PLATFORM TO PROTECT WHISTLEBLOWERS IN AFRICA

South Africa: Whistleblower Protection Guidebook

FRIEDRICH NAUMANN FOUNDATION For Freedom.

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Disclaimer

The information provided in this guidebook does not, nor is it intended to constitute legal advice. All information in this guidebook is for general informational and educational purposes only. As the law is constantly evolving, the guidebook is up to date as of 1 November 2023. Readers should contact an attorney to obtain advice with respect to a specific legal matter. The guidebook was written in general terms and the individual facts and circumstances of the reader's case may differ. Accessing this guidebook, does not create an attorney-client relationship between the authors and their respective employers or the sponsors, clients or donors. All liability with respect to actions taken or not taken based on the content of the guidebook are hereby expressly disclaimed. No representations are made that the content is error-free.

INTRODUCTION

This guidebook provides practical guidance to whistleblowers who are determining whether to make a disclosure or who have made a disclosure and require guidance on how to navigate the complex legal framework that regulates whistleblowing in South Africa. Civil society institutions and plaintiff-side legal practitioners may also find this guidebook helpful as it distils certain key legislative provisions underpinning whistleblower law in South Africa and advances suggestions on approaching the intersection of the highlighted statutory provisions and South African common law.

The Platform to Protect Whistleblowers in Africa (PPLAAF) is a non-governmental organisation established in 2017 to protect whistleblowers as well as to advocate and engage in strategic litigation on their behalf when their revelations deal with the general interests of African citizens.

In 2021, PPLAAF submitted twenty-one recommendations for South Africa's whistleblower protection regime to the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State (Zondo Commission). Since then, PPLAAF has engaged the South African Human Rights Commission (SAHRC) and the National Prosecuting Authority (NPA) to strengthen whistleblower protections in South Africa.

PPLAAF works with whistleblowers across the region and has collaborated with various civil society organisations that support and protect whistleblowers. This guidebook continues this effort by producing a comprehensive resource of the extensive range of legislation safeguarding whistleblowers, which is equally accessible to legal practitioners, civil society, and whistleblowers.

Rationale for the Guidebook

The existence of corruption is a global pandemic that South Africa has, over the past five years, made some strides in addressing but has ultimately failed to remedy. Law alone is a necessary but insufficient tool for the protection of any right; it also requires courage on the part of members of society to speak truth to power.[1]

1 UN General Assembly, "Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression." https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/273/11/PDF/N1527311.pdf?OpenElement (Last accessed: 14 September 2023).

Many whistleblowers face significant consequences for their courageous actions, from job loss to adverse impacts on their health and overall welfare. In extreme situations, some have lost their lives. In a just society, whistleblowing should be safeguarded and applauded, not punished. A transparent, accountable and just society can only exist if individuals are able to shine a light on corruption and its various manifestations. Thus, we confront the essential question: How might South African law be effectively harnessed to shield those who sound the alarm on corruption and speak truth to power? This guidebook offers practical guidance on leveraging existing legal provisions and mechanisms to empower and support whistleblowers in South Africa.

Contextualising Whistleblowing in South Africa

In the celebrated tapestry of our nation's Constitution and its concomitant human rights law, which has garnered acclaim worldwide, South Africa still suffers from endemic corruption and the targeting of people who shine the light on corruption. These whistleblowers often experience a sense of abandonment by the very justice system they sought to uphold. In the David versus Goliath battle that generally ensues, corrupt employers often have endless access to resources to abuse legal processes by bringing retaliatory claims or criminal charges to frighten, frustrate and deplete the limited resources of whistleblowers. While working with whistleblowers and legal practitioners representing whistleblowers, it has become evident to the Platform to Protect Whistleblowers in Africa (PPLAAF) that the legal landscape is convoluted and overwhelming, impacting the potential development of positive case law and effective redress for whistleblowers.

There are various avenues that whistleblowers can use, such as labour law and civil law, but this will require the skills and expertise of a legal practitioner. However, as is often the case, whistleblowers may have been dismissed and thus have not access to any income. Unless a legal practitioner is willing to take the matter on a contingency basis, it would be challenging for whistleblowers to afford the services of a legal practitioner to run their matter.

With this in mind and PPLAAF’s mission to support whistleblowers, this guidebook hopes to be a reference for whistleblowers, legal practitioners, and civil society organisations to navigate the legal frameworks and litigious processes related to blowing the whistle. Even if a whistleblower is representing themselves, we hope they can use this guidebook to navigate the often convoluted legal and procedural landscape.

The Whistleblower

In this guidebook, we have adopted the term "whistleblower" to describe individuals who disclose improprieties within both public and private domains. We recognise that this term may be soiled by the negative legacy of the term 'impimpis' from South Africa's Apartheid history. Notwithstanding this historical trauma, in our analysis and the recommendations of this guidebook, we revere whistleblowers as sentinels of our society and as defenders of the hard-earned freedoms that constitute the bedrock of our constitutional democracy. Ultimately, the term whistleblowers must be reclaimed as both respected and protected.

CHAPTER 1
Introduction to Whistleblowing in South Africa

What is Whistleblowing?

Although the term whistleblower is colloquially used, South African legislation rarely defines "whistleblowing" or “whistleblower”. The only legislation to mention "whistleblower” is the National Environmental Management Act 107 of 1998 (**NEMA**)[2] and the Companies Act 71 of 2008 (**Companies Act)**[3]; however both statutes fail to provide a clear definition. International organisations and various countries have adopted an asynchronous set of definitions related to whistleblowing. Some protection laws are limited to the context of a work-based relationship, while others offer protection to members of the public.[4]

The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression defines a whistleblower as:

“*a person who exposes information that he or she reasonably believes, at the time of disclosure, to be true and to constitute a threat or harm to a specified public interest, such as a violation of national or international law, abuse of authorities, waste, fraud, or harm to the environment, public health or public safety*.”[5]

PPLAAF has defined a whistleblower as:

“*a person who discloses information regarding actions that are unlawful, illicit or against public interest, that he/she has witnessed, especially in the context of his/her work*.”[6]

This definition will be used to explain the practical implications of whistleblowing in South Africa in terms of the law. As we reach the end of this introductory chapter, it is important to acknowledge the multilayered framework of legislation surrounding whistleblowing. However, among such statutes and regulations, the Protected Disclosures Act No. 26 of 2000 (**PDA**) remains South Africa’s cornerstone legislation concerning whistleblowers' protection. This guidebook places significant emphasis on the PDA, recognising its central role in the legal safeguarding of whistleblowers.[7]

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2 Chapter 7 Part 1 of NEMA, read with Section 31 of NEMA.
3 Section 159 of the Companies Act.
4 UN General Assembly, “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.”Accessed at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/273/11/PDF/N1527311.pdf (Last accessed on 14 September 2023).
5 Ibid.
6 PPLAAF, “Our Mission”, https://www.pplaaf.org/our-mission.html (Last accessed: 20 September 2023).
7 Preamble to the Protected Disclosures Act No. 26 of 2000.

CHAPTER 2
International and Regional Standards

Executive Summary

South Africa is a fully-fledged member of the international community and has ratified the United Nations Convention against Corruption (**UNCAC**) and the African Union Convention on Preventing and Combating Corruption. International and regional standards play an essential role when advocating for reforms related to the plight of whistleblowers. They also inform how courts interpret the Constitution and legislation pertaining to whistleblowing in South Africa. Comparative analyses with other jurisdictions may also shed light on where reforms can be made.

1. What are the International and Regional Standards Protecting Whistleblowers?

International and regional standards on the protection of whistleblowers play an important role when advocating for reforms and highlighting the plight of whistleblowers. In the realm of human rights law and democracy, South Africa, as an engaged and respected member of the global community, is committed to aligning its laws and policies with the standards set forth by international law.

South Africa ratified the **UNCAC** in 2004. Article 33 refers to a whistleblower as a "reporting person".

"*Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.*"

The UNCAC places an obligation on State Parties to implement laws to protect whistleblowers against any unjustified treatment. Interestingly, the UNCAC only mentions reporting to "competent authorities" and not entities such as the media or civil society, who commonly receive whistleblowing reports.

Regarding what can be reported, the UNCAC refers to offences such as corruption, bribery, embezzlement, misappropriation, and money laundering. Notably, the UNCAC does not contain any limitations regarding who a reporting person can be or the position they may hold.

Article 32 of the UNCAC places an obligation on state parties (which includes South Africa) to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences as well as their relatives and other persons close to them.[8] These protective measures include witness protection[9] and giving evidence *in camera*.[10] It also provides that state parties should enable the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.[11]

The 2015 thematic report to the UN General Assembly of the Special Rapporteur on freedom of opinion and expression highlighted that whistleblowers deserve the strongest protection in law and in practice.[12] Regarding Article 19 of the International Covenant on Civil and Political Rights, whistleblower protections rest upon a core right to freedom of expression.[13]

In respect of regional standards, South Africa ratified the African Union Convention on Preventing and Combating Corruption in 2005 (the **AU Convention**) and the Southern African Development Community Protocol Against Corruption in 2001 (**SADC Protocol**). Article 5 of the AU Convention makes provision for state parties to adopt measures that ensure citizens report corruption without fear of consequent reprisals. Article 5 of the AU Convention also mandates state parties to adopt national legislative measures to punish those who make false and malicious reports against innocent persons in corruption and related offences. Including this provision is unfortunate as it can create a chilling effect where whistleblowers fear blowing the whistle in good faith because of an accusation of false and malicious reporting.

Article 4 of the SADC Protocol puts forward preventative anti-corruption measures that member states are required to adopt. In particular, Article 4(e) requires nation states to adopt "systems for protecting individuals who, in good faith, report acts of corruption".[14] Again, however, the SADC Protocol contains a provision similar to that in

8 Article 32(1) of the United Nations Convention against Corruption.
9 *Ibid*, article 32(2)(a).
10 *Ibid*, article 32(2)(b).
11 *Ibid*, article 32(5).
12 UN General Assembly, 2015 "Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression." (Last accessed: 14 September 2023) https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/273/11/PDF/N1527311.pdf?OpenElement
13 Supra fn 12.
14 Southern African Development Community, Protocol Against Corruption, August 2001, article 4(e), https://www.sadc.int/sites/default/files/2021-11/Protocol_Against_Corruption2001.pdf. (Last accessed on: 27 October 2023).

Article 5 of the AU Convention. Article 4(f) of the SADC Protocol requires member states to adopt “laws that punish those who make false and malicious reports against innocent persons”.[15]

Of concern is the inclusion of the intent and purport of Article 5 of the AU Convention and Article 4(e) of the SADC Protocol in South African domestic law. Section 9B of the PDA includes a provision that makes it an offence to intentionally disclose false information with the intention to cause harm to the affected party and where the affected party has suffered harm as a result of such disclosure.[16]

2. What have other jurisdictions done?

2.1 Regionally

Corruption is not only a South African phenomenon; many other countries have acknowledged the critical role of whistleblowers in combating corruption by implementing specific statutes to encourage individuals to blow the whistle.

A comparative analysis can assist civil society in understanding where they can advocate for reforms and compare their regulatory framework to other jurisdictions. Countries such as Botswana, Namibia, and Zambia have dedicated whistleblower protection laws, while Malawi, Mozambique, and Zimbabwe have protective provisions related to whistleblowing in a spread of legislation.[17] The Namibian Whistleblower Protection Act of 2017 and the Botswana Whistleblowing Act of 2016, protect any person making a report that qualifies for legal protection under the law.

In South Africa, the PDA protects employees and workers, while the Companies Act extends this protection to a much broader spectrum of persons, such as shareholders, whether juristic or natural, entities that supply goods to the impugned company, employees of such suppliers, and registered trade unions.[18] Like the PDA, Zambia only extends protective measures to employees or workers.

Namibia established the Whistleblower Office to investigate misconduct. However, the office has yet to be effective as whistleblowers are only protected in certain instances. Zambia's approach to implementing the AU Convention's position on punishing false accusations has resulted in the excessive prosecution of whistleblowers who are

15 Ibid, article 4(f).

16 Supra fn 7, section 9B.

17 UNODC. 2022. *Whistle-blower reporting protection systems in Southern Africa: What are our commonalities?* Regional Workshop Cape Town

18 For a more detailed analysis of how the Companies Act and the PDA stem the effects of “gag provisions” in non-disclosure and similar-type agreements, see chapter 5 below.

suspected of having made frivolous or malicious disclosures. This has a negative effect on making disclosures and is creating a culture of fear and silence.[19]

Where the law does not threaten punishment of suspected frivolous or malicious disclosures, there is a common practice amongst employers making use of non-disclosure agreements, confidentiality agreements, mutual separation agreements or settlement agreements which contain “gag clauses” that prohibit whistleblowers from disclosing information which may show corrupt conduct and which may be in the public interest. The South African legislature has addressed this by including provisions in both the PDA and the Companies Act containing provisions which invalidate terms in agreements or the relevant Company’s memorandum of incorporation that limit a person from disclosing information in terms of the PDA or the Companies Act. [20]

2.2. International Whistleblower Programmes

Interestingly, specific statutes in the United States of America (**US**) permit international whistleblowers to participate in US whistleblower reward programmes. Generally, where an international whistleblower’s case is linked to the Securities and Exchange Commission’s (**SEC**) whistleblower programme or the Commodity Futures Trading Commission’s (**CFCT**) whistleblower programme, that whistleblower may be entitled to participate in the SEC or CFTC whistleblower reward programme.[21]

These programmes, created by the Dodd-Frank Act, do not require a person to be a US resident or citizen. For example, for the SEC to have jurisdiction, the company which is complicit in corruption which the whistleblower wishes to disclose about must be listed on an exchange in the United States or have operations within the United States.

