

Johannesburg
16 January 2019

IS WHISTLEBLOWING LEGISLATION AS EFFECTIVE IN PRACTICE AS IT IS ON PAPER?

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Theory and practice can be worlds apart, and unsurprisingly, in the realm of *morality* and *ethics*, the divide between the two is often clearly pronounced. While it may be easy for employees to claim that they would without question report any observations of fraud, corruption, or other impropriety being perpetrated in the workplace, it may not be that easy for them to do so in practice. Would their job be jeopardised? Would they lose their means of supporting themselves, their family and extended family? And what implications would it have for their chances of securing future employment, not to mention the social implications and, in more high-profile cases, the media and social media interest?

In many instances, these concerns for the implications of 'doing the right thing' are justified. Research indicates that individuals who blow the whistle on fraud and other improprieties in the workplace tend to find themselves victimised and treated unfairly. A very real obstacle to whistleblowing is that individuals may be too intimidated -- due to fear of negative reprisal -- to report unethical behaviour occurring within an organisation, and this leads to organisations losing a useful source of inside information and missing out on a valuable opportunity to avert potential risks.

"Ethics, too, are nothing but reverence for life. That is what gives me the fundamental principle of morality, namely, that good consists in maintaining, promoting, and enhancing life, and that destroying, injuring, and limiting life are evil."

Albert Schweitzer (1875 - 1965), German-French Philosopher and 1952 Nobel Peace Prize Winner

Do legal protections have teeth?

In South Africa, the government has shown some support for whistleblowing, and has acknowledged the need to offer legal protection to whistleblowers. Two examples of such legislation are the Protected Disclosures Act 26 of 2000 ('PDA') and the Financial Sector Regulation Act 9 of 2017 ('FSRA').

The PDA was originally enacted to provide procedures in terms of which any employee may disclose information relating to an offence or a malpractice in the workplace by his or her employer or fellow employees; and to offer protection for an employee who has made a disclosure.

This piece of legislation has been amended since it was first promulgated to purportedly increase its scope of application, including the obligations it places on employers and whistleblowers alike. For example, it is not only employees that blow the whistle on unlawful or irregular conduct who are meant to be protected; the PDA now also refers to the protection of 'workers', who include individuals currently or previously employed by the state, including independent contractors and consultants of private enterprises who are afforded the same protection.

Other changes to the PDA include the increased obligations of employers to have appropriate procedures in place to receive and deal with whistleblowing tip-offs, as well as to make all employees and workers aware of these procedures, through ongoing training and awareness programmes. Employers are also required to give their employee feedback on *what* has been done in respect of their tipoff - informing them of whether or not the matter is being investigated internally or externally, and keeping them apprised of developments regarding the progress being made in the matter, including the outcome.

In addition to the safeguards of the PDA, the FSRA was promulgated on 01 April 2018 and this legislation provides additional mechanisms of protecting whistleblowers. The FSRA aims to transform the South African financial services regulatory and risk management environment through a framework which is set to *promote financial stability; enhance the safety and soundness of financial institutions; provide fair treatment and protect financial customers; and prevent financial crime*, among other things.

Section 140 of the FSRA will go a long way to bolstering the rights of whistleblowers and, in practice, this legislation is already proving to be useful in turning perpetrators of white collar crime into whistleblowers and key witnesses. The section of the Act guarantees that any information given to authorities by a whistleblower *will not* be used against them in a criminal case.

Further, Section 156 provides for leniency agreements between authorities and co-operative individuals, while Section 151 enables settlement agreements to be entered into between authorities and organisations which have broken the law. Besides the whistleblowing protections offered in the PDA and FSRA, Section 159 of the South African Companies Act 71 of 2008 makes further provision to protect whistleblowers in addition to the aforementioned rights, and the provisions of these legal protections are not subordinated, but may be exercised jointly with each other.

While these legal developments and whistleblowing protections are commendable, it begs the question whether these safeguards are actually enough to actively encourage whistleblowing in the private and public sectors. This being said, considering the diabolic state of many South African state-owned organisations, the Treasury Regulations seem to fall short of whistleblowing since whistleblowing appears to be linked only to reporting vis-à-vis known or suspected “criminal acts”. Clearly, this limitation neglects to address the full scope of ethical breaches which, for example, are currently being exposed by the Zondo Commission of Inquiry into Allegations of State Capture.

It can be argued that organisations must implement policies, on the back of relevant legislation and codes of good governance, as a first step in detailing the expectations for whistleblowing, as well as the consequences for those who do not report improprieties. Organisations may be quick to tick the policy-making box around whistleblowing, since such policies generally assist them in demonstrating their ‘corporate citizenship’, moreover that they abide by good governance practices -- and even more importantly -- that they are upholding their social contract by acting ethically and in the best interests of all stakeholders. However, in practice, these actions do not make the decision to blow the whistle any easier for the whistleblower. Notwithstanding the fact that a number of organisations may be increasingly implementing anti-corruption policies, including whistleblowing hotlines and ethical statements, a 2018 Global Fraud Survey by EY has found that there has been *no marked decrease in unethical conduct in business*.

“One of the most direct methods of shining the light on corruption is whistleblowing. Unfortunately, whistleblowers commonly face retaliation in the form of harassment, firing, blacklisting, threats and even physical violence, and their disclosures are routinely ignored.”

Transparency International

Incentives to whistleblowers?

A current move being made by some large organisations in the financial services sector in South Africa, is to address the problem of reticent whistleblowers by paying incentive bonuses to those that blow the whistle on instances of failed internal governance practices, including known or suspected corruption within their business operations. Similar practices are seen in other countries internationally, but they have generally been met with some controversy, since such a system could be open to abuse and misuse.

In addition, irrespective of a whistleblower receiving legal protections or not, including criminal immunities or incentives, the initial concerns remain – if they did blow the whistle on observed improprieties, would they retain their job? Would they want to? Would they be able to secure future employment, and would they be able to endure the media and social media interest? In an ideal world, it would be prudent for the government and organisations to foster an ethical culture that supports good governance practices, which would include the necessary whistleblowing systems that offer true and proper protection to any whistleblower. But this is not an ideal world; whistleblowers will need to continue to rely on the existing, rather flimsy systems currently in place in the hope that these do not fail the whistleblower, whose intentions of reporting unlawful or irregular conduct is meant to bolster good governance

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Words: 1,244

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