The predicament of the unprotected: Why lack-lustre legislation fails South African whistleblowers

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Abstract

Inadequate legal provisions in South African state law have left whistleblowers vulnerable. Despite the existence of the Protected Disclosures Act (and its amendment) aimed at safeguarding whistleblowers, the law has numerous loopholes. The participants in this qualitative study expressed the view that the law is indeed ineffective. While calls are being made to amend state law for adequate whistleblower protection, such efforts would be futile unless provisions are adapted from reliable instruments for implementation in the South African context. This article recommends incorporating provisions from the Serbian Law on Protection of Whistleblowers as a means of offering adequate protection to South African whistleblowers.

1. Introduction

Acknowledging the source that inspired this article is of utmost importance to me. The title of this article is a tribute to Mosilo Mothepu, who acted as a whistleblower and subsequently authored the book, *Uncaptured: The true account of the Nenegate/ Trillian whistleblower*. In her book, Mosilo Mothepu chronicles her experience at Trillian, a company involved in state capture in South Africa. She also describes her decision to blow the whistle and the aftermath of her disclosure. The uncaptured are, unfortunately, the unprotected. This notion of feeling (and indeed being) unprotected resonates with most, if not all, South African whistleblowers. But where does it stem from? To adequately answer this question, this article examines what whistleblowing entails, what legislative protections currently exist for South African whistleblowers, and the protection they perceived to have had (or not had) throughout their disclosure experience. Based on this analysis and the whistleblowers'

experiences, a set of recommendations are offered for the refurbishment of legislative whistleblower protection in South Africa.

2. Conceptualising whistleblowing

The terms 'whistleblower' and 'whistleblowing' have become commonplace in the broader dialogue of South Africans, particularly considering recent events surrounding state capture. State capture is when private actors exert control over elements integral to the functioning of the state (Desai, 2018:501; Fazekas & Tóth, 2016:320). This influence of private interests is illicit and non-transparent, and it negatively impacts the public good (Fazekas & Tóth, 2016:320; World Bank, 2000:3). Whistleblowers were fundamental in exposing state capture under the Zuma regime and in other epochs of corruption in South Africa. Their roles in exposing wrongdoing were varied, but their impacts were great.

Cynthia Stimpel blew the whistle on improprieties within the national flag carrier, South African Airways (Stimpel, 2021). Mosilo Mothepu, together with Bianca Goodson, exposed how privately-held and Gupta-linked Trillian siphoned money out of state-owned enterprises (SOEs) like Eskom by maintaining mutually beneficial relationships with state officials (Mothepu, 2021; Wiener, 2020). Through disclosures that would become widely known as the Gupta Leaks, the anonymous whistleblowers 'Stan' and 'John' were critical in educating the broader South African public about the Gupta family and how they captured the state (AmaBhungane, 2018). Simphiwe Mayisela exposed corruption within the Public Investment Corporation (PIC), an SOE responsible for the investment of South African government pensions (Wiener, 2020). One cannot forget the name of Babita Deokaran who was assassinated in cold blood after dropping her child off at school, because she was in the midst of a disclosure that exposed the misuse of Covid-19 Personal Protective Equipment funds (Cruywagen, 2021). One could argue that Andre de Ruyter has become South Africa's foremost high-profile whistleblower after exposing mass sabotage and corruption within the country's power utility, Eskom.

But why is it that these individuals have been awarded the label of'whistleblower'? What makes them whistleblowers? To answer these questions, one cannot merely provide a definition of whistleblowing. One also has to examine the elements that are necessary for whistleblowing to occur.

A long-standing and widely accepted definition of whistleblowing continues to serve as the benchmark: the act of whistleblowing is when former or current members of an organisation disclose information regarding "illegal, immoral or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action" (Near & Miceli, 1985:4). But six elements need to be present to consider an act as whistleblowing. I discuss each of them in the rest of this section.

2.1 The act of wrongdoing

Firstly, a member of an organisation needs to observe that wrongdoing has taken place within that organisation. The wrongdoing is what the disclosure by the whistleblower

is about, and it entails any sort of practice that is illicit, immoral or dishonest in nature (Miceli & Near, 1992:15). Per this definition, it is evident a broad spectrum of iniquitous behaviours can constitute wrongdoing.

Legislation intended to provide protection to whistleblowers often defines wrongdoing narrowly by limiting the scope of what constitutes wrongdoing with strict boundaries. A prominent example is the Canadian Public Servants Disclosure Protection Act (Feinstein & Devine, 2021:10; Lukiwski, 2017:11), which consequently ranks as one of the worst whistleblower protection laws in the world (Bron, 2022). The opposite of such laws should be practised by using a broad definition for wrongdoing. A broader definition would entail a large scope of acts that qualify as wrongdoing, ranging from isolated incidents of fraud to the well-organised and repeated practices associated with state capture. With a broader definition, more whistleblowers would qualify for legislated protection because a broader set of unethical behaviours would qualify as wrongdoing (Skivenes and Trygstad, 2014:112).

2.2 The organisation responsible for the wrongdoing

Secondly, there needs to be a setting where the perceived wrongdoing occurred. The disclosed wrongdoing, therefore, needs to implicate the target organisation (which provides the context for the disclosure), as the wrongdoing manifested under the command of that organisation (Jubb, 1999:83; Vandekerckhove, 2006:23). In fact, it does not necessarily only have to be an act that had occurred, but it can also entail wrongful behaviour that is in the process of occurring or is expected to occur (Jubb, 1999:83, 86; Protected Disclosures Amendment Act 5, 2017:2). This is particularly important to consider since the whistleblower might pre-emptively make a disclosure in an attempt to prevent wrongdoing from occurring. This was the case with Stimpel's disclosure, where she managed to stop the transfer of SAA funds to a suspect service provider. Here, South African legislation provided Stimpel with protection under whistleblower law despite the impropriety not having been finalised.