Some potential whistleblower cases in South Africa have been sent to prominent law firms in the US specialising in whistleblower law to determine whether their case meets the requirements under the SEC or CFTC programmes. However, to our knowledge, there are no cases that the SEC has agreed to institute for a South African whistleblower under the SEC or CFTC programmes.

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19 Integrity Line, 2023,”Botswana: Africa’s Whistleblower Protection Trailblazer.” https://www.integrityline.com/expertise/blog/botswana-whistleblower-protection-trailblazer/ (Last accessed: 14 September 2013).

20 See Chapter 5 for an examination of distinct sections within the Companies Act and the PDA that address the use of non-disclosure agreements, confidentiality clauses, and the stipulations within mutual separation or settlement agreements that include "gag clauses”.

21 Phillips and Cohen LPP, ‘International Whistleblowers’ https://www.phillipsandcohen.com/whistleblower-practice-areas/international-whistleblower/ (Last accessed on 10 October 2023).

CHAPTER 3
Legal Framework of the Protected Disclosures Act

Background to the Protected Disclosures Act in South Africa

In drafting the Protected Disclosures Act, the legislature sought to fill a void in our jurisprudence, a lacuna where neither common law nor existing statutory frameworks provided for the processes or protections due to those who disclosed improprieties in the public or private spheres.[22]

The objective of the PDA is to protect employees or workers and ensure that they can come forward without fear of reprisal when disclosing information relating to suspected or alleged criminal or other irregular conduct by their employers.[23]

The PDA aims to create a culture which will facilitate the disclosure of information by employees and workers in the workplace in a responsible manner by providing comprehensive statutory guidelines for the disclosure of such information and protection against reprisals.[24]

The PDA came into effect in 2001 and was substantially amended in 2017. The amendments expand protection to "workers" in addition to employees, however, it does not include general members of the public.[25] It also expanded the definition of an "occupational detriment" to include any civil claim by the employer for the alleged breach of a confidentiality agreement or duty of confidentiality.[26] A further amendment that was introduced was the obligation on employers to authorise appropriate internal procedures for receiving and dealing with improprieties and to take reasonable steps to bring internal procedures to the attention of every employee and worker.[27] A further provision is the employer's duty to inform an employee or worker of the steps taken once a disclosure has been made.[28] The amendments also create a new liability: an employer and its client are jointly and severally liable for occupational detriment under specific circumstances. In complying with its obligation under the AU Convention, the amendments also introduced criminalising the intentional disclosure of false information.[29]

22 The Protected Disclosures Act was promulgated in 2000 and came into effect in 2001. It was substantially amended to be more progressive and reflective of international whistleblower standards in 2017.
23 Supra fn 7, preamble.
24 *Ibid*.
25 *Ibid*, section 1.
26 *Ibid*.
27 *Ibid*, section 6(2).
28 *Ibid,* section 3B.
29 Supra fn 7, section 9B.

Step 1: Who does the PDA apply to?

The PDA only applies to employees and workers, including independent contractors, consultants and agents, but not to third parties such as customers, suppliers, vendors, or members of the public who have knowledge of unlawful or irregular conduct.[30]
In terms of the PDA, an employee[31] is defined as:

(a) *any person, excluding an independent contractor, who works or worked for another person or for the State, and who receives or received, or is entitled to receive, any remuneration*; and
(b) *any other person who in any manner assists or assisted in carrying on or conducting or conducted the business of an employer.*

A worker[32] is defined as:

(a) *any person who works or worked for another person or for the State*; or
(b) *any other person who in any manner assists or assisted in carrying on or conducting or conducted the business of an employer or client, as an independent contractor, consultant, agent*; or
(c) *any person who renders services to a client while being employed by a temporary employment service*.

Step 2: What protection is available to whistleblowers if they are not an employee or worker?

Unfortunately, there is no comprehensive protection for whistleblowers who are not employees or workers. However, should a whistleblower start experiencing retaliation, they can apply for a protection order under the Protection from Harassment Act, No 17 of 2011. A whistleblower who is not an employee or a worker may also consult Section 159 of the Companies Act and Section 31 National Environmental Management Act,[33] which are discussed in greater detail in Chapter 5 and Chapter 6, respectively.

Step 3: What is a protected disclosure?

The PDA applies to any disclosure of information regarding any conduct of an employer, of an employee, or of a worker of that employer made by any employee or worker **who has reason to believe** that the information concerned **shows or tends to show**[34] one

30 For a discussion on the scope and reach of the Companies Act, No. 71 of 2008, see chapter 5 below.
31 Supra, fn 7, section 1.
32 *Ibid.*
33 Act No. 107 of 1998.
34 Supra fn 7, section 1.

or more of the following:

(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; that the health or safety of an individual has been, is being or is likely to be endangered*;
(d) *that the health or safety of an individual has been, is being or is likely to be endangered*;
(e) *that the environment has been, is being or is likely to be damaged*;
(f) *unfair discrimination as contemplated in Chapter II of the Employment Equity Act 1998, or the Promotion of Equality and Prevention of Unfair Discrimination Act 2000*; or
(g) *that any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed.*

Despite a relatively broad definition of a protected disclosure, the PDA has restricted when a disclosure will be protected if the employee or worker concerned commits a criminal offence by making that disclosure.[35] One example is the National Key Points Act,[36] which criminalises the furnishing of any information, in any manner, relating to the security measures applicable in respect of any National Key Point or in respect of any incident that occurred there.[37] Whistleblowers are encouraged to satisfy themselves that they are not committing a criminal offence by disclosing certain information.

Step 4: Can I report unlawful, illicit conduct or actions against the public interest if I was not a witness, and will I be protected?

The PDA does not specify that you need to have witnessed unlawful activity. Rather, it sets a lower standard in that the employee or worker has “reason to believe that the information concerned shows or tends to show” one or more of the unlawful activities listed in the PDA.

The case of *John v Afrox Oxygen Ltd* [2018] 5 BLLR 476 (LAC) set out the test for making a disclosure. The Labour Appeal Court found that to qualify as a protected disclosure, the employee or worker had to have reason to believe that the information disclosed, at the very least, tended to show that an impropriety has, is being, or may be committed, or that the employer has, is failing, or may in the future fail to comply with its legal obligation.[38]

35 *Ibid.*
36 National Key Points Act, No. 102 of 1980.
37 *Ibid,* section 10.
38 *John v Afrox Oxygen Ltd John v Afrox Oxygen Ltd* [2018] 5 BLLR 476 (LAC) [2018] 5 BLLR 476 (LAC) para 25.

In *SA Municipal Workers Union National Fund v Arbuthnot*,[39] the Court held that "*the enquiry [into whether a disclosure is protected or not] is not about the reasonableness of the information, but about the reasonableness of the belief." The "requirement of 'reasonable belief' does not entail demonstrating the correctness of the information, because a belief can still be reasonable even if the information turns out to be inaccurate*." [40]

In *Radebe v Premier Free State Province* (2012) 33 ILJ 2353 (LAC),[41] the Court held that the requirement of a reasonable belief:

> …*cannot be equated to personal knowledge of the information disclosed. That would set so high a standard as to frustrate the operation of the PDA. Disclosure of hearsay opinion would, depending on the reliability, be reasonable. A mistaken belief or one that is factually inaccurate can nevertheless be reasonable unless the information is so inaccurate that no one can have interest in its disclosure*.

In conclusion, a whistleblower can make a protected disclosure even if they did not personally witness the conduct. If a whistleblower is relying on hearsay evidence, then it would depend on the reliability of the evidence that the whistleblower is able to adduce and the reasonableness of their belief or reliance on such evidence. Therefore, a whistleblower does not need to prove the correctness of the facts for the existence of a belief to enjoy the protection under the PDA. However, a whistleblower should have reason to believe that the disclosures show or tend to show some unlawful conduct or wrongdoing listed in section 1 of the PDA.[42]

Step 5: What protection does the PDA offer to a Whistleblower?

One of the objects of the PDA is to protect an employee or worker, whether in the private or the public sector, from being subjected to an occupational detriment because of having made a protected disclosure.[43]

The PDA makes provision that no employee or worker may be subjected to any occupational detriment by their employer on account, or partly on account, of having made a protected disclosure.[44]

39 SA Municipal Workers Union National Fund v Arbuthnot (2014) 35 ILJ 2434 (LAC) at para 15.
40 Supra fn 38, at para 26.
41 Radebe v Premier Free State Province (2012) 33 ILJ 2353 (LAC) at para 20.
42 Supra fn 38, at para 28.
43 Supra fn 7, Section 2(1).
44 Ibid, Section 3.

An occupational detriment[45] means:

a) being subjected to any disciplinary action;
b) being dismissed, suspended, demoted, harassed or intimidated;
c) being transferred against his or her will;
d) being refused transfer or promotion;
e) *being subjected to a term or condition of employment or retirement which is altered or kept altered to his or her disadvantage*;
f) *being refused a reference, or being provided with an adverse reference, from his or her employer*;
g) *being denied appointment to any employment, profession or office*;
h) *being subjected to any civil claim for the alleged breach of a duty of confidentiality or a confidentiality agreement arising out of the disclosure of* -
(i) *a criminal offence*; or
(ii) *information which shows or tends to show that a substantial contravention of, or failure to comply with the law has occurred, is occurring or is likely to occur;*
i) *being threatened with any of the actions referred to in paragraphs (a) to (h) above*; or
j) *being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities, work security and the retention or acquisition of contracts to perform work or render services*.

Step 6: What does occupational detriment look like in real life?

International, regional, and national trends towards greater formal protection of whistleblowers have not necessarily translated into effective protection for sources and whistleblowers.[46] This is in part due to ineffective protection from gaps in law evident in South Africa wherein the Zondo Commission recommended to Government to introduce or amend existing legislation to ensure whistleblowers are protected as envisaged in the UNCAC, to incentivise disclosures and authorise the offer of immunity from criminal or civil proceedings.[47] As highlighted in further detail elsewhere in the guidebook, employers with deep pockets have also abused the law to manipulate the system.

PPLAAF has observed that retaliation is often not confined to the above-listed occupational detriments as set out in the PDA.[48] Employers or others accused of wrongdoing often take on multi-pronged approaches with respect to retaliating against the whistleblower. In many instances, legitimate disciplinary measures such as non-

45 Ibid, Section 1.
46 Supra fn 12.
47 Judicial Commission of Inquiry into State Capture Report: Part VI Vol 4: All the Recommendations
48 PPLAAF, ”Occupational Detriment 101” https://www.pplaaf.org/2023/03/27/occupational-detriment-101.html (20 September 2023).

disparagement obligations (an obligation on an employee to uphold the company's name) or keeping company information confidential have been used to discipline and dismiss whistleblowers who lawfully report wrongdoing. PPLAAF has also observed the invasion of whistleblower's privacy as their personal communication is often intercepted, and they are under constant surveillance on the orders of those they accused of wrongdoing.

In addition to the above, PPLAAF has also observed the use of the following retaliatory tactics by employers:

Criminal Charges	Claims for Defamation	Anton Pillar order
This may or may not be related to the protected disclosure. It may be either bogus charges or related to an earlier incident that the whistleblower may have been involved in. Examples include fraud, theft, money laundering and insubordination.	This may follow after the whistleblower approached the media or made some other type of allegation on social media or to third parties. Examples include urgent interdicts and claims for damages based on defamation or *crimen injuria*.	A court order permitting the inspection of the whistleblower's house or other related property and search and seizure of materials and documents including that of anyone present on the property. These orders are done on an *ex parte basis* which means that the whistleblower cannot defend it but can only oppose it once they have knowledge that the interim order was granted.
Claims for Damages	**Delinquent Director Claim**	**Withholding pension funds**
This is a delictual claim which covers various aspects which may or may not be related to the protected disclosure such as fraud or negligence in the performance of duties. This could also include a claim for defamation where the company seeks relief in the form of compensation for the harm caused by such alleged defamation.	If the whistleblower was a registered director of the employer or one of its related entities then an application may be brought to declare the director delinquent on allegations which may well be allegations unrelated to the protected disclosures made.	The employer may lay claim to the employee's pension fund pending the final outcome of the civil claims and/or criminal charges. The Pension Fund, on instruction from the employer will not pay out the pension until the criminal and civil matters are finalised.

Step 7: What can a whistleblower do if they are charged with unrelated misconduct following a protected disclosure?

Any victimisation suffered by a whistleblower will have to be shown to be causally linked – at least partly – to the whistleblower's protected disclosure(s).[49]

In the case of *Communication Workers Union v Mobile Telephone Networks (Pty) Ltd*,[50] the Court held that if there is some demonstrable nexus between the making of the disclosure and the occupational detriment threatened or applied by the employer, the protections of the PDA should apply. For example, the Court said that the detriment need not be directly linked to the disclosure. As a result, a whistleblower would need to be able to give context to the allegation that they have suffered occupational detriment as a result of the protected disclosure and prove that there is some level of a causal nexus between the occupational detriment and the protected disclosure.

Case Study: Establishing a causal nexus between the occupational detriment and the protected disclosure

Let's use an example where an employee makes a disclosure related to tender irregularities to illustrate the causal link. It will be relatively simple for the whistleblower to prove the causal link if they are charged in a disciplinary hearing for "bringing the company's name into disrepute for making allegations to the media that the CEO was engaged in tender irregularities". The employer has specifically listed the protected disclosure and is now disciplining the whistleblower. However, it will be more difficult when the whistleblower makes the protected disclosure and is then charged with unrelated, trumped up or bogus charges.

