expense incurred by the complainant as a consequence of the act or omission in question – this could conceivably cover the reasonable legal costs of the whistle-blower.
Measurable 4:	Appropriate incentives offered to private and public sectors to put appropriate whistle-blower measures in place			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
UK		x	There is no evidence in this respect	

Measurable 5:	Independent oversight body			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
UK		x	There is no evidence in this respect	
Measurable 6:	Ensuring that disclosures are timeously and properly investigated			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
UK		x	There is no evidence in this respect	
Measurable 7:	Ensuring that the identity of the whistle-blower is protected			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
UK		x	There is no evidence in this respect	
Measurable 8:	Protect anyone who makes use of internal whistle-blower procedures in good faith from any retaliation			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
UK	x	x	Section 230(3) of the Employment Rights Act 1996 as widened by section 43K of the PIDA Sections under measurable 3 above	The reason for the partial yes answer in this respect is as follows – • It does not avail protection to 'anyone', but only to workers as defined in terms of the PIDA and the Employment Rights Act 1996; and • It only avails work-related retaliation as set out in Chapter 13 hereof.
Measurable 9:	Prohibition of interference with a disclosure by a whistle-blower			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
UK		x	There is no evidence in this respect	
Measurable 10:	In relevant circumstances, external whistle-blowers are protected			

Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
UK		x	There is no evidence in this respect	
Measurable 11:	Whistle-blowers acting in good faith when blowing the whistle are protected even if it turns out later that the allegations were unfounded.			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
UK		x	There is no evidence in this respect	
Measurable 12:	Enforcement mechanism to investigate the whistle-blower's allegations			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
UK		x	There is no evidence in this respect	
Measurable 13:	Appropriate protection provided for accusations made in bad faith			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
UK		x	There is no evidence in this respect	
Measurable 14:	Burden of proof should rest with the employer to prove that the alleged action/ omission wasn't in reprisal due to protected disclosure made			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
UK	x	x	Section 98 of the Employment Rights Act 1996	The reason for the partial answer in this respect is that the burden of proof which is placed on the relevant employer relates only to dismissal and not any other acts of reprisal. In fact the PIDA only provides remedies for unfair dismissal. The section relates to the fairness of the

				dismissal in question, and in respect of which a burden of proof is placed on the employer.
Measurable 15:	The impact and implementation of the legislation measured at regular intervals			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
UK		x	There is no evidence in this respect	
Measurable 16:	Facilitation by the law of acceptance, participation in whistle-blowing and public awareness of whistle-blowing			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
UK		x	There is no evidence in this respect	

TABLE 7: EVALUATION OF THE UNITED KINGDOM

14.3 Conclusion

The purpose of the main whistle-blower legislation in the UK, the PIDA, is captured in the Act's preamble as being to protect people who make certain disclosures of information in the public interest, in order to allow for such individuals to bring action in respect of victimisation, and related purposes. This stated purpose seems to reflect a much wider scope as that which is available in terms of the relevant provisions of the related legislation, namely the PIDA and the Employment Rights Act 1996. However, this widened scope is also the reason for one of the main concerns relating to the text of the PIDA, and more specifically in relation to the persons who in making a disclosure qualify for the available remedies which are strictly limited to remedies within the employment context.

The provisions of section 43C (1)(*b*)(i) and (ii) of the PIDA, provide that in circumstances in which the employee believes reasonably that the relevant failure that he would want to blow the whistle on relates solely or mainly to a person other than his employer or to an issue for which a person other than his employer bears a legal burden, he is required to make the disclosure to such other person. And yet, all the remedies availed to the whistle-blower in terms of both the PIDA and the Employment Rights Act 1996, relate to employment related matters. It seems that such employee would be availed no protection in any manner, leaving him vulnerable.

The parties to whom a worker[1] may blow the whistle in good faith, and in the circumstances defined, include:

- The employer;[2]
- Someone other than the employer (as discussed in the paragraph above);[3]
- To a legal advisor;[4]
- To a Minister of the Crown;[5]
- To a prescribed person;[6] and

1 As defined in terms of section 230(3) of the Employment Rights Act 1996 and section 43K of the PIDA.
2 Section 43C(1)(a) of the PIDA.
3 Section 43C(1)(b)(i) and (ii) of the PIDA.
4 Section 43D of the PIDA.
5 Section 43E of the PIDA.

- Other cases.[7]

A worker in the UK has the right not to be subjected to any detriment by an act or a deliberate omission, by the employer, and which is done as a result of him having made a protected disclosure. What would amount to detriment is not in any manner defined within the text of the PIDA. It is noted though that in respect of whatever detriment may be complained of, the employee may receive an award for compensation.[8]

The protection in terms of the provisions of the PIDA, and as supplemented by the provisions of the Employment Rights Act 1996, and in respect of the undefined 'detriment', is aimed at the protection of workers as defined by section 230 (3) of the Employment Rights Act 1996, and as widened in scope by the provisions of section 43K of the PIDA, including aspects such as:

- Submitting the relevant complaint to an employment tribunal, which employment tribunal may make an award for compensation, which is to be paid by the employer to the relevant complainant.[9] In determining such award reasonable expenses and the loss of any benefit is taken into account.[10]

  In this respect an award may consist of a basic award and a compensatory award.[11]
- An order for re-engagement;[12]
- An order for reinstatement;[13]
- Interim relief;[14]

The PIDA, within the context of the Employment Rights Act 1996 does not expressly provide for relief in respect of the following:

---

6 Section 43F of the PIDA.
7 Section 43G of the PIDA.
8 The award for compensation as provided for in terms of section 49 (1) of the Employment Rights Act 1996.
9 Section 49(1) of the Employment Rights Act 1996.
10 Section 49(3)(a) and (b) of the Employment Rights Act 1996.
11 Section 118(1)(a) and (b) of the Employment Rights Act 1996.
12 Section 114 of the Employment Rights Act 1996.
13 Section 115 of the Employment Rights Act 1996.
14 Section 128 of the Employment Rights Act 1996.

- Criminal law;
- Civil law;
- Media law;
- Interim or final interdicts; and
- Compensation for pain and suffering;

So too, the PIDA does not make any provision in respect of the following:

- Specific anti-corruption measures;
- Appropriate incentives offered to both the public-and private sector to put appropriate whistle-blower measures in place within their sphere of responsibility;
- There is no independent oversight body that has been established to oversee and facilitate matters relating to whistle-blowing in terms of PIDA;
- There are no measures to ensure that disclosures made within the context of qualifying (protected) disclosures are timeously and properly investigated;
- There are no measures to ensure that in appropriate circumstances the identity of a whistle-blower is protected;
- There is no prohibition of interference with a whistle-blower;
- There are no provisions protecting external (non-worker) whistle-blowers in appropriate circumstances;
- There are no provisions indicating that whistle-blowers acting in good faith will be protected, even in circumstances in which it later turns out that the allegations made by the whistle-blower were unfounded;
- There are no provisions providing for appropriate enforcement mechanisms in respect of the investigation of whistle-blowers' allegations made;
- There are no provisions protecting a party (within this context predominantly the employer) against whom accusations are made in bad faith;
- There are no provisions ensuring that the impact and implementation of the measures of PIDA are measured at regular intervals; and

- There are no provisions in PIDA in respect of which the acceptance, participation in whistle-blowing and public awareness in respect of whistle-blowing.

Finally, the emphasis on the good faith in which a disclosure must be made in order to be a qualifying disclosure is questionable, as it is unclear for the pivotal role this plays within the greater scheme of whistle-blowing. Certainly the emphasis should rather be placed on whether or not there is truth in the allegations made first and foremost. The good faith element should arguably only become relevant in circumstances in which it turns out that the allegations made were totally unfounded, and vexatious and malicious only in nature. If for example party A has committed an offence, and party B blows the whistle on Party A's offence committed, certainly the main consideration and focus should be the illegal conduct by Party A. The motive behind the whistle-blowing, good or bad, vexatious or malicious, one way or another cannot change Party A's illegal conduct to legal conduct. This aspect will be dealt with further in the next chapter. Suffice it to say though that there are many perceived weaknesses within the PIDA, which leaves the potential whistle-blower vulnerable, and which should be addressed.

CHAPTER 15: A CONCLUSION ON THE DETERMINED POSITION OF THE WHISTLE-BLOWER IN SOUTH AFRICA

15.1 Introduction

The study at hand's main purpose is to determine whether the protection provided to the whistle-blower who blows the whistle under the protection of the relevant South African legislation, namely the PDA, enjoys appropriate protection, as availed in terms of the PDA's provisions.

In order to make the above-mentioned determination, it was stated[15] that it needed to be established:

- Who the persons are that qualify for protection in terms of the relevant legislation;
- Under what circumstances protection in terms of the relevant legislation is and is not availed to the whistle-blower;
- Whether the South African legislation meets the objectives in terms of the legislation itself;
- How the protection availed in the PDA measures up to that availed to whistle-blowers in the selected countries; and
- In the circumstance that the protection availed in terms of the PDA measures up negatively in terms of the comparison to that availed to the whistle-blowers in the selected countries, to determine how the legislation should be amended to strengthen the position of the whistle-blower in SA.

In attempting to determine what such appropriate protection would be, attention has been devoted to 16 determined measurables as described and determined in Chapter 1 of the study. The measurables are as follows:

Measurable 1	Definition of a protected disclosure includes all *bona fide* disclosures against various types of unlawful acts including serious human rights violation, life, liberty and health
Measurable 2	Covers public and private sector whistle-blowers, including armed forces and special forces
Measurable 3	Provides for various legal issues including –

15 Par 1.3, Chapter 1 hereof.

- Employment laws
- Criminal law
- Civil law
- Media law
- Specific anti-corruption measures
- Interim interdicts
- Final interdicts
- Compensation for pain and suffering
- Loss of earnings
- Loss of status
- Mediation
- Legal costs

Measurable 4	Appropriate incentives are offered to private and public sectors to put appropriate whistle-blower measures in place
Measurable 5	An independent oversight body has been established
Measurable 6	Ensuring that disclosures are timeously and properly investigated
Measurable 7	Ensuring that the identity of the whistle-blower is protected
Measurable 8	Ensuring the protection of anyone who makes use of internal whistle-blower procedures in good faith from retaliation
Measurable 9	Prohibition of interference with a disclosure by a whistle- blower
Measurable 10	In relevant circumstances, external whistle-blowers are protected
Measurable 11	Whistle-blowers acting in good faith when blowing the whistle are protected even if it turns out later that the allegations were unfounded
Measurable 12	Enforcement mechanism to investigate the whistle-blower's allegations
Measurable 13	Appropriate protection provided for accusations made in bad faith
Measurable 14	Burden of proof should rest with the employer to prove that the alleged action/omission wasn't in reprisal due to a protected disclosure made
Measurable 15	The impact and implementation of the legislation should be measured at regular intervals
Measurable 16	Facilitation by the law of the acceptance, participation in whistle-blowing and public awareness of whistle-blowing

TABLE 8: THE MEASURABLES

In determining the position of the whistle-blower in South Africa[16], a comparison is to be made in respect of the position of the whistle-blower in Australia[17], New Zealand[18] and the United Kingdom[19].