It also does not matter whether the misconduct took place inside or outside of the target organisation. What matters is that the organisation is considered responsible for the actions, or the disclosure targets the professional or private lives of a member of that organisation (Vandekerckhove, 2006:23, 25). Wrongdoing could, therefore, be transpiring within the confines of the organisation or the organisation as a whole could be responsible for committing wrongdoing in an environment external to it.

2.3 The whistleblower agent

Thirdly, an individual needs to assume the role of a whistleblower. Thus, an individual becomes a whistleblower agent, who is a former or current member of an organisation that gained access to organisational information or data because of their relationship with the organisation (Jubb, 1999:83). Their relationship with the organisation is one where they are considered an insider (Jubb, 1999: 83). The insider role means that the

whistleblower can be in a labour relationship with the organisation (Blonder, 2010:25), or that they simply identify with the organisation via their subjective understanding of group membership (Anvari, Wenzel, Woodyatt & Haslam, 2019:44). The insider, then, discloses information as they have suspicions regarding the occurrence of wrongdoing within the organisation (Uys, 2022:5).

An individual might emerge as a whistleblower when they perceive that an organisation's values are not congruent with their own ethics and values (Jubb, 1999:78). The wrongdoing committed within the organisation might elicit this non-congruence and lead the person to report the wrongdoing. However, it is also possible that the whistleblower was previously engaged in or knowledgeable about the organisational wrongdoing but later opted to blow the whistle (Chamorro-Courtland & Cohen, 2017:191).

2.4 The motive

The fourth element is the motivation that stands behind the disclosure. The motive is a somewhat contested element when considering the concept of whistleblowing. This is because whistleblowing is protracted, and the reasons for engaging in the act of whistleblowing change over time (Park, Vandekerckhove, Lee & Jeong, 2020:566-567, 575-576). Several authors do, however, acknowledge the motive as an element that can aid in understanding the whistleblowing experience (Lampert, 1985:111-116; Lewicka-Strzalecka, 2011:176, Roberts, 2014:207-229; Uys, 2022:39-42; Vandekerckhove, 2006:23). What is important is that an action should not be determined to qualify as whistleblowing, or not qualify as whistleblowing, based on the nature of the motive. Rather, it should be accepted that motives of any nature can drive disclosures. Roberts (2014:207) even presents an argument that motives serve as the impetus for making the choice to engage in whistleblowing.

A whistleblower can be driven by two different types of motives or a combination of the two (Uys, 2022:40-41). Firstly, a whistleblower can emerge out of selfless and altruistic reasons – being driven by moral guides to report wrongdoing behaviour (Miethe, 1999). This type of whistleblower is referred to as the altruist. Altruistic motives are grounded in the public interest without considering personal benefits (Vandekerckhove, 2006:23). These motivations can stem from the whistleblower disagreeing with organisational policies, particularly from an ethical perspective (Roberts, 2014:211-212). One's knowledge about ethical breaches in the organisation related to laws and codes of conduct such as fraud, theft, misuse of allowances and falsification of records tend to contribute to altruistic whistleblowing motivations (Roberts, 2014:211-212). In these instances, ethical breaches transgress the individual's own values. Roberts (2014:215) identified this as personal morality. Therefore, the higher the degree of morality an individual has, the more likely they are to report wrongdoing (Henningsen, Valde & Denbow, 2013:162).

In contrast, whistleblowing could be driven by self-interested or egoistic motives (Miethe, 1999). Here, the driving force is the personal benefits that one could accrue from making a disclosure, regardless of whether it serves the public interest or not (Vandekerckhove, 2006:23). Egoistic motives could include making a disclosure as a result of being subjected

to bullying or sexual harassment. Self-protection is another egoistic motive for blowing the whistle, generally stemming from a previously existing conflict situation involving excruciating and complex accounts of reciprocal action, along with the organisation acting against the interests of the whistleblower (Roberts, 2014:216-218). One aspect of Roberts' study (2014:217-218) examined a sample of public sector whistleblowers driven by self-protection. All of these whistleblowers were, at some stage, "the subject of complaint from other parts of the organization" where they had reported (Roberts, 2014:218). This meant that since others in the organisation laid complaints against them prior to their disclosures, a pre-existing conflict was present (Roberts, 2014:218). These whistleblowers used disclosure from a point of self-interest – as a response to the complaints previously laid against them. In certain instances, these whistleblowers, motivated by egoistic reasons, "made critical observations about the ethical standards in the organization" and thus rationalised using "the reporting process as a self-protection mechanism" (Roberts, 2014:218).

With whistleblowing being a protracted experience, which could contribute to changes in motivations (Park et al., 2020:575-576), whistleblowers face difficulty discerning what sort of motive drives them, with it likely being a mix of motivations (Miethe, 1999:14). This, of course, means that both types of motives could be present. This is referred to as 'mixed motives'. It is precisely because a motive can be mixed or misrepresented that the motive component is often not included as an element of whistleblowing (Vandekerckhove, 2006:23). Miceli and Near (2010:77) also established that it is a myth that altruistic motives exclusively inspire whistleblowers. Their research showed that the intention of more than half of all whistleblowers in their study was to benefit both themselves and others with their disclosures (Miceli & Near, 2010:77).

2.5 The act of making a disclosure

The fifth element is the act of making a disclosure. This entails how the whistleblower engages in exposing wrongdoing. According to Rothschild and Miethe (1994:254), potential whistleblowers have three options when becoming aware of wrongdoing:

1. Ignore the misconduct and take no action at all,
2. Discuss the wrongdoing with friends or family, or
3. Report it to a person in a position of authority who has the capacity to address the misconduct.