For example, the whistleblower is charged with fraud relating to a payment made a year before making the protected disclosure. In this instance, the whistleblower will need to argue at the internal disciplinary hearing, a hearing before the Commission for Arbitration Mediation and Conciliation (CCMA) or Court proceedings that the action taken against them is in retaliation to the protected disclosure. It will be helpful to create a timeline to show how the employer or co-workers' attitude changed towards the whistleblower following the protected disclosure.

For example, before making the protected disclosure, the whistleblower was invited to all staff meetings; after making the protected disclosure, the whistleblower's work performance is questioned, they are not invited to meetings, and the employer begins nit-

49 South African Law Reform Commission, Discussion Paper 107, Protected Disclosures, p. 34
50 https://www.justice.gov.za/salrc/dpapers/dp107.pdf (Last accessed: 6 September 2023).
Communication Workers Union v Mobile Telephone Networks (Pty) Ltd (2003) 24 ILJ 1670 (LC) para 19.

picking over minor issues. Furthermore, it will be useful to argue that the charge is not legitimate as the whistleblower made the payment under instruction from their manager or that a long period of time has lapsed and the employer failed to take action timeously.

When will such a disclosure be protected?

The above disclosure will only be protected, and the employee or worker will only be able to claim protection from occupational detriment if it is made to one of the following bodies listed in the table below:

Section Number	Designated Person or Entity				
Section 5	Legal Adviser	This will only be classified as a protected disclosure if it is done with the object and in the course of obtaining legal advice.			
Section 6	Employer	Good faith requirement	Disclosure to be made substantially in compliance with the procedure authorised by the employer or to the Employer.	Every employer must authorise appropriate internal procedures for receiving and dealing with information about improprieties ; and take reasonable steps to bring the internal procedures to the attention of every employee and worker.	*Despite the mandatory language used. There is no sanction if an Employer does not have a procedure in place.
Section 7	Member of Cabinet or the Executive Council of a Province	Good faith requirement	Only if the employee's or worker's employer is: • an individual appointed in terms of legislation by a member of Cabinet or of the Executive Council of a province; • a body, the members of which are appointed in terms of legislation by a member of Cabinet or of the Executive Council of a province; or • an organ of state falling within the area of responsibility of the member concerned.		

Section Number	Designated Person or Entity			
Section 8	Certain persons or bodies	• the Public Protector; • the South African Human Rights Commission; • the Commission for Gender Equality; • the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; or • a person or body prescribed for purposes of this section; and in respect of which the employee or worker concerned reasonably believes that— (i) the relevant impropriety falls within any description of matters which, in the ordinary course are dealt with by the person or body concerned; and (ii) the information disclosed, and any allegation contained in it, are substantially true, is a protected disclosure. • the Public Service Commission; • the Auditor General.	Good faith requirement	Substantially true requirement.
Section 9	Any other person or body	Good faith requirement. Disclosure not made for personal gain (excluding any reward payable in terms of the law). It is reasonable to make the disclosure.	Who reasonably believes that the information disclosed is substantially true. In determining whether it is reasonable for the employee to make the disclosure, consideration will be given to the following: • Identity of the person to whom the disclosure is made; • The seriousness of the impropriety; • Whether the impropriety is continuing or is likely to occur in the future; • Whether the disclosure is made in breach of a duty of confidentiality of the employer towards any other person; • The public interest.	One or more of the following conditions have been met: • The employee believed that they would be subjected to an occupational detriment if they made the disclosure to the employer in terms of section 6. • In the case where no person/body is prescribed in terms of section 8, the employee making the disclosure has reason to believe that it is likely that evidence relating to the impropriety will be concealed or destroyed if they make the disclosure to the employer. • The employee has previously made a disclosure of substantially the same information to: • The employer; or • A person/body referred to in section 8. • And no action was taken within a reasonably period after the disclosure; or • The impropriety is of an exceptionally serious nature.

What is good faith?

In terms of sections 6, 7, 8 and 9 of the PDA, protected disclosures made to the listed institutions must be made in good faith. The courts have interpreted good faith and therefore any disclosure made to the entities or persons listed in sections 6 through 9 of the PDA will have to meet the benchmark set by the courts in this regard. In the case of *Radebe and Another v Premier, Free State Province and others*,[51] the court referred to a decision of the UK Appeal Court in *Street v Derbyshire Unemployed Workers' Centre* [2004] 4 ALL ER 839 at 41 to define good faith.

'*Shorn of context, the words "in good faith" have a core meaning of honesty. Introduce context, and it calls for further elaboration. Thus, in the context of a claim or representation, the sole issue as to honesty may turn on its truth. But even where the content of a statement is true or reasonably believed by its maker to be true, an issue of honesty may still creep in according to whether it is made with sincerity of intention for which the Act provides protection or for an ulterior and, say, malicious, purpose. The term is to be found in many statutory and common law contexts, and because they are necessarily conditioned by their context, it is dangerous to apply judicial attempts at definition in one context to that of another*.'

The Courts have also interpreted what bad faith could mean in circumstances related to whistleblower cases and illustrate this below to elucidate the concept of good faith further. In the case of *Motloung v Universal Service and Access of South Africa and Others*,[52] the Court questioned the applicant's good faith as she was personally involved in the irregularities forming part of the protected disclosure. The applicant's protected disclosure related to the CEO's appointment of which the applicant was part of the panel to appoint the CEO.

In *Communication Workers Union and Other v Mobile Telephone Networks (Pty) Limited*,[53] the Court gave the example that where an employee deliberately sets out to embarrass or harass an employer, then it is not likely that the alleged whistleblower will satisfy the requirement of good faith. The Court also highlighted that the PDA is not intended to protect what amounts to mere rumours or conjecture.[54] A disclosure that is no more than an expression of a subjectively held opinion or any accusation rather than a disclosure of information.[55]

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51 *Radebe and Another v Premier, Free State Province and Others* (2012) 33 ILJ 2353 (LAC).
52 *Motloung v Universal Service And Access Of South Africa and Others* (J245/2023) [2023] ZALCJHB 35 (8 March 2023), at para 10.1
53 *Communication Workers Union and Other v Mobile Telephone Networks (Pty) Limited* (JS 803/03) [2003] ZALC 59 (26 May 2003), at para 21.
54 Ibid.
55 Ibid, at para 22.

We explore further nuances of the term good faith in chapter 5 below but pause to highlight the importance of whistleblowers ensuring their intention for making the disclosure is not for personal gain (which would generally exclude any reward payable in terms of any law), ulterior motives, or malicious intent for example.

Section 6 - Disclosure to the Employer

Although it may seem fairly simple to make a disclosure to the employer, section 6 is specific in that the protected disclosure must be made substantially in accordance with any procedure authorised by the employer for reporting, and the employee had to have been made aware of the procedure.[56] The 2017 amendment to the PDA places an obligation on the employer to authorise appropriate internal procedures for receiving and dealing with information about improprieties and to take reasonable steps to bring the internal procedures to the attention of every employee and worker.[57]

Suppose a whistleblower is faced with the allegation that they did not follow the procedure. In that case, it may be helpful for the whistleblower to argue that the employer did not have a procedure in place or it was not communicated to the whistleblower. This will require the employer to prove that they had a procedure at all material times of making disclosures and that it was communicated to the whistleblower.[58]

The Courts take this procedural requirement seriously, as in the case of *Communication Workers Union and Other v Mobile Telephone Networks (Pty) Limited*.[59] The Court found that employees must report through an authorised channel such as a fraud hotline or where the employer has advised the employee of where to report. If they do not do this, then they remove themselves from the ambit of the protection granted by the PDA. In this case, the employee sent an email copying high-level executives and colleagues with the alleged protected disclosure.

Despite an obligation on employers to authorise appropriate internal procedures for whistleblowing, the PDA fails to provide any sanction for a failure to take action. This is also evident by section 6(1)(b), wherein if the employer does not have a procedure, then the disclosure can be made to the employer without following any employer-sanctioned approach as there wouldn't be one.[60]

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56 Supra, fn 7, section 6(1)(a).
57 *Ibid*, section 6(2)(a)(ii).
58 For example this could be communicated to the whistleblower by way of email, at an induction training, or by placing signage in the workplace that the whistleblower ought to have read.
59 *Ibid,* para 24.
60 Supra fn 7, Section 6(1)(b).

Will I be protected under the PDA if I disclose to the media and/or civil society?

Neither the media nor civil society is specifically listed in the PDA nor its regulations. However, many whistleblowers trust the media or civil society to blow the whistle instead of reporting to the employer or various state institutions.

In such instances, a whistleblower must rely on Section 9 of the PDA to be protected. Section 9 of the PDA was substantially amended in 2017, increasing the statutory conditions for making a disclosure. Given the prevalence of whistleblowers opting to disclose information to media outlets or civil society organisations before approaching their respective employers, it becomes imperative to analyse this provision critically. It is essential to outline the key considerations that a potential whistleblower should contemplate before initiating a disclosure through media or civil society channels that may be available to them.

Step 1: Ensure that your disclosure is made in good faith, with a reasonable belief that the information disclosed, and any allegations contained in it, are substantially true.

Step 2: Ensure that you do not intend to disclose any information for personal gain (excluding any reward payable in terms of any law).

Step 3: Ensure that having weighed up your options, you earnestly believe that making a disclosure to the media or a civil society organisation is reasonable in the circumstances.

Step 4: Ensure that one or more of the following conditions will be satisfied when making the disclosure to the medial or a civil society organisation:

(i) that you have reason to believe that you will be subjected to an occupational detriment if you make a disclosure to your employer in accordance with section 6; or

(ii) after considering whether the disclosure falls within scope of a body or person listed in section 8 of the PDA,[61] and determining that no body or person in section 8 is relevant to the information you wish to disclose, and that you believe that the information you wish to disclose or evidence related to such impropriety will be concealed or destroyed if you make the disclosure to your employer; or

61 The bodies referred to in section 8 of the PDA are as follows: (a) the Public Protector, (b) the South African Human Rights Commission, (c) the Commission for Gender Equality, (d) the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, (e) the Public Services Commission, (f) the Auditor-General, or (g) a person or body prescribed for purposes of this section.

(iii) that you have previously made a disclosure of substantially the same information to your employer or a person or body listed in section 8 of the PDA, and no action has been taken within a reasonable period of time after such disclosure;[62] or

(iv) that the information and evidence that you wish to disclose is related to an impropriety of an exceptionally serious nature.

Will I be protected under the PDA if I disclose on social media?

For purposes of this guidebook, social media refers to any website or application used for the purposes of content sharing and communication, such as WhatsApp and its status sharing, Facebook, Instagram, X (formerly known as Twitter) and LinkedIn. A disclosure on social media will fall under Section 9 of the PDA. Similar to disclosing to the media, a disclosure on social media must comply with section 9 of the PDA.

Case Study

The Courts have already dealt with the issue of making a disclosure on social media. The *Beaurain v Martin NO and Others* case is a cautionary tale where employees act independently and disregard the employer's response to a protected disclosure. Even if a whistleblower feels that the employer has inadequately addressed a protected disclosure, they may forfeit legal protection under the PDA by prematurely resorting to media/social media platforms.

In *Beaurain*, the employee, an electrician at Groote Schuur Hospital, posted photographs and complaints on Facebook about the condition of the hospital's toilets, alleging that patient and staff health was at risk due to contaminated air circulating through the air conditioning system.[63] His employer told him to stop posting this information on Facebook, which he ignored. He was subsequently dismissed and referred an automatically unfair dismissal in terms of Section 187(1)(f) of the Labour Relations Act[64] (**LRA**) to the Labour Court and claimed he was a whistleblower. The employer, the Department of Health and its Member of the Executive Council (**MEC**) argued that the publication did not constitute a protected disclosure and that the publication was a breach of the employee’s duty to the employer and several express workplace rules. Further, the employee’s refusal to heed the instruction was persistent and deliberate and constituted gross insubordination.[65]

62 It would be important to obtain legal advice as to what reasonable may mean relative to the circumstances of your case.
63 *Ibid,* para 2.
64 Labour Relations Act, No. 66 of 1995.
65 *Ibid*, para 2.

In comparing this case to the requirements of section 9 of the PDA, the employee did complain to the employer, who investigated the matter and found that the area did not pose a health hazard.[66] He complained again to the Employer and then took to Facebook, posting a number of documents, including internal correspondence and photographs.[67] Once again, the employer responded to the employee's allegations, sometimes directing him to a different department or allaying his concerns that there was nothing wrong.[68] Eventually, the head of the employee's department told him to stop posting on Facebook and bringing Groote Schuur Hospital's name into disrepute. In the interim, and unbeknown to the employee, the employer had implemented a comprehensive programme to maintain the toilets at the hospital. Ignoring the warning, the employee continued his Facebook activity, leading to charges of gross insubordination and his dismissal.[69]

When conciliation failed at the relevant Bargaining Council, the employee brought an application to the Labour Court on the grounds of an automatically unfair dismissal. The Court was asked to determine whether the employee made a protected disclosure in terms of the PDA.

