



## **PPLAAF recommendations on improvements to South Africa's Protected Disclosures Act**

1. The Protected Disclosures Act 26/2000 (the PDA 26/2000) was enacted to promote clean corporate governance and to give protection to whistleblowers who disclosed fraud, corruption, and criminal conduct in the organisations they worked in. The purpose was to encourage a culture of transparency, whilst at the same time granting protections to whistleblowers from reprisal attacks arising from disclosures they made.
2. The Platform to Protect Whistleblowers in Africa (PPLAAF) seeks to defend whistleblowers, as well as strategically litigate and advocate on their behalf where their disclosures speak to the public interest of African citizens. PPLAAF has been supporting South African whistleblowers since 2017, including several who testified on State Capture including Bianca Goodson, Mosilo Mothepu and Athol Williams.
3. Whilst the PDA sets out some protections for persons making disclosures it lacks the necessary enforcement provisions, particularly punitive provisions for the enforcement of breaches of its provisions, with affected whistleblowers having to resort to other legislation or to civil society organisations to seek redress for the transgressions suffered by them. In addition, protections are not comprehensive enough and allow various reprisals against whistleblowers.

How then are transgressors to be held fully accountable without whistleblowers having to navigate onerous procedures and incur burdensome costs and lengthy litigation proceedings?

And how can South Africa expect more whistleblowers to step forward when their predecessors are still the victims of high-wired reprisals?

4. The establishment of a Whistleblower Regulatory Authority which would act as a database for both private and public sector disclosures, independent from the reporting agencies already established in terms of the PDA: to a legal adviser (section 5), an employer (section 6), a member of Cabinet or of the Executive Council of a province (section 7), the Public Protector or Auditor-General (section 9), or any other person or body (section 8), would be a starting point.
5. It would be headed by a senior legal professional such as a retired judge of the High Court (or a senior legal professional with at least 10 years admitted as an



attorney/advocate), supported by other legal professionals experienced in both labour law and civil law procedure, and further staffed by investigators who are skilled in forensic and criminal investigation, a unit modelled along the lines of the Directorate for Priority Crimes and the Special Investigative Unit (SIU).

6. It is important that this agency/authority be independent of the South Africa Police Services (SAPS) as SAPS may be riddled with corruption itself and highly factional, as is borne out by the current disputes within the Criminal Intelligence Unit, and the dispute between the current Minister of Police and the National Commissioner of Police.
7. There needs to be oversight on the functions of the Whistleblower Regulatory Authority, which function must be within the authority of the Parliamentary Committee on Judicial Affairs. Such oversight function will include reviewing the work done in terms of receipt of disclosures, assessment, and subsequent investigations thereof, as well as outsourcing of some of the work to collateral agencies like the Directorate for Priority Crimes and the Special Investigative Unit. Such reports to the Parliamentary Committee on Judicial Affairs should occur bi-annually (every six months), subject to the volume of cases and the importance of the investigations arising from such disclosures.
8. It is important that under the PDA, strict and obligatory timetables will be established for processing and acting on protected disclosures. Whistleblowing is by nature delicate, risky and stressful. The longer it takes for the authorities to handle a protected disclosure, the likelier it is the whistleblower's identity is revealed and he is retaliated against, that the illegal deed is concealed by the whistleblower's employer, among other obstacles.
9. As whistleblowers are too often left in the dark after they make a protected disclosure, it is important to create a positive duty on this agency to regularly inform the whistleblower of the status of his/her disclosure.
10. There should be amendments to the PDA, which address the lack of punitive sanctions, and any transgressions thereof should have a minimum prison sentence of at least five (5) years and /or minimum fine of R50 000.00 for the Directors/CEO and Director Generals. This would discourage even minimal transgressions, and the more serious the transgression, the higher the term of imprisonment and/or fine should be.
11. Similarly, to the EU Directive on the protection of whistleblowers, it is proposed that under the PDA, a whistleblower shall not incur liability of any kind in respect



to reasonable acts necessary to revelations of a disclosure and to protection of his anonymity as long as they had reasonable reasons to believe that the disclosure fell under the conditions of the PDA.