16 Especially Chapters 6, 7 and 8.
17 Chapters 11 and 12.
18 Chapters 9 and 10.

15.2 The bigger framework of whistle-blower protection in South Africa

The bigger framework in respect of whistle-blowing in South Africa was considered before the provisions of the PDA were considered, and which may be depicted as follows:

NON-LEGISLATIVE INFLUENCES	LEGISLATIVE INFLUENCES
The Code of Conduct for Public Servants	PDA
Minimum Anti-Corruption Capacity Requirements	Practical guidelines for employees in terms of section 10(4)(*a*) of the PDA
Anti-Corruption Framework	Public Service Act 103 of 1994
United Nations Convention against Corruption	Defence Act 42 of 2000
African Convention on Preventing and Combating Corruption	South African Police Act 68 of 1995
OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions	National Environmental Management Act 107 of 1998
SADC Protocol against Corruption	Western Cape Public Protector Act 6 of 1994
	Prevention and Combating of Corruption Activities Act 12 of 2000
	Financial Intelligence Centre Act 38 of 2001
	Witness Protection Act 112 of 1998
	Criminal Procedure Act 51 of 1977
	Companies Act 71 of 2008

TABLE 9: Bigger framework in respect of whistle-blowing in SA

However, there are admitted challenges in respect of this framework as discussed, both legislative and non-legislative in respect of the whistle-blower, especially in respect of duties of disclosures placed on persons in circumstances in which concurrent protection is not afforded to the discloser (whistle-blower). In this respect, it is argued more specifically that the Practical Guidelines for employees in terms of section 10(4)(*a*) of the PDA, needs to be reviewed and reconsidered as a matter of urgency to ensure that the challenges pointed out in Chapter 5 of this study are resolved. After having considered the bigger framework as set out above, the position of the whistle-blower in South Africa within the context of the PDA was considered and measured in Chapter 8 hereof.

19 Chapters 13 and 14.

15.3 A re-evaluation of South Africa, strictly within the context of the PDA

It was noted under paragraph 8.1 of Chapter 8 of the study that the measurement of the position of the whistle-blower in South Africa could not take place within the context of the PDA only, considering all the additional legislative influences in place already. However, in order to fairly measure the position of the whistle-blower in South Africa's position in comparison with the other elected legislation the measurement has to be reconsidered and measured strictly in accordance with the provisions of the PDA only.

Such re-evaluation reveals the following:

Measurable 1:	Definition of a protected disclosure includes all *bona fide* disclosures against various types of unlawful acts including serious human rights violations, life, liberty and health.			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
SA	x	x	Section 1 of the PDA[1]	
Measurable 2:	Covers public and private sector whistle-blowers, including armed forces and special forces.			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
SA	x	x	Section 2 (1) (*a*) of the PDA[2]	
Measurable 3:	Provides for various legal issues as set out below:			
Country/ Territory SA	*Yes*	*No*	*Evidence*	*Comment/Other*
Employment laws	x		PDA and LRA	
Criminal law	x		As discussed in Chapter 8	Part of the 'catch-all' section 4(1)(*a*) of the PDA
Civil law	x		As discussed in Chapter 8	Part of the 'catch-all' section 4(1)(*a*) of the PDA
Media law	x		As discussed in Chapter 8	Part of the 'catch-all' section 4(1)(*a*) of the PDA
Specific anti-corruption measures		x	There is no evidence in this respect in the text of the PDA	
Interim interdicts	x		As discussed in Chapter 8	Part of the 'catch-all' section 4(1)(*a*) of the PDA
Final interdicts	x		As discussed in Chapter 8	Part of the 'catch-all' section 4(1)(*a*) of the PDA
Compensation for pain and suffering	x		As discussed in Chapter 8	Part of the 'catch-all' section 4(1)(*a*) of the PDA
Loss of earnings	x		As discussed in Chapter 8	Part of the 'catch-all' section 4(1)(*a*) of the PDA
Loss of status	x		As discussed in Chapter 8	Part of the 'catch-all' section 4(1)(*a*) of the PDA
Mediation	x		As discussed in Chapter 8	Part of the 'catch-all' section 4(1)(*a*) of the PDA

1 As discussed in Chapter 8.
2 As discussed in Chapter 8.

Legal costs	x		As discussed in Chapter 8	Part of the 'catch-all' section 4(1)(*a*) of the PDA
Measurable 4:	Appropriate incentives offered to private and public sectors to put appropriate whistle-blower measures in place			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
		x	There is no evidence in this respect within the text of the PDA	
Measurable 5:	Independent oversight body			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
		x	There is no evidence in this respect within the text of the PDA	
Measurable 6:	Ensuring that disclosures are timeously and properly investigated			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
		x	There is no evidence in this respect within the text of the PDA	
Measurable 7:	Ensuring that the identity of the whistle-blower is protected			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
		x	There is no evidence in this respect within the text of the PDA	
Measurable 8:	Protect anyone who makes use of internal whistle-blower procedures in good faith from any retaliation			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
		x	There is no evidence in this respect within the text of the PDA	Only employees, and then within defined circumstances
Measurable 9:	Prohibition of interference with a disclosure by a whistle-blower			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
		x	There is no evidence in this respect within the text of the PDA	

Measurable 10:	In relevant circumstances, external whistle-blowers are protected			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
		x	There is no evidence in this respect within the text of the PDA	
Measurable 11:	Whistle-blowers acting in good faith when blowing the whistle are protected even if it turns out later that the allegations were unfounded.			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
		x	There is no evidence in this respect within the text of the PDA	
Measurable 12:	Enforcement mechanism to investigate the whistle-blower's allegations			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
		x	There is no evidence in this respect within the text of the PDA	
Measurable 13:	Appropriate protection provided for accusations made in bad faith			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
		x	There is no evidence in this respect within the text of the PDA	
Measurable 14:	Burden of proof should rest with the employer to prove that the alleged action/ omission wasn't in reprisal due to protected disclosure made			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
	x		Section 4(2) of the PDA, read together with section 192 of the LRA	See this portion in Chapter 8

Measurable 15:	The impact and implementation of the legislation measured at regular intervals			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
		x	There is no evidence in this respect within the text of the PDA	
Measurable 16:	Facilitation by the law of acceptance, participation in whistle-blowing and public awareness of whistle-blowing			
Country/ Territory	*Yes*	*No*	*Evidence*	*Comment/Other*
		x	There is no evidence in this respect within the text of the PDA	

TABLE 10: Evaluation of SA within the context of the PDA

15.4 An overview of the measurements allocated

Having placed the South African position squarely within the context of the PDA, it is necessary to compare the positions of the selected countries in an overview format, in order to more meaningfully gage the South African position.*[1]

	COUNTRY			
	South Africa	**New Zealand**	**Australia**	**United Kingdom**
MEASURABLE	**PDA**	**PDA NZ**	**PDA A**[2]	**PIDA**
Measurable 1	Partial	Yes	No	Partial
Measurable 2	Partial	Yes	Partial	Partial
Measurable 3				
Employment laws	Yes	Yes	Yes	Yes
Criminal law	Yes	Yes	Yes	No
Civil law	Yes	Yes	Yes	No
Media law	Yes	No	Yes	No
Specific anti-corruption measures	No	No	Yes	No
Interim interdicts	Yes	Yes	Yes	No
Final interdicts	Yes	No	Yes	No
Compensation for pain and suffering	Yes	Yes	Yes	No
Loss of earnings	Yes	Yes	Yes	Yes
Loss of status	Yes	Yes	Yes	Yes
Mediation	Yes	Yes	No	No
Legal costs	Yes	No	No	Yes
Measurable 4	No	No	Yes	No
Measurable 5	No	No	Yes	No
Measurable 6	No	No	Yes	No
Measurable 7	No	Yes	Yes	No
Measurable 8	No	Partial	No	Partial
Measurable 9	No	Yes	Yes	No
Measurable 10	No	No	Yes	No
Measurable 11	No	Yes	Yes	No
Measurable 12	No	No	Yes	No
Measurable 13	No	No	Yes	No
Measurable 14	Yes	No	No	Partial
Measurable 15	No	No	Yes	No
Measurable 16	No	No	Yes	No

TABLE 11: OVERVIEW OF MEASUREMENTS ALLOCATED

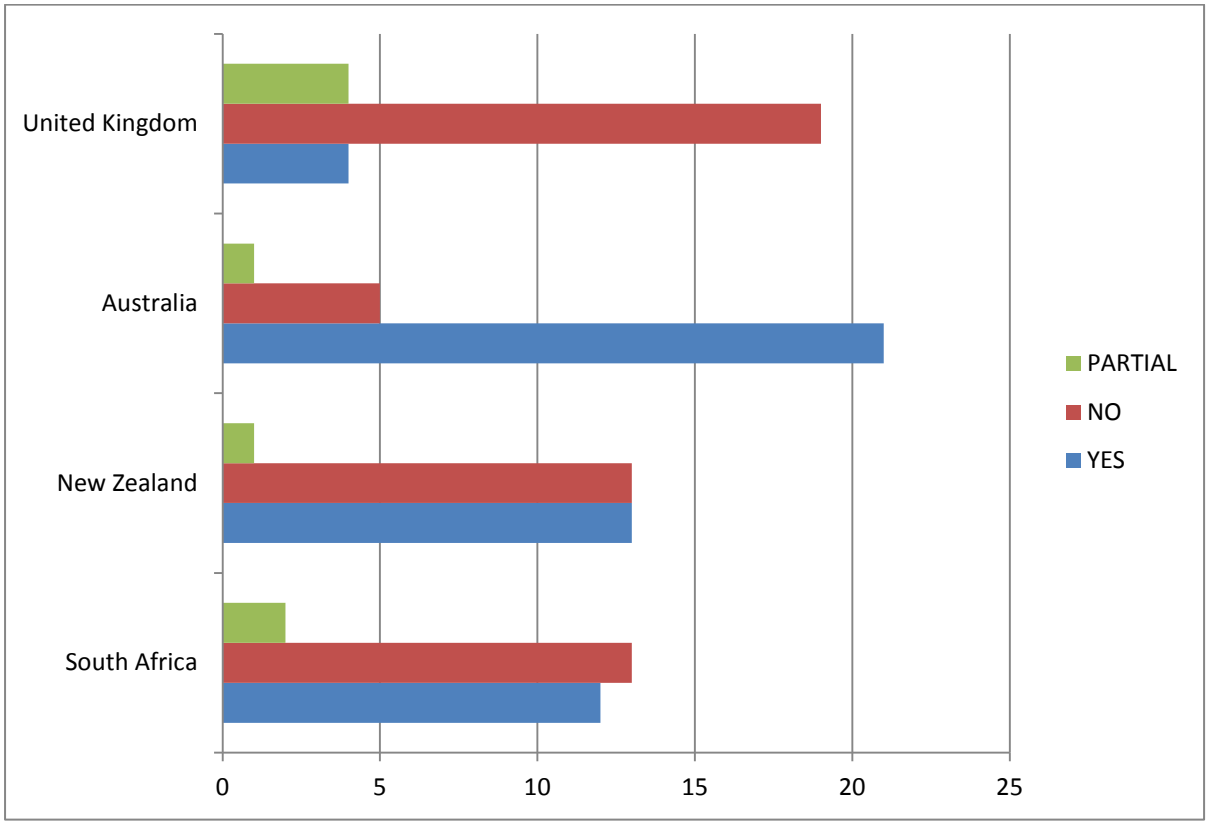
1 * In this respect an answer of ***partial*** denotes a yes with a qualification.
2 Victoria.