If an individual has opted to take the latter route, they have engaged in the act of making a disclosure.

The whistleblower could make the disclosure openly by using their real name or providing other identifying information (Park, Blenkinsopp, Oktem & Omurgonulsen, 2008:930). This would mean that the identifying information of the whistleblower becomes readily available in the public domain. A whistleblower can also opt for a confidential disclosure. With a confidential disclosure, "the recipient knows the identity of the person but agrees

not to disclose it if and when the information is used" (Calland & Dehn, 2004:8). Thus, the identifying information of the whistleblower should not be readily available to those other than the recipient.

The whistleblower can take further measures to protect their identity and engage in anonymous disclosure. The identity of the whistleblower remains hidden in this case (Park et al., 2008:930). In an anonymous disclosure, there is "little or no possibility of identifying or contacting the whistleblower or verifying the information" (Calland & Dehn, 2004:8). It has been argued that more idealistic employees are less inclined to utilise anonymous channels, as they detract from the credibility of the accusations (Nayir, Rehg & Asa, 2018:160). Interestingly, findings have indicated that public sector employees refrain from identified whistleblowing as it can result in legal sanctioning (Nayir et al., 2018:160). Legal sanctioning can entail retaliatory measures such as criminal charges for a breach of contract or confidentiality.

2.6 The disclosure recipient

Lastly, the wrongdoing needs to be reported to someone. A disclosure recipient is an individual to whom the wrongdoing is reported and who is perceived to have the capacity to remedy the wrongdoing (Jubb, 1999:83). Vandekerckhove (2006:25) makes it explicit that a disclosure can be made to "internal authorities, external authorities or the media". These are, essentially, the three tiers of recipients for whistleblowing.

In tier one, the internal disclosure recipient can be a superior or other party located within the confines of the organisation who is perceived to possess the relevant authority to address the wrongdoing (Jubb, 1999:90; Park et al., 2008:930). Therefore, the disclosure does not exit the confines of the organisation where the wrongdoing occurred. This is where formal whistleblowing occurs. Formal disclosure "is an institutional form of reporting wrongdoing, following the standard lines of communication or a formal organizational protocol" for reporting (Park et al., 2008:930). An organisation could employ a formal system that encourages positive responses to internal whistleblowing by making provisions for a code of conduct, an ethical standards committee, an ethics officer and an adequate internal disclosure policy (Zhang, Chiu & Wei, 2009:37). However, an internal disclosure "can either follow or by-pass formalized or conventional lines of communication" (Vandekerckhove, 2006:25), meaning that it does not need to be strictly formalised. If an organisation responds positively to internal reporting, the likelihood of external disclosures decreases (Feldman & Lobel, 2008:178).

If the organisation does not address the misbehaviour, is inadequately concerned about the seriousness of the misconduct, or if the disclosure resulted in organisational retaliation, the internal disclosure has proved unsuccessful without positive outcomes for any party (Vandekerckhove, 2010:16; Zhang, Pany & Reckers, 2013:179). The second tier is then utilised by whistleblowers. Here, an external disclosure is used to scrutinise the organisation (Vandekerckhove, 2010:18). In this scenario, the disclosure is made to parties not within the institution's organisational structure, such as a law enforcement agency or a regulatory or administrative body (Moberly, 2014:275; Park et al., 2008:930).

External whistleblowing can be more effective than internal whistleblowing, since bringing the misconduct to the attention of those outside of the organisation puts more pressure on the organisation to act (Dworkin & Baucus, 1998:1286). If the suspicion of misconduct becomes known outside the organisation it could have repercussions for the organisation (Barnett, Cochran & Taylor, 1993:128; Sims & Keenan; 1998:411). This adverse aftermath could entail undesirable outcomes such as the loss of investments due to negative investor sentiment regarding the organisation.

The third tier "is a watchdog over the second tier", in the event of the second tier not having an effect (Vandekerckhove, 2010:18). Tier three entails a public disclosure, which is generally made to the media. There are mainly two reasons why whistleblowers report publicly, namely dissatisfaction with the response to their reports, and severe retaliation.

The three-tier model ensures that organisations are held responsible for satisfactorily addressing whistleblowers' concerns, with a form of accountability across these three levels that serve as increments for safeguarding organisations and society when a level fails (Vandekerckhove, 2010:18). The second tier must be situated external to the organisation where the initial reporting (first tier) took place, while still retaining authority and oversight over the organisation. Additionally, whistleblowers should have equal access to the second and third tiers as they do with the first tier. (Vandekerckhove, 2010:18). Importantly, if the whistleblowing scheme does not make accommodations for public whistleblowing, whistleblowers would not be afforded protection when making their disclosures to broader society. Therefore, no normative balance would be achieved as internal and external recipients would not be held accountable in the event of inaction (Vandekerckhove, 2010:18).

From the discussion in this section, it is thus evident that for one to engage in the act of whistleblowing or to be considered a whistleblower, the following elements need to be present: a wrongdoing having occurred within an organisation; an organisation responsible for the wrongdoing; a whistleblower that reports the wrongdoing; a motive; the act of disclosure; and a disclosure recipient. When all of the aforementioned measures are in place, it can be concluded that whistleblowing has taken place.

3. Method

As this study was concerned with analysing the (in)adequacy of legislative measures drafted to protect whistleblowers, it was essential to gauge the experiences of whistleblowers and the difficulties associated with their disclosures because of a lack of protection. The optimal approach for such an examination required a bottom-up perspective, one where the experiences of those involved in uncovering wrongdoing come to the fore. This approach requires descriptive data that details the whistleblowers' experiences. Thus, a qualitative approach encompassing two research methods was fundamental in retrieving such data.