Firstly, the Labour Court needed to determine whether the employee's belief was reasonable. The Court considered that the employee raised the concern with the employer and was taken seriously and given a comprehensive reply by the employer.[70] However, the Court found that the employee's persistent refusal to accept the employer's reply could not be said to have been rational or reasonable.[71] Further, the employee's belief was not reasonable because the toilets did not pose any health risk.[72] In respect of the concern regarding the quality, the Court found that the legislature, in drafting the PDA, could not have intended that complaints about the under-performance of a quality systems department should be afforded the protection of the PDA.[73] Lastly, the Court held that because the information was already known by the employer and everyone, it was notorious and could not constitute a disclosure.[74]

In dealing with the disclosure on social media, the Court highlighted that one of the objectives of the PDA is to provide procedures in which information can be disclosed in a responsible manner.[75]

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66 *IIbid para 4.*
67 *Ibid para 7.*
68 *Ibid para 8.*
69 *Ibid paras 10-13.*
70 *bid* para 23.
71 *Ibid* para 23.
72 *Ibid* para 25.
73 *Ibid* para 26.
74 *Ibid* para 27.
75 *Ibid,* para 28.

The Court's interpretation of the PDA suggests a delicate balancing act: disclosures must be made with consideration, weighing on the one hand, the employer's interest in safeguarding its reputation and, on the other, the public's interest in being informed of irregularities, in alignment with the principles of good faith.[76]

In invoking Section 9 of the PDA, the Court emphasised that the onus is on the employee to demonstrate that the employer failed to take appropriate action within a reasonable timeframe. However, in this case, the employer successfully demonstrated that it had taken timely action.[77]

The Court arrived at a notable conclusion regarding disclosures made on social media platforms. It found that:

"Publishing the allegations on the internet was unlikely to solve the perceived problems... It was unnecessary to publish to the international community, who could do little to help." [78]

Further, the Court found that:

"The internet is, unlike the press, not subject to editorial policy: there was no prospect of a moderator contacting the Hospital for its side of the story so that the public be given a balanced perspective. The publication was, therefore, unfair as well as unreasonable. And, as I have set out above, the employer had investigated and adequately responded to the health concerns; the quality concerns were in hand and receiving attention." [79]

The Court found that the disclosure was unreasonable and did not amount to a protected disclosure in terms of the PDA. As the dismissal did not amount to an automatically unfair dismissal, the Court was then required to determine whether the dismissal was unfair and found that the dismissal was fair as the employee's conduct amounted to gross insubordination. [80]

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76 Ibid, para 29.
77 Ibid, para 32.
78 Ibid, para 33.
79 *Ibid,* para 34.
80 *Ibid*, para 39.

Who has the obligation not to subject the employee or worker to occupational detriment?

Neither the employer nor the employer's client may subject an employee or worker who has made a protected disclosure to occupational detriment.

The obligation not to subject an employee or worker to an occupational detriment is on the employer.[81] However, 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.[82]

Utilising the PDA to advance and advocate for whistleblower protection

When determining whether to litigate a matter, it is strongly suggested that the whistleblower or prospective whistleblower consult the PDA and determine the best course of action based on the legal provisions of the PDA. However, we also encourage whistleblowers to refer to the LRA, the Companies Act, and the NEMA to ensure that they are aware of all the rights and remedies afforded by these acts and, more importantly, that they follow the required procedure as contemplated in these acts.

81 Supra fn 7, Section 3.
82 Supra fn 7, Section 3A.

CHAPTER 4
Legal Framework of the Labour Relations Act Read with the Protected Disclosures Act

Background to the LRA Read with the PDA

Section 4 of the PDA lists several remedies available to whistleblowers for occupational detriment suffered both during and after termination of their employment. An employee or worker can approach both the Labour Court and any other court having jurisdiction, this will include both the Magistrate and High Courts, however, the Magistrates’ Court is limited to claims up to R400 000. An independent contractor would approach the High Court or Magistrates’ Court, as the Labour Court does not have jurisdiction over issues relating to independent contractors.

The Courts, including the Labour Court, can make an appropriate order that is just and equitable in the circumstances, including -

1. Payment of compensation by the employer or client.
2. Payment by the employer or client of actual damages suffered; or
3. An order directing the employer or client to take steps to remedy the occupational detriment.

Whistleblower-related cases frequently culminate in adjudication by the Labour Court due to the standard procedural course that whistleblowers adopt. Whistleblowers often initiate their claims as unfair labour practices or automatically unfair dismissals with the CCMA. Should the resolution rendered by the CCMA's commissioner prove unsatisfactory, the whistleblower is inclined to escalate the matter to the Labour Court. Consequently, this trajectory has resulted in a notable number of cases associated with protected disclosures being deliberated upon within the Labour Court or appealed to the Labour Appeal Court.

This section explores the interplay between the PDA and the LRA, outlining how the PDA's whistleblower protections are complemented by the LRA's remedies against unfair dismissal and occupational detriment.

The Constitution and the Labour Relations Act

Section 23(1) of the Constitution provides that everyone has the right to fair labour practices. The LRA gives effect to this constitutional right by providing the right not to be unfairly dismissed or subjected to an unfair labour practice. In respect of protecting employees against occupational detriment, the following sections of the LRA are applicable:

Section 185(a) provides that every employee has the right not to be unfairly dismissed, and section 185(b) provides that every employee has the right not to be subjected to unfair labour practice. Unfortunately, there is no right not to be disciplined.

Section 186(1) of the LRA defines an unfair dismissal. Dismissal means that an employer has terminated employment with or without notice, among other reasons listed in section 186(1) which includes:

1. an employer ending an employee's contract with or without notice.
2. when an employer doesn't renew, or offers less favourable terms upon the renewal of, a fixed-term contract that an employee expected to continue.
3. refusing to rehire an employee after maternity leave.
4. an instance where an employer rehires some employees but not others after a collective dismissal for similar reasons.
5. an employee quitting because the employer made the work environment intolerable.
6. an employee resigning due to the new employer, after a business transfer, offering substantially less favourable conditions than the previous employer.

Often, whistleblowers quit their jobs due to an employer creating or allowing an intolerable work environment. This particular type of dismissal, often called "constructive dismissal," arises when an employee resigns not by choice but because the employer's conduct effectively forces them to resign. It is also important for whistleblowers to note that where they have been dismissed in contravention of the PDA, such dismissal will be deemed to be an automatically unfair dismissal.[83]

Section 186(2) of the LRA defines an unfair labour practice as any unfair act or omission that arises between an employer and an employee involving:

a) *unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;*

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83 Labour Relations Act, No. 66 of 1995, section 187(1)(h)

b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;

c) a failure or refusal by an employer to reinstate or reemploy a former employee in terms of any agreement; and

d) an occupational detriment, other than dismissal, in contravention of the PDA on account of the employee having made a protected disclosure defined in the PDA. [84]

An occupational detriment other than a dismissal, due to an employee having made a protected disclosure as defined in the PDA, is specifically listed in the LRA as an unfair labour practice.[85] Most whistleblowers only take action once they have been dismissed, and this need not be the case. It is far more difficult to fight a case outside the organisation, with no salary than when one is still within the organisation and earning a salary. However, the unfair labour practice can only be challenged if the whistleblower is still employed and not after dismissal.

PPLAAF has noted many instances where whistleblowers suffer harassment, such as being isolated, being gossiped about, instances of slander, receiving constant negative criticism, other employees sabotaging work performance, and receiving humiliating or insulting conduct or threats from other employees within the organisation.

Utilising the LRA, below we depict how you can challenge the occupational detriment before dismissal.

Action	Timeframe
Occupational detriment occurs.	
Refer an unfair labour practice dispute to the CCMA or Bargaining Council.	90 calendar days from act or omission.
Conciliation	Dispute is resolved (enter into a settlement agreement; or Dispute is not resolved and receive a certificate of outcome.
Refer to the Labour Court for adjudication	30 calendar days.

84 *Ibid,* section 186(2)
85 *Ibid,* section 186(2)(d)

Refer an Unfair Labour Practice at the CCMA or the Council with the relevant jurisdiction

The whistleblower or their trade union can refer an unfair labour practice to the CCMA or the applicable bargaining council. Bargaining councils are established by either employers' organisations and/or trade unions. There are several bargaining councils regulating various sectors. One will need to check which one is relevant, otherwise, the employer will raise a jurisdictional point that the dispute is in the wrong forum if incorrectly referred.

A referral is made 90 calendar days from the date of the act or omission which constitutes an unfair labour practice (in this case, an occupational detriment). If the referral is filed outside of the 90 days, it must be accompanied by an application for condonation. This will require an explanation as to why the referral is late and it must show good cause why the CCMA should hear the dispute.

All referrals can now be done on the CCMA's website and one does not need to go in person. The referral needs to be served on the employer and this can be done via email. The CCMA will then allocate a date for conciliation. If conciliation fails, one will receive a certificate of outcome. In terms of section 191(13)(a) of the LRA and section 4(2)(b) of the PDA, following conciliation, the matter will then be referred to the Labour Court for adjudication. The Labour Court will not hear the matter unless the matter has been conciliated. The Court in *NEHAWU obo N Phathela v Office of the Premier: Limpopo Provincial Government* [86] found that a dispute about an occupational detriment (short of dismissal) may be referred to the Labour Court provided that the matter has been referred to conciliation and the matter remains unresolved.

Applying for an urgent interdict

In terms of Section 158(1) of the LRA, the Labour Court is entitled to grant urgent interim relief, interdicts and orders directing the performance of any particular act. Suppose a whistleblower has suffered an occupational detriment short of dismissal. In that case, they can apply for an urgent interdict at the Labour Court to stop either the disciplinary action, the suspension, the demotion or whatever action constitutes an occupational detriment.

86 *NEHAWU obo N Phathela v Office of the Premier: Limpopo Provincial Government and Others* (LC) (unreported case no J1480/2021, 7-2-2022) para 9.

The whistleblower will need to establish: [87]

- A well-grounded apprehension of irreparable harm if the interim relief is not granted;
- The balance of convenience favours the granting of an interim interdict;
- That there is no other satisfactory remedy; and
- That the matter deserves its urgent attention. [88]

One needs to bear in mind, that just because a matter is personally urgent [89] it does not mean the Court will agree. The reasons for urgency must be set out in the applicant's founding papers. In the whistleblower's case, this will relate to the occupational detriment and the legislative protection offered to whistleblowers. It also needs to explicitly advance the reasons for the whistleblower's claims and why they will not be afforded substantial redress at a future date if they had not brought the matter to court by way of an ordinary non-urgent procedure.[90]

The Labour Courts often cite that employees can refer an unfair dismissal dispute to the CCMA/relevant Bargaining Council. If they are dissatisfied, then they can take the decision on review. As a result, it is a difficult threshold to convince the Court that a matter is urgent; therefore, a proper case will need to be made out in terms of the PDA that distinguishes it from an ordinary dismissal.

A further issue that the Labour Court considers is whether the urgency is self-created due to the tardiness or procrastination of the applicant.[91] An urgent application needs to be brought at the first available opportunity, to prevent harm or consequences thereof. [92] If one wants to bring an urgent application, it must be done as soon as possible. For example, if a whistleblower receives notice of an occupational detriment such as a demotion for making a protected disclosure, they should obtain legal advice immediately.

Case Study regarding an Occupational Detriment - Transfer

In *Theron v Minister of Correctional Services and Another*,[93] the employee had provided medical care to prisoners at Pollsmoor Prison (**Pollsmoor**) and was in the employ of both the Department of Correctional Services (**DCS**) and the Department of Health (**DOH**).

87 For more information on the grounds for urgent interim relief see: *Spur Steak Ranches Ltd v Saddles Steak Ranch* 1996 (3) SA 706.
88 *Motloung v Universal Service and Access of South Africa & Others* (J245/2023) [2023] ZALCJHB 35 (8 March 2023) para 6.
89 All urgent applications need to comply with Rule 8 of the Labour Court Rules.
90 Supra 91, at para 7.
91 *Ibid*, para 8.
92 *Ibid,* para 10.
93 *Theron v Minister of Correctional Services and Another* (C579/07) [2007] ZALC 95; [2008] 5 BLLR 458 (LC); (2008) 29 ILJ 1275 (LC) (13 December 2007).

The employee had, on numerous occasions, complained of the standard of healthcare to several officials within both departments.[94] The employee raised these problems with the Inspecting Judge of Prisons and the Portfolio Committee on Correctional Services of Parliament, and both issued reports critical of health care services at Pollsmoor. The DOH charged the employee with misconduct for contacting the inspecting judge without informing the Area Commissioner.[95] The employee launched urgent proceedings to interdict the DOH from holding the disciplinary proceedings.

A settlement was reached whereby the DOH would withdraw the charges and settle the unfair labour practice dispute with the relevant bargaining council.[96] Despite the settlement agreement, the DCS decided that the employee should not return to work at Pollsmoor as the relationship had been damaged, and he was moved to another health centre.[97] The employee deemed his removal an occupational detriment, unlawful administrative action, and launched a review application. He also referred an unfair labour practice to the relevant bargaining council.[98]

The Court needed to determine the lawfulness of the decision to transfer him and whether the transfer was an unfair labour practice.[99] The Court granted the interdict against the transfer because his rights to fair labour practices had been infringed and that he had made a protected disclosure, which made him especially deserving of the protection of the court.[100]

What is especially significant about this case is that the whistleblower had adequately made out what the protected disclosure was and that he had used the proper channels to blow the whistle. He was proactive in protecting his right to fair labour practices and did not wait to approach both the relevant Bargaining Council and the Labour Court. What was also clear from this case was the whistleblower's early engagement with an attorney who understood the law and provided prudent advice on the procedural and legal steps one should take.

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94 *Ibid,* paras 6-7.
95 *Ibid,* para 11.
96 *Ibid,* para 12.
97 *Ibid,* para 13.
98 *Ibid,* para 16.
99 *Ibid,* para 23.
100 *Ibid*, para 43.