Reinterpreted in respect of the number of answers per category (yes, no and partial), the overview looks as follows:

COUNTRY	South Africa	New Zealand	Australia	United Kingdom
YES	12	13	21	4
NO	13	13	5	19
PARTIAL	2	1	1	4

TABLE 12: TOTALS IRO THE OVERVIEW

Graphically depicted the content of Table 12 reveals the positions as being as follows:



GRAPH 1: REINTERPRETATION OF THE OVERALL VIEW

It seems clear that the PIDA (UK) meets the least amount of the measurements set, with the PDA A (Australia, Victoria) meeting the most of the measurements; the PDA NZ is equally balanced in meeting and not meeting the measurements and the PDA meeting less of the measurements than not, but still meeting more than the PIDA.[3] The PDA ranks **third** out of the four when measured in this manner.

3 In this regard it needs to be noted that had it not been for the catch-all provision contained in section 4(1)(b) of the PDA, the PDA would have ranked last.

Ironically it seems therefore, with reference to the outcomes in respect of the 16 measurables that the country not to be followed is the UK (PIDA) upon which the PDA has been modelled, with the Victorian legislation being the furthest ahead in respect of measuring up to the measurables set.

There are a few comments to be made in respect of the two of the measurables that have attracted a 'no' in the PDA A (Victoria, Australia). In this regard it has to be borne in mind that:

- Measurable 1 – a protected disclosure does not need to be made in good faith, but with honesty. It is argued that this in in fact a positive aspect, that the PDA should aspire to, and as will be dealt with in the concluding remarks further, in this Chapter. Further the PDA is focussed solely on combatting corruption, although the measurements still remain relevant *in toto* within the context of this study.
- Measurable 8 – also relates to the fact that a protected disclosure does not need to be made in good faith, but with honesty.

Having established that the PDA ranks second last of the four countries compared, it is important to define in what respects the PDA is not meeting the measurements set.

15.5 In what respects the PDA does not measure up

It is not only important to understand how the PDA measures up to the selected countries' selected legislation, but also to understand more fully in what respects the PDA does measure up positively with reference to the set measurements.

The PDA fails to meet the set measurements in the following respects:

Measurable #	Description
Measurable 3	Specific anti-corruption measures
Measurable 4	Appropriate incentives offered to private and public sectors to put appropriate whistle-blower measures in place
Measurable 5	Independent oversight body
Measurable 6	Ensuring that disclosures are timeously and properly investigated
Measurable 7	Ensuring that the identity of the whistle-blower is protected

Measurable 8	Protecting anyone who makes use of internal whistle-blower procedures in good faith from any retaliation
Measurable 9	Prohibition of interference with a disclosure by a whistle-blower
Measurable 10	In relevant circumstances, external whistle-blowers are protected
Measurable 11	Whistle-blowers acting in good faith when blowing the whistle are protected even if it turns out later that the allegations were unfounded
Measurable 12	Enforcement mechanism to investigate the whistle-blower's allegations
Measurable 13	Appropriate protection provided for accusations made in bad faith
Measurable 15	The impact and the implementation of the legislation measured at regular intervals
Measurable 16	Facilitation by the law of acceptance, participation in whistle-blowing and public awareness of whistle-blowing

TABLE 13: MEASUREMENTS THE PDA FAILS TO MEET

Having said this, there is a further consideration that begs attention in this respect and in regard to the provisions of the PDA, which is the provision of section 4(1)(*b*) thereof, the so-called 'catch-all'.

Section 4(1)(b) of the PDA provides that any employee that has been subjected, is subject to or may be subjected to an occupational detriment in breach of section 3[4] *may pursue any other process allowed or prescribed in any law.*

It has to be admitted that this really is a 'catch-all' in every sense of the word, and it does not really add anything new, in other words something that is not already available in law, with the proviso that in order to attain the protection herein mention, the whistle-blower will first have to establish that he has made a protected disclosure correctly. It should however be pointed out that this provision alone is responsible for the attainment of a positive answer in respect of ten (10) of the sub-measurements of measureable 3. But which legislation meets the requirements that the PDA does not?

Relooking Table 11 provides the relevant answer:

4 Which provides that no employee may be subjected to any occupational detriment by his or her employer on account or partly on account of having made a protected disclosure.

	COUNTRY			
MEASURABLE	**South Africa**	**New Zealand**	**Australia**	**United Kingdom**
	PDA	**PDA NZ**	**PDA A**[5]	**PIDA**
Specific anti-corruption measures	No	No	Yes	No
Measurable 4	No	No	Yes	No
Measurable 5	No	No	Yes	No
Measurable 6	No	No	Yes	No
Measurable 7	No	Yes	Yes	No
Measurable 8	No	Partial	No	Partial
Measurable 9	No	Yes	Yes	No
Measurable 10	No	No	Yes	No
Measurable 11	No	Yes	Yes	No
Measurable 12	No	No	Yes	No
Measurable 13	No	No	Yes	No
Measurable 15	No	No	Yes	No
Measurable 16	No	No	Yes	No

TABLE 14: RELOOKING TABLE 11

It is telling to take note of the fact that the PDA fails in respect of the same measurables as the PIDA, which is to be expected in light of the fact that the PDA has obviously been modelled on the PIDA.[6]

Once again PDA A ranks number one in meeting the most of these requirements hands down.

15.6 What the PDA actually provides to the whistle-blower in respect of remedies

In determining what the content of the PDA actually provides to the whistle-blower in respect of remedies, it is deemed helpful to look at the actual construction of the PDA in identifying the said remedies, which may be done as follows:

Section of the PDA	Heading	Content
Section 1	Definitions	Disclosure Employee Employer Impropriety

5 Victoria.
6 As pointed out in paragraph 13.7 in Chapter 13, Table 5: Similarities between the PIDA and the PDA.

		Minister Occupational detriment Organ of state Prescribed Protected disclosure This Act
Section 2	Objects and application of the Act	As the heading indicates
Section 3	Employee making protected disclosure not to be subjected to occupational detriment	As the heading indicates
Section 4	Remedies	4 basic remedies
Section 5 -9	To whom disclosures may be made	As the heading indicates
Section 5	Protected disclosure to legal adviser	As the heading indicates
Section 6	Protected disclosure to employer	As the heading indicates
Section 7	Protected disclosure to member of Cabinet or Executive Council	As the heading indicates
Section 8	Protected disclosure to certain persons or bodies	As the heading indicates
Section 9	General protected disclosures	As the heading indicates
Section 10	Regulations	Regulations to be promulgated
Section 11	Short title and commencement	As the heading indicates

TABLE 15: CONSTRUCTION OF THE PDA

Almost 50% of the PDA is devoted solely to identifying to whom a protected disclosure may be made and how, with only one section providing 4 basic remedies to the whistle-blower.

It is clear from the above table utilised for measurement, that the protection and remedies offered to the whistle-blower within an employment relationship, as defined, are comprehensive, however, when looking at the remedies actually provided by the PDA as contained in section 4 thereof one notes the following:

- remedies in respect of dismissal and occupational detriment are (already) to be found in the LRA[7]; however in this regard it does provide that an employee may not be subjected to occupational detriment for having made or intending to make a protected disclosure; and

7 Section 4(2) of the PDA.

- the actual catch-all is the provision providing that a whistle-blower may approach any court with jurisdiction[8] and '*pursue any other process allowed or prescribed by law'*[9]; and
- the whistle-blower must if reasonably possible and practicable be transferred, with the terms and conditions of such transfer, not taking place without his written consent, not being less favourable than those applicable immediately before his transfer.[10]

Looking critically at the provisions of the PDA (being the main legislation protecting whistle-blowers in South Africa) in respect of the remedies offered it seems as though it makes the practice of subjecting a whistle-blower to occupational detriment addressable in terms of already existing rights and remedies available to employees.

Further to this it provides for the transfer of a whistle-blower, as above-mentioned.

The catch-all provided in section 4(1)(*b*) merely serves to provide remedies available to any person within South Africa, with the added burden of the whistle-blower having to ensure, assert and prove within such other process that he is in fact a whistle-blower and has made a protected disclosure in good faith. In light of this it is argued that the remedies availed to a whistle-blower in terms of the PDA is too general in nature to ascribe any praise for the PDA. It seems rather disappointingly, to be mainly concerned with setting the tests against which whistle-blowers are to be measured, hoops they have to jump through, before they are afforded protection potentially already available to anyone in South Africa, excluding the provision in respect of potential transfer.

Interestingly, within this context, the preamble of the PDA does not recognise that whistle-blowers need to be protected by availing appropriate and effective protection and or remedies apart from stating that every employer bears a responsibility to take all the necessary steps in ensuring that employees who wish to make a disclosure are protected from any reprisals as a result of having made such a disclosure.

No accordant responsibility is assigned within the provisions of the PDA.

8 Section 4(1)(a) of the PDA.
9 Section 4(1)(b) of the PDA.
10 Section 4(3) and (4) of the PDA.

It is argued that the PDA fails in actually meeting the objectives set in section 1(*a*) and (*b).* In fact, it would seem, especially taking into account the technicalities that the courts have attempted resolving, and that whistle-blowers have faced in their legal battles, that the PDA in its generality in respect of remedies, and the responsibilities placed on the shoulders of the whistle-blower in respect thereof, has unfairly tipped the bulk of the onus on the whistle-blower. The only provision in this respect placing any kind of requirement on the employer within this context is that no employer may subject a whistle-blower employee to occupational detriment[11], which onus of proof too lies on the whistle-blower employee. No punitive consequences are directly provided for in respect of an employer who does subject a whistle-blower employee to occupational detriment in contravention of the PDA; this statement excludes the remedies that may be implemented against the employer by the employee. It seems that the playing field in no manner equal, with the scale being tipped against the whistle-blower employee.

15.7 Conclusion and recommendations in respect of the suggested way forward

Effective and appropriate protection afforded to a whistle-blower makes blowing the whistle a great deal more enticing when the relevant remedies are embodied in legislation.

Within the South African context it is averred that whistle-blowers and whistle-blowing are a necessary check and balance, ensuring accountability, a core value of democracy, within our democratic society; and further that in terms of section 16(1)(*b*) of the Constitution that everyone has the right to freedom of expression, which includes the freedom to receive or impart information or ideas. The PDA is envisaged as being the main legislation in respect of the protection of whistle-blowers blowing the whistle in South Africa, and although many authors have commented on perceived shortcomings within the text of the PDA, since its commencement on the 16 February 2001, thirteen years ago, inexplicably not one amendment had been made to the PDA.

11 Section 3 of the PDA.

During June 2004, the South African Law Reform Commission published Discussion Paper 107, Project 123, in respect of Protected Disclosures; the project entailed a comparative study. The discussion paper highlighted the urgent need for the revision of the PDA, both with reference to the scope of the PDA, and the remedies availed to the whistle-blower. In the ten (10) years since, the recommendations were ignored flatly. The only movement at all has been seen in the last thirteen (13) years has been the issuing of the Practical Guidelines for Employees in terms of section 10(4)(*a*) of the PDA, and as discussed under paragraph 5.2 of Chapter 5. The additional challenges enlivened herewith need to be addressed as a matter of urgency.