The first method used documents as sources of data, while the other entailed the use of semi-structured interviews conducted with whistleblowers and members of organisations

that supported them throughout their disclosure experiences. As part of the document analysis method, focus was directed towards digital and print news articles, books discussing the exposure of state capture in South Africa produced by whistleblowers, civil society organisations or authors analysing the occurrences, official documents and academic research.

Semi-structured interviews were the dominant information source for the study. The interviews were conducted with South African whistleblowers and documented their experiences with regard to the protection offered by South African whistleblowing legislation (or the lack thereof). Members of non-governmental organisations (NGOs) and media outlets that supported whistleblowers in the absence of protection provided further insight. A total of 14 participants were interviewed, namely: six whistleblowers, two members of NGOs, four journalists, an owner and editor-in-chief of a prominent independent media outlet and a representative of a law firm that offered support to whistleblowers. Non-probability sampling, particularly purposive sampling, served as the initial sampling form as it is an ideal strategy for gathering information-rich data (Schreier, 2018:88). The initial sample consisted of seven participants. Snowball sampling was, thereafter, used to secure access to seven additional participants. Furthermore, data originating from seminars where whistleblowers were the keynote speakers was also used.

4. Why whistleblowers are in need of protection

Whistleblowers suffer detriments as a consequence of retaliation by those who have perpetrated the wrongdoing. Moreover, the very threat of retaliation often ensures that observers of wrongdoing keep quiet, and it is this menace of retaliation that forms part of the whistleblower's reality. Frequently, the mere threats of retaliation are surpassed, resulting in the actual manifestation of acts of retaliation.

Retaliation against whistleblowers is varied. Åkerström (1991:43-44) demonstrated that whistleblowers experience informal punishment by ostracisation, anonymous threats and other similar actions regardless of how they have been labelled. According to Åkerström (1991:43-44), there are three different labels that are assigned to whistleblowers, namely: hero, lonely crusader and martyr. A hero is regarded as the representative of a cause when making a disclosure (Åkerström, 1991:44). A lonely crusader does not receive much support. Hence, the lonely crusader does not qualify as a hero, but they are also not subjected to formal punishment because of their disclosure (Åkerström, 1991:44). A martyr experiences formal punishment but is typically aided after being retaliated against for their disclosure (Åkerström, 1991:44). All three types of whistleblowers are formally or informally labelled as traitors. Since labelling constitutes a form of retaliation, this informs us that even the positive whistleblower label of being a 'hero' does not spare the whistleblower from retaliation.

The fear of retaliation could have a chilling effect on potential whistleblowers (Rehg, Miceli, Near & Van Scotter, 2008:235). Mosilo Mothepu, who blew the whistle on Trillian

Financial Advisory and its involvement of using Eskom (South Africa's power utility) and Transnet (a SOE responsible for South Africa's railway, port and pipeline infrastructure) as the primary vehicles for state capture, said in an interview conducted with her for this study that she experienced economic detriments and a constant fear of physical retaliation. She argued that both forms of retaliation are not adequately addressed by whistleblowing legislation. According to her, a change in legislation would result in the protection of whistleblowers from victimisation.

It is possible to mitigate retaliation if responsible target organisations "promote a policy that protects the whistleblower from retaliation" (Radulovic, 2017:20) and thereby encourage the reporting of wrongdoing. Protection against retaliation could encourage whistleblowers to come forward. It could function as a social control mechanism by containing corrupt state officials (Chadah, 2011:757). Protection structures would deter wrongdoers from carrying out retribution – this would provide prospective whistleblowers with the peace of mind that their disclosures would earn them some degree of coverage against retaliation.

There are three types of retaliation that wrongdoers engage in, namely: work-related retaliation, social retaliation and physical retaliation (Uys, 2022:116-119). Work-related retaliation can vary "from subtle indications of displeasure to drastic victimization" (Uys, 2022:116). It aims to discredit and destroy the whistleblower by using workplace-related tactics such as blacklisting, dismissal, transfers to another section, personal harassment, character assassination and the implementation of disciplinary proceedings (Cortina & Magley, 2003:248). Workplace bullying can also occur, entailing "repeated and persistent patterns of negative workplace behaviour" (Keashly & Neuman, 2008: 2). Cynthia Stimpel, the whistleblower that exposed an unlawful R256 million contract at South African Airways (SAA), said in an interview conducted with her for this study that companies in South Africa often concoct a strategy to sideline the whistleblower and eventually push them out of the organisation. She held the sentiment that this occurs even if a whistleblower does manage to win their case, with their disclosure determined to qualify as a protected disclosure. The wrongdoers, essentially, work around legislation since it fails to mandate monetary penalties for the inadequate implementation of a whistleblower policy.

The second type of retaliation is social retaliation, and it usually accompanies work-related retaliation (Uys, 2022:118). It aims to isolate whistleblowers through closing ranks and identifying the whistleblower with terms such as 'troublemaker' or 'not one of us', thereby marginalising the whistleblower in the workplace and broader society (Alford, 2001:131; Cortina & Magley, 2003:248). In contrast to work-related retaliation, social retaliation is usually an informal and undocumented process (Miceli, Near & Dworkin, 2008:14-15).

Physical retaliation is the third and most severe form of retaliation. Uys (2022:119-120) details a number of physical retaliation cases in South Africa revolving around corruption in state institutions. Examining these cases, it became possible to define physical retalia-

tion as an intentional and premeditated act of physical assault (typically with a weapon), or threat to commit physical injury.