Section 188A(11) of the LRA

Section 188A(11) of the LRA was legislated to afford a substantive safeguard for employees who engage in the act of making a protected disclosure. A section 188A inquiry necessitates that an examination into allegations pertaining to an employee's conduct or capacity be presided over by a duly accredited body or the CCMA. Section 188A acknowledges the intersection of this provision with the PDA. It stipulates that should an employee, in good faith, claim that the instigation of a disciplinary inquiry infringes the provisions of the PDA, either party, the employee or the employer, is empowered to request that the inquiry be conducted in alignment with Section 188A which ensures a higher degree of impartiality during the disciplinary process.

However, whistleblowers need to bear in mind that holding such an inquiry and suspending an employee on full pay pending the outcome of such an inquiry do not constitute an occupational detriment.[101]

How this works in practical terms is that once a whistleblower receives a notice of a disciplinary hearing, they may write to the employer and/or the chairperson and/or the CCMA or relevant Bargaining Council of the disciplinary hearing requesting that the hearing be held in terms of Section 188A.

The invocation of a Section 188A inquiry is not automatically granted upon the mere assertion by a whistleblower that they made a protected disclosure. It requires the employee to substantiate their claim by presenting compelling evidence to the chairperson of the hearing. This evidence must verify that the individual indeed made a protected disclosure as defined by section 1 of the PDA. Additionally, a causal link must be established between this disclosure and any adverse occupational detriment suffered as a result. The onus is on the employee to illustrate this connection convincingly for the consideration of a Section 188A inquiry to be deemed warranted.[102]

Timing is also critical; the whistleblower must submit a request to refer the disciplinary hearing to a section 188A inquiry by an arbitrator prior to the disciplinary hearing, i.e., either in advance or on the day the hearing sits[103] and before it has started. Section 188A(11) does not envisage the holding of two parallel hearings. The 188A inquiry will take place instead of an internal disciplinary hearing.[104]

101 Section 188A(12) of the LRA.
102 *Motloung v Universal Service And Access Of South Africa and Others* (J245/2023) [2023] ZALCJHB 35 (8 March 2023) para 10.9.
103 *Ibid,* para 75.
104 *Tsibani v Estate Agency Affairs Board and Others* (J642/2021) [2021] ZALCJHB 150 (24 June 2021) para 67.

Case Study

In the case of *Nxele v National Commissioner: Department of Correctional Services and Another*,[105] the employee had blown the whistle to the Public Service Commission (PSC). The PSC declared the disclosure was a protected disclosure and that the employee had been subjected to an occupational detriment.[106] When the employee was put through a normal disciplinary hearing, he approached the Labour Court to obtain an order that his disciplinary hearing be stopped and that a Section 188A(11) inquiry be held. He was successful in getting the relevant relief.

What assisted the whistleblower in this case is that the PSC had declared the information a protected disclosure and that he had been subjected to occupational detriment. It was therefore easier for the Labour Court to decide to grant the relief as the PSC had already made a declaration. Although it may not always be possible, when whistleblowers are making a protected disclosure, they should request that the institution to whom they are making the disclosure declare it as such and that the whistleblower highlight that they fear being subjected to occupational detriment.

What is arbitration? Protected Disclosures Context

PPLAAF has noted that in many instances, whistleblowers are not aware of the protection afforded to them under the PDA and do not necessarily raise it at the CCMA or the relevant Bargaining Council. Although the law provides that an automatically unfair dismissal and an unfair labour practice must be referred to the Labour Court, many whistleblowers end up in arbitration at the CCMA. (This is also evident in the Potgieter case). The parties may also agree that the matter be dealt with at arbitration.

Arbitration is similar to a trial however it is less formal in that a commissioner at the CCMA must deal with the substantive merits of the dispute with a minimum level of legal formalities.[107] Each party is allowed to present evidence and examine and cross-examine witnesses. Should a party wish to have legal representation at the arbitration, this must be applied for, as it is not automatically granted. The length of the arbitration will depend on the number of witnesses and the credibility and persuasiveness of evidence led by both parties. Postponements may be granted by the Commissioner and the parties may also agree to postponements.

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105 *Nxele v National Commissioner: Department of Correctional Services and Another* (D303/2022) [2022] ZALCD 32 (2 August 2022) (not reportable).

106 *Ibid*, para 12.

107 Section 138 of the LRA.

Some tips for arbitration:

1. Prepare a timeline of all major incidents. This will make it easier for the whistleblower to remember the facts of their case and show a causal connection between the protected disclosure and the occupational detriment. For example:

Illustrative Timeline	Event
25 September	Make a protected disclosure to the Public Protector regarding irregular awarding of tender to Company X.
30 October	Receive anonymous text stating, ”You think you were very clever to go to the PP. We will show you who is clever now.”
5 November	Called into a meeting to discuss performance issues. Manager raises irrelevant issues such as my friendship with Mr Y.
15 November	Transferred to a different department and no reasons given.
20 November	Refer dispute to the CCMA.

1. Prepare all evidence such as e-mails, WhatsApp messages or minutes of meetings reflecting the occupational detriment. Put it in a file, number the pages, and prepare an index reflecting the title of the document and the page number. Make four copies: one for the Commissioner, one for your use, one for the opposing party, and another for any witnesses.
2. Prepare a list of questions to ask both your witness/es and the employer's witnesses.
3. It is often the case that because of the isolation experienced by whistleblowers there will not be witnesses willing to testify on their behalf or they are scared of the employer. Do not be disheartened by this as no one knows your case better than you. It would be prudent to seek legal advice on your case to ensure that you obtain an impartial opinion that has a legal lens.

What should the whistleblower do if they are facing a disciplinary hearing?

Importantly, when a whistleblower is being subjected to occupational detriment, they must ensure that such instances of occupational detriment and its supporting evidence are placed on record to the employer and the chairperson of a disciplinary or suspension hearing.

Should an employee make a protected disclosure and thereafter be charged and subjected to a disciplinary hearing, this could constitute an occupational detriment. The whistleblower would have to prove that the charges brought against them and the ensuing disciplinary hearing are causally linked to the protected disclosures made. The whistleblower can either:

- proceed with the disciplinary hearing;
- launch urgent proceedings to interdict the disciplinary hearing, as discussed on page 31 above; or
- request that the charges brought against the whistleblower be referred to a section 188A inquiry in terms of section 188A(11).

However, if the whistleblower does not have the funds for legal fees, is not able to secure a lawyer on contingency, or has chosen to continue with the disciplinary hearing then here are some tips:

- If you have elected to proceed with the disciplinary hearing, ensure that you appear and solicit the support of any witnesses who may be able to testify in your favour. The disciplinary hearing is the opportunity to put your version of events on record. This will be useful when referring a dispute to the CCMA or the Labour Court. **It would damage your case if you fail to appear at a disciplinary hearing, as this will appear in the record placed before the CCMA, Labour Court, or any other court that may hear your matter.**
- Prepare adequately. Even if the whistleblower does not have legal or trade union representation, one can still adequately represent themselves.
  - Understand the charges in the notice to attend the disciplinary hearing. If they are unclear, ask the chairperson to explain.
  - Prepare your version of events. For example, recollect the events of the day and activity in question, and gather any documentary evidence such as correspondence in the forms of e-mails or WhatsApp messages, policies or codes.
  - You will be responsible for your case and you should not labour under the belief that your employer will accede to your demands.
  - Understand your employer's disciplinary code and the procedural provision in such code or policy. For example, if the allegation is not in the code, raise it. Of course, this is not in respect of obvious misconduct such as theft or fraud.

- Splitting of charges. It is often found in whistleblower cases that employers will take one event and charge the employee with multiple charges. This has the effect that the charges against the employee look more severe than they really are, and the employee may receive a harsher sanction. This is unfair and the employee should raise this with the chairperson of the hearing.
- Appeal procedure. If the whistleblower is unhappy with the outcome of the disciplinary hearing, check whether the employer has an appeal procedure and file an appeal.

PPLAAF has also noted that in some instances some employees have not necessarily taken the positive action of disclosing information that highlights corruption, but instead they have refused to take unlawful action. For example, an employee may refuse to make payment to a vendor who is not registered as a vendor on the employer's verified vendor list. The employee is subsequently charged with insubordination as a result of such refusal. Although the employee may be viewed as a whistleblower, they may not necessarily receive the protection of the PDA. However, they can defend themselves at their disciplinary hearing by raising the defence that the instructions were unreasonable and unlawful as they did not follow internal policies or procedures. In this case, it will be helpful for the employee to show the policy and previous instances where payments have only been made to registered vendors.

Adjudication at the Labour Court

If the whistleblower has been dismissed, they can refer a dispute to the CCMA or relevant bargaining council. It will be set down for conciliation; if it fails, a certificate of outcome will be issued. In terms of section 187(1)(h) of the LRA, the dispute needs to be referred to the Labour Court, then it is preferable to obtain legal representation. If you cannot afford legal representation or an attorney willing to represent you on contingency, then you may consider approaching a legal aid clinic at a reputable university or SASLAW's pro bono office for assistance.

We understand that meeting with an attorney may feel intimidating, however, ensure that you research the lawyer you are set to consult with and that you feel comfortable with your attorney.

At the first consultation, bring the following documentation with you:

1. Contract of employment;
2. Identity document;
3. Proof of residence;
4. Payslips (last 6 months);
5. Code of conduct/disciplinary code/human resources manual of the employer;
6. Notice of disciplinary hearing;
7. Evidence presented at the disciplinary hearing;
8. Outcome or chairperson's decision of the disciplinary hearing;
9. Proof of any protected disclosure(s) made;
10. Any correspondence in respect of a report on the protected disclosure; and
11. Any media articles in respect of the protected disclosure.

Case Study: Automatically unfair dismissal

The case of *Mashilo & Seremane v SARS* highlights a successful case of automatically unfair dismissals for whistleblowers. The case was related to the well-documented capture of the South African Revenue Service (**SARS**). The employees in question faced dismissal after they raised concerns about the legitimacy and underlying motivations of the 2015 'restructuring' initiative at SARS, which resulted in the downgrading of their positions. They were compelled to accept supernumerary roles that were not part of the approved organisational framework devised by Bain & Company and endorsed by the former SARS Commissioner, Mr Tom Moyane. Despite repeated requests, the applicants were not provided with pertinent details or justifications regarding the nature and specifications of these newly assigned positions. The applicants were of the view that the executives who accepted the positions had no meaningful jobs to do.[108] The applicants refused to accept the positions and were ultimately dismissed due to operational requirements in terms of Section 189 of the LRA.[109]

In a protected disclosure, Mashilo raised her personal circumstances in the restructuring process, the unlawful appointment of Bain & Company, as well as the issue that domain specialists were being paid for doing no work for SARS.[110] Following this email, Ms Mashilo received a notice of termination and was escorted out of the SARS's premises.[111]

108 *Mashilo & Seremane v The Commissioner of South African Revenue Services* JS108/18 (Labour Court), para 48.
109 *Ibid* para 2.
110 *Ibid* para 51.
111 *Ibid* para 52.

In respect of Ms Seremane, she also fell victim to the restructuring and asked for further information but none was forthcoming. She was eventually dismissed. Her reasons for not taking the proposed supernumerary position were similar to Ms Mashilo's in that it was not on an approved structure, the new job was not meaningful, and she believed she would have no work to do. On analysis of the evidence, the Court found that none of the evidence tendered warranted dismissals for operational requirements.[112] Further, SARS failed to tender any evidence to demonstrate and prove that domain specialists were performing any meaningful jobs. The Court concluded that SARS failed to justify the applicants' dismissal for operational reasons.

The Court then went on to determine whether Ms Mashilo's email constituted a protected disclosure in terms of the PDA. The Court found that by reporting Bain & Company, Ms Mashilo was undertaking "one of the most underrated and thankless constitutional duties: whistleblowing."[113] The Court ruled that the dismissal of both applicants was automatically unfair due to protected disclosure, and they were reinstated to their positions at SARS.[114]

Prospective whistleblowers should note how the applicants made use of extracts of the reports of the Nugent Commission and the State Capture Commission, which highlighted the levels of corruption at SARS. Despite arguments from SARS that it would amount to hearsay evidence, the Court found no credibility to this and that the interests of justice were paramount in this case.[115] Whistleblowers should use reports from other institutions or inquiries which support their protected disclosures and their classification as whistleblowers. This may lend some weight to the causal nexus between the protected disclosure and the occupational detriment.

112 Ibid para 90.
113 Ibid para 96.
114 Ibid.
115 Ibid, para 2.

CHAPTER 5
Legal Framework of the Companies Act as it Relates to Whistleblowers

The Companies Act, No. 71 of 2008 (the **Act**) stands as a testament to the progressive and thorough codification of corporate governance in South Africa. It comprehensively outlines corporate responsibilities and attendant fiduciary duties required by corporations and directors which manage such entities. Recognised for its forward-thinking attributes, the Act seeks to align corporate practices with the democratic ideals of the Constitution. The purposive provisions of the Act play a pivotal role in colouring the lens through which the courts interpret and make send of the Act. Section 7 of the Act delineates the purposes of the Act.