The total apathy in this respect is inexplicable.

However, the fact of the matter is that the PDA needs to be revisited and addressed, and more specifically, it is recommended that the following aspects thereof needs to be addressed:

1. The fragmented provisions in various pieces of legislation regarding whistle-blowing and whistle-blowers, as evidenced in Table 2 [12] should be consolidated under the 'umbrella' of the PDA.
2. Either the preamble needs to be aligned to the actual provisions of the PDA, or the PDA needs to be aligned to the actual content of the preamble. Either way, in light of the current preamble, amendments incorporating –

    a. Appropriate incentives offered both to the public and private sectors for putting appropriate whistle-blowing mechanisms in place (measurable 4); and
    b. The facilitation by the PDA of the acceptance, participation and public awareness of whistle-blowing (measurable 16);
    c. The impact and implementation of the legislation should be measured in a compulsory fashion, at regular intervals (measurable 15). In this manner a proverbial finger can be kept on the pulse of whistle-blowing and best-practice identified, studied and implemented at a wider level of application.

12 Chapter 8.

d. In order to oversee the above-mentioned and related functions, an independent oversight body should be established. In this manner too, further fragmentation could be curbed, encouraging standardisation and resultant certainty.

   The requirements in respect of measurables 6 and 12 could be incorporated into the powers and functions of such an independent oversight body, separately or a division between the independent oversight bodies and organisations (public and private).

3. Section 1 of the PDA should include a definition of a 'contract of employment' in order to ensure the inclusion of so-called vulnerable workers;
4. Independent contractors, vendors and suppliers should be brought into the scope of protection if optimal effect is to be attained. Here too, reconsideration of what is considered to be potentially pivotal exclusions is recommended.[13] A portion of the PDA should be revised to include the protection of third parties to the employment relationship, standing outside the scope of the employment relationship as the Companies Act has done. This will not necessarily lead to a duplication of that provided for in terms of the Companies Act, as there are many other entities within which independent contractor, vendors and suppliers operate. The relationships between the entities, and an employee of either who blows the whistle on the actions or omissions of the non-employer party may be 'sacrificed' in any event to ensure that the relations between the parties continues undisturbed.
5. The definition in section 1 of the PDA is not wide enough to include the protection of disclosures relating to ethical and policy matters[14]; this should be reconsidered, especially in light of the importance of policy provisions and impact at both a macro and micro level;
6. In terms of the definition of a '*protected disclosure'*, a disclosure made in respect of which the *employee* concerned commits an offence by making the *disclosure,*[15] will not be a protected disclosure[16]. This would mostly be

13 With reference to *inter alia* paragraph 4.5.2 of Chapter 4.
14 With reference to the discussion under paragraph 4.5.2.1 of Chapter 4.
15 Protected disclosure – section 1(*e*)(i) of the PDA.

applicable in circumstances in which employees work with classified information in accordance with the Minimum Information Security Standards, and or where the employee has had to sign what amounts to an oath of secrecy. It is understood that such information is necessarily of such a sensitive nature that it needs to be protected, however, it is not understood why an alternative process has not been included for such employees, and in terms of which they would not be committing an offence if the prescribed process is followed, with the main aim of someone of appropriate clearance being the reporting channel and the integrity of the information remaining intact.

Blanket exclusion seems to belittle the importance of whistle-blowing, and potentially excludes crucial information being imparted in a controlled manner without further ado; this may not be justifiable.
An example of the manner in which this can be viably incorporated is to be found within the text of the PDA A.

7. The requirement of good faith is to be found in every instance in the PDA with the exclusion of a disclosure being made to a legal adviser.[17] The concept of good faith has not been defined within the text of the PDA, and establishing whether or not a whistle-blower has or has not complied with the requirement of good faith has had our courts grappling in order to define viable tests in this regard.[18] The actual reasoning behind the inclusion of good faith is not understood. Bearing in mind the aims of the PDA, as reflected in the preamble thereof, it is clear that the main aim of the PDA is to ensure 'the disclosure of information by employees *relating to criminal and other irregular conduct in the workplace in a responsible manner …and protection against any reprisals as a result of such disclosures'* and *'promote the eradication of criminal and other irregular conduct…'*

16 With reference to the discussion under paragraph 4.5.2.2 of Chapter 4
17 Sections 5 to 9 of the PDA.
18 See Chapter 7.

The criminal and irregular conduct relates to the conduct of a person other than the whistle-blower. So too, the conduct which is in essence the retaliation against the whistle-blower for having blown the whistle (in the form of occupational detriment) relates to conduct by a person other than the whistle-blower. In light of this consideration what should be abundantly clear is the fact that such criminal or irregular conduct will remain criminal or irregular conduct no matter what the intention of the whistle-blower is. Even if the disclosure is made in bad faith, the criminal or irregular conduct still remains what it is. The question that begs answering is why the attitude of a whistle-blower is of such import as to deprive him fully from the protection of the PDA.

The whistle-blower's intention should be totally irrelevant as long as he discloses the information honestly. In light of this the PDA should be amended to require honesty, not good faith. This amendment would not dislodge the requirement pertaining to *reasonable belief* in respect of the definition of a disclosure; in fact it would underpin it logically. In fact, such an amendment would tie in with a latter recommendation that where a whistle-blower, acting honestly blows the whistle should enjoy the protection offered in respect of the PDA, even if it later turns out that his allegations were unfounded. The reason for this is that the requirement of honesty would then be utilised to determine such protection in the stead of good faith alone, as good faith would necessarily be a factor to be considered in respect of the honesty of the disclosure. The meaning of 'honesty' within the context of the PDA should be defined within the content of section 1 thereof to minimise uncertainty as far as possible.

8. In accordance with measurable 3, specific anti-corruption measures should be incorporated into the text of the PDA; here valuable cues can be taken from the PDA A, especially in light of the fact that its focus is specifically anti-corruption;
9. In accordance with measurable 12 the provision of an enforcement mechanism relating to the investigation of whistle-blower allegations should

be incorporated within the text of the PDA.[19] Once again, the provisions of the PDA A in this respect could prove valuable.

10. In accordance with measurable 6 a provision to ensure the timeous and proper disclosure of whistle-blower allegations should be incorporated within the text of the PDA.[20] Once again, the provisions of the PDA A in this respect could prove valuable.
11. A remedy ensuring the prohibition of any interference with a disclosure by a whistle-blower, coupled with appropriate penalties, in accordance with measurable 9 should be incorporated within the text of the PDA.
12. Although accepted that in the main, the PDA is aimed at the protection of an employee whistle-blower within the context of employment, bearing in mind the definition of corruption, in relevant circumstances external whistle-blowers should also be afforded protection within the provisions of the PDA and in accordance with measurable 10.
13. In accordance with measurable 11 (but slightly adjusted), the remedies of the PDA should be extended to appropriately and effectively protecting whistle-blowers who honestly and on reasonable belief make disclosures, even if it later turns out that the allegations were unfounded. Once again, the provisions of the PDA A in this respect could prove valuable.
14. Based on the case law explored in Chapter 7, it is suggested that a provision should be included in the PDA in accordance with which disclosures are protected in the event that they lack merely in respect of technicalities. Once again, the provisions of the PDA A in this respect could prove valuable.
15. Penalties should be introduced for parties who cause occupational and other forms of detriment to the whistle-blower as a result of the whistle-blower having made a protected disclosure.
16. So too, penalties should be introduced in respect of employees who further personal agendas by malicious and dishonest allegations under the guise of disclosures, seeking protection for bad behaviour.

19 Note the suggestions in this regard made under point 2 above.
20 Note the suggestions in this regard made under point 2 above.

Introducing the above 16 suggested recommendations would most certainly align the PDA with as close to best practice as could be, and would in all probability revive the hopes and engagement of the whistle-blower in South Africa. So too it would build on the political will expressed and the multifarious foundation already laid for whistle blowing in South Africa.

ANNEXURE A

CHECKLIST

No.: Consideration:

Action or application proceedings to be instituted?

1 Does the court have jurisdiction?

a The court only has jurisdiction to determine the underlying dispute once the conciliation process has run its course.

b **Interim interdict:**

However, in respect of those matters in terms of which an interim interdict or interdict is sought, the court clearly has the power to order that the *status quo* be preserved or restored, pending the determination of the main dispute.

At common law a court's jurisdiction to entertain an application for an interim interdict depends on whether it has jurisdiction to preserve or restore the *status quo,* as opposed to the jurisdiction to decide the main dispute.

A court will only intervene in respect of disciplinary proceedings in exceptional circumstances

c **In an urgent application,** has a case for urgency been made out?

2 **Disclosure** must be made by an **employee** (either to an employer or an external party as provided for by the PDA)

3 **A disclosure** must be made

4 **When determining whether the disclosure made is indeed a protected disclosure:**

a **Determining whether a disclosure is a protected disclosure is a 4 stage process:**

1. Analysis of the information to determine whether there was a disclosure;
2. If yes, is it a protected disclosure?
3. Was the employee subjected to occupational detriment?
4. What remedy should be awarded?

b The applicant bears the evidentiary burden of proving that his disclosure is protected

Having said this, sight must not be lost of the provisions of section 192 of the LRA which deals with the onus in dismissal disputes.

Section 192 (1): in any proceedings concerning **any** dismissal, the employee must establish the existence of the dismissal.

Section 192 (2): if the existence of the dismissal has been established (by the employee), the employer must prove that the dismissal is fair.

c **The information:**

i Has reason to believe the information shows or tends to show the range of conduct that forms the basis of the definition of a disclosure.

ii It has been argued that 'disclosure' should be interpreted to mean conduct synonymous with whistle-blowing and excludes normal duty reports.

Counsel in Ramsammy matter referred to the Tshishonga matter:

Information includes, but is not limited to, facts…

Information would include such inferences and opinion based on the facts

that show that a suspicion is reasonable and sufficient to warrant an investigation.

iii Disclosure means the act or action of making known

iv The seriousness of the alleged impropriety must be considered

v 'Smelling a rat' is not information

vi The standard of the quality that the information must meet is no higher than requiring the 'impropriety' to be likely

d ***'Reason to believe' in respect of the information:***

i The court must be satisfied that there are facts upon which the reason to believe could be based.

ii Whether the employee had a reason to believe the information is both a subjective and objective test:
Subjective in the sense that the employee (making the disclosure) believes it.
Objective in the sense that the subjective belief has to be based on reason (belief has to be reasonable)
The reasonableness of the employee's belief is directly related to his bona fides (good faith).
For example: if the primary or exclusive purpose of reporting is to embarrass or harass the employer, the reasonableness of the employee's belief is questionable.

iii The PDA does not require the employee to prove the truth of the information, only the reasonable belief.

iv Reason to believe cannot be equated with personal knowledge.
Hearsay, depending on its reliability could influence the reasonableness of the belief.