As a by-product of the various forms of retaliation, whistleblowers suffer different detriments. With work-related retaliation, whistleblowers end up being dismissed or suspended from work, or undergo a process where their eventual dismissal would be legally justified (Bashir, Khattak, Hanif & Chohan, 2010:8-9; Uys 2022:116). Whistleblowers often end up carrying that work-related stigma and struggle to find employment post-disclosure. As work-related retaliation comprises of normative violence, rejection and "acute mental strain" mark the effects of such forms of retaliation (Kenny, Fotaki & Scriver, 2019:812).

With social retaliation, the whistleblower is stigmatised as having negative social characteristics (Bjørkelo, Ryberg, Matthiesen & Einarsen, 2008:71). The whistleblower experiences negative labelling because of exposing wrongdoing (Miceli et al., 2008:128-129). The whistleblower also experiences social ostracisation (Davis, 1989:5; Rothschild, 2008:890), with the whistleblower feeling disillusioned and humiliated (Uys, 2022:118-119).

Physical retaliation presents the risk of physically sustained injuries or death for the whistleblower, which elicits a disclosure-consequential dread in them. Assassination attempts are a typical form of physical retaliation. The result is the whistleblower living in fear for their life due to making a disclosure (Uys, 2022:119). Thus, whistleblowers should be able to depend on adequate legislated protection to offer them coverage against retaliation. The first line of implementation of an adequate whistleblowing policy should be within the organisation where the wrongdoing occurred.

5. Organisational protection

The organisational protection of whistleblowers is a crucial element that can lessen the detrimental severity of the whistleblower's experience of retaliation (or even the occurrence of retaliation). Organisational protection can occur in two forms, namely: anti-retaliation and institutional protection (Brown, Meyer, Wheeler & Zuckerman, 2014:459). Anti-retaliation is concerned with "creating and enforcing criminal, civil and employment sanctions against reprisals or other detrimental action", making it the most common form of protection (Brown et al., 2014:459). It is, however, a reactive approach as the whistleblower has already suffered detriment due to reprisals and is, as a consequence, suing for relief from the effects of retaliation (Brown et al., 2014:459). The approach is triggered once whistleblowers have experienced hardships and are worse off than what they were pre-disclosure.

Conversely, an institutional approach is when organisations "respond more effectively to disclosures from the outset" and are concerned with pre-empting retaliation, thus being proactive in their approach (Brown et al., 2014:459). A proactive approach minimises the degree of damage suffered by the whistleblower since management addresses the

wrongdoing internally (Brown et al., 2014:459). Therefore, a proactive approach decreases the possibility of the whistleblower prosecuting the organisation or suing for relief, since the likelihood of retaliation would have been significantly reduced.

Management, therefore, needs to occupy a crucial role in protecting whistleblowers, considering that if whistleblowing procedures are endorsed, and professionally and competently managed – there is a higher likelihood for effective internal whistleblowing to occur (Mazerolle & Brown, 2008:165-166).

However, whistleblowers often question the credibility of the line they are required to report to internally. Joanne, a whistleblower who exposed improprieties at an SOE but preferred to remain anonymous for this study, felt that whistleblower lines are not credible and asked the question: "where [do] these whistleblower reports go to?". If a chief executive officer (CEO) is implicated in corruption, surely they would have access to these reports. One would assume that the CEO would take no action and also exercise retaliation against the whistleblower. She emphasised that if the allegations are about the CEO, "it can't go to him". Cynthia Stimpel also held the notion that organisations generally do not make it possible to report wrongdoing if the CEO is corrupt or if the disclosure pertains to wrongdoing by the board (as it was in her case). Organisations could, as an alternative, implement anonymous hotlines but the likelihood still exists that whistleblowers would not trust the security of the line or believe in its effectiveness. Joanne argued for the alternative of external reporting, with the alleged wrongdoing being reported to "a completely independent person". This would mean that the act of whistleblowing is reported to an institution or individual completely independent of the organisation.

In the interview conducted with Mothepu, she recalled that when she was deciding whether to report the wrongdoing she witnessed, she consulted the law drafted to provide legislative protection to whistleblowers – Protected Disclosures Amendment Act (PDAA) – as a guideline for identifying the appropriate avenue through which to make a disclosure. The PDAA specifies that internal, external and public channels can be used when making a disclosure (Protected Disclosures Act 26, 2000; Protected Disclosures Amendment Act 5, 2017). She decided to make an external disclosure (as the internal reporting route would provide no remedy) to the South African Public Protector, having also met with the Hawks (South Africa's Police Services' Directorate for Priority Crime Investigation, which is concerned with serious crime such as organised crime, economic crime and corruption) and the Asset Forfeiture Unit (a unit of the National Prosecuting Authority that seizes assets and proceeds which have resulted from criminal activities). Despite fulfilling her constitutional obligation by reporting to the Public Protector, as specified in the PDAA, it led to her being made an enemy of the state. She was also investigated unduly by the Hawks (instead of the wrongdoing party, namely Trillian).

Simphiwe Mayisela (who blew the whistle on irregularities within the Public Investment Corporation [PIC]) was fired, and lost the subsequent appeal, because he failed to inform his CEO that he (the CEO) was under criminal investigation. Simphiwe knew

about the investigation, as the police enlisted him to collect evidence implicating the CEO in corruption. Simphiwe was fired on the basis that he "had failed to show good faith towards his employer by withholding information that its CEO was under police investigation" (Böhmke, 2021:121). His perception was that the PDAA did not protect him as he worked with the police, despite the fact that the PDAA allows for a "general disclosure" (Protected Disclosures Act, 2000:10; Protected Disclosures Amendment Act, 2017), which can include the police, media and non-governmental organisations (Thakur, 2018b:1).