Section 7(a) provides that the purpose of the Companies Act is to "promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law".[116] Section 7(b)(iii) provides that the purpose of the Companies Act is to "promote the development of the South African economy by encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation." [117]

The Act plays an important supplementary role by providing increased protection, statutory rights and common law redress to whistleblowers in the corporate sphere. The Act builds on the principles enshrined in the PDA by establishing a legal framework that promotes transparency and accountability. **Section 159 of the Act is aptly titled, "Protection for whistle-blowers" and, as we explore below, provides a complementary backdrop to the protective measures for employees envisaged by the PDA, fortifying the position of whistleblowers within South Africa's corporate environment.**

116 Companies Act, 71 of 2008, section 7(a).

117 Ibid, section 7(b)(iii). Note further: There are further provisions which speak to the purpose of the Companies Act in section 7, however, for the purposes of this report, the mentioned subsections of section 7 are sufficient.

The interpretation and application of Section 159 of the Act

In the evolving landscape of South African whistleblower law, section 159 of the Act represents a relatively new and uncharted legal tool whistleblowers may have access to when building their case. Despite its potential and its certain provisions, which are more progressive than the PDA, section 159 has seen little to no invocation by whistleblowers in court proceedings, remaining an academic tool in the pursuit of justice and the advocacy of whistleblower relief.

This guidebook seeks to strengthen the reader's understanding of section 159 and how it can be utilised to support whistleblowers. The deployment of section 159 could not only offer a means to sue for compensation for damages suffered by whistleblowers but also act as a deterrent against corporate wrongdoing. The potential of section 159 to offer redress to whistleblowers in South Africa aligns with the broader objectives of transparency and accountability espoused by the Act and the constitutional project of South Africa.

A common misnomer is that section 159 of the Act only applies to privately held companies. The term "company" is defined in section 1 of the Companies Act. This definition, when read with section 8 of the Companies Act, which sets out the categories of companies that may be registered in terms of the Companies Act, advances the notion that section 159 of the Companies Act applies to:

1. for-profit privately held companies registered in South Africa;
2. for-profit public companies registered in South Africa;
3. for-profit personal liability companies registered in South Africa;
4. non-profit companies registered in South Africa; and
5. state-owned companies operating in the public sector.[118]

A "state-owned company" is defined as "an enterprise that is registered in terms of the Companies Act, and either-

(a) is listed as a public entity in Schedule 2 or 3 of the Public Finance Management Act, 1 of 1999; or
(b) is owned by a municipality, as contemplated in the Local Government, Municipal Systems Act 32 of 2000, and is otherwise similar to an enterprise referred to in paragraph (a)." [119]

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118 Supra fn 119, section 8.

119 Supra fn 119, section 1. Note further that according to Henochsberg on the Companies Act 71 of 2008 a "state owned company should, by definition, be an organ of state, as well as a company established in terms of a particular Act". See *Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others* [2020] 2 All SA 1 (SCA). "State" does not have a universal meaning: *Holeni v The Land and Agricultural Development Bank of South Africa* [2009] 3 All SA 22 (SCA); 2009 (4) SA 437 (SCA) para 11; *The Isibaya Fund v Visser and Another* (20278/14) [2015] ZASCA 183 (27 November 2015) para 11.

Whistleblowing within state-owned entities carries profound implications for national accountability and fiscal management, primarily because these entities are custodians of taxpayers' contributions to the national fiscus. When state-owned companies are mismanaged or become conduits for corruption, it is not just the entities themselves that suffer but also the taxpayers, whose funds essentially capitalise and ensure the running of these entities.[120] Every rand misappropriated by a state-owned company is essentially a rand taken from the taxpayer, diminishing the resources available for essential services such as healthcare, education, and infrastructural development.

Equally, the financial health of state-owned companies, such as Eskom Holdings SOC Ltd, Transnet SOC Ltd and South African Airways SOC Ltd directly impact South Africa's ability to deliver services to civil and commercial sectors of society, credit ratings and, by extension, its cost of borrowing. When whistleblowers expose malfeasance, it not only stops the immediate haemorrhaging of state funds, but it can also restore investor confidence, increase service delivery and foster national economic growth. This makes the role of whistleblowers pivotal in ensuring that taxpayer's funds are effectively utilised by efficiently run organisations devoid of malfeasance, nepotism, and other forms of corruption that afflict the South African landscape.

Section 159 was specifically crafted to harmonise its language with the prevailing PDA and expand the protection afforded to employees who make protected disclosures. Importantly, section 159 must be read in addition to, and not in substitution of, the PDA to the extent that it creates any right of, or establishes any protection for, an employee as defined in the PDA.[121] **Further, an employee, as defined in the PDA, will be protected by a disclosure made in terms of section 159, irrespective of whether the disclosure finds application in the PDA.**

When applying provisions of the Act to a case involving a whistleblower, it is important to interpret the legislative framework as it applies to whistleblowers correctly. In terms of section 5(4)(a) of the Act, "if there is an inconsistency between any provision of this Act and a provision of any other national legislation, the provisions of both Acts apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second."[122]

120 State Capture Report Part 1, p 539.
121 Supra fn 119, section 159(1)(a).
122 Supra fn 119, section 5(4)(a).

However, in terms of section 5(4)(b) the following is applicable:

1. where there is an inconsistency between the PDA or the NEMA and the Companies Act, the provisions of the Companies Act prevail.[123]
2. where there is an inconsistency between the LRA,[124] the Public Finance Management Act 1 of 1999,[125] the Financial Markets Act No. 19 of 2012,[126] or the Local Government: Municipal Finance Management Act, 56 of 2003,[127] the applicable provisions of the aforementioned Acts shall prevail.[128]

Legal professionals and whistleblowers are tasked with a meticulous reconciliation of their factual landscape as it relates to the Act and the PDA. Section 159(1)(a) of the Companies Act confers on the whistleblower a composite safeguard couched in both the Act and the PDA which must be utilised carefully and by a legal practitioner who understands whistleblower law in South Africa.

Legal practitioners play a pivotal role in identifying the appropriate forum for seeking redress and in crafting pleadings that ensure the law as it exists is used to support and protect whistleblowers. Their expertise is vital in steering complex protected disclosure claims through South Africa's legal system, from the initial filing to settlement or judgment.

Expanded Definition of Whistleblowers Under the Companies Act

The Act plays an important, yet apparently little-known role in broadening the scope of who may be considered a whistleblower. As we highlighted above, the PDA and its amendments in 2017[129] extended whistleblower protection beyond just employees to include both workers and employees. H**owever, unlike the PDA, which is mainly concerned with employees and workers, the Act extends its protection to a wider group of individuals and entities that could be seen as company stakeholders.**[130] This includes shareholders with a vested interest in the company's success and directors who guide its strategic direction. Company secretaries and prescribed officers are also listed as persons who are recognised as having standing to be a whistleblower, as they play an important role in a company's corporate governance and management.

Employees, recognised trade unions, and representatives who represent employees are also recognised as persons or entities with standing in section 159 of the Act. Further extending its reach, the Act protects a company's suppliers and the supplier's employees, acknowledging the broader network of relationships that a company maintains.

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123 *Ibid*, section 5(4)(b)(ii).
124 *Ibid*, section 5(4)(b)(i)(bb).
125 *Ibid*, section 5(4)(b)(i)(ee).
126 *Ibid*, section 5(4)(b)(i)(ff).
127 *Ibid*, section 5(4)(b)(i)(hh).
128 *Ibid*, section 5(4)(b)(i).
129 Protected Disclosures Amendment Act, No. 5 of 2017.
130 Supra fn 119, section 159(3) read with section 159(4).

By including these various persons or roles, the Act promotes an environment where whistleblowing is valued as an essential component of ethical business practice and strong corporate governance. This broad approach ensures that a diverse range of stakeholders can act with the protection of section 159 when it comes to calling out wrongdoing and cultivating a culture of transparency and accountability in South Africa's private and public sectors.

A Suggested Process of Inquiry in Terms of Section 159

Step 1: Determine who the prospective whistleblower is

The first section that should be consulted by a whistleblower,[131] or preferably, a legal advisor, is section 159(4) of the Companies Act which establishes the categories of persons to whom section 159(4) will apply. This will also affect the *locus standi* or legal standing of a litigant-whistleblower who wishes to sue for damages in terms of the Act.

The applicable persons to whom Section 159 applies are as follows:

1. a shareholder;
2. a director;
3. a company secretary;
4. a prescribed officer;
5. an employee;
6. a registered trade union that represents employees of the company;
7. a representative of employees of the company (if it is not a registered trade union);
8. a supplier of goods or services to the company; and
9. an employee of such a supplier.

To be conferred the rights and protections afforded in section 159, the whistleblower must hold one of the positions listed in section 159(4) at the material time of making the disclosure and suffering detriment. However, further assessment is required where the person is one of the following listed persons in terms of section 159(4):

1. **A shareholder** – In terms of section 37(9) of the Companies Act, "a person acquires the rights associated with any particular securities of a company (i) when that person's name is entered into the company's certificated securities register; or (ii) as determined in accordance with the Central Securities Depository.[132]"[133] A shareholder can be a natural person or a juristic person. We contend that in order for a shareholder to enjoy the rights of section 159, it must have been a shareholder as contemplated in section 37(9) of the Companies Act at all material times.

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131 This need not be a person; it could also be a supplier to the impugned company or a trade union for example. The corollary effect of this, is that a juristic entity, such as a company, may bring an action for damages against a company that breaches the statutory duties contained in section 159 of the Companies Act.

132 A central securities depository is defined in section 1 of the financial Markets Act 19 of 2012, as "a person who constitutes, maintains and provides an infrastructure for holding uncertificated securities which enables the making of entries in respect of uncertificated securities, and which infrastructure includes a securities settlement system."

133 Companies Act, 71 of 2008, Section 37(9)(a).

1. **A registered trade union (RTU) that represents employees of the company** – Section 213 of the LRA defines a trade union as “an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers’ organisations”.[134] Section 95 of the LRA, prescribes the requirements that must be met in order for a trade union to be registered in terms of the LRA. In this instance, a trade union must have been a duly registered trade union of the company in question at all material times.
2. **A representative of employees of the company (if it is not a registered trade union)** – The intention of this clause is indicative of situations where a trade union does not exist, however, there is a representative of employees that has been appointed in terms of internal company policy or by agreement.
3. **A supplier of goods or services to the company** – This provision[131] expands the ambit of the types of “whistleblowers” that are contemplated in terms of section 159 of the Act. This provision would generally apply to a company that provides services to the company in question. It would then follow that the supplier, which would likely be a company, may make a disclosure through one of its representatives. It is further noted that a contract, whether, implied, oral or written between the supplier and the impugned company should subsist at all material times.
4. **An employee of such supplier –** This provision contemplates instances where a company’s management or board may not sanction the disclosure, rather an employee of the supplier may make a disclosure as contemplated by section 159(3). Should any retaliation ensue against the employee of the supplier personally, such person would enjoy the rights and protections of section 159.

Step 2: Determine when the disclosures were made and to whom

To avail oneself of the rights and protections in section 159, an individual must, at the crucial point of making a protected disclosure and being subjected to the subsequent prejudice, occupy a position listed in section 159(4) of the statute.[135] It is incumbent upon the whistleblower to demonstrate that the protected disclosure was made and the adverse consequence incurred contemporaneously while holding any of the capacities listed on page 48 above for a proper cause of action to arise.

Once you have determined when the disclosure was made, the disclosure must be made to one or more of the prescribed persons contemplated in section 159(3)(a) of the Companies Act:

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134 Section 213, Labour Relations Act, No. 66 of 1995.

135 Borrowing the defined term “occupational detriment” from the Protected Disclosures Act No. 26 of 2000, in the context of an action for compensation in terms of the Companies Act should be avoided where the person claiming compensation is not an employee of the entity against which compensation is claimed. For example, where the person that suffers harm is a supplier of goods and services to the company, an occupational relationship does not exist. Rather, the term “detriment” should be adopted, as contemplated in section 159(5)(a) and section 1599(5)(b) of the Companies Act, 71 of 2008.

The Companies and Intellectual Property Commission	The Companies and Intellectual Property Commission (CIPC) was established in terms of section 185 of the Companies Act. The CIPC is a South African government agency responsible for registering and maintaining company and intellectual property records. It provides a centralised database of all companies operating in South Africa, as well as intellectual property rights such as patents, trademarks, and copyrights.
The Companies Tribunal	The Companies Tribunal was established in terms of section 193 of the Companies Act. The Tribunal adjudicates a range of disputes related to general concepts of corporate law.
A regulatory authority	Section 1 of the Companies Act defines a regulatory authority as an entity established in terms of national or provincial legislation responsible for regulating an industry, or sector of an industry.
an exchange	Section 1 of the Financial Markets Act 19 of 2012 defines an exchange as a person who constitutes, maintains, and provides infrastructure for (a) bringing together buyers and sellers of securities; (b) matching bids and offers for securities of multiple buyers and sellers; and (c) whereby a matched bid and offer for securities constitutes a transaction.
a legal adviser	The key element of being a legal adviser is the requirement to have a legal qualification. Legal advisers could range from attorneys, advocates, and prosecutors to legally qualified professionals employed internally by a corporation or organ of state. It is advisable to approach a lawyer who specialises in protected disclosure law and who would be willing to hold a free initial consultation with you.
a director	Section 1 of the Companies Act defines a director as “a member of the board of a company, as contemplated in section 66 of the Companies Act, or an alternate director of a company and includes any person occupying the position of a director or alternate director, by whatever name designated”
a prescribed officer	Section 1 read with Regulation 38 of the Companies Act defines a prescribed officer in the following terms: “Despite not being a director of a particular company, a person is a 'prescribed officer' of the company for all purposes of the Act if that person (a) exercises general executive control over and management of the whole, or a significant portion, of the business and activities of the company; or (b) regularly participates to a material degree in the exercise of general executive control over and management of the whole, or a significant portion, of the business and activities of the company.”
a company secretary	The company secretary is generally a clearly defined position in a company typically found in medium to large entities. A company secretary “is in essence, the chief administrative officer of the company and, as such, performs a vital role in the day-to-day business affairs of a company but does not necessarily exercise executive control or participates to a material degree (in the executive as opposed to an administrative capacity) in the executive control of the company.”
an auditor	An auditor refers to a person or entity conducting the internal audit function of a company or a person or entity mandated as the external auditors of a company. Section 32 read with section 37 of the Auditing Profession Act 26 of 2005 governs the accreditation and registration of registered auditors, and the Independent Regulatory Board for Auditors, established in terms of section 3 of the Auditing Profession Act, is the regulatory body that oversees the auditing profession.
a person performing the function of internal audit	A person performing the function of internal audit is indicative of a person within the company that is assigned the responsibility to conduct internal auditing procedures. This may occur in smaller companies or in specific situations where a dedicated internal auditor may not be appointed.
a board or committee of the company concerned	Section 1 of the Companies Act defines a board as “the board of directors of a company” which is self-explanatory. A committee of a board is contemplated in section 72 of the Companies Act, which permits the board of a company, in accordance with its MOI, to appoint any number of directors and delegate to any committee any of the authority of the board”. Common committees include: executive, social and ethics, remuneration, audit, transformation and diversity, and nomination committees.