5 **The channel used:**[21]

a Where required, the disclosure must be made to the employer

b If there is a prescribed or authorised procedure in accordance with which the disclosure must be made, there must be substantial compliance therewith

c If there is no prescribed or authorised procedure, the disclosure must be made to the employer

d If the procedure authorises the employee to make the disclosure to an external party the employer is deemed to have made the disclosure

e PDA encourages a culture in terms of which internal remedies and procedures are resorted to and exhausted before a disclosure is made public

f Engaging with and cooperating with the employee before going to an external party, is directly linked to good faith and the reasonableness of the belief involved

g Four recognised factors to be considered in respect of making the

---

[21] It needs to be noted that in respect of the channel utilised in making the disclosure, employees potentially have an exception in this regard, and in accordance with the provisions of section 31(4) and (6) of the NEMA. It is argued that this section is applicable to employees, as it refers to 'any person' and dismissal and discipline.
Section 31 (6) of the NEMA provides that section 31(4) is applicable, whether or not the whistle-blower has exhausted any other applicable external or internal procedure to report or otherwise remedy the matter, relating to environmental risk. This proposition has as yet to be tested in our courts.

disclosure public:

1. The concern was raised internally or with a prescribed regulator, but was not properly addressed;
2. The concern was not raised internally or with a prescribed regulator because the whistle-blower reasonably believed that he would be victimised;
3. The concern was not raised internally because the whistle-blower reasonably believed a cover-up was likely and there was no prescribed regulator;
4. The concern was exceptionally serious.

6 **Good faith:**

a Disclosure must be made in good faith – the PDA seeks to balance the employee's rights to free speech, on a principled basis, with the interests of the employer.

b An employee who deliberately sets out to embarrass or harass the employer will not satisfy the requirement of good faith.

c May not be made for personal gain

d **Good faith requires:**

i The core meaning of good faith is honesty

By setting good faith as a specific requirement in the PDA, the legislature must have intended something more than reasonable belief and the absence of personal gain.

Good faith is a finding of fact.
The requirement of good faith invokes a proportionality test to establish the dominant motive.

ii Proof of the validity of the concerns or suspicions

iii Conjecture, rumour and a subjective opinion or accusation do not qualify

iv Malcontents and employees who slander the employer without foundation or who disagree with the way in which the organisation is managed do not enjoy whistle-blower protection.

7 **A demonstrable nexus:**

a There must be a nexus between the disclosure made and the occupational detriment alleged

b The nexus must be demonstrable
In this regard it needs to be noted that the Commissioner in **H & M Ltd** added to this, in that it stated that it wasn't deemed necessary that the detriment be directly linked to the disclosure in the sense that an employee would be entitled to a remedy if and only if the detriment threatened or applied by the employer is so threatened or applied expressly for the making of a disclosure, as this would permit unscrupulous employers to create pretexts upon which to effect occupational detriments and undermine the purpose of the PDA.

ACRONYMS	DESCRIPTION
ABET	Adult Basic Education and Training
ACF	Anti-Corruption Framework
ACFE	Association of Certified Fraud Examiners
ACT	Australian Capital Territory
ACTT	Anti-Corruption Task Team
ACWG	Anti-Corruption Working Group
ADR	Alternative Dispute Resolution
AGM	Annual General Meeting
AUC on PCC	African union Convention on Preventing and Combating Corruption
BCEA	Basic Conditions of Employment Act 75 of 1997
CA	Companies Act 71 of 2008
CCMA	Commission for Conciliation, Mediation and Arbitration
CDC	Coega Development Corporation
CEO	Chief Executive Officer
CFO	Chief Financial Officer
CID	Crime Intelligence Division
COO	Chief Operations Officer
COSATU	Congress of South African Trade Unions
CPA	Criminal Procedure Act 51 of 1977
CV	Curriculum Vitae
CWU	Communication Worker's Union
DA 1957	Defence Act 44 of 1957
DA 2002	Defence Act 42 of 2002
DCS	Department of Correctional Services
DOH	Department of Health
DPCI	Directorate of Priority Crime Investigation
DPSA	Department of Public Service and Administration
Dr	Doctor
ERA	Employment Relations Act 24 of 2000 (New Zealand)
EXCO	Executive Committee
FIC	Financial Intelligence Centre
FICA	Financial Intelligence Centre Act 38 of 2001
HDC	Health and Disability Commission
HPCSA	Health Professions Council of South Africa
HRA	Human Rights Act 82 of 1993 (New Zealand)
IBAC	Independent Broadbased Anti-Corruption Commission
IBAC Act	Independent Broadbased Anti-Corruption Commission 2011
ICAC	Independent Commission against Corruption

IMATU	Independent Municipal and Allied Workers' Union
IPCA	Independent Police Conduct Authority
JCPS	Justice Crime Prevention and Security Cluster
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act 66 of 1995
Ltd	Limited
MACC	Minimum Anti-Corruption Capacity
MEC	Member of Executive Council
Mr.	Mister
Ms.	Miss
MNE	Meyersdal Nature Estate
MTN	Mobile Technology Network
NACH	National Anti-Corruption Hotline
NDP	National Development Plan – 2030
NEMA	National Environmental Management Act 107 of 1998
NNA	Nozuko Nxusani Attorneys
NZSIS	New Zealand Security Intelligence Services
OECD	Organisation for Economic Co-operation and Development
OHSA	Occupational Health and Safety Act 85 of 1993
OWAP	Office of Witness Protection
PACOFS	Performing Arts Centre of the Orange Free State
PAIA	Promotion of Access to Information Act 2 of 2000
PAJA	Promotion of Administrative Justice Act 3 of 2000
PIDA	Public Interest Disclosure Act 1998
PDA	Protected Disclosures Act 26 of 2000
PDA A	Protected Disclosures Act 85 of 2012 (Australia)
PDA NZ	Protected Disclosures Act 7 of 2000 (New Zealand)
PFMA	Public Finance Management Act 1 of 1999
PRECCA	Prevention and Combating of Corrupt Activities Act 12 of 2004
PSA	Public Service Act 103 of 1994
PSC	Public Service Commission
PSC	Power System Control
QAD	Quality Assurance Department
R	Rand
RAG	Retail Apparel Group
RSA	Republic of South Africa
SA	South Africa
SADC	Southern African Development Community
SALRC	South African Law Reform Commission
SAMWU	South African Municipal Workers' Union

SANDF	South African National Defence Force
SAPS	South African Police Service
SAPS Act	South African Police Act 68 of 1995
SARS	South African Revenue Service
SC	Senior Council
SC Act	Supreme Court Act 59 of 1959
SCA	Supreme Court of Appeal
SEO	Strategic Executive Officer
SITA	State Information Technology Unit
SSC	State Services Commission
TAACT	Tax Administration Act 28 of 2011
UNCAC	United Nations Convention Against Corruption
UNISA	University of South Africa
USC	United States Congress
v	Versus
VARGO	Victorian Auditor General Office
VAT	Value Added Tax
VIA	Victorian Inspectorate Act 2011
W & R SETA	Wholesale & Retail Sector Education and Training Authority
WA	Western Australia
WCPPA	Western Cape Public Protector Act 6 of 1994
WPA	Witness Protection Act 112 of 1998

Bibliography

Internet sources:

A

African Union “African Union Convention on Preventing and Combating Corruption” www.assetrecovery.org/kc/node/b08103a3-a348-11dc-bf1b-335d0754ba85.0:jsessionid=9B32A686CA990EB29EB65F2DEE01FE5A (Date of use: 8 May 2013)

African Union Advisory Board on Corruption, “Status of Ratification of the Convention on Corruption” http://www.auanticorruption.org/auac/about/category/status-of-the-ratification (Date of use: 30 June 2015)

Anonymous http://www.ibac.vic.gov.au (Date of use: 27 May 2014)

Anonymous “The Free Dictionary by Farlex, Exemplary Damages http://legal-dictionary.thefreedictionary.com/exemplary+damages (Date of use: 27 May 2014)

Anonymous “The Free Dictionary by Farlex, Injunction http://legal-dictionary.thefreedictionary.com/injunction (Date of use: 27 May 2014)

Anonymous “Law Vision Pty Ltd, The law of torts, 2008” http://www.lawvision.com.au/uploads/PDFs/Tort%20Law%20.pdf (Date of use: 27 May 2014)

Anonymous “Victorian Inspectorate: About us” http://www.vicinspectorate.vic.gov.au/home/about+us (Date of use: 27 May 2014)

Anonymous http://www.police.govt.nz/about-us/structure/commissioners-executive-commanders (Date of use: 24 May 2014)

Anonymous “Qui Tam” http://www.law.cornell.edu/wex/qui_tam_action (Date of use: 9 May 2013)

Anonymous “Qui Tam: A Colourful History” http://www.whistleblowingprotection.org/?q=node/12 (Date of use: 1 July 2015).

Anonymous “Qui Tam History” http://www.justia.com/employment/qui-tam-whistleblower/ (Date of use: 9 May 2013)

Anonymous “Synonyms for whistle-blowers” http://thesaurus.com/browse/whistle-blower (Date of use: 15 September 2012)

Anonymous “Whistleblowing” http://www.uib.no/rg/bbrg/research/whistleblowing (Date of use: 9 May 2013)

Anymous “SADC Protocol Against Corruption” http://www.sadc.int/documents-publications/show/795 (Date of use: 8 May 2013)

Anonymous “OECD Anti-Bribery Convention” http://en.wikipedia.org/wiki/OECD_Anti-Bribery_Convention (Date of use: 8 May 2013)

Anonymous “The Role of Controller and Auditor-General” http://www.oag.govt.nz/about-us/cag-role (Date of use: 24 May 2014)

Anonymous “About us” Independent Police Conduct Authority: http://www.ipca.govt.nz/Site/about/default.aspx (Date of use: 24 May 2014)

Anonymous “About us Crown Law Office: http://www.crownlaw.govt.nz/pagepub/docs/about/officers.asp (Date of use: 24 May 2014)

Anonymous “Commissioner, Executive and District Commanders” New Zealand Police: http://www.police.govt.nz/about-us/structure/commissioners-executive-commanders (Date of use: 24 May 2014)

Anonymous “Ombudsman: What we do” http://www.ombudsman.parliament.nz/what-we-do/protecting-your-rights/protected-disclosures-whistle-blowing (Date of use: 10 April 2014)

Anonymous “Our Role and Purpose The Serious Fraud Office” https://www.sfo.govt.nz/about (Date of use: 24 May 2014)

Anonymous “The Commissioner Health and Diasbility Commission” http://www.hdc.org.nz/about-us/the-commissioner (Date of use: 24 May 2014)

Anonymous “The Role of the SCC” http://www.ssc.govt.nz/sscer (Date of use: 24 May 2014)

Association of Certified Fraud Examiners “Report to the nations on occupational fraud and abuse, 2012 Global Fraud Study” http://www.acfe.com/uploadedFiles/ACFE_Website/Content/rttn/2012-report-to-nations.pdf (Date of use: 28 October 2013)

Auditor General of South Africa “Mandate and functions of the Auditor General” http://www.agsa.co.za/AboutUs.aspx (Date of use: 23 May 2013)