In this case, the disclosure needs to be made in good faith, although the PIC obviously argued that it was not made in good faith as he did not notify his CEO (the very person under investigation). This supports Mosilo Mothepu's argument, which is also mirrored by Joanne's sentiment, that one cannot report on a person committing wrongdoing to the very person that is responsible for it. It is in the absence of adequate management of internal whistleblowing procedures that these whistleblowers' sentiments of external reporting as a reliable alternative tier to effect action rings true.

Considering the absence of adequate organisational protection offered to whistleblowers, legal reform could be used as a tool for the implementation of whistleblower policies and imposed statutory duties (Zorkin, 2007:18). This could be achieved through required amendments that would balance opposing interests and thus create a state with a sustainable civil society and economy.

6. The state and whistleblower protection

Ideally, whistleblower protection needs to transcend the organisational level and be addressed from a macro perspective. In essence, provisions within state laws should provide whistleblower protection against a variety of retaliatory forms.

South Africa's legislative provisions, however, appear to be lacking, where protection law does exist but its coverage is meagre. The year-2000 iteration of the Protected Disclosures Act designated to protect whistleblowers had a poor track record (Lewis & Uys, 2007:85). While the long-overdue amendment of the Act – the PDAA – became effective on 2 August 2017, it still faces extensive criticism for being inadequate (Davis, 2020). Chris, a forensic auditor (and interviewee of this study) with an extensive resume on exposing financial crimes that had attention drawn to them by whistleblowers, held the professional opinion that the PDAA presents a significant problem with its inadequate provisions for whistleblower protection. All of the whistleblowers interviewed by renowned South African journalist, Mandy Wiener, indicated that the PDAA was failing them as their experiences of retaliation showed that it was not providing sufficient protection (Wiener, 2020:419-420). Wiener's personal belief is the same: the PDAA has many fault lines and it does not adequately protect South African whistleblowers.

A significant problem is that the South African whistleblower can only claim a protected disclosure once the employer charges them with a legal breach (Thakur, 2018b:4).

Although the PDAA extends protection to an individual who has made an internal, external, or public disclosure (Thakur, 2018b:1), there are no provisions within the PDAA to protect the identity of the whistleblower in the event of a public disclosure. This deters the whistleblower from considering initiating measures to legally pursue the employer. South African whistleblowers, therefore, resort to being on the defensive and fighting off legal battles raised by their employer (who initiates a legal process as a means of retaliation).

The PDAA makes provision for joint liability, which means that where "an employer, under the express or implied authority or with the knowledge of a client, subjects an employee or a worker to an occupational detriment, both the employer and the client are jointly and severally liable" (Protected Disclosures Amendment Act, 2017:6). This addition to the Act means that an employer will be held liable (together with the individual exercising retaliation against the whistleblower) should an employee suffer occupational detriment after making a protected disclosure. The PDAA (2017:10) also obligates employers to "authorise appropriate internal procedures for receiving and dealing with information about improprieties" and to "bring the internal procedures to the attention of every employee and worker".

Despite the expansion of protections offered by the PDAA, it still fails to meet international standards in several key respects (Thakur, 2018a:3). The PDAA's glaring failure is that it does not meet Transparency International's[1] (2018) best practice guidelines for whistleblower legislation. The Transparency International Guidelines recommend a comprehensive, broad definition of whistleblowing, whereas the PDAA is too specific about what sort of action constitutes a wrongdoing. Therefore, the scope of acts that will qualify an individual to be provided protection under its jurisdiction is limited (Thakur, 2018a:3). This can result in non-disclosure as the potential whistleblower might not find the subject of their disclosure in the definition and, therefore, opt not to act (Thakur, 2018a:3).

Those that do not qualify for protection include people mistaken as whistleblowers (individuals having suffered reprisals despite not having made the disclosure – a case of mistaken identity) and those connected to whistleblowers (such as family or close friends) (Thakur, 2018a:4). Those that do qualify for legislative protection under the PDAA do not have coverage for workplace bullying, blacklisting or economic detriments that arose out of retaliation (Thakur, 2018b:3). Mosilo Mothepu provided a first-hand account of this in her interview, arguing that "legislation does not protect whistleblowers", with legislation simply saying that "you cannot be victimised for whistleblowing" which she

1 *A Best Practice Guide for Whistleblowing Legislation* presents a set of recommendations for policymakers and whistleblower advocates on how to implement the *International Principles for Whistleblower Legislation* into national laws (Transparency International, 2018:2). The *International Principles for Whistleblower Legislation* is an earlier, and significantly shorter, document that provides principles that can guide policymakers in the formulation and improvement of new and existing whistleblower legislation that would ensure adequate whistleblower protection (Transparency International, 2013:3).

felt is "completely rubbish". For her, the "PDA[2] is not worth the paper it's written on". She went on to further criticise the PDAA:

> I see you steal from the kitty; you see me see you stealing. I report you, and then you are investigated. Surely you are going to victimise me. You are not going to protect me.

Problematically, South African legislation does not make provision for financial compensation, which is especially difficult for the whistleblowers who have lost substantial capital (Davis, 2020). The PDAA (2017:6) states that provision should be made "for certain remedies in connection with any occupational detriment suffered on account of having made a protected disclosure". In the event of an unfair dismissal stemming from the whistleblower's disclosure, the whistleblower can utilise the remedy of following the procedures set out in the Act "to recover damages in a competent court" (Protected Disclosures Amendment Act, 2017:10). This means that if the matter has not been resolved through conciliation, the whistleblower can use the Labour Court as a remedy (Protected Disclosures Amendment Act, 2017:10). The Act notes that if "the Labour Court is satisfied that an employee or worker has been subjected to or will be subjected to an occupational detriment on account of a protected disclosure, it may make an appropriate order that is just and equitable in the circumstances", and this could include compensation (Protected Disclosures Amendment Act, 2017:10). However, there are no explicit obligations for whistleblower compensation. The exclusion of this provision implies that the whistleblower would still have to undergo a legal process to obtain such a ruling.