12. In proceedings before a court relating to a detriment suffered by the whistleblower, assuming that detriment followed a protect disclosure under the PDA, it shall be presumed that the detriment was made in retaliation for a disclosure. The burden of proof shall be on the person who has caused the detriment to prove that that measure that led to the detriment was justified.
13. Section 191(13) of the Labour Relations Act (LRA) permits an employee to approach the Labour Court directly for adjudication where the employee alleges that he/she has been subjected to an “occupational detriment” by the employer for having made a protected disclosure. This is in instances where an employee has been demoted, harassed, by-passed for promotion, victimized, been the victim of an unfair labour practice and even dismissed because of making a protected disclosure. In instances of unfair labour practice, an employee would be entitled to a maximum of twelve (12) months compensation; and in cases of automatically unfair dismissal, compensation of up to twenty (24) months.

The compensation of 24 months is different from cases where the employer did not prove that the reason for dismissal was a fair reason related to the employee’s conduct, capacity or the employer’s operational requirements or because the employer did not follow a fair procedure or both. In these instances, the compensation must be “just and equitable” but not more than the equivalent of 12-months remuneration. We recommend that such a punitive provision be written into the amendments to the PDA, and that the Whistleblower Regulatory Authority be authorized to impose such sanction after a proper enquiry. This may be a more expeditious route to provide remedy to an affected whistleblower than having to follow the Labour Relations Act route, making use of the Similarly, Commission for Conciliation, Mediation and Arbitration (CCMA), bargaining councils and the Labour Court.

14. The Whistleblower Regulatory Authority, together with the Directorate of Priority Crimes, should in meritorious cases, where significant asset recoveries have occurred by virtue of the protected disclosures, consider awards of at least (10%) percent of the value of the asset recovered. It should be noted that foreign jurisdictions like the United States have adopted such a scheme with great success.



15. In recent testimonies before the State of Capture Commission of Enquiry (Zondo Commission), testimony has emerged about the financial losses incurred by whistleblowers because of victimization. It may be appropriate to consider financial awards as suggested above in paragraph 8, much along the lines of the USA program.
16. We are at pains to propose sanctions on employees who report transgressions which are not borne out by evidence, except in instances where it is objectively apparent that such report was made in malice and there is no reasonable evidence at hand to corroborate the report. It may deter legitimate whistleblowers who can act in the public interest from making disclosures.
17. There are mechanisms in place to report corruption anonymously but our opinion, reporters of protected disclosures cannot always remain anonymous throughout to ensure compliance with the right to the equality provisions in terms of the law. Law enforcement agencies will need make use of mechanisms such as the Witness Protection Act and its provisions, to safeguard the physical integrity of whistleblowers in matters which lead to a trial or any other formal enquiry such as the State of Capture Commission of Enquiry.
18. The PDA should as part of the proposed amendments incorporate such a provision to safeguard whistleblowers from physical harm. The Whistleblower Regulatory Authority must be enabled to keep confidential the information of whistleblowers in matters of extreme sensitivity, as is the case in terms of section 17 of the Witness Protection Act. The Witness Protection Act in section 22 makes it an offence for any person who wilfully or negligently, allows an unauthorized person to gain access to a protected person, discloses the identity of a protected person, discloses the location of a protected person, compromises the safety of such protected person, and furthermore renders such offender upon conviction liable to a fine or direct imprisonment not exceeding thirty (30) years.
19. It may well be that what is required to enforce the safety of whistleblowers is for the Protected Disclosures Act to incorporate some of the recommendations referred to herein to deter violations of the rights of persons who make such disclosures to combat corruption, fraud and criminal conduct.
20. The PDA should also extend the measures for the protection of whistleblowers, if relevant, to third persons who assisted the whistleblowers and could suffer from retaliation, such as colleagues, family members, or legal entities that assisted the whistleblowers or made the disclosure public such as media outlets and civil



society organisations. A similar measure is proposed in the EU Directive on the protection of whistleblowers.

21. The PDA should expressly state that it is to be read with the relevant legislation that impacts its practical enforcement: Labour Relations Act; Witness Protection Act; Companies Act and so on.

PPLAAF  
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