B

Binikos E “Sounds of silence: Organisational trust and decisions to blow the whistle” www.uj.ac.za/EN/Faculties/humanities/departments/sociology/about/Documents/Binikos%20Sounds.pdf (Date of use: 21 August 2012)

Bouville M “Whistle-blowing and morality” http://mathieu.bouville.name/education-ethics/Bouville-whistle-blowing.pdf (Date of use: 21 Augustus 2012)

Brown A J “Public Interest Disclosure Legislation in Australia: Towards the Next Generation, An Issues Paper November 2006” http://www.griffith.edu.au/__data/assets/pdf_file/0015/151314/full-paper.pdf (Date of use: 26 May 2014)

C

Cambridge Dictionaries Online “Definition of a whistle blower” http://dictionary.cambridge.org/dictionary/british/whistle-blower (Date of use: 9 May 2013)

Clarke J “The Whistleblower’s Dilemma” 1999 *Sunday Business Post* October www.sme.ie/articles/business_ethics/whistleblowers_dilemma.pdf (Date of use: 15 August 2012)

Constitution of the Republic of South Africa, 1996 http://www.info.gov.za/documents/constitution/1996/a108-96.pdf (Date of use: 8 May 2013)

COSATU “Cosatu submission on the SALC'S Issue Paper on Protected Disclosure submitted to the South African Law Commission” http://www.cosatu.org.za/show.php?ID=2222 (Date of use: 9 May 2013)

Crown Law Office: About us http://www.crownllaw.govr.nz/pagepub/docs/about/officers.asp (date of use: 24 May 2014)

D

Dawson S “Whistleblowing: a broad definition and some issues for Australia” www.bmartin.cc/dissnet/documents/Dawson.html (Date of use: 20 August 2012)

Dawson S “Whistleblowing: a broad definition and some issues for Australia” www.bmartin.cc/dissnet/documents/Dawson.html (Date of use: 16 September 2012)

Department of Public Service Administration “Minimum Anti-Corruption Capacity” www.ccps-africa.org/actoolkit/pdf/guidelines/DPSA_AC.pdf (Date of use: 8 May 2013)

G

Gabriella “Perception of corruption on the increase” http://opengovpartners.org/za/2012/06/01/perception-of-corruptiion-on-the-increase/ (Date of use: 15 September 2012)

Gehringer E F “Ethics in Computing, Lecture 15 – Whistleblowing" http://people.engr.ncsu.edu/efg/379/sum06/lectures/wk15lecture.html (Date of use: 21 Augsut 2012)

Government Gazette http://www.labour.gov.za/DOL/downloads/legislation/sectoral-determinations/basic-conditions-of-employment/Determination%20Earnings%20Threshold%202013.pdf (Date of use: 5 November 2013)

Government Gazette 28985, Government Notice 643 http://www.info.gov.za/view/DownloadFileAction?id=62412 (Date of use: 24 May 2013)

Government Gazette 33524, Government Notice 783 http://www.info.gov.za/view/DownloadFileAction?id=131372 (Date of use: 24 may 2013)

H

Health and Disability Commission: The Commissioner http://www.hdc.org.nz/about-us/the-commissioner (Date of use: 24 May 2014)

I

Independent Police Conduct Authority: About us http://www.ipca.govt.nz/Site/about/default/aspx (Date of use: 24 May 2014)

International Labour Office “Termination of Employment Convention, No. 158” http://www.ilo.org/public/libdoc/ilo/1983/83B09_engl.pdf (Date of use: 10 May 2013)

InvestorWords “Definition of a whistle blower” http://www.investorwords.com/5304/whistle_blower.html (Date of use: 9 May 2013)

Independent Commission against Corruption: Home

http://www.icac.nsw.gov.au (Date of use: 30 June 2015)

K

King A “Hansard and Journals New Zealand Parliament”
http://www.parliament.nz/en-nz/pb/debates/debates/48HansD_20071018_00000926/protected-disclosures-amendment-bill-%e2%80%94-first-reading (Date of use: 24 May 2014)

L

Liyanarachchi G and Nedwick C
http://ecampus.nmit.ac.nz/moodle/file.php/4599/Whistleblowing/Liyanarachchi_Newdick-The_impact_of_Moral_Reasoning_and_Retaliation_on_Whistle-Blowing_New_Zealand_Evidence_2009.pdf (date of use: 24 May 2014)

Luke M “Five Ethical Dilemmas Faced by Employees in Whistle-Blowing”
www.ehow.com/info_8546932_five-dilemmas-faced-employees-whistleblowing.html (Date of use: 23 August 2012)

M

Martin P “The status of whistleblowing in South Africa, taking stock, June 2010”
www.opendemocracy.org.za/wp-content/uploads/2010/10ODAC_Whistleblowing_Report_web.pdf (Date of use: 8 and 24 May 2013)

N

National Anti-Corruption Forum “Guide to the Whistle-blowing Act”
http://www.nacf.org.za/guide_to_the_whistle_blowing_act/section_two.html (Date of use: 9 May 2013)

National Planning Commission
http://www.npconline.co.za/medialib/downloada/home/NPC%20National%20Development%20Plan%20Vision%202030%20-lo-res.pdf (Date of use: 13 February 2013)

National Development Plan
http://www.npconline.co.za/medialib/downloada/home/NPC%20National%20Development%20Plan%20Vision%202030%20-lo-res.pdf (Date of use: 13 February 2013)

O

OECD "OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Ratification Status as of 21 May 2014" http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf (Date of use: 30 June 2015).

Office of the Ombudsman "Ombudsman: Making a protected disclosure - blowing the whistle" http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/441/original/making_a_protected_disclosure___blowing_the_whistle_.pdf?1349214579 (Date of use: 23 March 2014)

Office of Witness Protection "Sub-programme 2, Witness Protection" www.npa.gov.za/UploadedFiles/SUB-PROGRAMME%202%20-%204%20(OWP,%20DSO,%20AFU).pdf (Date of use: 25 May2013)

Omtzigt P 2009 "The protection of whistle-blowers" http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=12302&Language=EN (Date of use: 29 October 2013)

Orifici A and Webster T "A new whistle at work" http://www.liv.asn.au/Mobile/Home/Law-Institute-Journal/Article?NodeID=509756&NodeParentID=509746 (Date of use: 27 May 2014)

Oxford Dictionaries "Definition of a whistle blower" http://oxforddictionaries.com/definition/english/whistle-blower (Date of use: 9 May 2013)

P

Parliamentary Commissioner for the Environment: Functions and Powers http://pce.parliament.nz/about-us/functions-and-powers (date of use: 24 May 2014)

Parliamentary Counsel Office New Zealand Legislation http://www.legislation.govt.nz/act/public/1996/0047/latest/DLM392290.html (Date of use: 10 April 2014)

Parliamentary Counsel Office "Human Rights Act 1993" New Zealand Legislation http://www.legislation.govt.nz/act/public/1993/0082/latest/DLM304212.html (Date of use: 10 April 2014)

Parliamentary Counsel Office
http://www.legislation.govt.nz/act/public/2000/0024/latest/DLM58317.html (Date of use: 23 March 2014)

Parliamentary Counsel Office “Ombudsman Act 1975” New Zealand Legislation
http://www.legislation.govt.nz/act/public/1975/0009/latest/DLM430984.html?search=qs_act%40bill%40regulation%40deemedreg_inspector-general+intelligence+and+security+act+1996_resel_25_h&p=1&sr=1 (Date of use: 10 April 2014)

Parliamentray Counsel Office “Local Government Official Information and Meetings Act 174 of 1987”
http://www.legislation.govt.nz/act/public/1987/0174/latest/DLM122242.html (Date of use: 12 April 2014)

Pierson J K http://dl.acs.org.au/index.php/ajis/article/view/432/392 (Date of use: 20 August 2012)

Practical Guidelines for Employees in terms of Section 10(4) (a) of the PDA, 2000. Government Gazette No. 34572, Government Notice No. 702
www.justice.gov.za/legislation/notices/2011/20110831_gg34572_n702-disclosure-guidelines.pdf (Date of use: 25 May 2013)

Protected Disclosures, Discussion Paper 107, Project 123
Http://salawreform.justice.gov.za/dpapers/dp107.pdf (Date of use: 23 May 2013)

Public Protector of South Africa “Vision and Mission of the Public Protector” http://www.pprotect.org/about_us/Vision_mission.asp (Date of use: 23 May 2013)

Public Protecor of South Africa “Public Protector of South Africa: History and Background to the Office of the Public Protector”
http://www.publicprotector.org/about_us/history_background.asp (Date of use: 24 May 2013)

Public Service Commission “A Guide for Public Sector Managers Promoting Public Sector Accountability Implementing the Protected Disclosures Act – Introduction” www.psc.gov.za/documents/docs/guidelines/psc_odac_update.pdf (Date of use: 23 May 2013)

Public Service Commission “Code of Conduct for Public Servants”
http://www.psc.gov.za/documents/code.asp (Date of use: 29 October 2013)

Public Service Commission “Feedback information”
http://www.psc.gov.za/feedback/feedback_form.asp (Date of use: 24 May 2013)

Public Service Regulations 2001
http://www.dpsa.gov.za/dpsa2g/documents/acts&regulations/regulations1999/PSRegulations_13_07_2012.pdf (Date of use: 8 May 2013)

R

Responsibilities: New Zealand Security Intelligence Service
http://www.nzsis.govt.nz/about-us/our-purpose (Date of use: 24 May 2014)

Roane B "Independant Online News (IOL)" http://www.iol.co.za/news/crime-courts/saps-website-hacked-1.1520042 (Date of use: 23 may 2013)

S

SALRC Discussion Paper 107 http://www.justice.gov.za/salrc/dpapers/dp107.pdf (Date of use: 18 October 2013)

SANDF http://www.dod.mil.za/ (Date of use: 24 May 2013)

SAPA "ANC says it assassinated top impimpi and other informers"
http://www.justice.gov.za/trc/media/1997/9705/s970512e.htm (Date of use: 14 September 2012)

Serious Fraud Office: Our Role and Purpose http://www.sfo.govt.nz/about (Date of use: 24 May 2014)

South African Revenue Service "Tax Administration"
http://www.sars.gov.za/Legal/TaxAdmin/Pages/default.aspx (Date of use: 28 October 2013)

State Service Commission: The Role of the SCC http://ssc.govt.nz/sscer (date of use: 24 May 2014)

State Service Commission "Core State sector legislation and 2013 amendments"
http://www.ssc.govt.nz/node/8521(Date of use: 23 March 2014)

Status of Ratification of the United Nations Convention against Corruption
https://www.unodc.org/documents/treaties/UNCAC/COSP/session4/V1186007e.pdf (Date of use: 30 June 2015)

Stewart A P "Injuctions"
http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&ved=0CFIQFjAF&url=http%3A%2F%2Fsydney.edu.au%2Flec%2Fsubjects%2Fequity%2FSummer%25202011-

12%2FInjunctiions.pptx&ei=nnSEU9_bJuaV7Aap6IGwBQ&usg=AFQjCNFT4sBV6fhxVxhg6_sWFakTbRiB1w&sig2=7oe4LSK4 (Date of use: 27 May 2014)

Stock R http://www.stuff.co.nz/the-press/news/7965398/NZs-attitudes-to-whistleblowers (date of use: 24 May 2014)