Altu Sadie (who blew the whistle on wrongdoing occurring at Ecobank) argues that a mechanism needs to be employed which would guarantee compensation, in a fiscal form, to assist whistleblowers post-disclosure.

> So, in my case, I'm claiming thirteen years. So, losing my job in theory, you've actually done me a favour because I can retire. You're never going to get the thirteen years if you're going to get into a settlement. Maybe I'll get five years or whatever. But that should get me where I'm in a place where I can hopefully buy a house and a car and put enough money away so that I can make a decent retirement.

The current problem regarding compensation in South Africa is that even a positive Labour Court outcome would likely result in insufficient compensation for the whistleblower, as the financial losses resulting from job loss and an inability to find new forms of employment would be immense. Moreover, the intangible costs, such as time lost with family due to the ordeal of disclosure, would be impossible to compensate. Furthermore, the whistleblower would be required to bear the legal expenses relating to court proceedings without any assurance of a favourable outcome.

Aside from compensation, there are also rewards that can be accounted for within legislation. If compensation is the reparation that a whistleblower receives because of detriments suffered from retaliation, rewards are financial incentives that encourage

2 Mothepu refers to it as the PDA, though the PDAA would have been in effect by the time that the interview was conducted with her.

disclosure (Uys, 2022:71, 168). The US False Claims Act, for example, has awarded far more financial rewards to US whistleblowers than the combined efforts of all compensation paid to every other non-US whistleblower in the world (Kohn, 2020:28). Mosilo Mothepu's argument is that such an incentive or rewards system should be used in South Africa. The US False Claims Act could serve as a model for this. According to her, this would entail a legislative provision where if the whistleblower's allegation is proven true, with the state winning the court case, they receive 10% of the recuperated funds. A rewards-based system might, however, offer more problems than solutions through the 'solicitation' of reporting wrongdoing. Therefore, compensatory mechanisms would present a sounder solution to the problem of economic detriments arising out of retaliation.

South African whistleblowers also face severe physical risks, yet only criminal law and the Protection from Harassment Act (2011) provide some cover, but remains insufficient. It is particularly because of this that noteworthy legislative measures need to be taken to provide fast and accessible police protection to whistleblowers (Thakur, 2018b:4).

It should be evident that whistleblower protection in South Africa is lacklustre at best. One whistleblower presented a remarkable conclusion for this – that the law was written for a different space in South Africa's history. Mosilo Mothepu stated in her interview that South African whistleblowers were not protected by the PDAA as legislators and policymakers could not possibly predict the occurrence of state capture in the country.

> So, when the PDA, the Protected Disclosures Act, was written it was not written for state capture. It was written for petty theft. Like when the constitution gave presidential powers, they thought "Mandela", they had Mandela in mind. Then there was Zuma. So, we need now to completely overhaul the justice system and the protection and the reward so that we regain our country.

She argued that "the laws, just like the constitution give the president power, because they thought Mandela was that moral compass for the president". She adds that the laws should have changed when Jacob Zuma became president, because these Mandela-era laws did not make provision for a government that would abuse the laws. As a consequence of this, the scale of state capture became "so grand, and so entrenched in the institutions" that the systems and policies were rendered useless.

The unfortunate reality is that South African whistleblowers are not afforded sufficient protection by state law, in any phase of their disclosure. This protection is particularly necessary because of the frequency of retaliation against whistleblowers in South Africa. With the PDAA having been long criticised as inadequate (Davis, 2020; Lewis & Uys, 2007:85; Thakur, 2018a:3), the interviews with the participants only confirmed this standpoint.

7. Recommendations

With the whistleblowers in this study generally feeling that the PDAA did not provide them sufficient protection from reprisals, this article seeks to put forward a number of recommendations that would provide at least some reprieve from retaliation for future

South African whistleblowers. It must be noted that the Department of Justice and Correctional Services is currently "embarking upon a process to review the legislative framework for whistleblower protection" (Felix, 2022). However, one must question whether these revisions will come soon enough and whether adequate provisions from tried-and-tested instruments will be implemented to improve the effectiveness of whistleblower protection laws.

The European Union (EU) has promoted an instrument, the Whistleblower Directive (WD), which presents the minimum protection standards for whistleblowers in the EU (Martić, 2021:76). The WD sets an excellent precedent by mandating fair and equal treatment of whistleblowers in the legal framework, while also advancing the application of EU law (Martić, 2021:76-77). Very importantly, the WD places the onus of proof of retaliation on the organisation and not on the whistleblower (Abazi, 2020:649), resulting in the reversed burden of proof. These provisions, along with the Transparency International Guidelines, should serve as a point of departure when amending South African whistleblower protection laws.

A comprehensive remedy could emerge from following the example of the Serbian Law on the Protection of Whistleblowers (LPW). The LPW appears to have exceeded expectations, and authorities in Serbia now consider whistleblower protection an important matter (BETA Belgrado, 2017). The LPW has arguably set an international "gold standard" and serves as an effective legislative model, with the legislation of several EU member states and Canada having incorporated its provisions (BETA Belgrado, 2017). Feinstein and Devine's (2021:10) comprehensive report comparing global legislative protection instruments for whistleblowers has determined that the Serbian LPW ranks as one of the national laws with the best records. It complies with fifteen out of the twenty best practices, as set forth by Transparency International's *Best Practice Guide for Whistleblowing Legislation* (Feinstein & Devine, 2021:10). The reasons for this are abundant. Foremost, the LPW offers protection not only to whistleblowers but also to those connected to whistleblowers[3] and those mistakenly perceived to be whistleblowers[4] (Thakur, 2018a:4), which is, coincidently, one of the oversights of the PDAA.