At this juncture it is important to summarise two important provisions of section 159 that we have discussed above: First, "who can be a whistleblower" in terms of the Act and, second, "to whom the whistleblower can make a disclosure".

In Summary- Who can be a whistleblower:

- A shareholder of the company, listed as such in the company's securities register or determined by the Central Securities Depository.
- A director on the board of the company.
- A company secretary with administrative duties within the company.
- A prescribed officer, with significant executive control or influence over the company's management.
- An employee of the company.
- A registered trade union that represents the company's employees.
- A representative of the company's employees, appointed in the absence of a registered trade union.
- A supplier of goods or services to the company, or an employee of such a supplier.

To whom the whistleblower can make a disclosure to:

- The CIPC.
- The Companies Tribunal.
- A regulatory authority that oversees the industry the company operates in.
- An exchange as defined by the Financial Markets Act.
- A legal adviser with expertise in protected disclosure law.
- A director as defined by the Companies Act.
- A prescribed officer as defined by the Companies Act.
- A company secretary, primarily responsible for administrative tasks.
- An auditor, either internal or external, accredited under the Auditing Profession Act.
- A person performing the function of internal audit within the company.
- A board or a committee of the company, such as executive, social and ethics, audit, or nomination committees.

Finally, it is important to be cognisant that the whistleblower must occupy one of the positions listed when making the disclosure and when they experience any detriment because of it.[136]

136 At this point South African case law does not provide further clarity on this point as these types of matters have not had their day in court.

Step 3: Determine the content of the disclosure in relation to section 159(3)(b)

Subsection 159(3)(b) lists the various forms of improper conduct that a person or stakeholder listed in section 159(4) may highlight in their disclosure. The improper conduct must have been done by either the company or an employee of that company, an external company, a director, or a prescribed officer acting in that capacity.

The disclosure of information by the person making the protected disclosure is only protected where such disclosure is made in good faith in terms of subsection 159(3)(a). Section 159(3)(b) also requires that the whistleblower reasonably believed, at the material time of making the disclosure, that the information showed or tended to show that a company or director of a company acting in that capacity had:

1. 159(3)(b)(i) – contravened the Act or a law mentioned in
2. schedule 4[137] of the Act;
3. 159(3)(b)(ii) – failed to or was failing to comply with any statutory obligation to which the company was subject to;
4. 159(3)(b)(iii) – engaged in conduct that had endangered, or was likely to endanger, the health or safety of any individual, or had harmed or was likely to harm the environment;
5. 159(3)(b)(iv) – unfairly discriminated or condoned unfair discrimination, against any person, as contemplated in section 9 of the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act or
6. 159(3)(b)(v) – contravened any other legislation in a manner that could expose the company to an actual or contingent risk of liability or is inherently prejudicial to the interest of the company.

The effectiveness of the protection granted under section 159(3)(b) of the Act hinges on the legal analysis of the disclosure against the criteria specified by section 159(3)(b). The statutory language **"showed or tended to show"**[138] sets forth a threshold that does not require irrefutable evidence of a violation but nec ssitates a reasonable belief in there being an existence of misconduct. It is strongly suggested that an analysis of section 159(3)(b) against the factual matrix of the matter in question be undertaken by a legal practitioner.

137 The statutes referred to in schedule 4 of the Companies Act are as follows: Close Corporations Act, 1984 (Act 69 of 1984), Share Blocks Control Act, 1980 (Act 59 of 1980), Co-operatives Act, 2005 (Act 14 of 2005), Copyright Act, 1978 (Act 98 of 1978), Performers Protection Act, 1967 (Act 11 of 1967), Registration of Copyright in Cinematograph Films Act, 1977 (Act 62 of 1977), Counterfeit Goods Act, 1997 (Act 37 of 1997), Designs Act, 1993 (Act 195 of 1993), Merchandise Marks Act, 1941 (Act 17 of 1941), Patents Act, 1978 (Act 57 of 1978), Trade Marks Act, 1993 (Act 194 of 1993), Unauthorised Use of Emblems Act, 1961 (Act 37 of 1961), 'Vlaglied' Copyright Act, 1974 (Act 9 of 1974), Protection of Businesses Act, 1987 (Act 99 of 1978), Part A of Chapter 4 of the Consumer Protection Act, 2008 (Act 68 of 2008).

138 See page 20 which references the UK Appeal Court decision in *Street v Derbyshire Unemployed Workers' Centre* [2004] 4 ALL ER 839 at 41.

Legal practitioners must ensure the alleged wrongful act satisfies the expansive yet specific conditions outlined in section 159(3)(b). **This involves a thorough legal analysis comparing the conduct in question against the statutory provisions of section 159(3)(b) and the references to other legislative or regulatory provisions. This stage of the audit is crucial, not only for the whistleblower's protection but also to ensure that any decision to sue an entity complicit in corruption has merit.**

Step 4: Determine whether the disclosure meets the reasonableness and good faith requirements of section 159

Section 159 of the Companies Act places two conditions on the proper protocol for making a disclosure:

The first condition: The disclosure must be made in good faith.[139] In *Tshishonga v Minister of Justice*, the Court found that good faith is a finding of fact and is more than one having a reasonable belief with an absence of personal gain.[140]The Court should go further to consider the evidence cumulatively to determine whether there is good faith or an ulterior motive, and if there are mixed motives, what the dominant motive is.[141]

The case of *Radebe and Another v Premier, Free State and Others* set out a non-exhaustive list of factors that could lead to a finding of an absence or lack of good faith. These factors include malice, an ulterior motive aimed at self-advancement or revenge, and reliance on fabricated information known by the whistleblower to be false.[142]

The second condition: The disclosure must be made with reasonable belief. In *Chowan v Associated Motor Holdings (Pty) Ltd and Others*, Meyer J held that: “the test for determining whether an employee had the requisite “reason to believe” is subjective and objective. The employee who makes the disclosure is required to hold the belief and that belief has to be reasonable”.[143] This is a two-pronged enquiry:

- **Subjective aspect:** This stage looks at whether the whistleblower truly believed that the information they disclosed pointed to wrongdoing. It's about the whistleblower’s perspective and the specific reasons they had for thinking that the unlawful conduct was or may have taken place.
- **Objective aspect:** This stage focuses on the factual realities of the matter. Here, the court looks at whether the whistleblower's belief was reasonable, that is: would any other person, with the same information, think that there was wrongdoing?

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139 See page 20 which references the UK Appeal Court decision in *Street v Derbyshire Unemployed Workers’ Centre [*2004] 4 ALL ER 839 at 41.

140 *Tshishonga v Minister of Justice and Constitutional Development and Another* [2007] (4) SA 135 (LC), para 203.

141 *Ibid*, para 204.

142 [2012] (5) SA 100 (LAC), para 35. See also: A Critical Analysis of the Corporate Whistleblowing Provisions of the South African Companies Act, R Cassim, Journal of African Law (2023), 67, p304. See also: page 20 above.

143 [2018] 2 All SA 720 (GJ), para 47.

It is essential for legal practitioners to examine the evidence related to the disclosure carefully. They must confirm that the whistleblower had a valid reason to believe in the misconduct. Furthermore, they must establish a clear connection (causal nexus) between the act of disclosing and any negative actions taken against the whistleblower. This link is important because it proves that the whistleblower is suffering directly from their decision to speak up.

Step 5: Determine whether there is a right to claim compensation for any damages suffered in terms of the Companies Act

Subsection 159(5) of the Companies Act makes provision for a person to claim compensation for any damages suffered if: (i) the claimant makes or is entitled to make a disclosure contemplated in section 159; and (ii) because of the possible or actual disclosure, the entity or person to whom the disclosure is made:

"engages in conduct with the intent to cause detriment to the first person, and the conduct causes such detriment;[144] *or*

directly or indirectly makes an express or implied threat, whether conditional or unconditional, to cause any detriment to the first person or to another person, and (i) intends the first person to fear that the threat will be carried out; or (ii) is reckless as to causing the first person to fear that the threat will be carried out, irrespective of whether the first person actually fears or feared that the threat will or would be carried out."[145]

Section 159(5) envisages situations where someone faces negative consequences (like getting fired or demoted) because they might reveal something wrong happening at work, even if they haven't officially reported it yet. However, as highlighted throughout this guidebook, it's not enough to just say it happened; you have to show that the harassment, intimidation or detriment you faced was directly because you were about to report something.

Subsection 159(5)(a) makes provision for cases where someone intentionally does something to harm you because you made a good faith disclosure premised on a reasonable belief. In order to claim damages for any harm suffered by you, you will have to prove on a balance of probabilities that the harm you suffered was a result of the intentional conduct of the victimiser. It appears from the text of this provision that negligence or even gross negligence will not meet the standard required to prove fault on the part of the victimiser, there must be an element of intention to cause you harm.

Section 159(5)(b) envisages an express or implied threat that can be conditional or unconditional, and that is aimed at causing detriment to the person making the disclosure or any other person. Importantly, the threat can be expressed or implied; this mitigates the possibility of the victimiser making a threat that does not outright threaten harm but suggests it indirectly.

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144 Section 159(5)(a)
145 Ibid Section 159(5)(b)

For example, if the victimiser hints that something bad will happen to you if you do not accede to its demands. Furthermore, subsection 159(5)(b)(i) indicates that the person making the threat intends that the person receiving the threat fears that it will be carried out.

Section 159(5)(b)(ii) covers situations where the victimiser is reckless in causing you to fear that a threat will be carried out by it. This assessment is viewed independently of whether you actually believe that the threat will be carried out.

Case study: How threats made to the whistleblower results in a potential damages claim

An employee named Thandi works in the finance department of a large corporation. She notices that some irregular financial transactions suggest embezzlement by the Chief Financial Officer. Thandi is considering reporting these findings through the company’s official whistleblower hotline, however, she raises her concerns with her direct line manager to obtain some guidance from him.

The next day, the senior manager casually mentions to Jane that the company has been 'letting people go' who 'don't align with the company's general operating standards' and ‘that the CFO is a very powerful person in the company’. The senior manager also mentioned that it would be a 'shame' if Thandi’s 'future with the company became uncertain.' This is not a direct threat, but it is pretty clear that he is hinting at negative consequences if Thandi says anything about the financial discrepancies she's found.

Under section 159(5)(b), this scenario covers both an express threat (if the manager explicitly said she would lose her job if she reports the irregularities) and an implied threat (the veiled suggestion that her job security would be in jeopardy).

Section 159(5)(b)(i) would apply if the manager intended to make Thandi explicitly afraid of reporting the misconduct by suggesting she would be fired or that her future would be in jeopardy.

Section 159(5)(b)(ii) would apply if the manager didn’t outright say she would be fired for reporting but showed a disregard for the fear his comments would naturally cause her, knowing that she might feel threatened and thus keep silent.

In both situations, the manager's conduct could be interpreted as trying to prevent Thandi from making a disclosure or to punish her if she does, which is the kind of scenario section 159(5)(b) was legislated to address.

When determining whether to institute proceedings against your past or current employer – consider the following important provisions of section 159

Qualified Privilege

A person who makes a disclosure that meets the requirements of section 159 shall, in terms of section 159(4)(a), be afforded qualified privilege regarding the disclosure. Qualified privilege generally refers to a legal protection that applies to defamatory statements made in the context of a "privileged occasion". The rationale for this principle is rooted in the recognition of the importance of free speech, particularly where such speech aligns with the moral convictions of society and is in the public interest. In the context of protected disclosures, the doctrine of qualified privilege and the protection it affords to the whistleblower may be invoked by 159(4)(a). This privilege is "qualified", and therefore, is not absolute, particularly if the individual abuses the privilege by acting with malice or without proper cause.

Immunity from any civil, criminal or administrative liability

Section 159(4)(b) provides the whistleblower with further protection against retaliatory conduct for making a protected disclosure. The legislature envisaged circumstances where whistleblowers, who would often be dismissed under orchestrated circumstances, would face further victimisation by their past employer, sometimes in the form of SLAPP suits.[146] Hence, section 159(4)(b) was included in the Act to ensure that a whistleblower can claim immunity from any litigious proceedings launched against them that may be related to their disclosure. It is important to note two important prerequisites to gaining statutory immunity in terms of section 159(4)(b):

1. The person who made the disclosure must satisfy a court that such disclosure met the requirements of being a protected disclosure in terms of the PDA or a disclosure which meets the requirements set out in section 159(3) read with section 159(4).
2. The whistleblower will only be able to claim statutory immunity in terms of section 159(4)(b) if the proceedings instituted against the whistleblower are related to the disclosure. Our courts will have to provide greater clarity on the extent of the connection required between the disclosure made by a whistleblower and any subsequent litigation.

