



P P L A A F

PLATFORM TO PROTECT WHISTLEBLOWERS IN AFRICA

# Highlights: Whistleblower Protection Guidebook



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# Why is this guidebook necessary?

## Introduction

The Whistleblower Protection 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 distills the key legislative provisions which underpin whistleblower law in South Africa and advances suggestions on how to approach the intersection of the highlighted statutory provisions and South African common law.

## Rationale

The existence of corruption is a global pandemic, one that South Africa has made some strides in diagnosing, but has ultimately failed to remedy. Law alone is a necessary but an insufficient basis for the protection of any right, it also requires courage on the part of members of society to speak truth to power. Many whistleblowers have faced significant consequences for their brave and courageous actions, from job loss to

adverse impacts on their health and overall welfare, and in extreme situations, some have lost their lives. In a just society, the act of 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 inquiry: How might South African law be effectively harnessed to shield those who sound the alarm on corruption and who speak truth to power? This guidebook offers practical guidance on leveraging existing legal provisions and mechanisms to empower and support whistleblowers in South Africa.



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# South African Context

## Contextualising Whistleblowing in South Africa

In the celebrated tapestry of our nation's Constitution and its concomitant human rights law, which has garnered acclaim across the world, 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 oftentimes 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 even 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.

## What is the legal framework protecting whistleblowers?

In South Africa, whistleblowers are supported by a robust legal framework that aims to protect them from retaliation while encouraging the disclosure of information that points to unlawful or unethical conduct. In this guidebook we assess, in detail, four key statutes that provide protection and remedies to whistleblowers.

The foundational pillar of this framework is the Protected Disclosures Act (PDA) which serves as the cornerstone for whistleblower legislation, providing clear protections and remedies for employees and workers in both the public and private sectors who disclose information about unlawful or irregular conduct by their employers or fellow employees. The objective of the PDA is to protect employees or workers, without fear of reprisals, when they disclose information relating to suspected criminal or other unlawful conduct by their employers, whether in the private or the public sector.

Building on the foundation laid by the PDA the Labour Relations Act (LRA) provides employees with avenues for redress in the face of workplace retaliation. It provides procedural integrity to workplace disputes and enshrines certain rights that combat unfair labour practices, particularly where such retaliation is as a consequence of an employee having made a protected disclosure.

Simultaneously, the Companies Act (the Act) espouses and promotes a culture of transparency and accountability within the realm of corporate governance. Section 159 of the Act, which should be read with the PDA, aims to protect a broader set of potential whistleblowers who may be stakeholders of a company and also increases the governance expected by companies when addressing issues related to whistleblowing.

Finally, we assess the plight of environmental whistleblowers and the specific protection afforded to them under the National Environmental Management Act (NEMA). We review section 31 of the NEMA and the manner in which it seeks to ensure that individuals raising concerns about environmental harm are shielded from adverse consequences.

Collectively, these statutes create a comprehensive network of legal support aimed at fostering an environment where whistleblowers can come forward without fear of reprisal. However, we stress that the role of plaintiff-side attorneys and civil society will be critical to enabling whistleblowers to utilise the protection and benefit that these statutes seek to achieve.

## What is whistleblowing?

South African legislation does not define the terms “whistleblowing” nor “whistleblower”. The only legislation to mention “whistleblower” is the National Environmental Management Act 107 of 1998 (NEMA) and the Companies Act 71 of 2008 (Companies Act) however both statutes fail to provide a clear definition. 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.”*

This definition will be used to explain the practical implications of whistleblowing in South Africa in terms of the law. 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 as it relates to the protection of whistleblowers. This guidebook places significant emphasis on the PDA, recognising its central role in the legal orchestration of whistleblower protection.



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# The PDA, the Constitution, the LRA, the Companies Act, and the NEMA

## 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. In terms of the PDA, an employee 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 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.

## 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 an unfair labour practice. Unfortunately, there is no right not to be disciplined.

Section 186(1) of the LRA provides a definition of 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:

- An employer ending an employee's contract with or without notice.
- 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.

- Refusing to rehire an employee after maternity leave.
- An instance where an employer rehires some employees but not others after a collective dismissal for similar reasons.
- An employee quitting because the employer made the work environment intolerable.
- An employee resigning due to the new employer, after a business transfer, offering substantially less favourable conditions than the previous employer.

Oftentimes whistleblowers quit their job as they feel compelled to terminate their employment due to an employer creating or allowing an intolerable work environment. This particular type of dismissal, often referred to as "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.

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:

- *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;*
- *the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;*
- *a failure or refusal by an employer to re-instate or reemploy a former employee in terms of any agreement; and*
- *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.*

An occupational detriment other than a dismissal, on account of an employee having made a protected disclosure as defined in the PDA, is specifically listed in the LRA as an unfair labour practice. 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 of 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, receiving humiliating or insulting conduct or threats from other employees within the organisation.

## The interpretation and application section 159 of the Companies Act

The Companies 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 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.

Section 159 of the Act represents a relatively new and uncharted legal tool which 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 delineate and edify the reader's understanding of section 159 and the manner it can be utilised as a tool 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.

## The NEMA and Whistleblowing in the Environmental Arena

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.

The section which deals with whistleblowing and the protection of whistleblowers is Section 31 of NEMA. Section 31 provides for the 'Access to Environmental information and protection of whistle-blowers'.

Importantly, section 31(4) serves as a legal safeguard for any individuals who disclose information regarding environmental risks. This provision clarifies that irrespective of other laws, individuals cannot be subject to civil or criminal litigation, nor can they face employment-related consequences such as dismissal or disciplinary action, as long as the disclosure is made in good faith. This means that if at the time of revealing the information, the person genuinely and reasonably believed that the information pointed to a potential environmental hazard, then that individual should enjoy the protection under this provision. The aim here is to encourage the reporting of environmental concerns by offering a shield against retaliation, thereby promoting transparency and accountability in environmental matters.



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# Tips: Making a Protected Disclosure

- Ensure that in your correspondence or report to the relevant institution, that you state that the information is being disclosed in terms of the PDA and that you request the institution to regard it as such.

- Raise in your correspondence or report to the relevant institution, that you fear being subjected to occupational detriment.

- Do not report on mere rumours or conjecture.

- You only need to have reasonable belief of wrongdoing and not necessarily be an eye witness.

- The disclosure will not be protected if the information is notorious i.e. everyone knows about it.

- When making a disclosure to an employer, follow the internal procedure. Do not simply send an email to the entire management team.

- Before disclosing on social media and/or media, make sure that you have followed up with the employer or one of the listed institutions in section 8, as to whether anything was done such as an investigation.

- Disclosures in terms of section 6,7,8 and 9 of the PDA must be made in good faith.

Some examples of bad faith:

- Where the whistleblower has skin in the game – where they are involved in the reported irregularities.
- Where the employee deliberately sets out to embarrass or harass an employer



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