What makes the LPW particularly effective is that it uses a broad definition for whistleblowing. Additionally, the LPW caters for internal, external and public disclosure protection, with the whistleblower being protected in the case of a public disclosure even if they had not previously disclosed to internal or external authorities. This could prove crucial for South African whistleblowers as the whistleblowers interviewed for this study were no longer confident in internal whistleblowing channels. They, in recollection of their disclosure experiences, argued that it is non-sensical to follow an internal reporting

3 This entails Article 6 of the LPW, *Protection of Associated Persons*, and it provides the same degree of protection to a person experiencing retaliation due to their association with the whistleblower as what the whistleblower would qualify for (Law on the Protection of Whistleblowers, 2014:2).

4 This entails Article 7 of the LPW, *Entitlement to Protection due to Wrongful Identification as Whistleblower*, and provides the same degree of protection that a whistleblower would enjoy to a person who was wrongly perceived by the wrongdoer as the whistleblower (Law on the Protection of Whistleblowers, 2014:2).

procedure when the disclosure will, ultimately, reach the top of the organisation, appearing before the very people who are responsible for the wrongdoing.

A dominant issue faced by the whistleblowers in this study is that they were subjected to victimisation and a loss of income due to an inadequate implementation, and understanding, of the channels of reporting. This issue is further compounded by the fact that the PDAA makes no guarantee that whistleblowers will receive compensation since the outcome of that resides with the Labour Court. To remedy this, compensatory provisions, like those available in Australia and the US, need to be considered for South African whistleblowers. In Australia, the Federal Court can issue orders for compensation (Armstrong & Francis, 2015:593). The orders can entail the offender or employer compensating the whistleblower for loss, damage or injury; ordering the restraint of a reprisal; offering an apology to the whistleblower; reinstating the whistleblower or providing an alternative position for the whistleblower at the same level (Armstrong & Francis, 2015:593). In the US, Illinois, Florida, Oregon, South Carolina and Wisconsin have provisions in their laws for whistleblower compensation (Cordis & Lambert, 2017:291). The LPW also makes provision for whistleblower compensation and judicial relief (Law on the Protection of Whistleblowers, 2014:10), which indicates why it, too, should be examined when revising compensatory provisions within South African law.

The whistleblowers in this study had been subjected to varying forms of retaliation, largely because the PDAA does not prescribe a fine against the organisation if it fails to adequately implement an internal whistleblowing policy. This, according to Thakur (2018c:1), likely results in few employers having whistleblowing policies in place despite a mandated obligation by the PDAA. South African legislation could again refer to the LPW to remedy this. The LPW prohibits all retaliatory action against whistleblowers and imposes a fine against the employer if they fail to protect the whistleblower against retaliation. The LPW also mandates that all employers need to have an internal whistleblower procedure visibly displayed for all employees to see, and in the absence of such a measure, a fine is imposed against the employer (Law on the Protection of Whistleblowers, 2014:1-10). With such a provision in place, one could then expect an internal whistleblowing procedure to be displayed next to the Basic Conditions of Employment Act and Labour Relations Act in any given work environment.

As the above-stipulated recommendations would take time to implement into legislation, an immediate mechanism is necessary to fill this gap in the interim. However, this mechanism would still serve its support purpose once the PDAA (or any other piece of legislation) has been revised. Such a mechanism would need to pursue the advancement of public interests through comprehensive representation that focuses on broad groups of individuals (Lewis, 2006:694). To achieve this, the focus would need to be on democratic values, mutual public interests with ethical standards and a sustainable system that builds a legacy for future generations with adequate accountability systems (Lewis, 2006:694).

The accountability system, in this instance, would entail a central state institution for whistleblower support. Since Chapter Nine Institutions serve the purpose of safeguarding

democracy in South Africa whilst being independent, such a state institution would present an ideal accountability system. Therefore, the pursuit of the public interest can be accomplished through the creation of a Whistleblowing Complaints Authority (WCA) as a Chapter Nine Institution for the comprehensive protection and support of whistleblowers, and to ensure the accountability of public officials. Through the incorporation of a WCA, various civil society organisations could (with the aid of the WCA) find a podium to pool their resources together and offer comprehensive support to future whistleblowers. With a WCA in place, whistleblowers would have a more easily accessible and centralised avenue to access whistleblower support agencies. A WCA would provide whistleblowers with compensation for financial losses and intangible costs related to disclosure. It would also develop career rehabilitation programmes for whistleblowers, provide them with structured assistance in engaging with media, legal and political supporters and implement mandatory measures to investigate and address perceived wrongdoing. The financial resources to accomplish this would come from fines levied from organisations, initially identified by whistleblowers, that were proven to have committed wrongdoing.

8. Conclusion

It is in the absence of effective state-level laws that South African whistleblowers have fought an uphill battle. The difficulty of disclosure is immense, but the escalated difficulty of being unprotected by one's state makes the experience of disclosure a mammoth one. It is, of course, the responsibility of the organisation wherein the wrongdoing occurred to ensure mechanisms are implemented that would proactively, rather than reactively, protect whistleblowers. And the onus of this should reside with the management of the organisation. However, when this is not mandated on a legislative level, the management of an organisation feels no push to enforce policies that protect whistleblowers. Think of the absurdity of a situation where the Basic Conditions of Employment Act (BCEA) would not be mandated and enforced. The result would be widespread infringements on workers' basic rights, ones where employees lose their rights to annual leave and reasonable working hours. As much as an adequate BCEA is the norm in South Africa, so should an adequate PDA (or its replacement). Thus, legislative revisions need to occur urgently, lest we have to face another daughter of a Babita Deokaran.

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