T

The Free Dictionary “Definition of a whistleblower” http://www.thefreedictionary.com/whistleblower (Date of use: 15 September 2012)

The Role of Controller and Auditor-General http://.oag.govt.nz/about-us/cag-role (Date of use: 24 May 2014)

U

United Nations “United Nations Convention against Corruption” http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf (Date of use: 8 May 2013)

V

Vermaas J 2002 http://docs.szw.nl/pdf/35/2002/35_2002_3_2107.pdf (Date of use: 18 June 2014)

Z

ZIWAPHI “Police use journalists' footage to arrest protestors, says Premier DD Mabuza” http://www.ziwaphi.com/ziwaphi/Police_use_journalists%E2%80%99_footage__to_arrest_protesters,_says_Premier_DD_Mabuza.html (Date of use: 15 September 2012)

Journal articles

Blonder 2010 *Criminal Justice Ethics* 258

Blonder I “Public interests and private passions: A peculiar case of police whistleblowing” 2010 December *Criminal Justice Ethics* (29) (3) 258-277

Camerer 2001 *Occasional Paper* 47

Camerer L “Protecting whistle blowers in South Africa: The Protected Disclosures Act, no 26 of 2000” 2001 *Occasional Paper* 47 Institute for Security Studies

Domfeh and Bawole 2011 *Journal of Public Affairs* 334

Domfeh K A and Bawole N “Muting the whistleblower through retaliation in selected African Countries” 2011 *Journal of Public Affairs* (11) (4) 334-343

Ellison 1982 *Journal of Business Ethics* 167

Elllison F A “Civil disobedience and whistleblowing: A corporative appraisal of two forms of dissent” 1982 *Journal of Business Ethics* 167-177

Evans 2008 *Innovation: the European Journal of Social Science Research* 267

Evans A J “Dealing with dissent: whistleblowing, egalitarianism, and the republic firm” 2008 September *Innovation: the European Journal of Social Science Research* (21) (3) 267-279

Fredin *Ethics & Behaviour* 404

Fredin A J “The effects of anticipated regret on the whistleblowing decision” 2011 *Ethics & Behaviour* (21) (5) 404-427

Hucker 2005 *The Bottom Line* 1

Hucker D "Whistleblowing" is it the right thing or the only thing to do? 2005 *The Bottom Line* (1) 1-4

James *Philosophy in Context* 99

James G G “Whistleblowing, its nature and justification” 1980 *Philosophy in Context* (10) 99-117

Pierson, Forcht and Bauman 1993 *AJIS*

Pierson J K, Forcht K A and Bauman B M “Whistleblowing: An Ethical Dilemma” 1993 *Australasian Journal of Information Systems* (1) (1) 58-62.

Klaaren 2002 *South African law Journal* 721

Klaaren J "National Information Security? Constitutional issues regarding the protection and disclosure of information by public officials" 2002 *South African Law Journal* (119) 721-732

Lewis and Uys 2007 *Managerial Law* 76

Lewis D and Uys T "Protecting whistleblowers at work: A comparison of the impact of British and South African legislation" 2007 *Managerial Law* (49)(3) 76-92

Mansbach 2007 *Business Ethics: A European Review* 16

Mansbach A "Political surplus of whistleblowing: a case study" 2007 *Business Ethics: A European Review* (16) (2) 124-131

McGregor 2007 *Juta's Business Law* 160

McGregor M "Blowing the whistle: Disclosures to the media" 2007 *Juta's Business Law* 15(4) 160-163.

McGregor 2014 *Journal of Law and Social Sciences (JLSS)* 87

McGregor M "Blowing the whistle on attempts to appoint unqualified people under the guise of enhancing representation: Whistleblowing, affirmative action and safety in the workplace" 2014 *GST Journal of Law and Social Sciences (JLSS)* 4(1) 87-94.

Millard 2012 *De Jure* 225

Millard B "The past, present and future vicarious liability in South Africa" 2012 *De Jure*, 225-253.

Preston 1995 *Autralian Journal of Public Administration*

Preston N "Public Sector Ethics in Australia: A Review" 1995 *Australian Journal of Public Administration* (54)(4) 462-470

Uys 2000 *Business Ethics: A European Review* 259

Uys T "The politicisation of whistleblowers: a case study" 2000 *Business Ethics: A European Review* (9) (4) 259-267

Uys 2008 *Current Sociology* 904

Uys T "Rational Loyalty and Whistleblowing: The South African Context" 2008 *Current Sociology* October 15 904 - 921

Van Es and Smit 2003 *Business Ethics: A European Review* 144

Smit V E “Whistleblowing and media logic: a case study” 2003 *Business Ethics: A European Review* (12) (2) 144-150.

Books

Basson *et al Essential Labour Law*

Basson AC, Chriastianson M, Garbers C, Le Roux PAK, Mischke C, Strydom EML. *Essential Labour Law* (Third ed.) (South Africa:Labour Law Publications, 2002)

Basson *et al Essential Labour Law*

Basson AC, Chriastianson M, Garbers C, Le Roux PAK, Mischke C, Strydom EML . *Essential Labour Law* (Fourth ed.) ((South Africa:Labour Law Publications, 2005).

Basson *et al Essential Labour Law*

Basson AC, Chriastianson M, Garbers C, Le Roux PAK, Mischke C, Strydom EML . *Essential Labour Law* (Fifth ed.) ((South Africa:Labour Law Publications, 2009).

Kruger *Hiemstra’s Criminal procedure*

Kruger, A*Hiemstra's Criminal Procedure*. Kruger A, *Hiemstra's Criminal Procedure* (Service Issue 6) (Durban : LexisNexis 2013)

McGregor *et al Labour Law Rules*

McGregor M, Dekker AH, Budeli M, Manamela ME, Manamela TE, Tshoosie CI *Labour Law Rules* (Corrected Reprint ed.) (Cape Town: Siber Ink CC 2012).

Ockleton *Evidence*

Ockleton M, Heydon J D. *Evidence: Cases & Materials* (Fourth ed.) (South Africa: Butterworths 1996)

Pete *et al Civil Procedure*

Pete S, Hulme D, Du Plessis M, Palmer R and Sibanda O *Civil Procedure, A Practical Guide* (2nd ed.) (South Africa: Oxford University Press 2012)

Potgieter, Steynberg and Floyd *Law of Damages*

Potgieter J M, Steynberg L, Floyd T B *Law of Damages* (3rd ed) (Cape Town: Juta 2012)

Schwikkard *et al Principles of Evidence*

Schwikkard P J, Van Der Merwe SE, Collier DW, De Vos WL, Van Der Berg E *Principles of Evidence* (third ed.) (Cape Town, South Africa: Juta & Co 2010)

Snyman *Criminal Law*

Snyman C R *Criminal Law* (5th ed) (LexisNexis Durban 2008)

Theophilopoulos, Van Heerden and Boraine *Fundamental Principles*

Theophilopoulos C, Van Heerden C M, Boraine A *Fundamental Principles of Civil Procedure* (LexisNexis Durban 2012)

Van Loggerenberg *Jones and Buckle: Civil Practice in the Magistrates' Courts in South Africa*

Van Loggerenberg DE *Jones and Buckle: The Civil Practice of the Magistrate's Courts in South Africa* (10th ed.) (South Africa: Juta & Co. Ltd.)

Van Loggenberg *Erasmus: Superior Court Practice*

Van Loggerenberg, DE *Erasmus: Superior Court Practice, Main Volume.* (Revision Service 40) (South Africa:Juta & Co Ltd 2012)

TABLE OF CASES

SOUTH AFRICA

A

Airoadexpress (Pty) Ltd v The Chairman, Local Transportation Board, Durban & others 1986 (2) SA 663 (A)

Ampofo & Others v Members of the Executive Council for Education, Arts, Culture, Sports & recreation: Northern Province & another (2001) 22 ILJ 1975 (T)

Arbuthnot v SA Municipal Workers Union Provident Fund (2012) 33 ILJ 584 (LC)

Arbuthnot v SA Municipal Workers Union Provident Fund (JS575/09) [2011] ZALCJHB 166

B

Bargarette & others v Performing Arts Centre of the Free State & others (2008) 29 ILJ 2907 (LC)

Barkhuizen v Napier 2007 5 SA 323 (CC)

Beaurain v Martin N. O. and Others (C16/2012) [2014] ZALCCT 23

Bennett v Minister of Safety and Security 2006 (1) SACR 523 (T)

Brisley v Drotsky 2002 4 SA 1 (SCA)

C

Charlton v Parliament of the Republic of SA (2007) 28 ILJ 2263 (LC)

Charlton v Parliament of the Republic of South Africa (C367/06) [2007] ZALC 47

Charlton v Parliament of the Republic of South Africa [2011] 12 BLLR 1143 (SCA)

Charlton v The Parliament of the Republic of South Africa 2012 (1) SA 472 (SCA)

City of Tshwane Metropolitan Municipality v Engineering Council of South Africa & another 2010 (2) SA 333 (SCA)

City of Tshwane Metropolitan Municipality v Engineering Council of South Africa and Another [2010] 3 BLLR 229 SCA

Coin Security Group (Pty) Ltd v SA National Union foe Security Officers and Other Workers & Others (1998) 19 ILJ 43 (C)

Communication Workers Union v Mobile Telephone Networks (Pty) Ltd (2003) 24 ILJ 1670 (LC)

Country Fair v CCMA & others [1998] 6 BLLR 577 (LC)

D

Denel (Pty) Ltd v Gerber 2005 26 ILJ 1256 (LAC)

E

Engineering Council of SA v City of Tshwane Metropolitan Municipality & another (2008) 29 ILJ 899 (T)

Engineering Council of South Africa and Another v City of Tshwane Metropolitan Council and Another [2008] 6 BLLR 571 (T)

Eskom Ltd v National Union of Mineworkers (2001) 22 ILJ 618 (W)

Ex Parte Minister of Justice: In re R v Pillay 1945 AD 653

F

Franks v University of the North (2001) 22 ILJ 1158 (LC)

Free State Gold Areas Ltd v Merriespruit (Orange Free State) Gold Mining Co Ltd and Another 1961 (2) SA 505 (W)

G

Gcaba v Minister of Safety and Security & Others 2010 (1) SA 238 (CC)

Govender v Minister of Defence (C695/09) [2009] ZALC 106

Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board 1950 (2) SA 420 (A)

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

Grobler v Naspers Bpk & Another [2004] 5 BLLR 455 (C)

H

H & M Ltd (2005) 26 ILJ 1737 (CCMA)

I

Imatu & Another v City Of Matlosana Local Municipalilty (J620/14) [2014] ZALCJHB 122

Independent Municipal & Allied Trade Union v Northern Pretoria Metropolitan Substructure & Others (1999) 20 ILJ 1018 (T)

Independent Municipal & Allied Trade Union Obo Ngxila-Radebe V Ekurhuleni Metropolitan Municipality And Another (J1029/2010) [2010] ZALC 289

J

Jacot-Guillarmod v provincial Government, Gauteng & others (1999) 20 ILJ 1689 (T)

Jones & another v Telkom SA Ltd & others (2006) 27 ILJ 911 (T)