146 The acronym SLAPP suits means: Strategic Litigation Against Public Participation. This form of litigation is often used by large corporations to silence or impoverish whistleblowers by suing them for conduct unrelated to the reasons for their dismissal.

The onus of proof - the Companies Act

Subsection 159(6) of the Companies Act reverses the onus of proof that would ordinarily be required of a whistleblower claiming relief. The effect of the provision presumes that the conduct or threat contemplated in section 159(5)(a) or 159(5)(b) respectively, which we delineated in step 5 above, did in fact occur. This would require the entity engaged in such conduct or making such threats, whether expressly or implied, to prove that such claims are unfounded or that there was a different cause for doing so. Whistleblowers and legal practitioners need to ensure that they plead their case with this provision in mind, as it places the task of proving the detriments carried out against the whistleblower on the company or victimiser.

Duty on public and state-owned companies to establish whistleblowing policies

Lastly, in terms of section 159(7) of the Companies Act, public companies and state-owned companies are required to establish and maintain a system to receive disclosures contemplated in section 159 confidentially and act on them. These companies are also statutorily required to routinely publicise the availability of the whistleblowing policy to all employees, directors, trade unions, and suppliers of goods and services to the public or state-owned company. Where a public or state-owned company fails to comply with this provision, there will certainly be a greater degree of fault attributable to the company, and there would be greater latitude afforded to the whistleblower should they have not followed internal procedures.

The Voidability of provisions which limit a whistleblower from speaking up

Whistleblowers are often forced to sign non-disclosure agreements, settlement agreements or mutual separation agreements which contractually curtail their ability to speak to persons listed in the Companies Act or the PDA about the unlawful conduct of which they have information. Both the PDA and the Companies Act provide robust frameworks to safeguard these whistleblower rights.

Specifically, Section 2(3)(a) of the PDA and Section 159(2) of the Companies Act serve as bulwarks against corporate attempts to “gag” whistleblowers through private contractual arrangements. These provisions declare any agreements and, in the case of section 159(2), even a company’s MOI, void insofar as it limits a whistleblower’s ability to disclose information about any unlawful conduct contemplated by the PDA and the Companies Act. This underscores the commitment of our constitutional democracy to uphold transparency, accountability, and the public interest.

In terms of section 159(2) of the Companies Act: "Any provision of a company's Memorandum of Incorporation or rules, or an agreement, is void to the extent that it is inconsistent with, or purports to limit, set aside or negate the effect of this section." (Our emphasis). In addition to section 2(3)(a) of the PDA, section 159(2) of the Companies Act amplifies the effect of section 2(3)(a) of the PDA.

The provisions in section 159(2) of the Companies Act are self-explanatory, and on a plain reading, it appears that an agreement or the memorandum of incorporation (**MOI**) of a company that purports to limit or negate the effect of section 159 of the Companies Act, can be declared void in so far as it limits or negates the effect of the provisions of section 159 of the Companies Act.

Section 2(3)(a) of the PDA provides that: "*Any provision in a contract of employment or other agreement between an employer and an employee or worker is void in so far as it purports to exclude any provision of this Act, including an agreement to refrain from instituting or continuing any proceedings under this Act or any proceedings for breach of contract.*" (Our emphasis). On an ordinary grammatical interpretation of section 2(3)(a) of the PDA and further consideration given to the intention and purport of the PDA, a favourable argument can be raised that essentially renders non-disclosure agreements, settlement agreements or mutual separation agreements null and void so far as it circumvents the utility and intended purpose of the PDA.

CHAPTER 6
Legal Framework of the National Environmental Management Act as it Relates to Whistleblowers

Climate change and the need for corporate accountability for environmental oversights is increasingly becoming a pressing global issue, one which government agencies and courts must take seriously. **As the importance and urgency of addressing climate change intensify, and given the largely foreign-owned makeup of extractive industries operating in South Africa and Africa, the need to protect and empower whistleblowers who blow the whistle on issues related to the environment is of paramount importance.**

In this context, the NEMA provides a pivotal tool to whistleblowers by providing individuals with a legal shield to expose illicit activities, non-compliance, or harmful practices that contribute to environmental harm. The NEMA builds on the PDA, LRA and the Companies Act and can be drawn on where the substance related to a protected disclosure contains an environmental element.

The purpose of NEMA is to provide cooperative environmental governance by establishing principles for decision-making on matters affecting the environment, institutions that promote cooperative governance and procedures for coordinating environmental functions exercised by organs of state; to provide for certain aspects of the administration and enforcement of other environmental management laws; and to provide for matters connected to this.

The preamble to the NEMA states, *inter alia,* that everyone has the right to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures that prevent pollution and ecological degradation, promote conservation, and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. Importantly the NEMA also recognises that “many inhabitants of South Africa live in an environment that is harmful to their health and well-being.[147]

147 NEMA, Preamble

Section 31 of NEMA provides for the *'Access to Environmental information and protection of whistle-blowers*'.

Section 31(4) states that "*notwithstanding the provisions of any other law, no person is civilly or criminally liable or may be dismissed, disciplined, prejudiced, or harassed on account of having disclosed any information, if the person in good faith reasonably believed at the time of the disclosure that he or she was disclosing evidence of environmental risk…*" [148]

The protection referred to above is only applicable where the whistleblower concerned discloses the information to:

1. a committee of Parliament or to the provincial legislature;
2. an Organ of State responsible for protecting any aspect of the environment or emergency services;
3. the Public Prosecutor;
4. the Human Rights Commission;
5. any Attorney-General (or his/her successor);
6. more than one of the bodies/persons identified above;[149] or
7. to one or more news media and on clear and convincing grounds believed at the time of the disclosure -
   a. that the disclosure was necessary to avert an imminent and serious threat to the environment, to ensure that the threat to the environment was properly and timeously investigated or to protect himself or herself against serious or irreparable harm from reprisals; [150] or
   b. giving due weight to the importance of open, accountable, and participatory administration, that the public interest in disclosure of the information clearly outweighed any need for nondisclosure.[151]
8. You can also make a disclosure where you:
   a. disclosed the information substantially in accordance with any applicable external or internal procedure, other than the procedures contemplated above, for reporting or otherwise remedying the matter concerned; [152] or
   b. disclosed information that, before the time of the disclosure, the information had become available to the public, whether in South Africa or elsewhere.[153]

What is important to note is that a whistleblower needn't have exhausted any other external or internal procedure to report the information concerned to an entity or office external to the company in which they are employed.[154]

148 NEMA, section 31(4).
149 NEMA, section 31(5)(a).
150 NEMA, section 31(5)(b)(i).
151 NEMA, section 31(5)(b)(ii).
152 NEMA, section 31(5)(c).
153 NEMA, Section 31(5)(d).
154 NEMA, Section 31(6).

Furthermore, section 31(8) prohibits anyone from threatening to take action against any person who exercises or intends to exercise their right in terms of section 31(4) of the NEMA. Like section 159 of the Companies Act, section 31(8) prohibits any individual from threatening a whistleblower. More specifically, no person is permitted to intimidate or threaten someone for either having made a disclosure that complies with section 31 of the NEMA or intends to make a disclosure that complies with section 31 of the NEMA.

When compared with the PDA and the Companies Act, the NEMA extends the list of defined persons to whom a disclosure can be made, and further prescribes a disclosure to news media outlets, as contemplated in s31(5)(b)(i) and s31(5)(b)(ii). Importantly, and unlike the PDA or the Companies act, there is no closed list of persons who are eligible to make a disclosure; in terms of section 31 of the NEMA, any person may make a disclosure, so long as it complies with the provisions of substantive and procedural provisions of section 31(4) and section 31(5) of the NEMA respectively.

Case Study: Blowing the Whistle in terms of the NEMA

To demonstrate the practical steps one may take to make a disclosure in terms of the NEMA and how this procedure does not have as high a threshold as the PDA, we have summarised the case of *Potgieter v Tubatse Ferrochrome & others*. [155]

In this case, the employee was a project superintendent and one of his responsibilities was to ensure that health and safety standards were maintained at the workplace. The employee went on extended sick leave and was instructed to return to work but failed to do so. A disciplinary hearing was held, and he was found guilty and was dismissed.[156] Following the dismissal, but before the hearing of his internal appeal, the employee released a report to the media. An article was subsequently published in a local publication, Highland Panorama, wherein the employee was quoted as alleging that the employer did not have adequate measures to address the water pollution its mining operations had caused.[157]

Following the dismissal, the employee referred an unfair dismissal dispute to the relevant bargaining council, who found the dismissal to be substantively and procedurally unfair. However, the Commissioner did not grant reinstatement but only the maximum compensation. The Commissioner found that the employment relationship had been irretrievably damaged due to the employee disclosing the report to the media after his dismissal.[158] The Commissioner also found that the employee's contention that this was a protected disclosure in terms of the PDA was not plausible as it was highly improbable that the employee made the disclosure in good faith, as it was only made after his dismissal.[159] The employee took this element of the decision on review to the Labour Court with the prayer that he be reinstated.[160]

155 *Potgieter v Tubatse Ferrochrome & others* (JA 71/12) [2014] ZALAC 114.
156 *Ibid,* para 4.
157 *Ibid* para 6.
158 *Ibid* para 8.
159 *Ibid*.
160 *Ibid* para 9.

The Labour Court agreed with the Commissioner's decision and the employee took the decision on appeal. The Labour Appeal Court took into consideration the PDA, as well as the NEMA, which, among others, provides that no person may be civilly or criminally liable or be dismissed, disciplined, prejudiced or harassed on account of having disclosed any information.[161] Unlike the PDA, NEMA specifically lists the media as a category of institutions to whom disclosures of information can be made.[162]

The Appeal Court also considered that the employee was tasked with compliance with legal prescripts such as the NEMA, to disclose information regarding environmental pollution. In particular, the Appeal Court found that the employee blew the whistle in good faith.

The Court also found that the employee had: (i) made the disclosure because he feared criminal sanctions; (ii) had previously made reports to his employer; (iii) he regarded the release of the report as a protected disclosure, as it was made in the public interest.[163] In dealing with the employer's argument that the employee had disclosed sensitive information, the Appeal Court held that the sensitivity of the information disclosure ought not to deny the whistleblower of the protection granted by the prescripts of the law.[164] Further, that it cannot be held that the mere disclosure of sensitive information renders the employment relationship intolerable, as this would seriously erode the very protection that the legal framework seeks to grant to whistleblowers.[165]

In respect of whether a whistleblower benefits from protection if they disclose after dismissal and motivated by vindictiveness, the Appeal Court found that:

"this proposition fails to consider that it is not inconceivable that an occupational detriment can take place after termination of employment hence the reference to "being refused a reference, or being provided with an adverse reference" and "being adversely affected in respect of his or her employment, profession or office, including employment opportunities and work[157] security" in the PDA. In my view, these two subsections of the PDA clearly contemplate that victimisation can go beyond an existing employment relationship."[166]

The Appeal Court also relied on Section 31 of NEMA wherein protection is not confined to employees but to all holders of information about possible harm to people or the environment.[167]

The Court concluded that the Commissioner's conclusion that the employee released his report to the media out of vindictiveness is unreasonable[168] and warned against adopting a narrow approach when interpreting the PDA.

This case is crucial for whistleblowers in the environmental sector and demonstrates that NEMA offers wider protection than the PDA when blowing the whistle to the media.

161 Supra fn 165, at para 19.
162 *Ibid* para 21.
163 *Ibid* para 25.
164 *Ibid* para 30.
165 *Ibid* para 31.
166 *Ibid* para 33.
167 *Ibid* para 34.
168 *Ibid* para 35.

CHAPTER 6
Conclusion

In many countries, including South Africa, whistleblowers play an essential role in upholding integrity and transparency by reporting unlawful conduct and corruption in both public and private sectors that would otherwise have continued unchecked. Yet, as evidenced in recent years, for whistleblowers, the decision to expose wrongdoing comes with significant risks that extend far beyond professional repercussions. To better equip whistleblowers, civil society and legal professionals interested in representing whistleblowers, this guidebook plays a role in illuminating the intricate legal landscape surrounding whistleblowing, highlighting key legislative provisions designed for their protection. It also highlights the importance of articulating cases in accordance with the provisions of applicable whistleblower legislation, such as the PDA, the LRA, the Companies Act and the NEMA.

Many attorneys offer an initial consultation at no cost, some may be willing to work on a contingency basis, meaning they can only charge fees in the matter if they are successful. In these arrangements, the attorney's payment is a percentage of any settlement or award obtained in the case. Engaging an attorney, preferably in preparation for, but also following a disclosure, is pivotal in navigating the nuances of civil procedure law, and the substantive provisions enshrined in the PDA, the LRA, the Companies Act and the NEMA. Such professional guidance ensures that whistleblowing is conducted in a manner that not only champions the cause of justice but also guards the rights and well-being of the whistleblower. In a world where ethics, transparency and accountability are increasingly vital to a functioning state, understanding and utilising the whistleblower legal framework is paramount.

FRIEDRICH NAUMANN
FOUNDATION For Freedom.

Get In Touch

Email Us
info@pplaaf.org

Website
www.pplaaf.org

Social Media
@pplaaf