Jordan v MEC for Finance, Eastern Cape & Another [2007] JOL 19802 (CK)

K

Kriel v Legal Aid Board & others 2010 (2) SA 282 (SCA)

Kroukamp v SA Airlink (Pty) Ltd (2005) 26 ILJ 2153 (LAC)

L

Langeveldt v Vryburg Transitional Local Council & others (2001) 22 ILJ 1116 (LAC)

Lowies v University of Johannesburg (JS1062/2009) [2013] ZALCJHB 284

M

Magagane v MTN SA (Pty) Ltd and Another (JS834/11) [2013] ZALCJHB 77

Malan v Johannesburg Philharmonic Orchestra (JA61/11) [2013] ZALAC 24

Mantzaris v University of Durban Westville & other (2000) 21 ILJ 1818 (LC)

Manyathi v MEC for Transport, KwaZulu- Natal & another (2002) ILJ 273 (N)

Mattheus v Octagon Marketing (Pty) Ltd (J2264/13) [2013] ZALCJHB 317

Mears v African Platinum Mines Ltd and Others (1) 1922 WLD 48

Media 24 Ltd & Another v Grobler (2005) 26 ILJ 1007 (SCA)

Minister of Justice and Constitutional Development & another v Tshishonga 2009 (30) ILJ 1799 (LAC)

Minister of Justice v Firstrand Bank Ltd and Others 2003 (6) SA 636

Mkhize v Martens 1914 AD 382

Mogale & Others v Seima (2008) (5) SA 637 (SCA)

Mogothle v Premier of the North West Province & another [2009] 4 BLLR 331 (LC)

Motingoe v The Head of the Department Of The Northern Cape Department Of Roads And Public Works And Others (C18/2014) [2014] ZALCCT 6

MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd 2007 (6) SA 620 (SCA)

Murray v Minister of Defence [2008] 6 BLLR 513 (SCA)

N

National Education Health and Allied Workers Union v University of Cape Town and others 2003 (3) SA 1 (CC)

National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA)

National Gambling Board v Premier KwaZulu-Natal & others 2002 (2) SA 175 (CC)

Ngobeni v Minister of Communications and another (2014) 35 ILJ 2506 (LC)

Ntsabo v Real Security CC [2004] 1 BLLR 58 (LC)

P

Palace Group Investments (Pty) Ltd and Another v Mackie (JA52/12) [2013] ZALAC 27

Parliament of the Republic of South Africa v Charlton (2010) 31 ILJ 2353 (LAC)

Pedzinski v Andisa Securities (Pty) Ltd (formerly SCMB Securities (Pty) Ltd) (2006) 27 ILJ 362 (LC)

Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd 1984 (3) SA 623

Police & Prisons Civil Rights Union v Minister of Correctional Services & others (1999) 20 ILJ 2416 (LC)

Potgieter v Tubatse Ferrochrome and Others [2012] 5 BLLR 509 (LC)

Potgieter v Tubatse Ferrochrome and Others (2014) 35 *ILJ* 2419 (LAC)

R

R v Abelson 1933 TPD 227

R v Makaula 1949 (1) SA 40 EC

R v Van Schalkwyk 1938 AD 543

Radebe & Another v Mashoff, Premier of the Free State Province & Others (JS140/08) [2009] ZALC 20

Radebe & Another v Premier, Free State Province and Others (JA61/09) [2012] ZALAC 15

Ramsammy v Wholesale & Retail Sector Education & Training Authority (2009) 30 ILJ 1927 (LC)

Randles v Chemical Specialities Ltd (2010) 31 ILJ 2150 (LC)

Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T)

Roos v Commissioner Stone NO & others [2007] 10 BLLR 972 (LC)

Runeli v Minister of Home Affairs and Others (2000) 21 ILJ 910 (TK)

S

S v Peake 1962 4 SA 288 (C)

S v Rossouw 1973 (4) SA 608 (SWA)

S v Safatsa 1988 (1) SA 686 (A) 886

S v Solani 1987 (4) SA 203 NC

Schweizer Reneke Vleis Mkpv (Edms) Bpk v Die Minister van Landbou en Andere 1971 (1) PH F11 (T)

Sekgobela v State Information Technology Agency (Pty) Ltd (2008) 29 ILJ 1995 (LC)

Setlogelo v Setlogelo 1914 AD 221

Solidarity obo Roos v South African Police Service and others (JS1043/12) [2014] ZALCJHB 131

South African Breweries Ltd (Beer Division) v Woolfrey & others [1999] 5 BLLR 525 (LC)

South African Municipal Workers Union National Fund v Arbuthnot (JA73/11) [2014] ZALAC 23
Suliman v Hansa (1) 1971 (2) SA 437 (N)

Swanepoel v Minister van Veiligheid en Sekuriteit 1999 2 SACR 284 (T)

Swissborough Diamond Mines (Pty) Ltd & others v Government of the Republic of South Africa 1999 (2) SA 279 (T) 343

T

Theron v Minister of Correctional Services & Another (2008) 29 ILJ 1275 (LC)

Tranter v Attorney-General 1907 TS 415

Tsika v Buffalo City Municipality (2009) 30 ILJ 73 (CC)

Tshishonga v Minister of Justice & Constitutional Development & Another (2007) 28 ILJ 195 (LC)

Tshishonga v Minister of Justice and Constitutional Development and Another 2007 (4) BLLR (LC)

V

Van Alphen v Rheinmetall Denel Munition (Pty) Ltd (C418/2013) [2013] ZALCCT 21

Venter v Automobile Association of SA (2002) 21 ILJ 675 (LC)

Viljoen v Smith 1997 (18) ILJ 61 (A)

Vumba Intertrade CC v Geometric Intertrade CC 2001 SA 1068 (W)

X

Xakaza v Ekurhuleni Metropolitan Municipality and Others (JS281/11) [2013] ZALCJHB 22

Y

Young v Coega Development Corporation (Pty) Ltd 2009 (6) SA 118 (ECP)

UNITED KINGDOM

Miklaszewicz v. Stolt [2002] ILRL 344

Parkins v. Sodexho Ltd [2002] ILRL 109

Darnton v. University of Surrey [2003] ILRL 333

Kraus v. Penna plc [2004] ILRL 260

Street v. Derbyshire Unemployed Workers Centre [2004] ILRL 687

Lucas v. Chichester Diocesan Housing Association Ltd (EAT 0713/04)

EUROPEAN COURT OF HUMAN RIGHTS

Guja v Moldova, application number 14277/04

TABLE OF LEGISLATION

SOUTH AFRICA

Admiralty Jurisdiction Regulation Act 105 of 1983
Aviation Act 74 of 1962

Basic Conditions of Employment Act 75 of 1997

Close Corporations Act 69 of 1981
Companies Act 71 of 2008
Competition Act 89 of 1998
Constitution of the Republic of South Africa Act 108 of 1996
Criminal Procedure Act 51 of 1977

Defence Act 42 of 2000
Defence Act 44 of 1957
Domestic Violence Act 116 of 1998

Electoral Commissions Act 51 of 1996
Electronic Communications Act 36 of 2005
Executive Members Ethics Act 82 of 1998
Extradition Act 67 of 1962

Financial Intelligence Centre Act 38 of 2001
Financial Services Law General Amendment Act 45 of 2013
Firearms Control Act 60 of 2000

Housing Protection Measures Act 95 of 1998

Internal Security Act 74 of 1982

Labour Relations Act 66 of 1995
Labour Relations Amendment Bill Notice 1112 of 2010
Local Government Municipal Structures Act 117 of 1998
Lotteries Act 57 of 1997

Magistrates' Court Act 32 of 1944

National Archives and Record Service Act 43 of 1996
National Energy Act 40 of 2004
National Environmental Management Act 108 of 1999

Open Democracy Bill 71 of 2008

Patents Act 57 of 1978
Pensions Fund Act 24 of 1956
Prevention and Combating of Corrupt Activities Act 12 of 2004
Promotion of Access to Information Act 2 of 2000
Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

Protected Disclosures Act 26 of 2000
Protection from Harassment Act 17 of 2011
Protection of Information Act 84 of 1982
Public Audit Act 25 of 2004
Public Finance Management Act 1 of 1999
Public Protector Act 23 of 1994
Public Service Act 103 of 1994

South African Police Act 68 of 1995
South African Police Service Amendment Act 57 of 2008
Special Investigation Unit and Special Tribunals Act 74 of 1996
Superior Courts Act 10 of 2013
Supreme Court Act 59 of 1959

Tax Administration Act 28 of 2011
The Protection of Constitutional Democracy against Terrorism and Related Activities Act 33 of 2004
Town Planning and Townships Ordinance Act 15 of 1986

Value Added Tax Act 89 of 1991

Western Cape Public Protector Act 6 of 1994
Witness Protection Act 112 of 1998

REGULATIONS

Public Service Regulations 2001

UNITED STATES OF AMERICA

False Claims Act 31 United States Congress

NEW ZEALAND

Employment Relations Act 24 of 2000
Environment Act 127 of 1986
Equal Pay Act 118 of 1972

Holidays Act 129 of 2003
Human Rights Act 82 of 1993

Inspector-General of Intelligence and Security Act 47 of 1996

Local Government Act 84 of 2002
Local Government Official Information and Meetings Act 174 of 1987

Minimum Wages Act 115 of 1983

Ombudsman Act 9 of 1975

Parental Leave and Employment Protection Act 129 of 1987
Protected Disclosures Act 7 of 2000
Public Audit Act 10 of 2001

State Sector Amendment Act 49 of 2013

Volunteers Employment Protection Act 25 of 1973

Wages Protection Act 143 of 1983

AUSTRALIA

Audit Act 1994

Broadbased Anti-corruption Commission Act 2011

Charter of Human Rights and Responsibilities Act 2006
Constitution Act 1975

Education and Training Reform Act 2006
Electoral Boundaries Commission Act 1982
Evidence (Miscellaneous Provisions) Act 1958

Major Crime (Special Investigations Monitor) Act 2004
Monetary Units Act 2004

Ombudsman Act 1973

Police Regulation Act 1958
Protected Disclosure Act 2012
Protected Disclosures Act 1994
Public Administration Act 2004
Public Interest Disclosure Act 1994
Public Interest Disclosure Act 1994
Public Interest Disclosure Act 2002
Public Interest Disclosure Act 2003
Public Interest Disclosure Act 2008
Public Interest Disclosure Act 2012
Public Interest Disclosure Act 2013
Public Interest Monitor Act 2011

Surveillance Devices Act 1999

Telecommunications (Interception) (State Provisions) Act 1988
Terrorism (Community Protection) Act 2003
Transport (Compliance and Miscellaneous) Act 1983

Transport Integration Act 2010

Victorian Inspectorate Act 2011
Whistleblowers Protection Act 1993
Whistleblowers Protection Act 1994
Whistleblowers Protection Act 2001

UNITED KINGDOM

Employment Rights Act 1996

National Health Service Act 1977
National Health Service (Scotland) Act 1978
Public Interest Disclosure Act 1998

TABLE OF CONVENTIONS

African Union Convention on Preventing and Combating Corruption

OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

SADC Protocol against Corruption

Termination of Employment Convention, 1982, no. 158 (International Labour Office)

United Nations Convention against Corruption